

Sports Law

Case Note by Elizabeth Brimer



Australian Sports Anti-Doping Authority v Muhlhan [2009] FCA 21

Appeal from Administrative Appeals Tribunal-question of law-interpretation of clause 4.6.2 of the International Standards for Testing – World Anti-Doping Code- athlete’s urine sample tested positive for testosterone or androstenedione – entry of name on Register of Findings – whether an anti-doping organisation’s consideration of matters listed in clause 4.6.2 of the IST is a pre-requisite to selecting an athlete for target testing – clause 4.6.2 does not limit the discretion of anti-doping agencies to conduct target testing of athletes – ASADA did not fail to comply with cl4.6.2 of the IST – appeal allowed – respondent’s application for review dismissed.

This is an appeal on a question of law pursuant to s44 of the Administrative Appeals Tribunal Act 1975 (Cth) from a decision of the Administrative Appeals Tribunal dated 30 May 2008 to a single Judge of the Federal Court.

On 9 December 2006, the respondent to the appeal, an athlete, provided a urine sample to an anti-doping officer from the Australian Sports Anti-Doping Authority (ASADA). Upon testing, the sample returned a positive result for Testosterone or Androstenedione. Consequently, ASADA entered the athlete’s name on the Register of Findings under the National Anti-Doping Scheme (“the NAD Scheme”).

The athlete challenged ASADA’s decision to enter his name on the Register of Findings on a number of grounds. Ultimately, the Tribunal found in the athlete’s favour on one ground only, namely, that ASADA had not complied with cl. 4.6.2 of the International Standard for Testing (“IST”) made by the World Anti-Doping Agency under the World Anti-Doping Code. Sub-section 4.6 of the IST deals with test planning and requires the anti-doping organisation to select athletes for sample collection using target testing, weighted and random selection methods. Clause 4.6.2 says:

“As a minimum, the ADO shall consider Target Testing Athletes based on the following information;

- *Injury;*
- *Withdrawal or absence from expected Competition;*
- *Going into or coming out of retirement;*
- *behaviour indicating doping;*
- *reliable information from a third party.”*

It was common ground that the testing of the athlete was targeted. The Tribunal found as a fact, that in selecting the respondent for testing, the applicant had not considered any of the items listed in (a)-(j) of clause 4.6.2 of the IST. In the view which the Tribunal took, that omission invalidated the testing because clause 4.6.2 of the IST sets out the minimum considerations which anti-doping testing authorities must address before a targeted test is undertaken.

On appeal, the Federal Court rejected the submissions made on behalf of the respondent and the finding of the Tribunal. The Court held that the IST specifies the minimum steps that must be taken. Where the expression "as a minimum" in clause 4.6.2 is used, it is referring to matters which, at least, should be included in a particular testing regime as justifying tests. The Standard is not to be read as limiting, in any way, the discretion of an anti-doping organisation to conduct target testing only in the circumstances referred to. There is nothing in clause 4.6.2 which would prevent an organisation from administering target tests in circumstances other than those listed in 4.6.2 (a)-(j). The Court held that ASADA did not fail to comply with the IST and dismissed the respondent's application for review.