

# worldsportslawreport

**FEATURED ARTICLE**  
**11/09**



cecile park publishing

Head Office UK: Cecile Park Publishing Limited, 17 The Timber Yard, Drysdale Street, London N1 6ND  
tel +44 (0)20 7012 1380 fax +44 (0)20 7729 6093 info@e-comlaw.com  
[www.e-comlaw.com](http://www.e-comlaw.com)

# Sample collection: failure to submit to doping control

Under World Anti-Doping Agency rules, failure to submit to sample collection for doping control purposes constitutes an anti-doping rule violation. Mike Morgan, a Solicitor with Hammonds, examines recent case law to explain that seemingly innocuous actions by athletes - such as taking a shower or attending a private team talk once in the presence of Doping Control Officers - can result in such an anti-doping rule violation.

The implementation of the World Anti-Doping Agency's (WADA) latest version of the World Anti-Doping Code (the 'WADA Code') was greeted with considerable debate from both ends of the anti-doping spectrum, some arguing that the rules go too far, others arguing they do not go far enough.

Among the more divisive provisions, much focus centred on the issue of athlete whereabouts; in particular, the requirement that certain athletes are required to submit their exact whereabouts for a 60-minute slot every day of the year. A number of legal observers have speculated that this could breach data protection and privacy laws. However, whilst important, it has perhaps detracted from other provisions, which affect a greater percentage of the athlete population than the whereabouts system and have more severe implications.

The whereabouts system affects a comparatively small percentage of the athlete population, all of whom are permitted three whereabouts failures over an 18-month period before they are deemed to have committed an anti-doping rule violation. By contrast, all athletes are subject to the procedural requirements of sample collection and a single breach of these

requirements may result in a ban of up to two years.

It is therefore imperative that all athletes understand their obligations in relation to sample collection procedures.

## Sample collection regulation

The WADA Code provides at Article 2.3 that the following constitutes an anti-doping rule violation:

'Refusing or failing without compelling justification to submit to Sample collection after notification as authorized in applicable anti-doping rules, or otherwise evading Sample collection'

Article 2.3 of the WADA Code is supported by requirements set out in WADA's International Standard for Testing, in particular Section 5.4.1(e), which stipulates that it is each athlete's responsibility to 'Remain within direct observation of the DCO/Chaperone at all times from the point of notification by the DCO/Chaperone until the completion of the Sample collection procedure'.

However, something that is likely to surprise many observers is the extent of behaviour that constitutes a 'failure to submit to sample collection' under the WADA Code. This has been the subject of some debate in recent proceedings before the Court of Arbitration for Sport (CAS).

## Mannini & Possanzini

In December 2007, following a Serie B match between Brescia and Chievo Verona, two Brescia players, Daniele Mannini and Davide Possanzini (the 'Players'), were selected to undergo doping control. As they were led to a doping control station by Doping Control Officers (DCOs), their Coach and the club President demanded that the Players attend an urgent team meeting. Crucially,

the two DCOs assigned to the players remained outside the changing room for a period of 10 to 25 minutes until the Players re-emerged.

The Players then submitted blood and urine samples, the subsequent analysis of which did not reveal the presence of any prohibited substances.

However, the DCOs reported that the Players had been out of sight for 10 to 25 minutes, as a result of which, disciplinary charges were brought. A 15-day ban was imposed on both players for minor breaches of the anti-doping rules of the Italian National Olympic Committee (the 'CONI Rules') relating to 'non-cooperation' with the DCOs, but - crucially - neither tribunal chose to apply Article 2.3 of the WADA Code (which is incorporated in the CONI Rules).

WADA then appealed the decision to the Court of Arbitration for Sport (CAS), on the basis that the Players should have been sanctioned for a violation of Article 2.3.

The CAS Panel determined that the Players had failed to submit to sample collection within its interpretation of Article 2.3, namely that failure or refusal to submit to sample collection is constituted by 'any delay in providing one's sample after having been notified to do so, where the delay is not authorised by the control personnel and during which the athlete is not chaperoned [i.e. out of sight], irrespective of whether the athlete submits a sample at some subsequent point in time'.

It then considered whether the Players had a 'compelling justification' for their failure. The Panel accepted that the Players faced a dilemma by disobeying their club President's orders and arriving late at the doping-control station. The Panel, however, did

not consider the dilemma to be a 'compelling justification' since, in its view, the Players could have done more, for instance insisting that the DCOs were also admitted to the dressing room.

The Panel therefore found that the Players had violated Article 2.3 before addressing the appropriate sanction. The starting point under Articles 10.4.1 and 10.2 of the WADA Code was a two year ban, unless the Players could establish no significant fault or negligence, in which case the sanction could be reduced by up to one half.

The Panel considered a number of events that culminated in the violation:

- Brescia's run of bad results;
- the defeat resulted in the club president being particularly agitated;
- the Players felt under pressure as they left the pitch;
- this pressure increased when they were summoned to an immediate meeting in the presence of the President;
- although not locked in the room, the Players were under considerable pressure to remain in the meeting and were therefore not in a position to easily get up and leave.

The Panel's view was that the combination of those circumstances made it much more difficult for the Players to think lucidly and may have led them to falsely believe that they could attend the meeting before proceeding to the doping control station without breaching anti-doping regulations. The Panel therefore found that the Players were not at 'Significant Fault or Negligence' and so reduced the mandatory two-year sanction to a one-year period of ineligibility<sup>1</sup>.

### **Cherubin**

Following a Serie A match between Reggina and Livorno on 31

**WADA's stance is that constant observation is crucial to prevent athletes altering or tampering with any part of the doping control process**

October 2007, two Livorno players and Reggina players Nicolo Cherubin and Nenad Novakovic were selected to undertake a doping control test.

The doping control station was manned by four individuals: two DCOs, a representative of the Italian Football Association (FIGC) and the FIGC's lawyer. At the doping control station (at 10.25pm), the two Livorno players were chaperoned to their changing rooms for a shower under supervision of one of the doping control officers. Novakovic was to submit his sample first, during which time he was supervised by the remaining three officials, effectively leaving Cherubin unattended in the room. At that point, Cherubin left the doping control area in order to have a shower. He returned 30 minutes later to undergo his doping control test, which subsequently proved negative.

The doping control officers reported Cherubin's 30-minute absence, as a result of which disciplinary charges were brought and a month-long ban imposed for minor breaches of the CONI Rules relating to 'non-cooperation'. WADA appealed the decision to the CAS requesting that Cherubin be suspended for between one and two years for violating Article 2.3 of the WADA Code.

The CAS Panel held that Cherubin, having attended the anti-doping station on time, was not, 'told or directed not to leave the anti-doping station in a manner which enabled him to understand that he would be in breach of his duties if he did so'.

The Panel emphasised the circumstances in which Cherubin chose to leave the doping control station:

- he arrived at the doping station to find that two Livorno players had been permitted to go and

shower (albeit accompanied by a doping control officer); and ● the remaining three officials left at the anti-doping station were all supervising his team-mate.

The CAS Panel held that there had been no violation of Article 2.3 of the WADA Code and distinguished Cherubin's case from Mannini & Possanzini on the basis that it had not been proven that Cherubin actually refused or failed, within the meaning of Article 2.3, to give his sample at 10.25pm. Rather, he left the station without having been told not to do so in terms he could readily understand 'as being a formal injunction linked to impress a possible sanction and in circumstances enabling him to believe that if he immediately returned after taking a shower, rather than waiting around when his team mate was being tested, that would be sufficient'.

In other words, the CAS Panel felt that there had been no breach of Article 2.3 as the DCOs had not audibly refused Cherubin permission to leave to shower nor expressly communicated that doing so would result in possible disciplinary consequences.

As a consequence, the CAS Panel dismissed WADA's appeal.

### **Busch**

On 6 March 2008 at 12:30, a doping control officer visited the home of German International Ice Hockey Player, Florian Busch, in order to perform an out-of-competition sample collection. Mr Busch refused to submit to sample collection on the basis that he felt harassed by the number of recent doping control tests he had had to undergo. The doping control officer warned Busch that refusing a test could lead to severe disciplinary sanctions and suggested that sample collection could occur at a place other than Busch's apartment, if he so wished.

Busch refused and confirmed his refusal to be tested at all, despite the doping control officer's numerous pleas. The doping control officer eventually left Busch's house at 12:50.

Busch called the German National Anti-Doping Agency (NADA) and informed it of the events. Busch explained that he had recently been tested a couple of times and that the tester had turned up at his apartment at a very inconvenient time since he had been in the midst of a private moment with his girlfriend. The NADA warned Busch of the possible sanctions for refusing to submit to sample collection. Busch then called the German Ice Hockey Federation (DEB) and explained his predicament. The DEB immediately arranged for the doping control officer to return to Busch's house for a new test to take place on the same day. The sample collection subsequently took place at 17:40. The analysis of the sample did not reveal the presence of a prohibited substance.

The NADA prosecuted the case against Busch as a result of which he was sanctioned with a public warning, a fine of €5,000 and 56 hours of community work. WADA appealed the decision to the CAS.

The CAS Panel held that on the facts it had no choice but to find that Busch had refused to submit to sample collection without a compelling justification and imposed a two-year ban. The Panel held that Busch did not offer sufficient explanations in the circumstances of his case that could be regarded as truly exceptional.

#### Comment

From the moment athletes are notified that they are due to undergo doping control, whether in-competition or out-of-competition, they must remain

within sight of the DCO at all times or risk the consequences.

Sample collection procedures are not new to the WADA Code and existed in its previous version. However, increased testing across the globe and better understanding of the testing requirements by DCOs and/or Chaperones, mean that athletes have to be aware more than ever of their obligations.

WADA's stance is that constant observation is crucial to prevent athletes altering or tampering with any part of the doping control process. According to WADA, 'it is scientifically proven that it may take only a few minutes to manipulate the sample or mask the presence of a prohibited substance or the use of a prohibited method, or to alter with the testing process'<sup>2</sup>.

Nevertheless, the CAS Panel in *Mannini & Possanzini* made it clear that for the purposes of Article 2.3, it is irrelevant whether or not an athlete attempts to manipulate his or her sample, since it is the failure to report to the control station without delay and being out of sight during such delay which is the act being sanctioned.

The Panel in *Cherubin* took a much more restrictive approach to what it felt would constitute a 'failure to submit', putting the onus squarely on the DCOs to audibly refuse athletes permission to remove themselves from sight, and to expressly communicate that doing so would result in disciplinary consequences. It is very difficult to reconcile this position with that in *Mannini & Possanzini*. *Mannini* and *Possanzini* were never expressly warned not to go in the changing room and were also not warned of the possible sanctions yet the Panel found that they had 'failed to submit to doping control'.

It has always been the case that

failure to submit to doping control can have catastrophic consequences. However, what is now unequivocal, following the recent spate of case law on the issue, is the very wide range of behaviour that could be deemed to constitute a failure to submit a sample.

---

**Mike Morgan** Solicitor

Hammonds

[mike.morgan@hammonds.com](mailto:mike.morgan@hammonds.com)

---

1. After the close of proceedings, new factual evidence came to light which resulted in reopening of the proceedings and a cancellation of the sanction. This does not alter the Panel's interpretation and application of the WADA Code in the context of the facts, as they understood them to be at the time of the first set of proceedings.

2. See [www.wada-ama.org](http://www.wada-ama.org)