

**SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)**

NO: SDRCC DAT19-0014
DOPING APPEAL TRIBUNAL

KYLE BORSA

(Appellant)

AND

CANADIAN CENTRE FOR ETHICS IN SPORT
U SPORTS

(Respondents)

AND

WORLD ANTI-DOPING AGENCY (WADA)

(Party)

JANICE JOHNSTON

(Jurisdictional Arbitrator)

REPRESENTATIVES:

FOR THE APPELLANT:

Paul J. Harasen
Kanuka Thuringer LLP

FOR THE RESPONDENT:

Adam Klevinas
Sport Law & Strategy Group
Counsel to CCES

AWARD

BACKGROUND

1. On May 6, 2019, the Appellant filed a request to appeal the SDRCC Doping Tribunal decision in case number SDRCC DT 18-0302. The Appellant missed the thirty-day appeal period set out in Section 7.4(a) of the Canadian Sport Dispute Resolution Code (“Code”) and has requested an extension of the time for the filing of an appeal. The Respondent opposed the granting of an extension and has raised a jurisdictional challenge to the authority of the SDRCC to grant an extension in the circumstances of this case. The parties agreed to resolve the jurisdictional dispute by way of arbitration.
2. A preliminary conference call with the parties took place on May 15, 2019. At that time, the parties agreed to proceed by way of written submissions and a schedule for filing the submissions was established. The parties agreed that, should it be deemed necessary, a conference call could be held to allow for the making of oral submissions. None of the parties requested an oral hearing. After carefully reviewing the submissions of the parties, I determined that an oral hearing was not necessary and that I could decide the challenge based on the written submissions.
3. During the conference call, the parties also agreed that the issues to be determined were:
 - a) Does the SDRCC have jurisdiction to extend the appeal time limits under Section 7.4(a) of the Code and Rule 13.2.2 of the Canadian Anti-Doping Program (“CADP”) pursuant to Subsection 3.5(d) of the Code? and,
 - b) If so, should an extension be granted in the circumstances.
4. The facts are not in dispute. Kyle Borsa (the “Appellant”) is a U Sports football player playing in the Canada West Conference. He was 19 years old at the time of the violation. Following a hearing, Mr. Borsa was sanctioned with a 16-month period of ineligibility by a Doping Tribunal for committing an anti-doping rule violation for the presence of higenamine in his sample. Mr. Borsa’s violation was an out-of-competition violation. The Doping Tribunal

released its reasoned decision on March 14, 2019, and it was provided to the parties that same day. Pursuant to Rule 13.2.2 of the CADP and Section 7.4(a) of the Code, the Appellant had 30 days from the date of notification of the Doping Tribunal's decision to file an appeal to the Doping Appeal Tribunal. Therefore, the Appellant had until the end of the day on April 13, 2019, to file an appeal of the decision. On May 6, 2019, the Appellant filed an appeal against the Doping Tribunal's decision, 23 days after his appeal deadline had expired.

5. The Appellant asserts in support of the request to extend the time limits for the filing of an appeal that, on April 15, 2019, two days after his appeal filing deadline, the decision in *CCES v. McDonald*, SDRCC DT 18-0304 ["McDonald"] was released to the public by the CCES. The McDonald decision involved a U Sports football player who plays in the same league as Mr. Borsa. The athlete in the McDonald decision is the same age as Mr. Borsa. The athlete in McDonald also tested positive for the same prohibited substance as Mr. Borsa, namely higenamine. And unlike Mr. Borsa, the athlete in McDonald committed his violation in competition. He received a sanction of ten (10) months whereas the Appellant received a sanction of sixteen (16) months.
6. The relevant provisions in the Code read as follows:

3.4 Request

[...]

- (d) *Under exceptional circumstances or if all Parties agree, the SDRCC may accept a Request that is not filed within the time limit or that is not completed pursuant to Sections 3.4 or 3.5 hereof. The SDRCC may, in its discretion, refer this issue to a Panel.*

3.5 Time Limits

[...]

- (d) *Subject to the rules of the Anti-Doping Program applicable hereunder, upon application on justified grounds, the SDRCC may extend or reduce the time limits. The SDRCC may, in its discretion, refer this issue to be decided by a Panel.*

7.4 Initiation of a Doping Appeal

- (a) *With respect to a Doping Appeal, a Person shall initiate the process by delivering a notice of appeal in writing to all Parties who were before the Doping Dispute Panel and to the SDRCC within thirty (30) days of the Doping Dispute Panel's decision pursuant to Rule 13.2.2 of the Anti-Doping Program.*

[...]

7. The relevant provision in the CADP reads:

13.2.2 Appeals Involving Other Athletes or Persons

In cases where Rule 13.2.1 is not applicable, the decision of the CCES or the Doping Tribunal may be appealed to the Doping Appeal Tribunal. An appeal from the Doping Tribunal shall be initiated by a notice of appeal in writing to all parties before the Doping Tribunal and to the SDRCC within thirty (30) days of the notification of the Doping Tribunal's decision. An appeal from the decision of the CCES shall be initiated by a notice of appeal in writing to all parties before the CCES and to the SDRCC within ten (10) days of the notification of the CCES' decision.

SUBMISSIONS OF THE RESPONDENT

8. The Respondent took the position that Section 3.5(d) of the Code did not apply to this matter. Instead, the Respondent argued that the applicable section was Section 3.4(d) of the Code, which provides for the more stringent test of "exceptional circumstances" as opposed to the test of "justified grounds" found in Section 3.5(d) of the Code.
9. In response to the second question, the Respondent argued that an extension of the time limits should not be granted. In support of his position, counsel argued:

20. *In Tuckey v. Softball Canada (SDRCC 08-0071), Arbitrator Devlin found that the term "exceptional circumstances" should be given its ordinary meaning. She found that the term denoted circumstances that are "extraordinary or unusual." Arbitrator McDougall in Gerhart v. CCES (SDRCC DAT 13-0002) agreed with Arbitrator Devlin in this regard.*

21. *The CCES considers that this is a reasonable and sensible interpretation of the term 'exceptional circumstances' as used in Section*

3.4(d) of the Code and submits that there is no reason to depart from this interpretation in the present matter.

22. Further, in *Wachowich v. Shooting Federation of Canada* (SDRCC 13-0213) Arbitrator Pound held that Section 3.4(e) of the Code (now Section 3.4(d)) contained ‘minimal flexibility...to deal with unusual and unforeseen circumstances’ but that such ‘flexibility is clearly an exception to the general principle and rule, and must be interpreted accordingly.’

23. Arbitrator Pound went on to say that circumstances that approach what is often referred to as force majeure might provide grounds for extending the normal delays [foreseen in the Code]. He further intimated that exceptional circumstances could be those that could arise in a situation of an accident, illness or other unforeseeable emergency.

24. It is the CCES’ position that the Appellant’s grounds for seeking an extension to the time limit provided in Section 7.4(a) of the Code and Article 13.2.2 of the CADP to file a doping appeal – that a different Doping Tribunal rendered a decision in a case with some factual similarities but many factual and evidentiary distinctions – does not meet the threshold of constituting an exceptional circumstance as interpreted by Arbitrators McDougall, Pound and Devlin. Put differently, there is nothing unusual, extraordinary, exceptional or unforeseeable that a Doping Tribunal – or any Tribunal – could render a different decision in a different case that has some factual similarities, but many differences that could justify and result in a different outcome

ii. No exceptional circumstances

25. On the basis of the *Tuckey* and *Wachowich* decisions, it is clear that the concept of exceptional circumstances found in Section 3.4(d) of the Code is meant to apply to situations where an athlete is prevented from filing a Request as a result of some kind of unusual, extraordinary or unforeseeable circumstance. In other words, the athlete needs a valid reason that justifies why they did not file their Request within the otherwise prescribed time limit

26. In the present matter, it is the CCES’ position that the Appellant did not find himself in a situation where some kind of unusual, extraordinary or unforeseeable circumstance prevented him from filing his appeal on or before April 13, 2019.

[...]

46. It is the CCES’ position that there must be finality in doping disputes. This position is supported by the decision in *Gerhart*, *supra*, as well as in *Wachowich*, *supra*, which, while not a doping dispute, nevertheless makes reference to the need for bringing closure to any period during which a matter may be uncertain or unfinished.

47. *In Gerhart, supra, Arbitrator McDougall held as follows, at paragraph 74:*

Moreover, the Jurisdictional Arbitrator has sympathy with the CCES' argument that there has to be finality in doping disputes. Indeed, the reasons set forth by the Claimant could justify any length of delay in filing a notice of appeal in a Doping Appeal, not just a delay of two months. If there is no finality to doping disputes, any party can come back at any time and invoked these kinds of circumstances in order to re-open the dispute. This is certainly not the purpose of Article 3.4(e) of the SDRCC Code. Therefore, exceptional circumstances should be truly extraordinary or unusual, justifying the party's failure to file on time.

48. *The CCES considers that allowing any party – including the CCES – to file an appeal beyond the prescribed time limit to appeal on the basis of that party's position that a subsequently released decision would be (or would have been) more favourable to their case would be a dangerous precedent and would create a slippery slope that would undermine the purpose of Section 3.4(d) of the Code and create a climate of uncertainty. There is also nothing truly extraordinary or unusual about such a situation and it would, if accepted, justify any length of delay in filing a notice of appeal and any party could come back at any time to invoke such a circumstance, which Arbitrator McDougall warned against in Gerhart. [...]*

52. *As has already been stated on numerous occasions above, it is the CCES' position that the subsequent release of a decision by a Doping Tribunal in a case with some similar but many different facts, arguments and evidence does not meet the threshold of constituting an unusual or unforeseen circumstance or approach what is known as force majeure. Consequently, the CCES considers that there is nothing about the present matter and the Appellant's circumstances that should justify the Arbitrator exercising her authority to depart from the general rule that rights must be asserted within the prescribed time limits or the general principle that the need for certainty and closure trumps the existence of rights.*

SUBMISSIONS OF THE APPELLANT

10. Counsel for the Appellant took the position that the decision in the McDonald case resulted in an irreconcilable, unfair and inconsistent result when compared to the results in the Appellant's case. It was asserted that this should be corrected on appeal.

11. In response to the first question raised in this case, “Does the SDRCC have jurisdiction to extend the appeal time limits under Section 7.4(a) of the Code and Rule 13.2.2 of the Canadian Anti-Doping Program (“CADP”) pursuant to Subsection 3.5(d) of the Code?”, counsel argued that an extension of the appeal time limit can be granted under either Section 3.5(d) or Section 3.4(d). In terms of whether or not an extension should be granted, counsel stressed that the test under either section is satisfied in this case. He suggested that there is jurisdiction to extend the appeal time limit on “justified grounds” under Section 3.5(d) in addition to jurisdiction to extend that time limit due to “exceptional circumstances” under Section 3.4(d).
12. Appellant’s counsel then provided a detailed and exhaustive comparison of the two cases, the one before me and the McDonald case. These submissions detailed the substantive differences between the two cases and it was asserted that based on these comparisons, the decision that is the subject of this jurisdictional dispute was unfair and needed to be corrected on appeal. Counsel suggested that the appeal should be allowed to proceed so that the Appellant can argue, and an appeal panel can consider, whether the significant difference between the sanctions imposed is irreconcilable and unfair.
13. Counsel concluded his submissions by suggesting that the existence of two highly inconsistent decisions, within an extremely short time frame, together with the absence of an appeal of McDonald within the time limits for that decision, provides “justified grounds” and “exceptional circumstances” to extend the appeal time limits. An appeal panel should be allowed to hear Mr. Borsa’s appeal and wrestle with the existing inconsistency.

RESPONDENT REBUTTAL SUBMISSIONS

14. Counsel reiterated the position that Section 3.5(d) of the Code does not apply to this matter and that the applicable section was Section 3.4(d) of the Code, which provides for the more stringent test of “exceptional

circumstances” as opposed to the test of “justified grounds” found in Section 3.5(d) of the Code. However, counsel went on to suggest that whether the test of “justified grounds” or the test of “exceptional circumstances” was applied in this case, the circumstances of the present matter do not satisfy the requirements of either section of the Code. He asserted that there are simply no justified grounds to extend the time limits for the appeal of the Doping Tribunal’s March 14, 2019 decision.

15. Counsel stressed that the Appellant’s arguments regarding what he considers an “irreconcilable, unfair inconsistency” between the Doping Tribunal’s March 14, 2019 decision in his case and the McDonald decision are all points that address the substantive merits of his appeal. They do not properly address the jurisdictional point regarding whether there are exceptional circumstances – or even justified grounds – that would merit the extension of the time limit to file an appeal against the Doping Tribunal’s March 14, 2019 decision in this case. Raising these substantive points does not properly address the jurisdictional question.
16. It was argued that allowing an appeal to be heard beyond the stipulated time limits because a new decision has been subsequently released that an athlete considers would have made a difference in their own case would set a dangerous precedent for future cases because it would result in significant uncertainty for all parties involved in the anti-doping system, including athletes themselves.
17. With respect to the jurisdictional point, counsel suggested that the question that must be asked by a Jurisdictional Arbitrator to assess whether there are exceptional circumstances, or even justified grounds, that should allow for the Appellant’s appeal to proceed despite it being filed beyond the time limit is: What prevented the Appellant from filing his appeal within the stipulated time limit? In this case, the answer is nothing at all. The Appellant has not brought forward any valid explanation as to why he did not file his appeal within the applicable time limits. It was not the release of the McDonald

decision that prevented him from filing a timely appeal and in fact numerous other relevant decisions could have been relied upon in a timely appeal.

18. Counsel for the Respondent concluded his submissions by arguing that the request to extend the time limits for the filing of an appeal be denied in this case.

DECISION

19. The Appellant took the position that the SDRCC had the jurisdiction to extend the time for the filing of an appeal under either Section 3.4(d) or 3.5(d) of the Code. The Respondent argued that Section 3.5(d) did not apply in the circumstances of the case before me but did not dispute the jurisdiction of the SDRCC to extend the time limits pursuant to Section 3.4(d).
20. I am satisfied that the SDRCC has the jurisdiction to extend the time limits for the filing of an appeal. Given my conclusions set out below, it is not necessary, based on the circumstances present in this case, for me to determine which section is the appropriate one. In my view, whether the standard is “exceptional circumstances” or “justified grounds” does not need to be determined, as on the facts before me the Appellant has not met either standard.
21. I have carefully reviewed the submissions of the Appellant and I find myself in agreement with counsel for the Respondent that there have been no reasons offered as to why the Appellant did not launch an appeal within the thirty-day time period set out in the Code and the CADP.
22. The Appellant argues that it was the issuance of a decision with allegedly similar facts that triggered the appeal request. In this case, the decision relied upon by the Appellant, the McDonald decision, happened to be released within two days of the expiry of the thirty-day appeal filing deadline. What if it had been released a month after? Or six months after? I agree with Respondent’s counsel that allowing an appeal to be heard beyond the

stipulated time limits, because a new decision has been subsequently released that an athlete considers would have made a difference in their own case, would set a dangerous precedent for future cases because it would result in significant uncertainty for all parties involved in the anti-doping system.

23. As pointed out by Respondent's counsel, the focus in this case must be on what prevented the Appellant from filing his appeal within the stipulated time limit. I agree that the question I must ask is: what prevented the Appellant from appealing within the thirty-day time limit? What occurred during that period that caused the Appellant to miss the thirty-day appeal window? No reason was provided in answer to this question. Instead, the focus was on the fact that a decision was issued by a different Doping Tribunal with some allegedly similar facts. Even if I were to conclude that the facts were essentially the same and a different result arrived at, this is not relevant to the issue before me. This cannot be the basis for the extension of the time limits. It does not meet either standard of "exceptional circumstances" or "justified grounds".
24. Accordingly, for all of the above noted reasons, I hereby conclude that, although the SDRCC does have jurisdiction to extend the time limits for the filing of an appeal of the decision of a Doping Tribunal, it is not appropriate to do so in the circumstances of this case. The request to extend the time limits for the filing of an appeal is hereby denied.

Signed in Toronto, this 9th day of August, 2019



Janice Johnston
Jurisdictional Arbitrator