

DECISION
OF THE FIM INTERNATIONAL DISCIPLINARY COURT (CDI)

Sitting in the following composition:

Chairman: Mr Sakari VUORENSOLA
Mr Marek MALECKI
Mr Ernesto RUSSO

in the following case:

Fédération Internationale de Motocyclisme (FIM)
Represented by
Ms. Sara Maria Moreno, FIM Legal Adviser

Claimant

vs.

Anthony Keith West
Represented by
Mr. Michael John Adamson, Solicitor

Respondent

Case concerns: Violations of the Prohibition of Participation during Ineligibility - Article 10.12.3 of the FIM Anti-Doping Code

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I. RELEVANT FACTS

1. Mr Anthony West (hereinafter referred to as '*Mr West*' or '*Rider*') is a professional rider and was participating notably in the 2018 FIM Supersport World Championship.
2. On 8 July 2018 during a routine in-competition doping control, the Rider's urine sample tested positive of benzoylecgonine which is the main metabolite of cocaine considered a prohibited substance under the heading 'S6 Stimulants' of the list of prohibited substances of the FIM Anti-Doping Code (ADC).
3. As a consequence Mr West was sanctioned by the CDI with a period of Ineligibility of two (2) years running from 17 January 2019 until 14 September 2020.
4. Between February and July 2019 Mr West participated in several rounds of Brazilian Superbike Pirelli Cup 2019 or the Superbike Brazil Championship 2019 (hereinafter referred to as '*Brazilian races*' or '*races in Brazil*').
5. In August 2019 the representatives of the Superbike Brazil Championship and Brazilian Motorcycling Confederation, CBM (the Brazilian national motorcycling federation of the FIM) concluded a formal partnership in order for the Brazilian races to join the licence issuance system of the CBM.
6. By letter dated 24 January 2020, Mr West was informed by the FIM that his participation in those motorcycling competitions during the period of Ineligibility of two years running until 14 September 2020 will be referred to the CDI which will have to determine whether the Rider violated the prohibition against participation during Ineligibility and whether an adjustment is appropriate.

II. ASSESSMENT BY THE CDI

CDI Jurisdiction

7. The CDI has jurisdiction to handle this case and decide on its merits in accordance with Article 8.1.1 ADC and Article 3.3.2 of the FIM Disciplinary and Arbitration Code. The Rider has not called into question or challenged the competency of the CDI in the present proceedings.
8. In accordance with Article 8.1.1 ADC and Article 3.3 of the FIM Disciplinary and Arbitration Code Mr Sakari Vuorensola (Chairman), Mr Marek Malecki and Mr Ernesto Russo were appointed by the Director of the International Commission of Judges as the members of the present CDI panel, which was communicated to the Parties by procedural order N°1 dated 23 March 2020. No objection to the constitution of the CDI was raised.
9. Within the framework of the present CDI proceedings Mr West was given the opportunity to exercise in full his right to be heard (present his version of the facts, arguments and submit relevant evidence in particular). In accordance with Article 8.1.3 ADC the Parties to the case had the possibility to file written submissions to support their case. Due to the several extensions of deadlines requested by Mr West (according to Mr West these requests were justified by the ongoing global Corona pandemic) there

were delays in the proceedings. The Parties agreed to the proposal of the CDI to conduct the present hearing by using only emails and written submissions and to complete it without its usual oral part.

Scope of review of the CDI and applicable law

10. When adjudicating in first instance, the CDI enjoys, as usual, full powers to establish the relevant facts and applies the law applicable to the case.
11. While the CDI has considered all the facts, allegations, legal arguments and evidence submitted by the Parties, it refers in its Decision only to the submissions and evidence it considers necessary to explain its reasoning.
12. The 2019 FIM Anti-Doping Code, the FIM Disciplinary and Arbitration Code, and as usual and complementarily Swiss law, if necessary, as the FIM has its seat in Switzerland [cf. Arbitration CAS 2003/A/461 & 471 & 473 WCM-GP Limited v/ Fédération Internationale de Motocyclisme (FIM), Award of 19 August 2003] apply to this case. The CDI shall also consider the relevant case law of the Court of Arbitration for Sport (CAS).
13. The following documents and submissions were furnished to the CDI:
 - 1) Notice of potential Violations of the Prohibition of Participation during Ineligibility, dated 24 January 2020;
 - 2) Procedural Order No 1 issued by the CDI, dated 23 March 2020;
 - 3) Statement of Anthony Keith West, dated 8 June 2020;
 - 4) Letter from Peter Doyle, CEO Motorcycling Australia, dated 2 June 2020;
 - 5) Letter from Bruno Corano, owner/promoter of the Brazilian Superbike Championship, dated 3 June 2020;
 - 6) Legal submissions – on behalf of Anthony Keith West, not dated, received on 12 June 2020;
 - 7) Procedural Order No 2 issued by the CDI, dated 16 June 2020;
 - 8) Statement of Allegations by the FIM, not dated, received on 7 July 2020, together with 22 Exhibits;
 - 9) Final written observations of the Rider to the FIM Statement of Allegations, received on 23 July 2020.
 - 10) Procedural Order No 3 issued by the CDI, dated 10 August 2020, including questions from the CDI to the Rider as well as the CDI proposal to complete the hearing without its oral part.
 - 11) The Rider's replies to the questions, dated 15 August 2020.
 - 12) The Parties' agreements to the CDI proposal to complete the hearing without its oral part, dated 15 August 2020 and 14 August 2020 respectively.

14. In addition to the above listed documents and submissions a number of email exchanges between the Rider's representative and the clerk of the CDI, in particular concerning the extensions of the particular deadlines to deliver submissions, were available to the CDI.

Summaries of submissions

15. Mr West's submissions filed to the CDI were reviewed and discussed in detail by the CDI. The following were the relevant submissions of Mr. West:

- a. The Rider admits participating in several rounds of the races in Brazil during his period of Ineligibility.
- b. He was invited to participate in those races by a private team known as "JC Team" which covered his travel and living expenses.
- c. He was made aware by the Team and the owner/promoter of the Brazilian races Mr Bruno Corano that:
 - i. the series was created in 2009 by Bruno Corano, an avid motorcycle racing enthusiast;
 - ii. Bruno Corano funded the series privately without any government support;
 - iii. the event was not in any way associated or affiliated with FIM;
 - iv. the event, and its owner and promoter, was not a signatory to any agreement with FIM;
 - v. the event had not agreed to adopt rules for initiating, implementing or enforcing any part of the FIM's anti-doping code;
 - vi. the event was non-professional and the Rider would not be breaking any rules by participating in the series.
- d. The Team and Bruno Corano gave him verbal assurances that he could race in Brazilian races based on the facts above.
- e. He formed the view that the Brazilian races were not a Competition or activity within the meaning of Article 10.12.1 ADC for the following reasons:
 - i. the events between February and July 2019 were not authorised or organised by any Signatory, Signatory's member organisation, or a club or other member organisation of a Signatory's member organisation; and
 - ii. the events were not a Competition authorised or organised by any professional league or any international or national level Event organisation or any elite or national-level sporting activity funded by a governmental agency. They were organised by private individual.
- f. Thus he believed that he could ride in the Brazilian races and that if he was not eligible to ride in those races based on the ADC he would not have ridden.
- g. The provisions of the ADC ought to be interpreted in a manner which upholds the purpose of the Code, where the words used permit such an interpretation. Where the words used do not permit such an interpretation that should equally be recognized.

- h. On the facts of this case the words used in Article 10.12.1 ADC should be applied for their plain ordinary meaning, consistent with what a reasonable person would think.
- i. In deciding cases involving interpretation of anti-doping regimes, the need for clarity and certainty or predictability in anti-doping rules where, if athletes are found to have committed violations, they may lose their careers, has been emphasized by CAS (CAS 2000/A/312 and CAS 2008/A/1545).
- j. CAS has warned of the need to keep the purpose of anti-doping regimes in mind, and to construe them in a manner which will discern the intention of the rule maker, rather than frustrate it.
- k. Whether terms are pronounced ineffective for lack of clarity or ambiguous or construed in a manner which gives effect to the purpose of anti-doping policy will depend on the words used in the particular provisions under consideration.
- l. The principle of interpreting a rule which lacks clear meaning against the party which has produced the rule has been relied on by CAS in declaring that a rule is ineffective or should be interpreted in a particular way.
- m. Therefore, the CDI should determine the meaning of the ADC in a straightforward way by approaching the words used in Article 10.12.1 ADC, together with the notes to the ADC, and asking what meaning a reasonable person would give to the words in that Article in the context of the ADC overall.
- n. Accordingly, the races in Brazil were not competitions or activities within the meaning of Article 10.12.1 ADC. Thus, Mr West has not violated the prohibition against participation during the Ineligibility period and the CDI should apply the plain ordinary meaning of the words and elements in Article 10.12.1 ADC and not attempt to misconstrue the meaning and operation of that provision in a broad manner beyond its current ambit.

16. On behalf of the FIM, the following submissions were made:

- a) A number of publicly available information and announcements (press releases, internet and social media) indicates Mr West's intention to continue participating in international motorcycling championships.
- b) The language used in the information and announcements demonstrates that the Rider was aware that his participation in the races in Brazil constitutes a violation of the prohibition against participation during the Ineligibility.
- c) WADA is entitled to ensure implementation and compliance with the World Anti-Doping Code (WADA Code). The FIM as a signatory of the WADA Code is bound to its compliance and therefore found it appropriate to rely on guidance given by WADA.
- d) Following the FIM's request WADA confirmed that a suspended rider may not participate in any sporting activity, whether under jurisdiction of the FIM or not, except for authorised anti-doping education activities.

- e) WADA further confirmed that the scope of the prohibition against participation during ineligibility is intended to be quite broad.
- f) The races in Brazil were competitions organised by a national level organisation as stipulated under Article 10.12.1 ADC. They were neither private events nor non-professional.
- g) Also the public information on the Superbike Brazil Championship website indicates that the races in Brazil were one of the important major motorcycling races in the world. In fact, the rounds of the Championship are presented as events organised solely by the Brazilian association of motorcycling riders (Associagao dos Pilotos da Motovelocidade, ASA).
- h) The ultimate aim of Article 10.12.1 ADC is to prohibit basically any participation during the period of Ineligibility except for the anti-doping education and rehabilitation programs. Such expansive scope of the prohibition is consistent with the overall aim of the WADA Code, which is to provide an effective sanction regime.
- i) Anti-doping sanctions are to be applied to protect rider's fundamental right to participate in a doping-free sport and thus promote health, fairness and equality. Hence, one of the main purposes the WADA Code as well as the ADC is to ensure that athletes are treated in the same way.
- j) By making a convenient interpretation of Article 10.12.1 ADC Mr West pretends to obtain a preferential treatment exempting him from a general prohibition that applies to every rider sanctioned with a period of Ineligibility. Sanctions shall be imposed equally to every rider without exemption to protect fairness in the anti-doping procedures.

Findings of the CDI

17. In the opinion of the CDI, the following are the issues to be decided by the CDI:

- I. Whether the participation of Mr West in the races in Brazil is established?*
- II. If the participation is established, whether the races in Brazil are covered by the scope of Article 10.12.1 ADC?*
- III. If the races in Brazil are covered by the scope of Article 10.12.1 ADC, whether the Violations of the Prohibition of Participation during Ineligibility are established?*
- IV. If the violations are established, what are the consequences of such violations and whether any adjustment to the consequences is appropriate?*

I. The participation of Mr West in the races in Brazil

18. In his written statement, dated 8 June 2020, the Rider admits his participation in the motorcycling races in Brazil (*Copa Pirelli Superbike 2019* or *Brazilian Superbike Championship*, see paragraphs 4 and 15 above). This is further confirmed in the Rider's legal submissions of 12 June 2020. The participation is, therefore, established and not disputed in the present case.

II. Were the races in Brazil covered by the scope of Article 10.12.1 ADC?

19. The next question for the CDI to address is whether the races in Brazil were covered by the prohibition of Article 10.12.1 ADC. That Article enumerates a number of different kinds of competitions and activities in which an Ineligible Rider may not participate. The list of those different kinds of competitions and activities can be divided in three following situations;

- 1) Competitions or activities authorised or organised by any entity that has agreed to comply with the ADC ("Signatory, Signatory's member organisation, or club or other member organisation of a Signatory member organisation", i.e. affiliated with the FIM), or
- 2) Competitions authorised or organised by any professional league or any international or national level event organisation, or
- 3) any elite or national level sporting activity funded by a governmental agency.

The Brazilian races

20. According to the allegations of the Rider he knew that the races in Brazil were not in any way affiliated with the FIM or activities caught by the provisions of the ADC, since they were non-professional private events organised without any government support by a private individual who was an avid motorcycle racing enthusiast. To the contrary the Rider states that he was conscious of his obligations under the ADC and would not have ridden in the Brazilian races if he believed that he was not eligible to ride in those races.

21. According to the FIM the races were organised by a national level organisation as stipulated in Article 10.12.1 ADC and they were, contrary to the Rider's allegations, neither private nor non-professional events, since the official website of the Superbike Brazil Championship indicates that this championship is the 5th major championship in the world and the biggest event of motorcycling speed in America with an audience of more than 250 000 persons.

22. The FIM considers that the importance of the Superbike Brazil Championship is further evidenced by the fact that a partnership between the Brazilian Motorcycling Confederation (CBM, Brazilian FNM of the FIM) and the representatives of the Superbike Brazil Championship was concluded in August 2019 in order for the Brazilian races to join the licence issuance system of the CBM.

23. The Rider emphasises that he did not anymore participate in any events after the above mentioned affiliation was made with the CBM. He states that no reliable evidence has been placed before the CDI which demonstrates that the Superbike Brazil Championship was before the above mentioned affiliation a national level event organisation within the meaning of Article 10.12.1 ADC or otherwise within the meaning of that Article on any interpretation.

Assessment of the CDI

24. The CDI notes that the races in Brazil, at the time when the Rider was participating in them, were neither organised nor authorised by any Signatory, Signatory's member organisation, or a club or other member organisation of a Signatory's member organisation. The CDI further notes that the races in Brazil were not funded by any governmental agency.
25. Therefore, the relevant provision for the present case is the part of Article 10.12.1 ADC that concerns the second situation mentioned above in Paragraph 19. According to that part an Ineligible Rider may not participate in 'competitions authorised or organised by any professional league or any international or national level event organisation'.
26. The comment to Article 10.12.1 ADC stipulates that 'an Ineligible Rider may not compete in a non-Signatory professional league (e.g. the National Hockey League, the National Basketball Association, etc.), events organised by a non-Signatory international event organisation or a non-Signatory national level organisation without triggering the Consequences set forth in Article 10.12.3'.
27. According to the FIM, although the races in Brazil were not organised by the FIM or by any member of the FIM family, they were competitions organised by a national level organisation as stipulated in Article 10.12.1, since they were neither private nor non-professional events due to their importance as explained above in Paragraphs 16 and 21.
28. In fact, according to the FIM, the races are presented as events organised by the Brazilian Association of Motorcycling Riders (*Associação dos Pilotos da Motovelocidade, APA*).
29. The FIM further submits that, as established by the CAS panels, it is important to keep the purpose of the anti-doping regimes in mind and to construe them in a manner which will discern the intention of the rule maker, which is WADA in this particular case.
30. Furthermore, the FIM submits that WADA is entitled to ensure the implementation and compliance with the provisions of the WADA Code. The FIM, as a signatory to this Code, is bound to its compliance and to rely on guidance given by WADA.
31. Following a request from the FIM on May 2019 WADA confirmed that 'a suspended rider may not participate in any sporting activity, whether under the jurisdiction of the FIM or not, except for education'.
32. According to the Rider the provision relevant for the present case should be determined in a straightforward way by approaching the words used in that Article, together with notes to the ADC, and asking what meaning a reasonable person would give to the words in the context of the ADC overall. The plain ordinary meaning of the relevant words used in Article 10.12.1 ADC is not consistent with the submission of the FIM.
33. Further, the Rider submits that the principle of interpreting a rule which lacks meaning against the party who has produced the rule has been relied on by CAS Panels in declaring that a rule is ineffective or should be interpreted in a particular way.
34. The Rider relies also to the letters from Motorcycling Australia (the Australian Affiliated Member of the FIM) and from Mr Bruno Corano. Both letters are dated in June 2020, i.e. after the Rider's concerned participations. The letters state in different ways that the Races in Brazil were not covered by the scope of Article 10.12.1 ADC. The CDI takes note of those letters, however, it is for this CDI to decide on the scope of that Article and

not for the private individuals signing those letters.

35. The CDI has noted that although the Rider probably did not receive neither prize money nor any other pecuniary benefits for his successes in the races, he was nevertheless sponsored by a number of private companies. Also the JC Team, that invited the Rider to participate in those races, covered his travel and living costs in Brazil. Furthermore, the Team is publicly presented as 'Kawasaki Racing Team Brazil'. It is, therefore, likely that the JC Team was financially supported by the motorcycle company Kawasaki.
36. The CDI notes that in accordance with Article 21.2 ADC the comments annotating various provisions of the code shall be used to interpret the code. Also the purposes of the ADC shall, pursuant to Article 21.6 ADC, be considered as an integral part of the code.
37. The CDI further notes that the ADC aims at enforcing anti-doping principles in a global and harmonised manner. The purposes of the ADC include the preservation of the intrinsic values of sport also referred to as "the spirit of sport". The values include i.a. ethics, fair play and honesty.
38. In the opinion of the CDI the wording of Article 10.12.1 ADC (enumerating a number of different situations in which an Ineligible Rider may not participate) may give the impression that it is intended to enumerate exclusively all situations in which the participation should be prohibited. Although the wording of Article 10.12.1 ADC may be in this sense unfortunate, it nevertheless has to be interpreted with keeping in mind the aim and objectives in the context of the ADC.
39. Therefore, the CDI finds that the interpretation of Article 10.12.1 ADC in the present case should not only take into account the wording of the provision but also the aim and objectives of the ADC as independent and autonomous text. An interpretation narrowly looking only to the wording of this Article would be inconsistent with the overall aim of the WADA Code and, therefore, also of the ADC, which is to provide an effective and globally harmonised sanction regime including the preservation of the spirit of sport.
40. Accordingly, viewed in the totality of the factors above and taking, in particular, into account the comment to Article 10.12.1 ADC ('an Ineligible Rider may not compete in ... events organised by a non-Signatory ... national level organisation without triggering the Consequences set forth in Article 10.12.3') as well as the overall aim and purposes of the ADC (enforcing anti-doping principles in a global and harmonised manner; preservation of the intrinsic values of the spirit of sport, including ethics, fair play and honesty), the CDI finds that the races in Brazil are covered by the scope of the provisions of Article 10.12.1 ADC in the present case.

III. Are Violations of the Prohibition of Participation during Ineligibility established?

41. Since the races in Brazil are found to be covered by the scope of Article 10.12.1 ADC and the participation of the Rider in those races is undisputed, the Violations of the Prohibition of Participation during Ineligibility as notified to the Rider on 24 January 2020 by the Notice of potential Violations of the Prohibition of Participation during Ineligibility, are established in the present case. Therefore, the CDI has to assess what are the consequences of such violations and whether an adjustment to the consequences is appropriate

IV. What are the consequences of the violations and whether any adjustment to the consequences is appropriate?

Consequences

42. Pursuant to Article 10.12.3 ADC where a Rider, who has been declared ineligible, violates the prohibition against participation during the ineligibility as described in Article 10.12.1, a new period of Ineligibility equal in length up to the original period of Ineligibility shall be added to the end of the original period of Ineligibility. The new period of Ineligibility may be adjusted based on the Rider's degree of fault and other circumstances of the case.
43. Accordingly, the CDI has to decide on a new period of Ineligibility to be added to the end of the initial period of Ineligibility in accordance with Article 10.12.3 ADC.

Whether an adjustment is appropriate

44. In the present case the circumstances are such that the CDI needs to assess whether the new period of Ineligibility should be adjusted due to the degree of fault of the Rider and due to the other circumstances of the case.
45. In this regards, the CDI takes into account the following considerations;
- The Rider was given assurances at the time of his agreement to participate in the Brazilian races and during his ongoing participation in those races that the races were in no way associated or affiliated with the FIM or with the FIM anti-doping rules.
 - Due to such information and assurances given to the Rider he understood and believed that he could ride in the Brazilian races without breaking any rules.
 - The Rider, when becoming aware that the promoter of the Brazilian Superbike Championship entered into a formal relationship with the FIM via CBM (Brazilian Motorcycling Federation), did not anymore compete in the Brazilian Superbike Championships.
 - Motorcycling Australia (the Australian Affiliated Member of the FIM) has promised to provide ongoing guidance and support to Mr West in order for him to recommence his racing activity after the period of Ineligibility.
46. From those considerations the CDI finds, when viewed in the totality of the circumstance of the present case, that Mr West could have easily been misled by the information and assurances given to him and that, therefore, the degree of fault of Mr West is low. Since the new period of Ineligibility has to be in proportion to the level of Rider's fault, the CDI finds it appropriate that the new period of Ineligibility has to be adjusted to six (6) months commencing from 15 September 2020 (i.e. the first day after the end of the initial period of Ineligibility) and shall end on 14 March 2021.

III. Costs

47. As regards the costs of the CDI proceedings in the present case, Article 6 of the FIM Disciplinary and Arbitration Code stipulates that the costs will be assessed by the FIM Administration and will be awarded against the losing party, unless the CDI decides otherwise.
48. Given the outcome of this case, the CDI considers that Mr West, as the sanctioned party, shall bear the said costs as assessed by the FIM Administration.

On these grounds,

the International Disciplinary Court rules that:

- I. Mr West is sanctioned with a new period of Ineligibility of six (6) months commencing at the day following the end of the first period of Ineligibility on 15 September 2020 and ending on 14 March 2021.
- II. The costs of the present proceedings, as assessed by the FIM Administration, shall be borne by Mr West.

Dated in Espoo, Finland on 24 August 2020

[Signed]

On behalf of the CDI the Chairman

An Appeal against this decision may be lodged before the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland within 21 days from the date of receipt of the CDI decision pursuant to Article 13.7 of the FIM Anti-Doping Code. Moreover, Articles R47 ff. of the Code of Sports-related Arbitration shall apply.

The full address and contact information of the CAS are the following:

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