

FOOTBALL ASSOCIATION REGULATORY COMMISSION

In the matter of disciplinary proceedings brought pursuant to the Football Association Anti-Doping Programme for the season 2012-2013

THE FOOTBALL ASSOCIATION

- and -

GERARD KINSELLA

Commission: Christopher Quinlan QC (Chairman)

Thura KT Win, JP

Gary Mabbutt

Robert Marsh (Secretary to the Commission)

Date: 19 June 2013

Venue: Wembley Stadium, London

Present: Gerard Kinsella

Lydia Banerjee, Counsel for Gerard Kinsella

Andrew Mitchell, Gerard Kinsella's solicitor

Football Association ('FA')

Max Baines, Representative for The FA

Observers

Jason Torrance, UK Anti-Doping

Daniel Palmer, UK Anti-Doping Paralegal

Kevin Haynes, FA Anti-Doping Manager

John Bramhall, Deputy Chief Executive PFA, Professional Footballers Association ('PFA')

DECISION

Introduction

1. We were appointed to hear and determine a misconduct charge brought against Gerard Kinsella ('GK') arising out of his commission of a doping rule violation contrary to Rule E25 of the Football Association's ('FA') Rules of Association when on 5 February 2013 he provided a sample of urine which contained 19-norandrosterone and 19-noretiocholanolone (metabolites of nandrolone) and nandrolone. By way of a letter dated 5 April 2013 he was charged with a breach of Regulation 3 of the FA Anti-Doping Programme Regulations ('FAADR').
2. This document records our decision and the reasons for it.

The Regulatory Scheme

3. Gerard Kinsella ('GK') was born on 13 November 1991. He is now twenty-one years of age. At the relevant time he was registered with Fleetwood Town FC and is bound by the Rules of the Football Association ('the Rules'). Part E of the Rules is headed "Conduct". Pursuant to Rule 1(b) defines "misconduct" to include a breach of "the Rules and Regulations of The Association and in particular Rules E3 to 28".
4. Rule E25, entitled "Anti-Doping" states: "A Participant shall comply with the provisions of any anti-doping regulations of The Association from time to time in force". FAADR 2 provides that "committing an Anti-Doping Rule Violation will be regarded as amounting to a breach of the [FAADR] which must be complied with pursuant to Rule E25 of the Rules...".

5. Pursuant to FAADR 3 an anti-doping rule violation is committed if a Prohibited Substance or its metabolites or markers is present or detected in a sample provided by a player. FAADR 3(b) provides that it is the Player's duty to ensure no prohibited substance(s) or its metabolites or markers enters his body. It further provides that a player is "strictly responsible" for any prohibited substance present in such a sample.
6. Prohibited Substances are defined in Schedule 3 to the FAADR. 19-norandrosterone and 19-noretiocholanolone are metabolites of nandrolone. Nandrolone is an Anabolic Androgenic Steroids under Category S1.1, Schedule 3 to FAADR.
7. Parts 5-10 of the FAADR make provision for the imposition of penalties for doping offences. FAADR 29 (Part 5) requires the imposition of minimum penalties set out in FADR 43-62 unless *the Player establishes* that there are grounds to eliminate or reduce such penalties in accordance with FAADR 63-79 (Part 9).
8. The minimum penalty for a first violation is a suspension of two years (FAADR 43(a)). That is subject to the player establishing grounds to eliminate or reduce that period (FAADR Part 9).
9. The burden rests upon the player to establish the 'reduction' provisions. In such circumstances the standard of proof is the balance of probabilities (FAADR 22), except as required by Parts 8 and 9.
10. By FAADR 63 (Part 9) the Regulatory Commission ('the Commission') "*may replace*" the minimum penalties if the player establishes any of the applicable conditions set out in FADR 65-72 FAADR 66 applies only to specified substances. Nandrolone, an anabolic androgenic steroid, is not a specified substance.

11. FAADR 68-70 apply where the player establishes no fault or negligence. Rightly it was not suggested they applied in this case.
12. GK relied upon FAADR 71. If he establishes:
- a. That he bears no significant fault or negligence and;
 - b. Proves how the Prohibited Substance entered his body
- then the minimum sanction for a first offence may be reduced but the reduced period of suspension may not be less than twelve months.

The Anti-Doping Rule Violation

13. GK admitted (in advance of the hearing and before the Commission) committing the anti-doping rule violation contrary to Rule E25 of the FA Rules of Association when on 5 February 2013 he provided a sample of urine which contained 19-norandrosterone and 19-noretiocholanolone (both metabolites of nandrolone) and nandrolone. The facts were not in dispute.
14. On 5 February 2013 under the FA Anti-Doping Programme GK was one of the Fleetwood Town FC's professional squad players selected to provide an 'out-of-competition' urine sample. He did so. The sample was sealed and marked and the necessary and appropriate forms completed according to procedure.
15. The sample collection form within the papers records the player answered "None" to this request " please provide details of any prescription/non-prescription medication or supplements taken in the last 7 days (including dosage where possible)". That answer was not inconsistent with his account.
16. There was no issue in respect of any aspect of the sampling and testing procedure, chain of custody, the laboratory analysis or results thereof.

17. The specimen was sent and the A sample tested. By letter dated 18 February 2013 the Acting Principal Analyst (Richard Caldwell) reported that the A sample (A1106611) contained 19-norandrosterone and 19-noretiocholanolone (metabolites of nandrolone) and nandrolone. By letter from the FA (Jenni Kennedy) dated 20 February 2013 GK was informed of the said result and provisionally suspended. The same letter advised him, *inter alia*, of his right to have the B sample analysed.
18. In an email sent by John Bramhall at 12.53 on 1 March 2013 GK's explanation was summarised. He said that he believed the "substance came to be present in his urine sample following the use of a substance that he was recommended for pain relief. He was not aware at the time of what the substance was and was subsequently informed that the substance was Durabolin which is, in effect, nandrolone". He did not ask for the B sample to be tested, therein or at all.
19. He was interviewed by Jenni Kennedy and Kevin Haynes (FA Anti-Doping Manager), in the presence of John Bramhall on 11 March 2013. He repeated his account, namely that he believed the prohibited substance entered his system by way of injections administered by his cousin Neil Kinsella ('NK'). He said they were given to him on two consecutive days in early January to relieve pain from a shoulder injury. NK, a taxi driver, did not tell him what he was injecting, other than it would relieve the pain. Only after he was informed that he had provided a 'positive' test did NK tell him he had injected what he called "Deca" (an abbreviation for the substance he injected)
20. The FA charged GK by way of a letter dated 5 April 2013. The letter stated that he was "hereby charged in accordance with FA Rule E25 for a breach of Regulation 3" of the FADR. He replied admitting the breach and requested a personal hearing.

21. The burden of proving an anti-doping rule violation rests upon the FA (FAADR 21). In light of the evidence before us, including the player's admissions it discharged that burden and established the said violation.

22. It is GK's first such violation.

Gerard Kinsella's Case

23. His account remained, in essence, as articulated in the said email and during interview. In advance of the hearing we read and had regard to GK's written Response, two statements from him dated 9 May and 5 June respectively and attachments thereto. Before us, he confirmed the truth of those statements. The FA did not challenge in any way his account.

24. The player's case can be summarised shortly. He was given a professional contract with Everton FC when sixteen years of age. A woeful catalogue of serious injuries has emasculated his short career. During his time with Everton they included a (a) "chipped ankle bone" and torn ankle ligaments in April 2007 which kept him out of the game for six months (b) "shin splints" in September 2008 which caused him to miss two months (c) stress fracture to his second metatarsal which resulted in his missing two months in March 2010 and (d) three separate left shoulder dislocations which were operated on in April 2009, November 2010 and in 2011 and which caused him to miss ten months. Everton released him aged nineteen, a decision he believes was based principally on his injury record.

25. In July 2011 a knee injury led to Plymouth Argyle FC terminating his trial with the club. He did not have a job in football for the whole of the 2011/2012 season. He developed and received medication for depression.

26. In the summer of 2012 he was offered a trial at Fleetwood Town FC. Following that trial he signed a two-year contract in August 2012. He dislocated his shoulder on 27 October 2012. He dislocated his left shoulder again on 22 December 2012. This further set back caused him not inconsiderable distress.
27. Sometime thereafter, probably on 26 December he was at home when his significantly older (by fifteen years) cousin Neil Kinsella ('NK') visited. He enjoys a very close relationship with NK; GK described him as like a "father figure". He told him about his shoulder and his fears that he faced another operation. He was in a lot of pain and told NK. NK, who is a taxi driver and suffers back problems, said he had a "painkiller" which would help.
28. The following day he brought it to GK's home and injected him. Before doing so GK asked him if "all right for [him] to have" as he did not want to "break any drugs rules". NK said it would be "fine" and, as GK put it, he "trusted him". He was injected with 1ml that day and one the day after. He went on loan to Telford United FC on 5 January 2013. He was selected as a substitute for Fleetwood Town FC first team on 18 February 2013.
29. We also read and considered an email sent 16.23 on 24 February 2013 from an account [REDACTED] which we were told is NK's account. The email is headed "Statement Neil Kinsella for Gerard Kinsella". The FA did not challenge it. We proceeded on the basis that it was from NK. That email read:

To whom it concerns,

I am 35 years old , am like an uncle to Gerard . For years I have seen him struggle with injuries and frustration, which hurt me to see him suffering with depression.

The stuff I gave him , I use my self as a pain killer , I do not go the gym or participate in any exercise , Iam over weight and suffer with my joints and back i use durabolin.

I did not no this was a sports enhancer because it's used for joints and pain, I did not know it was also known as nandrolone .

Gerard definitely didn't know either . I gave Gerard 2 bits of it I never knew this would happen as I know you have to go through a cycle to make it work or have any use on the body. he has not had a cycle of it. I done this as a placebo to him. I told him what I use it for to act as a painkiller and acts to help the ligaments, he is negligence to sav the least, i neglected him the truth.

Iam so sorry for this and am gutted this is my fault what has happened ,I mis lead him . And also i didn't know it would be in his system of such a small bit. He has no reason to dis- trust me. I didn't know what it really was so my little cousin Gerard had no idea.

Gerard asked what it was I just said it would help. This has lead to my family falling out with me .
Neil kinsella

30. Once informed of the 'positive' test he called NK. When he asked NK told him the substance he injected was "Deca". He said he was "destroyed" by the 'positive' test and once more suffers with depression for which (again) he is prescribed medication.
31. We read and considered a number of testimonials which all spoke of the player in glowing terms. He apologised for his behaviour which he said were actions of "desperation and stupidity".
32. Ms Banerjee invited us to the view that the player had satisfied FAADR 71. Since the FA did not take issue as to how the substance entered his system, she concentrated her submissions on the degree of fault or negligence. She submitted that his fault/negligence was not significant in light of (1) his injury record (2) his depression and desperation and (3) his youth. She argued that the overwhelming likelihood was that a two years suspension would spell the end of his career.

The FA's Case

33. On behalf of the FA Mr Baines accepted GK's explanation for how the prohibited substance entered his body and submitted that he "satisfied" that part of FAADR 71. However, he submitted that the facts of GK's case are not truly exceptional and his conduct was not such as could properly be said to be without significant fault or negligence.

Determination

34. The minimum penalty for the presence of anabolic steroids is a suspension of two years unless GK can establish that FAADR 71 applies.

How the prohibited substance entered his body

35. In light of the FA's concession, and the absence of any evidence to the contrary or to undermine his account, we have no reason to doubt GK's contention that the nandrolone entered his body in the circumstances he described.

No significant fault or negligence

36. The full heading to FAADR 71 and 72 reads, "No Significant Fault of negligence (Exceptional Circumstances)". FAADR 64 provides the principles to be applied. It reads:
"Decisions taken under these Regulations regarding exceptional or specific circumstances must be consistent. Therefore the following principles shall apply:
(a) Exceptional of specific circumstances will exist only where the circumstances are truly exceptional and not in the vast majority of cases;
(b) The evidence must be decisive and specific to explain the departure from the expected standards of behaviour;

(c) A Player's or Participant's minority is not in itself a justification of a reduction of the minimum penalty, but youth and inexperience are factors to be taken into account in determining fault under Regulations 68-72 below."

37. FAADR 64 repeats aspects of the commentary to the provisions from which FAADR 68-72 are derived, namely Article 10.5 of the World Anti-Doping Code. That commentary notes that WDAC Article 10.5 is applicable in "truly exceptional cases". For example, a mislabelled vitamin or sabotage. It does suggest that administration of a prohibited substance by an athlete's personal physician or trainer without disclosure to the athlete could (depending on the circumstances or "unique facts of a particular case") result in a reduced sanction based on no significant fault or negligence. The facts of this case are a long way from those examples.

38. The high threshold to be overcome by the athlete seeking to establish no significant fault or negligence is illustrated by a number of CAS anti-doping rule violation decisions. In *Despres v CCES & Bobsleigh Canada Skeleton CAS 2008/A/1489 & 1510*, CAS the athlete failed where he did not "*show a good faith effort to leave no reasonable stone unturned before he ingested*" the prohibited substance (para. 7.8).

39. In *Kendrick v ITF, CAS 2011/A/2518* CAS observed that the "*athlete's fault is to be measured against the fundamental duty which he or she owes under the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance*" (para. 10.14).

40. Further, and by way of illustration in *UKAD v Attard, 26 July 2010* the NADP Panel commented that in a "*case in which the player has embarked upon a medical unauthorised course of treatment with illicitly obtained prescription-only drugs is not an obvious case in which a tribunal would be persuaded that there was no fault or negligence*" (para. 4.2.6).

41. We acknowledge that all cases are fact-specific. We must apply well-settled and understood principles to the facts of this case.
42. We take into account his relative youth and inexperience. However, notwithstanding both, we find that GK's conduct fell well short of establishing that he acted without significant fault or negligence. He had some knowledge of the existence of an anti-doping regime and had received some education on the subject. In his statement he comments that he knew, that "steroids such a nandrolone are banned". Further, on his own case he did make an enquiry of NK as to whether the substance he proposed injecting would "break any drugs rules". That was the only enquiry he made. Candidly he admitted he was desperate to go on loan, and he was not thinking straight and said, "looking back it was stupid".
43. In our judgment this player fell well short of establishing that he bears no significant fault or negligence. There were a host of enquires and steps he could and should have taken, which he did not. By way of example:
- a. Whilst he did make an enquiry of the person injecting the substance, that person was a relative whom he trusted. That person (NK) had no relevant qualifications, experience or expert knowledge. NK was not his trainer or physician.
 - b. The enquiry he made was cursory and wholly inadequate. He did not ask the name of the substance or its ingredients. He did not ask to see nor did he see its packaging.
 - c. He did not make any enquiries with his club, club doctor, or any other person there who might be able to help or advise him about what he was told or what was to be injected
 - d. Similarly, he did not make any enquiry of such persons at the FA.

- e. He did not make any enquires himself, for example using research facilities available on the Internet. Had he searched “Deca” within seconds he would have learned it was nandrolone and that it is a prohibited steroid.
 - f. In short, he made no proper efforts to establish what the substance was and whether it was prohibited. In truth, he had no real idea what was injected into his body.
44. Those steps would have got him only so far. We do not suggest they would have led to his being able to establish he was without significant fault. FAADR 71 requires consideration of the player’s fault judged against those necessarily strict standards. He cannot absolve his personal responsibility by reliance on another. He is responsible for what he ingests. In the circumstances we cannot say, applying the FAADR 71 properly, that he has satisfied us that he bears no significant fault or negligence. Regrettably we are driven to conclude he was significantly at fault.

Commencement of suspension

40. The FA provisionally suspended GK by its letter 20 February 2013. We were invited by Ms Banerjee to apply FAADR 36 and to backdate the start of the suspension to 5 February 2013, the day the sample was taken. He immediately acknowledged the anti-doping offence. Therefore and in accordance with FADR 36 (and *Despres, UKAD v Barrett*, 9 October 2012 and *UKAD v Whyte*, 27 March 2013¹) the period of ineligibility shall start on 5 February 2013 and expire at midnight on 4 February 2015.
41. His status during his suspension is as provided by FAADR 37(a): he cannot participate in any football match or any other football related activity other than anti-doping education or rehabilitation programmes.

¹ Appeal dismissed by decision dated 27 March 2013

42. The FA expressly submitted that this was not a suitable case to order designated or target testing as provided for by FAADR, Schedule 1, paragraph 9 and the FA Disciplinary Procedures Regulation 8.4 and so we do not make any such direction.

43. The hearing fee is to be retained by the FA. We make no order for costs of the hearing.

Summary

44. For the reasons adumbrated the Commission found as follows -

- a. Gerard Kinsella committed an anti-doping rule violation, namely the presence in his urine sample taken on 5 February 2013 of 19-norandrosterone and 19-noretiocholanolone (metabolites of nandrolone) and nandrolone.
- b. The appropriate penalty is a period of suspension from all football and football activities for a period of two years.
- c. The suspension is effective (i.e. commences) from the date the sample was taken, namely 5 February 2013.
- d. The hearing fee is to be retained by the FA.
- e. There is no order for costs of the hearing.

45. The Player has a right of appeal as provided by FADR Part 11 and the Disciplinary Regulations.

Christopher Quinlan QC

Chairman

Regulatory Commission



19 June 2013