IRISH SPORT ANTI-DOPING APPEAL PANEL

WORLD ANTI-DOPING AGENCY (WADA)

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IRISH SPORT ANTI-DOPING DISCIPLINARY PANEL
AND MS. IS-1517

DECISION OF IRISH SPORT ANTI-DOPING APPEAL PANEL

29th July 2010

1. Introduction

1. By a decision of the 9th February 2009, the Irish Sport Anti-Doping Disciplinary Panel concluded that Ms. IS-1517, an athlete engaged in the sport of kick boxing, committed a violation of Article 2.3 of the Irish Anti-Doping Rules in that she refused to provide a sample on the 8th September 2008. Under Article 10.4.1 of the Rules (2009 version), the sanction for a violation of Article 2.3 is a period of ineligibility. For a first violation, the relevant period of ineligibility is 2 years (Article 10.2).

2. However, under Article 10.4.1 of the Rules, *"If an athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated."* Under Article 10.4.2, if the athlete establishes that she bears *"No Significant Fault or Negligence"*, then the otherwise applicable period of ineligibility may be reduced to not less than one half of the period of ineligibility otherwise applicable.

3. The Disciplinary Panel took the view that they were *"just about satisfied"* that Ms. IS-1517 bore *"no fault or negligence"* in respect of the violation.[1] It imposed a period of ineligibility of 3 months commencing on the 19th November 2008 (the date when the hearing before the Panel commenced) which period therefore expired on the 19th February 2009. It is not clear, for reasons explained later, how the Panel arrived at the period of 3 months.

4. The World Anti-Doping Agency (WADA) filed a Notice of Appeal dated the 23rd February 2009 against the decision of the Disciplinary Panel which Notice of Appeal was directed to the Chair of the Irish Sport Anti-Doping Disciplinary Panel.[2] As required under the Rules, the Chair of the Irish Sport Anti-Doping Disciplinary Panel (Mr. Michael M. Collins S.C.) appointed three members of the Panel to determine the appeal, being Mr. Collins, Mr. Patrick Boyd and Dr. Martin Walsh.[3]

[1] Panel decision, paragraphs 82 and 90.
[2] Pursuant to Article 13.4.1 of the Rules.
[3] Pursuant to Article 13.4.3 of the Rules.

5. Pursuant to procedural directions given by the Appeal Panel, written legal submissions were submitted to the Appeal Panel where the parties agreed that an oral hearing of the appeal was unnecessary.

6. WADA submitted a written submission (complementary brief) dated the 31st July 2009. Legal submissions on behalf of Ms. IS-1517 were submitted on her behalf by Arthur Cox, solicitors, on the 18th September 2009. A reply was submitted by Carrard & Associes on behalf of WADA dated the 12th October 2009. Although Ms. IS-1517 was given the opportunity to file any further written submission which she wished by 18th November 2009 **[June to confirm date]**, no further submissions were filed.

2. Factual background

7. The factual findings made by the Disciplinary Panel are not in dispute and are set out fully in the Disciplinary Panel's decision. They may be briefly summarised as follows. On the 8th September 2008 Anti-Doping Officers called unannounced to the home of Ms. IS-1517 at approximately 5.50pm for the purpose of taking a urine sample from Ms. IS-1517. Ms. IS-1517 declined to furnish the sample because she was on her way out to a meeting with a very important customer of her employer. Ms. IS-1517 had recently commenced employment as the [...] Manager with the [...] and [...] on the 28th July 2008. She had a meeting with a potential new client ([...]) which meeting had been arranged some weeks previously. The purpose of the meeting was to try to secure this potential client, with whom Ms. IS-1517 had dealt in her previous employment, as a client of her new employer. Ms. IS-1517 regarded the meeting as a very important one for which she could not be late and therefore felt she was not in a position to give the urine sample there and then. She offered to give a sample after the meeting at 8 o'clock that evening when she would be at training in her club but this offer was declined by the Officers. The Officers suggested accompanying her to the meeting (to keep her under observation before she would give the sample) but Ms. IS-1517 said that this was not possible given the private and work-related nature of the meeting and because

of the perception on her part as to how her employer would react to it. As noted by the Disciplinary Panel in its decision,

> *"She explained that when the testers arrived at her door she did "panic a little bit" because she knew that she would not be in a position to bring them with her. She explained that she was anxious to keep her private life separate from her work life and, having just started the job 5 weeks previously, she felt she was not in a position to bring Mr. Fogarty and Ms. Crosbie* [the Anti-Doping Officers] *with her to the meeting."*[4]

8. Mr. Fogarty told her that refusing to give a sample was a rule violation and that she might be subject to sanction but she did not realise the consequences of this and was not informed as to what the potential sanctions were. Ms. Crosbie asked her whether she realised that *"everything you get from the Sports Council is now at risk by refusing the test."* Ms. IS-1517 asked Ms. Crosbie what she meant by that but Ms. Crosbie did not answer and went to make a telephone call. Ms. IS-1517 thought she was referring to a possible loss of financial support from the Sports Council but in fact Ms. IS-1517 was not in receipt of any funding from the Sports Council.

9. Ms. IS-1517 then went to her meeting without furnishing the sample.

10. Subsequently the Irish Martial Arts Commission and the Irish Sports Council alleged that Ms. IS-1517 had violated Article 2.3 of the Irish Anti-Doping Rules (2007 version) and in particular that she committed the following anti-doping rule violation:

> *"Refusing, or failing without justification, to submit to sample collection, after notification, in breach of the Rules, or otherwise evading the sample collection in breach of the Rules pursuant to Article 2.3 of the Rules."*

11. This is the allegation that was referred to the Disciplinary Panel.

[4] Paragraph 47.

3. The decision of the Irish Sport Anti-Doping Disciplinary Panel

12. The Panel decided that a violation of Article 2.3 had occurred. It was accepted that Ms. IS-1517 had refused to give the sample. The Disciplinary Panel was *"comfortably satisfied"* that there was no *"justification"* for the refusal. The expression *"comfortably satisfied"* comes from Article 8.4.1 of the Rules which specifies that in disciplinary proceedings before the Disciplinary Panel, the

> *"standard of proof shall be whether the National Governing Body has established the anti-doping rule violation(s) to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt."*

13. The sanction for a first violation of Article 2.3 is a period of ineligibility (meaning that the participant is barred for a specific period of time from participating in any competition or other activity or funding as provided in Article 10.8)[5] unless the conditions provided in Article 10.4 are met.[6] Under Article 10.4.1, if the athlete establishes that she bears *"No Fault or Negligence"*, the otherwise applicable period of ineligibility shall be eliminated. Under Article 10.4.2, if the athlete[7] establishes that she bears No Significant Fault or Negligence, then the otherwise applicable period of ineligibility may be reduced but may not be less than one half of the period of ineligibility otherwise applicable.

14. The Disciplinary Panel

> *"formed the view that Ms. IS-1517 has just about, on the balance of probabilities, established "No Fault or Negligence" on her part. The Panel observes, however, that its decision in this regard was a very finely balanced one. On balance, therefore, the Panel accepts that Ms. IS-1517 bore "No Fault or Negligence" for the violation."*

[5] See definitions appendix 1 to the Rules.
[6] Article 10.2.1.
[7] The word in the Rule is *"Participant"* which is defined as meaning *"any Athlete or Athlete Support Personnel"* but nothing turns on this for present purposes.

15. The Panel appears to have believed that in such circumstances it had a discretion to impose a sanction between 2 years ineligibility and no period of ineligibility and decided that the appropriate period of ineligibility was a period of 3 months commencing on the date of the first hearing before the Panel, being the 19th November 2008.

4. Jurisdictional and procedural issues

16. Attached to the legal submissions filed on behalf of Ms. IS-1517 is an unsigned letter from Ms. IS-1517 of the 26th June 2009 stating that she has made a decision to retire from competing in competitions and would like her name to be removed from the Athlete's Registered Testing Pool as from the 26th June 2009. Although this letter is unsigned, in light of the fact that Ms. IS-1517 has clearly instructed her solicitors that she has resigned from competing in competitions, the Appeal Panel accepts that this is the case. It was argued on behalf of Ms. IS-1517 that she is therefore no longer governed by the Irish Anti-Doping Rules, that the Appeal Panel has therefore no further jurisdiction over her and that the appeal is therefore moot.

17. However, Ms. IS-1517 was subject to the Irish Anti-Doping Rules at the time of the offence (when the 2007 version of the Rules was in force). In the view of the Appeal Panel, in such circumstances, the athlete must be taken to have submitted to the disciplinary processes laid down in the Anti-Doping Rules (including the disciplinary hearing before the Disciplinary Panel and any appeal before the Appeal Panel). The Appeal Panel does not consider that an athlete can avoid this jurisdiction by the simple expedient of announcing that he or she is retiring from competition. We are therefore satisfied that the Appeal Panel has jurisdiction to deal with this appeal.

18. We note that under the World Anti-Doping Code (2009 version), Article 7.6 states:

> *"If an athlete or other person retires while a results management process is underway, the Anti-Doping*

Organisation conducting the results management process retains jurisdiction to complete its results management process. If an athlete or other person retires before any results management process has begun, the Anti-Doping Organisation which would have results management jurisdiction over the athlete or other person at the time the athlete or other person committed an anti-doping rule violation, has jurisdiction to conduct results management."

19. The Irish Anti-Doping Rules are adopted and implemented by the Irish Sports Council in discharge of its statutory functions under the Irish Sports Council Act 1999 which include the function of taking such action as it considers appropriate, including testing, to combat doping in sport. In performance of this function, the Irish Sports Council established and implemented the Irish Sport Anti-Doping Programme and adopted the Irish Anti-Doping Rules both in discharge of its statutory functions and duties and in accordance with its obligations under the Code.[8]

20. The 2007 Rules did not contain any provision similar to Article 7.6 of the 2009 WADC and neither does of the later 2009 version of the Rules. However, we are reinforced in the conclusion we have reached with regard to the interpretation of the Rules and the jurisdiction of the Appeal Panel by Article 7.6 of the 2009 Code which we see simply as an express statement of a jurisdiction that was and is already implicit in the Irish Rules and by Article 18.2.2 of the 2009 Rules.[9].

21. A second question which arises is which version of the Irish Rules is applicable in considering this matter. The 2007 Rules were in force as of the date of the violation in 2008.

22. Prima facie, the matter is governed by the Rules which were in force at the time of the violation. Article 20.1.1 of the 2007 Rules provide, somewhat curiously, at

[8] In April 2003, the Minister for Arts, Sports and Tourism signed the Copenhagen Declaration on Anti-Doping in Sport on behalf of the Irish Government. By signing the Copenhagen Declaration, the Irish Government agreed to recognise the role of the Code as the foundation in the world-wide fight against doping in sport and to seek to progressively adapt, where appropriate, national anti-doping policies and practices in sport in conformity with the provisions of the Code and to encourage national organisations engaged in anti-doping in sport to adopt the Code. Article 18.2.2 provides that the Rules are to be interpreted in a manner that is consistent with the applicable provisions of the Code.

[9] Corresponding to Article 18.2.3 of the 2007 Rules.

Article 20.1.1 that the Rules *"shall come into full force and effect on, and shall be adopted and incorporated by National Governing Bodies … by the 1st day of June 2004."* However Article 20.1.2 provides:

> *"These Anti-Doping Rules shall not apply retrospectively to matters pending before the date of coming into effect of these Anti-Doping Rules."*

23. Thus as of the date of the violation (8th September 2008) the 2007 Rules were in force.

24. A new version of the Rules was adopted in 2009. Again, somewhat curiously, Articles 19.1.1 and 19.1.2 provide that the Rules shall come into full force and effect and shall be adopted by National Governing Bodies by the 1st June 2004 and will not apply retrospectively to matters pending before the 1st June 2004.

25. Article 19.2 provides however that *"the 2009 version of these Rules shall apply in full after the 1st day of January 2009."*

26. Article 19.3 provides:

> *"With respect to any anti-doping rule violation case which is pending as of the 1st day of January 2009 and any anti-doping rule violation case brought after the 1st day of January 2009 based on an anti-doping rule violation which occurred prior to the 1st day of January 2009, the case shall be governed by the substantive Anti-Doping Rules in effect at the time the alleged anti-doping rule violation occurred unless the Irish Sport Anti-Doping Disciplinary Panel or CAS, as the case may be, determines the principle of lex mitior appropriately applies under the circumstances of the case."*

27. While we do not find it easy to reconcile the reference in Article 19.1.1 to the 2009 Rules coming into effect on the 1st June 2004 and the combined effect of Articles 19.2 and 19.3 which appear to state that the Rules will only apply from the 1st January 2009 and will not apply retrospectively unless the principle of lex mitior applies, it seems to us that the specific provision about retroactivity under Article 19.3 overrides any more general statement in Article 19.1. In other words,

we consider that the 2009 Rules do not apply to an anti-doping rule violation case which was pending as of the 1st January 2009 unless the principle of lex mitior applies.

28. The case against Ms. IS-1517 was commenced by a letter of the 19th September 2008 when the Irish Sports Council notified the Disciplinary Panel of the alleged anti-doping rule violation followed by a notification from the Disciplinary Panel to Ms. IS-1517 by letter of the 22nd September 2008. Therefore, prima facie it is the 2007 Rules which apply to the case.

29. The principle of lex mitior means that if the law relevant to the offence of the accused has been amended, the less severe law should be applied. In an Advisory Opinion pronounced by the Court of Arbitration for Sport (CAS 2005/C/841 CONI)[10] the CAS repeated its agreement[11] with statements in a previous Advisory Opinion[12] as follows:

> *"The principle whereby a criminal law applies as soon as it comes into force if it is more favourable to the accused (lex mitior) is a fundamental principle of any democratic regime … This principle applies to anti-doping regulations in view of the penal or at the very least disciplinary nature of the penalties that they allow to be imposed. By virtue of this principle, the body responsible for setting the punishment must enable the athlete convicted of doping to benefit from the new provisions, assumed to be less severe, even when the events in question occurred before they came into force … The Panel considers that … the new provisions must also apply to events which have occurred before they came into force if they lead to a more favourable result for the athlete."*

30. The only distinction between the 2007 Rules and the 2009 Rules insofar as Article 2.3 is concerned is that the 2007 Rules refer to *"refusing, or failing without justification, to submit to sample collection …"* whereas the 2009 version refers to *"refusing or failing without <u>compelling</u> justification, to submit to sample collection …"* (emphasis added). Since this later version does not appear to be in

[10] A request from the National Olympic Committee of Italy for an Advisory Opinion pursuant to Article R60 of the Code of Sport – Related Arbitration.
[11] Paragraph 52.
[12] CAS 94/128 rendered on the 5th January 1995.

ease of the athlete, it is Article 2.3 of the 2007 Rules that is appropriate to apply in the present case. WADA argues that the test is *"compelling justification"* pursuant to Article 2.3 of the 2009 Rules. For the reasons described above, we do not agree.

31. Insofar as the issue of a sanction to be imposed and the elimination or reduction of the period of ineligibility is concerned, there appears to be no difference between the 2007 Rules and the 2009 Rules with one exception. In the 2007 Rules, the provision dealing with no fault or negligence (Article 10.5.1) appears confined to violations under Article 2.1 (presence of prohibited substances etc.) and Article 2.2 (use of a prohibited substance etc.). It does not appear that a violation of Article 2.3 (failure to submit to sample collection) is covered by Article 10.5.1.

32. On the other hand, in the 2009 version the no fault or negligence provision (Article 10.4.1) is not so confined and appears to apply to any violation.

33. Accordingly, we are of the view that Ms. IS-1517 is entitled to have the issue of whether the otherwise mandatory 2-year period of ineligibility should be reduced or eliminated determined under Article 10.4 of the 2009 Rules since this affords her the opportunity of eliminating the period of ineligibility entirely if she can establish that there was no fault or negligence on her part. This appears to be the approach also adopted by the Disciplinary Panel. In particular, we are of the view that the issue of sanctions is part of the substantive Anti-Doping Rules as referred to in Article 19.3 of the 2009 Rules and is not merely a matter of procedure.

5. Whether Ms. IS-1517 has established that she bore "*No Fault or Negligence*" or, alternatively, "*No Significant Fault or Negligence*"

34. In dealing with the 2009 Rules the Disciplinary Panel appears to have been of the view that if the athlete could establish that she bore *"No Fault or Negligence"* in respect of the violation, the period of ineligibility could be eliminated altogether *"or reduced to a period of less than one year."*[13] The Panel therefore considered

[13] Paragraph 74.

that even in such circumstances, it had a discretion to impose some period of ineligibility up to one year[14] and in the exercise of this purported discretion, the Panel imposed a period of ineligibility of 3 months.

35. We are not clear as to where in either the 2007 or the 2009 Rules the Disciplinary Panel has such a discretionary jurisdiction. It seems to us that if the athlete establishes under Article 10.4.1 of the 2009 Rules that she bore no fault or negligence, then the otherwise applicable period of ineligibility (in this case 2 years) is eliminated. In our view therefore, if the Panel was correct in finding that Ms. IS-1517 bore no fault or negligence, they should have imposed no period of ineligibility upon her.

36. The fundamental question remains, however, whether the Panel was correct in finding that there was no fault or negligence. If not, we need to consider whether Ms. IS-1517 has established that she bore no significant fault or negligence.

37. Both terms are defined in both the 2007 and the 2009 Rules in the same way.

38. The term *"No Fault or Negligence"* is defined as follows:

> *"The Athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method."*

39. It can be seen at once that this definition is not readily applicable at all to a violation concerning a refusal to give a sample since it is clearly drafted with a totally different type of doping violation in mind.

40. The term *"No Significant Fault or Negligence"* is defined as follows:

> *"The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into*

[14] Although there is a slightly confusing reference to a possible 2-year sanction in paragraph 23 of the Panel's decision.

account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation."

41. The draftsman similarly seems to have had in mind a different type of doping violation although the wording is capable of a somewhat more general interpretation.

42. Nonetheless, some meaning has to be given to these expressions in the context of a refusal to furnish a sample violation. It is undoubtedly difficult to work out such a meaning. A particular difficulty is that an Article 2.3 violation seems to involve some element of intent on the part of the athlete since refusing to give a sample is something which an athlete normally does deliberately. (An inability to give a sample for natural reasons would obviously not be a violation of Article 2.3).

43. WADA argues that when a finding is made (as in the present case) that the athlete has refused to give a sample *"without justification"*, this necessarily excludes the possibility of the athlete being able to establish *"No Fault or Negligence"* although WADA accepts that it is open to the athlete to establish that there was *"No <u>Significant</u> Fault or Negligence."*

44. While it is unquestionably very difficult to envisage a situation where the athlete deliberately refuses to give a sample, refuses without justification but nonetheless bears no fault or negligence, it seems to us that some meaning has to be given to this provision bearing in mind that it was enlarged in the 2009 Rules to apply to any violation (and not just the presence of a prohibited substance etc.).

45. There have been a number of cases touching on this issue although many are more concerned with whether the athlete had a justification (or, depending on which rules were applicable, a compelling justification) for not furnishing the sample. This is the issue of whether a violation has occurred at all and is a separate issue from whether there was no (significant) fault or negligence. However, sometimes the finding of no justification is treated as determinative that there was significant fault or negligence. For example, in *Canadian Centre for Ethics in Sport –v- Shari Boyle,* a decision of an arbitrator of the Sport Dispute Resolution Center of

Canada, the athlete did not give a sample because she got sick and went home without completing the doping control procedure and without notifying the doping control personnel that she was leaving (so that they could have accompanied her and kept her continually chaperoned).

46. Apart from the fact that the arbitrator appears not to have believed some of her evidence, he concluded that there was no justification for leaving the training centre without telling the relevant personnel what she was doing. For it to be a compelling justification, he said that *"her departure would have to have been unavoidable"* when in fact it was voluntary and intentional.

47. On the no fault or negligence issue he said:

> *"On behalf of the athlete it is submitted that she did nothing consciously wrong, that her actions were deliberate and, accordingly that there was no fault or negligence or no significant fault or negligence on the athlete's behalf.*
>
> *Given my findings, on the evidence, that the athlete's departure from the track and field center was voluntary and intentional, I cannot conclude that there was no fault or negligence or no significant fault or negligence on her behalf."*

48. In *Boxing New Zealand Inc –v- Robertson* (a decision of the Sports Tribunal of New Zealand, 5th September 2007), there is a reference to proceedings against Christine Johnson brought under the 2006 anti-doping rules of the World Yachting Association where the Tribunal observed *"that the athlete's misunderstanding did not allow a basis for finding "no significant fault or negligence" – and a deliberate refusal could seldom meet that standard."*

49. In the New Zealand decision, the athlete was no longer boxing (but had not advised his sports body that he was retired and had not abandoned the idea of resuming boxing). He thought in this context he did not have to provide a sample. In those circumstances the Tribunal was not satisfied that he bore no significant fault or negligence. It stated:

> *"The Tribunal was left with a clear impression that he simply took no care, nor interest in understanding his obligations."*

50. In *WADA –v- Busch* (CAS 23rd June 2009), the athlete refused to submit to a test because he felt disturbed by too frequent doping tests and criticised the way athletes are selected to be submitted to out of competition testing. He did however submit to a test later in the day which was negative. The Court was, unsurprisingly, not satisfied that the athlete had established no significant fault or negligence.

51. In *British Bobsleigh Association –v- Howe* (4th May 2009), the athlete, a Royal marine, was asked to submit to a test at 5.35am and he refused to provide a sample because he had to be at work at 6am. The Tribunal held that on the facts he still had sufficient time to provide a sample and not be late for work. Indeed, the Tribunal did not accept his evidence as to his excuse because he initially refused on the basis that he did not know he was still subject to the relevant doping control regime. The Tribunal also considered that he could have contacted somebody at his base to explain that he would be slightly late.

52. In *USADA –v- Haimline* (29th December 2005) the Tribunal stated:

> *"The respondent's test refusal constitutes a presumptive WADA code violation requiring the respondent, in order to overcome the presumption, to demonstrate by a preponderance of the evidence truly exceptional or compelling circumstances justifying less than the maximum 2 year sanction … Only had he not intentionally refused testing would he be in a position to argue exceptional circumstances or no significant fault."*

55. In *Australian Water Polo –v- Heuchen* (15th June 2006) the CAS said:

> *"The jurisprudence that has developed in relation to the interpretation of the phrase no significant fault or negligence reveals that the satisfaction of that standard has occurred when the athlete has established that his or her conduct was not intentional or purposeful and/or unique circumstances prevail. The respondent is not able to avail herself of clause 12.5(b). Her conduct* [failure to submit to a test] *was intentional and she bore significant fault and/or negligence in the circumstances."*

53. One of the very few cases where despite an intentional refusal, there was a finding of no significant fault or negligence is *New Zealand Rugby League Incorporated –v- Tawera*, a decision of the Sports Disputes Tribunal of New Zealand, 6th May

2005. The player was requested to and was in the process of giving a urine sample in a toilet cubicle accompanied by the relevant officer who correctly insisted that he had to witness the sample leaving the body. The player became agitated and upset at what he saw as an unnecessary invasion of privacy and having passed a certain amount of urine, then threw it or dropped it into the toilet telling the official *"fail me, I don't care."* The Tribunal found that the discarding of the sample *"was a spontaneous overreaction to the circumstances at a time when Mr. Tawera was anxious to get the process over and done with and get on the road to Hawkes Bay"* (where his girlfriend was about to give birth).

54. The player left the room but remained outside the door for 2 or 3 minutes. He then agreed to provide a sample with the supervising official rather than the designated chaperone watching him although warned that by leaving the sight of the chaperone, he had failed to comply with the in-competition testing process and that any subsequent test would not remedy this failure.

55. The second test proved negative and the Tribunal was satisfied on the facts that the player was not able to and did not do anything in the few minutes that he was out of sight of the chaperone which could have altered the result of the second test.

56. The Tribunal said that *"His failure to provide a sample was a hot-headed, spur of the moment overreaction to momentary inconvenience or embarrassment and was not motivated by a desire to avoid the detection of an anti-doping rule violation."* However, he did commit a violation but the Tribunal regarded the fact that the second sample was negative meant in the circumstances that the Tribunal was confident that the first sample would also have tested negative:

> *"The provision of a second sample which returned a negative result, and our conclusion from that that the first sample would necessarily also have been negative, is a truly exceptional circumstance. In most cases of refusal or failure to provide a sample, it is not possible to say with certainty what the result of the analysis would have been. But we believe we can be certain here.*

> *That means that the intentional failure to provide a sample assumes less significance "when viewed in the totality of the circumstances." We feel able to hold, therefore, in the particular and exceptional circumstances of this case, that Mr. Tawera has satisfied us that there was no "significant" fault or negligence on his part."*

57. The Tribunal imposed the lesser sanction of a 1-year ban running from the date the player was suspended by the NZRL.

58. It should be noted that the reference to exceptional circumstances derives from the fact that Article 10.4 of the 2009 Rules (and the equivalent provision in other Rules) is headed *"Elimination or reduction of period of ineligibility based on exceptional circumstances."*

59. Considering the facts of the present case, we have sympathy for the predicament in which Ms. IS-1517 found herself. For amateur athletes, the necessity to earn a living and the demands of one's work can clearly create significant conflicts with the requirements of the sport in which one chooses to participate. But we find it difficult to see how it can be said that Ms. IS-1517 bore no fault or negligence. It is undoubtedly the case that she was only a short time in her new job, that the appointment with a potentially important customer had apparently taken quite some time to arrange, and it was clearly important to Ms. IS-1517 that she make the meeting on time. We can also understand why she was reluctant to have the officials sit in on the meeting to keep her under observation until she could give a sample.

60. However, it does not seem to us that these were particularly insuperable problems. It is not clear just how late Ms. IS-1517 would have been for the meeting if she had given the sample when requested. Nor did she explain why she could not have telephoned the customer to explain that she might be a little late for the meeting.

61. It seems clear from the caselaw discussed above that to establish no fault or negligence or no significant fault or negligence, the circumstances have to be exceptional. We do not think Ms. IS-1517 has established this. The letter she

furnished from her employer ([...]) refers to her obligations in general terms but does not, as we would have expected, address the issue of the meeting in question, why it was particularly important, why the employer would have regarded it as a top priority for Ms. IS-1517 to attend the meeting on time and why it would have taken a very serious view had she not done so. Her employer was not called as a witness.

62. Similarly, the letter from the potential client with whom Ms. IS-1517 was meeting ([...]) makes no reference at all to how important the meeting was or what view the customer would have taken had Ms. IS-1517 been somewhat late for the meeting (particularly in circumstances where Ms. IS-1517 could have telephoned to explain that she would be a little bit late so that no discourtesy could have been inferred).

63. In these circumstances, it cannot be said that there was no fault or negligence on Ms. IS-1517 part. The concept of *"No Significant Fault or Negligence"* allows for the possibility of some degree of fault or negligence but not fault or negligence to a significant extent. For the reasons we have outlined above, we do not think the fault or negligence was sufficiently small as not to be significant.

64. We have reached this conclusion with some regret. As pointed out in the legal submissions made on behalf of Ms. IS-1517, she is an amateur athlete deriving no income from the sport. She has been engaged in the sport of kick boxing for over [...] . She has been [...] champion.

She was registered with the Irish Sports Council Anti-Doping Testing pool and, in this regard, complied with her obligations to provide *"whereabouts forms"* and has been subject to anti-doping testing. There is no evidence that she has ever been found guilty of any anti-doping violations throughout, what is by any measure, a long and distinguished career.

65. As she described in her own evidence, she *"panicked a bit"* when the testers arrived. This combined with her anxiety about her new job and the importance of a waiting customer may have contributed to her not thinking as calmly as she

might have done and realising that there was a way in which she could have reconciled the needs of her employment with the requirements of her sport. There is no evidence to suggest that she was deliberately attempting to evade the testing procedure and she did offer to subject herself to testing later than evening. Equally however, it is understandable why this was not acceptable to the testers in circumstances where Ms. IS-1517 was not prepared to allow them to keep her under observation at all times. Thus, these factors are not such as to amount to no significant fault or negligence.

66. It is argued in the legal submissions on behalf of Ms. IS-1517 that there is a discretion to mitigate the sanction, apart from the provisions of Article 10.4, where proportionality, fairness and justice so require. They cite the case of *Puerta –v- ITF* (CAS 2006/A/1025) which concerned a positive drug test in a tennis player. The substance in question was contained in a medication the player's wife was taking. The CAS Panel concluded that the player had mistakenly taken the substance by using a glass to take a drink of water which his wife had used a few minutes earlier to take her medication. The Court was of the view that despite the extraordinary circumstances, Mr. Puerta failed to exercise *"utmost caution"* at the critical time and it could not be said therefore that he was guilty of no fault or negligence. On the other hand, it did consider that given the truly exceptional and unique circumstances, he bore no significant fault or negligence with the consequence that the period of ineligibility fell to be reduced from a lifetime to 8 years.

67. This would have effectively ended the player's career but the Court said that determining the actual period of ineligibility to be imposed *"necessarily requires the Panel to consider the issue of proportionality."*[15]

68. This was the player's second offence and the WADC did not distinguish between significant and less significant breaches when it came to the issue of a second offence. In other words, under the WADC, even though the first offence may have been qualified by a finding of no significant fault or negligence (as was the

[15] Paragraph 11.7.1.

case in Mr. Puerta's earlier offence), the WADC required the second offence to be considered as if there had been no finding of no significant fault or negligence in relation to the first breach. As the Court put it *"This is an application of a very crude "two strikes and you are out" policy."*

69. In the *Puerta* case, Mr. Puerta had established no significant fault or negligence in the first and second offences, a circumstance that the draftsman of the WADC did not appear to have contemplated. The 8-year ban followed from the WADC Rules without considering the circumstances of the first offence.

70. Thus, if the Court considered that an 8-year sanction was not proportionate in circumstances where the athlete had established no significant fault or negligence in the case of both the first and second offences, the question was whether the Court could impose a lesser period of ineligibility.

71. The Court pointed out that the flexibility built into the Code itself, providing for reduced sanctions in certain circumstances, was designed to satisfy the general legal principle of proportionality:

> *"Indeed, in all but the very rare case, the WADC imposes a regime that, in the Panel's view, provides a just and proportionate sanction, and one in which, by giving the athlete the opportunity to prove either "No Fault or Negligence" or "No Significant Fault or Negligence", the particular circumstances of an individual case can be properly taken into account.*
>
> *But the problem with any "one size fits all" solution is that there are inevitably going to be instances in which the one size does not fit all … It is, however, in the very rare case that the imposition of the WADC sanction will produce a result that is neither just nor proportionate."*

72. The Court concluded that since an 8-year ban was, for a tennis player, equivalent to a lifetime ban since it would effectively end his career, the very minor failure

on his part did not justify such a sanction which would be *"neither proportionate nor just."*[16]

73. While it is argued that strict application of the Rules is required to effectively conduct the fight against doping in sport, the Court pointed out that *"it would be a disaster for the WADC, and for the fight against doping in sport, if the WADC were to be struck down in any jurisdiction as not producing a just and proportionate sanction."*[17]

74. Equally however, the Court pointed out that the Code

> *"does not bestow upon tribunals a general discretion. Indeed, the existence of such a general discretion would be inimical to the WADC, which seeks to achieve consistency and certainty. The Panel does not believe that such a discretion exists, and would not welcome its existence.*
>
> *The circumstances in which a tribunal might find that a gap or lacuna exists in the WADC in relation to sanctions for breach of its provisions will arise only very rarely. … Indeed, the Panel repeats its view that in all but the very rarest of cases the sanction stipulated by the WADC is just and proportionate."*[18]

75. The Court went on to hold that it was not so much exercising a discretion as *"filling … a gap or lacuna in the WADC in circumstances which will rarely arise."* The gap in question was where both the first and second offence were accompanied by a finding of no significant fault or negligence. In such circumstances the Court considered that the 8-year period was disproportionate and that a 2-year period was *"the only just and proportionate sanction."*[19]

76. Ms. IS-1517 legal submissions also refer to the case of *FINA –v- Mellouli* (CAS 2007/A/1252) where the fact that a 2-year ban would have ruled the athlete out of the 2008 Olympic Games was taken into account in reducing the otherwise applicable sanction from 2 years to 18 months, the CAS Panel noting the *"need to*

[16] Paragraph 11.7.21.
[17] Paragraph 11.7.24.
[18] Paragraphs 11.7.25-11.7.26.
[19] Paragraph 11.7.34.

respect the universal principle of proportionality in determining the sanction to be imposed."

77. However in *Despres –v- Canadian Centre for Ethics and Sport* (CAS 2008/A/1489), the Court described the decisions in *Puerta, Mellouli* and *Squizzato –v- FINA* (CAS 2005/A/830) as decisions which

> *"involved extenuating or unusual circumstances that merited a finding of "No Significant Fault or Negligence", or where the Panel found the appropriate sanction to be unjust or disproportionate to the circumstances surrounding the positive test result. These considerations do not apply in the present case … Unlike Mr. Puerta, Mr. Despres was not the "victim of an extraordinary and unpredictable sequence of events." Mr. Despres knew he was taking a supplement, was aware of the risks of doing so, but took it anyway because he wanted to enhance his performance by recovering faster from surgery.*
>
> *In the Panel's view, the facts of this case do not warrant a reduction in Mr. Despres' period of ineligibility based on a proportionality analysis. The proportionality doctrine gives the Panel flexibility in cases involving extreme or exceptional circumstances. As the risk of contamination in nutritional supplements is widely known, the circumstances surrounding Mr. Depres' adverse analytical finding were neither extreme nor unique. As a result, the Panel does not reduce the 2-year suspension period required under the WADC and the CADP."*

78. In our view, the circumstances in which Ms. IS-1517 found herself cannot be described as so unusual or extreme as to warrant a reduction in the sanction which follows from the application of the Rules. As the CAS Panel pointed out in *Puerta*, the Code (and the Irish Rules which are modelled on the Code) contains flexibility designed to meet the requirements of proportionality. If, for example, Ms. IS-1517 had been able to establish no fault or negligence on her part, no period of ineligibility would have been imposed. If she had been able to establish no significant fault or negligence, then the period would have been reduced from 2 years to 1 year. Since she has not, in our view, established either of these mitigating circumstances, there would appear to be no reason on the grounds of proportionality to reduce the sanction.

79. We have considered two further points. First, as is apparent from the cases discussed above, there is scope for exercising some discretion where there is a gap in the relevant rules. As we have noted above, the definitions of *"No Fault or Negligence"* or *"No Significant Fault or Negligence"* are crafted in the context of violations involving prohibited substances and are difficult if not impossible to apply literally to a violation consisting of a refusal to give a sample. However, we have attempted to deal with this by taking the view that notwithstanding the definition, it is necessary to give some meaning to these terms in the context of a refusal to supply a sample violation and we have sought to apply those terms by giving them their ordinary and natural meaning, informed by the way the Rules define them in the context of a prohibited substance violation. Thus, while we think the Rules are in urgent need of revision to make clear how the no fault exception operates in the context of a failure to supply offence, we do not consider that there is a gap in the basic structure of sanctions and mitigating circumstances contained in the Rules as would warrant a departure from the sanctions as laid down in the Rules.

80. Secondly, despite the analysis in the cases of the Court only exercising a discretion where there is some identified gap in the Rules, we accept that if, at the end of all the analysis and the application of the Rules, the result produced was one which in all the circumstances was fundamentally unjust and disproportionate, we think there are powerful arguments that any tribunal must have a discretion to avoid a result that it considers to be fundamentally unjust and disproportionate. However, we need not decide this issue because on the facts of this case, we do not think that the imposition of a 2-year period of ineligibility is unjust or disproportionate having regard to the importance of the objectives of combating doping in sport and having regard to the fact that Ms. IS-1517 retired from competing in competitions effective as of the 26th June 2009.

6. Commencement of period of ineligibility

81. The final issue to consider is when the 2-year of ineligibility should begin to run.

82. As pointed out by the Disciplinary Panel, the provisions of Article 10.8 of the 2007 Rules appear more favourable to the athlete and accordingly they are the provisions to apply. Article 10.8.1 provides:

> *"The period of ineligibility shall start on the date of the hearing decision providing for ineligibility or, if the hearing is waived, on the date ineligibility is accepted or otherwise imposed."*

83. The term *"hearing decision providing for ineligibility"* is not defined. The Disciplinary Panel took the view that the appropriate date on which the period of ineligibility should commence was the date of the first hearing before the Disciplinary Panel which occurred on the 19th November 2008.

84. We see no reason to interfere with the identification of this date as the appropriate starting date for the 2-year period of ineligibility. We appreciate that there might be an argument that the reference to *"the hearing decision providing for ineligibility"* should be a reference to the appeal process rather than the process before the Disciplinary Panel having regard to the fact that the final period of ineligibility has been determined by the Appeal Panel rather than the Disciplinary Panel. On the other hand, the initial decision imposing a period of ineligibility is that of the Disciplinary Panel without which the appeal is not possible. In other words, the process before the Disciplinary Panel followed by an appeal is all part of the disciplinary process provided for in the Rules to deal with the particular alleged violation. In these circumstances, we consider that it is appropriate to treat the date of the first hearing before the Panel (19th November 2008) as being the appropriate start date for the period of ineligibility.

85. Even if we wrong in that view as a matter of construction of Article 10.8.1, we note that Article 10.8.3 gives the Disciplinary Panel or the Appeal Panel a discretion *"when required by fairness"* to set the start date at an earlier date as far back as the date of sample collection. There is an express reference in Article 10.8.3 to issues such as *"delays in the hearing process or other aspects of doping control not attributable to the athlete."* The fact that the procedure before the Disciplinary Panel and the Appeal Panel has taken the period which it has is in no

way attributable to any default on the part of Ms. IS-1517 and in our view, it would be inappropriate and unfair to commence the period of ineligibility from any later date in these circumstances.

86. Accordingly, we conclude that Ms. IS-1517 is subject to a 2-year period of ineligibility beginning on the 19th November 2008 and expiring on the 19th November 2010.

Michael M. Collins S.C. (Chairman)

Dr. Martin Walsh

Mr. Patrick Boyd

Members of the Irish Sport Anti-Doping Appeal Panel