

IRISH SPORT ANTI-DOPING DISCIPLINARY PANEL

IN THE MATTER OF:

SPORT IRELAND

V

Athlete IS-6516

DECISION

1. INTRODUCTION

- 1.1 Athlete IS-6516 (“**IS-6516**”) is a professional football player who at the relevant time was a registered player with St. Patrick’s Athletic Club.
- 1.2 It is alleged by Sport Ireland that on 19th April, 2019 IS-6516 committed two anti-doping rule violations under the Irish Anti-Doping Rules 2015 (version 2.0) (“the **Rules**”), namely::
- (i) evading Sample Collection, or without compelling justification refusing or failing to submit to Sample Collection after notification as authorised under the Rules or other anti-doping rules (Article 2.3); and
 - (ii) tampering or attempted tampering with any part of Doping Control as articulated in Article 2.5.
- 1.3 A Disciplinary Panel (“the **Panel**”) comprising Hugh O’Neill, Senior Counsel, Professor Colm O’Moráin, Medical Practitioner, and Warren Deutrom, Sports Administer, was duly convened pursuant to the Rules to adjudicate on the alleged violations.

2. HEARING AND SUMMARY OF EVIDENCE

- 2.1 A hearing was held on 3rd December, 2019. Sport Ireland was represented by Ms. Louise Reilly, BL and Mr. Aidan Healy, DAC Beachcroft. IS-6516 was represented

by Mr. Patrick Marron, BL and Mr. Stuart Gilhooly, Hugh J. Hagan Ward & Co. The Panel heard evidence from Stuart MacKenzie-Smith, Jerome Howe, Anthony Delaney, Mark Kenneally (all of whom had presented signed witness statements to the Panel in advance of the hearing), IS-6516 and his partner, Ms. [...]. Written legal submissions were also presented by both parties in advance of the hearing.

2.2 IS-6516 was randomly selected for anti-doping testing (by means of providing a urine sample) on 19th April, 2019 on the evening of a football match between St. Patrick's Athletic FC and Sligo Rovers FC in which IS-6516 was an unused substitute. In the minutes before the end of the match, Mr. MacKenzie-Smith, the designated chaperone of the athlete, on noticing IS-6516 leaving the playing area apparently to go to the toilet intercepted IS-6516 and informed him that he had been selected for random testing and suggested that he hold off going to the toilet. IS-6516 agreed although he gave evidence that he was not leaving the playing area to go to the toilet but rather due to disappointment on his part in not having been afforded any playing time.

2.3 IS-6516 was brought to the trophy room in the Club which was used on that occasion as the Doping Control Station ("DCS") at 21:45 and having provided a partial sample at 23:45 immediately thereafter left. Present during the time IS-6516 was in the DCS were Mr. MacKenzie-Smith, Mr. Howe, the Doping Control Officer, Mr. Delaney, the Club Secretary of St. Patrick's Athletic FC, and Mark Kenneally, the Club's Physiotherapist and Strength & Conditioning Coach and IS-6516's representative on the night.

2.4 On his way to the DCS IS-6516 asked could he have his mobile phone which was duly given to him. IS-6516 gave evidence that he noted from his phone that he had missed two calls from Ms. [...] and had received a message from her "ring me". With the permission of Mr. MacKenzie-Smith IS-6516 phoned Ms. [...] who told him that his four year old daughter, [REDACTED] had had a fall. [REDACTED]

2.5 During the course of his time in the DCS IS-6516 received a number of further telephone calls from Ms. [...] during which he was told that Ms. [...] was going to bring his daughter to hospital, that Ms. [...]’s mother had said his daughter [REDACTED]

_____ after having had a bad fall and imploring IS-6516 to come home. While in direct evidence IS-6516 stated that Ms. [...] had told him that she was going to go to bring _____ to hospital, under cross-examination by Ms. Reilly he said Ms. [...] told him that his daughter was in hospital.

2.6 Mr. MacKenzie-Smith gave evidence that IS-6516 told him that his daughter had fallen from a height, _____ and that an ambulance had brought her or was bringing her to Tallaght Hospital. Mr. MacKenzie-Smith believed from what he was told by IS-6516 that _____ was _____ Mr. Howe recalls mention (either by Mr. MacKenzie-Smith or IS-6516) of the need for _____ to have a _____ although Mr. MacKenzie-Smith has no recollection of so stating and IS-6516 denies that he ever said so.

2.7 To summarise, IS-6516's evidence was that he believed that his daughter was in Tallaght Hospital, _____

2.8 Despite these phone calls, which occurred over a period of time, IS-6516 remained in the DCS unable to provide a urine sample despite aids such as drinking water and walking on cold floors in his bare feet. Ultimately, he provided a partial sample of approximately 18 mls (rather than the specified minimum of 90 mls) at approximately 11.45 pm. According to Mr. MacKenzie-Smith he had previously attempted to provide a sample on seven or eight occasions and, indeed, it ultimately took him quite a while to provide the partial sample. Having provided that partial sample IS-6516 left due to concerns about the health of his daughter.

2.9 Mr. MacKenzie-Smith said that on two occasions offers were made to accompany Mr. IS-6516 to hospital to facilitate the provision of a sample; IS-6516 acknowledged that one such offer was made but was declined by him as he did not want to bring any stress back home or back to the hospital. IS-6516 did not recall any other offers although he stated that as time went on he was getting more stressed and anxious.

2.10 All of the witnesses present during the whole or part of the time IS-6516 was in the DCS agreed that IS-6516 acted in a sincere and fully cooperative manner at all times during what they saw as an emotional time for IS-6516 and expressed the view that IS-6516 was agitated and upset.

- 2.11 Mr. Howe, the Doping Control Officer, gave evidence that on two occasions, first, at approximately 20:20 and then just before IS-6516 left the DCS having provided a partial sample he informed IS-6516 that if he left without providing a sample he could be committing an anti-doping rule violation. On both occasions he drew IS-6516's attention to the Doping Control Form (signed by IS-6516 before he left) and to the passage therein stating that failure or refusal to provide a sample as requested may constitute an anti-doping rule violation. Mr. MacKenzie-Smith confirmed Mr. Howe's evidence as did Messrs. Keneally and Delaney in respect of the warning given after providing the partial sample. Mr. Howe stated that at the initial warning he informed IS-6516 that the consequences of a violation could lead to a ban of three months or more although none of the other witnesses present (including IS-6516) recalled this.
- 2.12 After IS-6516 left the DCS he started driving home although he did not believe then that Ms. [...] (and presumably his daughter) were at home; his evidence was that he believed they were in hospital. On his way home he phoned Ms. [...] who asked him to come home. He either then or on arriving home discovered that his daughter was not in, and had not been brought to, hospital.
- 2.13 Ms. [...] gave evidence that on the night in question her daughter, [REDACTED], fell and struck her head, sustaining a big lump on her head. [REDACTED]
[REDACTED]
[REDACTED] She confirmed that she unsuccessfully tried to contact IS-6516 and when she ultimately spoke to him told him that [REDACTED] had fallen, that she had a big lump on her head, [REDACTED]
[REDACTED] and that she was going to have to bring her to hospital, On one of the occasions she asked IS-6516 what was more important to him: his child being sick or giving urine? Ms. [...] said that she did not want to go to hospital on her own and wanted IS-6516 home to accompany her to the hospital. She told IS-6516 that she was going to the hospital as an angry reaction as to why he was not [REDACTED]
[REDACTED] No doctor was ever called and the decision not to bring [REDACTED] to hospital was made after IS-6516 returned home at which stage her temperature had gone down and she was in better form on seeing her father.

3. CONCLUSIONS

- 3.1 Insofar as concerns the present case there are two elements to the alleged violation of Article 2.3, namely, the failure to submit to sample collection after notification and, secondly, the absence of compelling justification for any such failure.
- 3.2 It is not in dispute that there was a failure to provide a full sample following notification to IS-6516 of the need to provide such a sample. It has been established to the comfortable satisfaction of the Panel that IS-6516 was aware that the failure to provide a full sample might constitute a violation. First, the Panel accept the evidence of Mr. Howe (corroborated by the evidence of Messrs. MacKenzie-Smith, Kenneally and Delaney) that IS-6516 was informed that a potential breach might occur should a full sample not be provided. It is unnecessary to decide whether a reference was made to a possible sanction of three months or more; what is relevant is the potential commission of an anti-doping rule violation rather than the sanction applicable thereto. Secondly, IS-6516 acknowledged that he was aware of the need to provide a sample and, indeed, while as a registered player with Shamrock Rovers had attended an Anti-Doping Workshop in March 2018 during which these and other anti-doping violations had been discussed.
- 3.3 The second element of a violation of Article 2.3 involves establishing the absence of compelling justification for the failure to submit two sample collections. During the course of the hearing it was acknowledged on behalf of IS-6516 that the onus of establishing compelling justification fell on him and not, as asserted in the written submissions, on Sport Ireland. The Panel believes this concession is correct and justified by authority (e.g. **F v International Olympic Committee**¹).
- 3.4 There is no great difference between the parties as to the meaning of “*compelling justification*”; the difference between them arises on whether the conduct of IS-6516 in failing to provide a sample can be categorised as compelling justification. A narrow interpretation has been given to the phrase without which the avoidance of providing a sample might be easily achieved thereby defeating the very purpose of the anti-doping Rules. Thus, in **Azevedo v FINA**² the CAS panel said:

¹ CAS 2004/A/714.

² CAS 2005/A/925.

*"No doubt, we are of the view that the logic of the anti-doping tests and of the [FINA] DC Rules demands and expects that, whenever physically, hygienically and morally possible, the sample be provided despite objections by the athlete. If that does not occur, athletes would systematically refuse to provide samples for whatever reasons, leaving no opportunity for testing."*³

This passage was cited and followed in **Williams Brothers v FINA**⁴. In **UKAD v Six**⁵ it was stated that the expression "*compelling justification*" suggests a reason that is truly exceptional or unavoidable.⁶

3.5 In **Troicki v International Tennis Federation**⁷ it was held that whether or not there was compelling justification fell to be determined objectively.

3.6 A narrower interpretation of "*compelling justification*" accords generally with anti-doping Rules as any other interpretation could render otiose the mitigation of sanctions where, for example the anti-doping rule violation was not intentional and where there is no, or no significant, fault or negligence.

3.7 To consider the issue objectively one has to determine the state of knowledge of IS-6516 while in the DCS and at the time he left the DCS. Initially IS-6516 said that Ms. [...] told him that she was going to take ■■■ to hospital but thereafter stated that he believed that ■■■ was in hospital. Of course, ■■■ never did go to hospital and it seems strange to the Panel that during the multiple telephone conversations IS-6516 would not have ascertained that ■■■ was not actually (then) in hospital. In evidence IS-6516 states that until the time he left at approximately 11:45 pm he was receiving phone calls asking him to "*please come home*" rather than come to the hospital. Finally, when IS-6516 left the DCS he started to drive home, rather than to the hospital, and it was only when so driving home that IS-6516 phoned Ms. [...] and ascertained that ■■■ was at home.

3.8 Without resolving this issue, the significant fact is that IS-6516 decided to go home rather than to the hospital where, he believed, his daughter was. Also relevant is the

³ See paragraph 75.

⁴ CAS 2016/A/4631, paras. 49 & 77.

⁵ A decision of the UK National Anti-Doping Panel dated 25th October, 2012.

⁶ See para. 37.

⁷ CAS 2013/A/3279.

fact that at least one offer was made to IS-6516 to accompany him to the hospital where the sample could be provided.

- 3.9 Looking at the matter objectively, the Panel is not satisfied that IS-6516 has established on the balance of probabilities a compelling justification for failing to give a sample. Sport Ireland has established to the comfortable satisfaction of the Panel that IS-6516 has committed an anti-doping rule violation under Article 2.3.
- 3.10 IS-6516 is also charged with an anti-doping rule violation under Article 2.5 of tampering or attempted tampering with any part of doping control which is articulated in that sub-article as follows:

“Conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, intentionally interfering or Attempting to interfere with the Doping Control official, providing fraudulent information to an Anti-Doping Organisation or intimidating or Attempting to intimidate a potential witness.”

“Tampering” is also defined in Appendix 1 to the Rules as meaning:

“altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering in property; obstructing, misleading or engaging in any fraudulent conduct to alter results or prevent normal procedures from occurring.”

- 3.11 Sport Ireland assert that IS-6516 misled the Doping Control Officer (and others) in incorrectly asserting that his daughter was in hospital thereby necessitating him to leave the DCS without providing a full sample.
- 3.12 In the opinion of the Panel, the commission of a violation under Article 2.5 requires intentional acts or omissions on the part of the athlete with the objective of subverting the Doping Control process. In addition to the matters relating to the somewhat inconsistent evidence of IS-6516 outlined above the Panel has also taken into account the following matters:

- (i) IS-6516 provided a partial sample;

- (ii) All four witnesses called on behalf of Sport Ireland were of the view that IS-6516 acted in a sincere and fully cooperative manner at all times and took the decision that he had to be there for his family; and
- (iii) All four witnesses called by Sport Ireland genuinely believed that IS-6516 was agitated and upset and concerned about the health of his daughter.

3.13 In light of the foregoing evidence, it has not been established to the comfortable satisfaction of the Panel that IS-6516's failure to provide a full sample and leaving the DCS without providing a full sample was motivated by a desire to subvert the Doping Control process or that he has committed an anti-doping rule violation under Article 2.5.

4. SANCTIONS/PERIOD OF INELIGIBILITY

4.1 Under Article 10.2.1 the headline period of ineligibility is four years for an anti-doping rule violation under Article 2.3 unless the athlete can establish that the commission of the anti-doping rule violation was not intentional as defined by Article 10.1.3.

4.2 Article 10.1.3 reads:

"As used in Articles 10.1 and 10.2 the term "intentional" is used to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct that might constitute or result in an anti-doping rule violation and manifestly disregarded that risk...." (emphasis added).

4.3 The Panel accepts and recognises that IS-6516 and his partner, Ms. [...], are caring and responsible parents who regard as paramount the health and well being of their young daughter. The Panel notes that the concern of IS-6516 for the well being of his daughter manifested itself to Messrs. MacKenzie-Smith, Howe, Delaney and Keneally who were present with IS-6516 in the DCS. In the view of these witnesses IS-6516 cooperated fully and took the decision to leave after many attempts to provide a complete sample (and having provided a partial sample). Thus, while Mr.

IS-6516 was aware that in leaving without providing a full sample he was potentially committing an anti-doping rule violation, the failure to provide the sample (after a two-hour period), was driven by IS-6516's desire to be with his family and daughter and does not in the opinion of the Panel constitute a manifest disregard of the potential anti-doping rule violation. In the circumstances, the Panel is of the view that the conduct of IS-6516 was not intentional for the purposes of Article 10.2.1 of the Rules and, consequently, the period of ineligibility should be reduced from four years to two years under this sub-Article.

4.4 The Rules provide for the elimination or further reduction in the period of ineligibility in the case where there is no fault or negligence or no significant fault or negligence under Articles 10.3 and 10.4.2 respectively of the Rules.

4.5 "No Significant Fault or Negligence" is defined in Appendix I as meaning:

"The Athlete or other Person's [sic] establishing that his or her Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence was not significant in relationship to the anti-doping rule violation. ..."

"No Fault or Negligence" in turn is defined as:

"The Athlete or other Person's [sic] 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 ...violated an anti-doping rule."

4.6 Having regard to the Panel's conclusion that IS-6516 was aware that in failing to provide a full sample he may be committing an anti-doping rule violation, he does not fall within the parameters of "No Fault or Negligence". The Panel regards the failure to provide a sample as a very significant matter as random testing constitutes the primary basis upon which athletes can be monitored and discouraged from taking prohibited substances and thereby prevented from cheating. Bearing in mind the totality of the circumstances and in particular the failure of IS-6516 to accept the offer of the Doping Control Officer to accompany IS-6516 to the hospital to facilitate the taking of a sample, the Panel is not satisfied that IS-6516 has established on the balance of probabilities that his fault or negligence in failing to provide a full sample

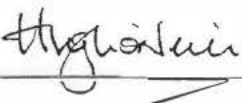
was not significant vis-à-vis the anti-doping rule violation or that he has satisfied the criteria of no significant fault or negligence for the purposes of Article 10.4.2.

- 4.7 Viewing the evidence in its totality, the Panel is of the view that a period of ineligibility of two years is proportionate and appropriate.
- 4.8 On 9th September, 2019 IS-6516 through his solicitors accepted in writing a provisional suspension in accordance with Articles 10.7.3.2. Consequently, the two-year period of ineligibility imposed upon IS-6516 by the Panel shall run from 9th September, 2019.

5. CONCLUDING COMMENTS

- 5.1 The Panel would like to thank its Secretary, Mr. Andrew Nugent, for all his assistance during the course of these proceedings. The Panel would also like to thank the parties, their legal representatives and witnesses for their assistance in these proceedings.

Dated this 13th day of December, 2019



Signed on behalf of the Panel
by Hugh O'Neill, SC
Chairman