Case number: NST-E22-334478

Case Title: Michael Randall v Australian Football League and Sport Integrity Australia CEO

Determination

National Sports Tribunal

Appeals Division

sitting in the following composition:

Panel Member/s — Mr. David Grace AM KC (Chair)

Dr. Carolyn Broderick

Mr. Peter Kerr AM

in the arbitration between

Michael Randall *(Appellant)*

Represented by Mr. Tom Percy KC of Counsel, instructed by Jarrod Ryan, Solicitor and Mr. Dean Turner, Authorised Representative

And

Australian Football League *(Respondent – Sporting Body)*

Represented by Mr. Patrick Tiernan of Counsel, instructed by Mr. Stephen Meade, GM Legal & Regulatory and Mr. Jonathan Edge, AFL Legal Counsel

And

Sport Integrity Australia CEO *(Respondent – Sport Integrity Australia CEO)*

Represented by Mr. Patrick Knowles SC of Counsel, instructed by Ms. Emily Fitton, Director Legal and Ms. Peta Rogers, Senior Lawyer

PARTIES

1. Michael Randall ("the Appellant") competes in the sport of Australian Rules Football and is a contracted player for East Perth Football Club in the Western Australian Football League ("**WAFL**").

2. The Australian Football League ("**AFL**") is the governing body of his sport, of which he is a member (pursuant to a Membership Agreement).

3. Sport Integrity Australia ("**SIA**") is the independent National Anti-Doping Organisation for Australia.

INTRODUCTION

4. SIA is authorised under the Australian Football Anti-Doping Code 2021 ("**AF Code 2021**") to institute proceedings against an athlete who it asserts has engaged in an Anti-Doping Rule Violation ("**ADRV**") contrary to Article 2 of the AF Code 2021.

5. The Appellant accepts that he returned an Adverse Analytical Finding ("**AAF**") for a prohibited substance and that he has committed the ADRV by the presence of a prohibited substance in his system contrary to Article 2.1 of the AF Code 2021. Whilst accepting that finding, the Appellant asserts that he is entitled to a reduction of the period of ineligibility by reason of "No Significant Fault or Negligence" pursuant to Article 10.6.2 of the AF Code 2021 and that the period of ineligibility ought to be reduced from 24 months down to 18 months or below.

6. The AFL has always been supportive of a reduction in sanction to 18 months, however SIA has always submitted that the Appellant does not qualify for any reduction and that a 2-year ineligibility period should be imposed.

7. These proceedings are an appeal from a Determination made in the Anti-Doping Division of the National Sports Tribunal ("**NST**") delivered on 14 November 2022 (Case Number: NST-E22-124881) that determined that a period of ineligibility of 2 years be imposed on the Appellant pursuant to Articles 10.2.2 and 10.2.3 of the AF Code 2021 for the ADRV and that the commencement date of the period of ineligibility be 2 September 2021 (when the mandatory provisional suspension of the Appellant commenced).

NST JURISDICTION

8. The NST has jurisdiction under Section 31 of the *National Sports Tribunal Act 2019* (Commonwealth) ("**NST Act**") to determine this appeal. Section 31 provides for appeals where the NST in its Anti-Doping Division has made a Determination under Section 27 of the NST Act in relation to an arbitration of a dispute as a result of an application made under Section 22 of the NST Act and, further, that the AF Code 2021 permits an appeal to the Appeals Division of the NST from the Determination.

9. All parties consented to the jurisdiction of the NST to conduct the appeal pursuant to the NST Act and no objection has been made to the jurisdiction of the NST Appeals Division to deliver a Determination in respect of the appeal.

10. The Chief Executive Officer of the NST appointed Mr. David Grace AM KC as the Chair of the Panel and Dr. Carolyn Broderick and Mr. Peter Kerr AM to be Panel Members for the purposes of the appeal. No objection was made to the composition of the Panel.

FACTUAL BACKGROUND

11. The Panel adopts the factual background as found by the Anti-Doping Division in its Determination and sets those facts out below. There is no dispute to these facts.

12. The Appellant has been playing Australian Rules Football since he was 5 or 6 years of age. He is currently a member of East Perth Football Club but was previously a player for the Peel Thunder Football Club. Both Clubs play in the WAFL, the highest level of Australian Rules Football competition in Western Australia, below the national AFL competition.

13. The Appellant has been registered in the WAFL since 2016 and has played in the WAFL competition since 2019. As at September 2021, the Appellant had played 32 games of WAFL league football.

14. At the time of the ADRV, the Appellant had a player sponsorship which covered the cost of his registration and uniforms. In the previous season, the Appellant had a one-year contract with Peel Thunder Football Club and received about $300 a game. He is not a full-time professional athlete.

15. The Appellant has a long history of mental health problems, having been diagnosed with major depressive disorder. Since 2016, he has taken 20mg of Escitalopram, an anti-depressant medication, daily.

16. In June 2021, the Appellant started a new job working for an aluminium refinery as a water blaster. His job required him to start early, at around 6:30am and to drive 50 minutes to and from work. This meant that he was up getting ready for work at 5:00am or earlier. He worked shifts of a duration of either 8 hours or 12 hours. The work is physically demanding and dangerous.

17. The Appellant's sister told him about medication called Duromine, which she took for her weight loss. She also said it helped her stay awake at her job. The Appellant's sister gave him four to six tablets by cutting some off the blister pack. The Appellant did not see the medication box or his sister's prescription for the medication. The Appellant said that he took one tablet in the morning on 12, 13, 14, 15, 16 and 19 July 2021. He never took Duromine on the day he played in a match. He took Duromine to see if it would help him stay alert and awake on the long daily drives to and from work, and be more focused at work.

18. On 24 July 2021, the Appellant was playing in a WAFL match between West Perth and Peel Thunder, at the Provident Financial Oval, Joondalup, Western Australia. He was the subject of an In-Competition doping control test.

19. The Appellant's Part "A" Sample returned an AAF for Phentermine. Phentermine is listed under Class S6.A (Non-Specified Stimulants) of the *World Anti-Doping Code - International Standard - Prohibited List 2021* ("**Prohibited List 2021**"). It is prohibited In-Competition but not Out-of-Competition. Phentermine is classified as a Non-Specified Substance under the Prohibited List 2021. At the time of the doping control test, the Appellant did not have a therapeutic use exemption permitting him to use Phentermine.

20. On 2 September 2021, the AFL imposed a Mandatory Provisional Suspension on the Appellant.

21. On 14 September 2021, the Appellant was sent a Notice of ADRV dated 13 September 2021, notifying him of the AAF.

22. On 12 October 2021, the Athlete's Part "B" Sample confirmed the Part "A" Sample analysis.

23. On 22 October 2021, the Appellant participated in a voluntary interview with SIA investigators.

24. On 10 January 2022, SIA issued to the Appellant, on behalf of the AFL, a Letter of Charge for asserted ADRV and Notice under clause 4.08 of the National Anti-Doping scheme established by the *Sport Integrity Australia Act 2020* (Cth) ("**the Letter of Charge**").

25. The Letter of Charge gave notice that SIA and the AFL had determined that a period of Ineligibility of two (2) years was to be imposed on the Appellant, pursuant to Articles 10.2.2 and 10.2.3 of the AF Code 2021, and that the commencement date of the period of Ineligibility was 2 September 2021 (to reflect the date the Mandatory Provisional Suspension began). The Letter of Charge also gave the Appellant options for proceeding.

26. On 28 January 2022, the Appellant signed an 'Acceptance of Consequences Form' in which he admitted that he had committed the alleged ADRV.

27. The Appellant sought a Case Resolution Agreement which, pursuant to Article 10.8.2 of the AF Code 2021, would be an agreement between the Appellant, the AFL, SIA and the World Anti-Doping Agency ("**WADA**"). The effect of the Case Resolution Agreement would have been to reduce the applicable Ineligibility period to 18-months from the date of the provisional suspension.

28. WADA declined to exercise its discretion to enter into a Case Resolution Agreement and declined to provide reasons.

29. As a result, the NST Anti-Doping Division was requested to determine the appropriate sanction.

30. On 14 November 2022, the Anti-Doping Division of the NST delivered its Determination. The Appellant then lodged an appeal to the Appeals Division of the NST.

31. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties, it refers in its Determination only to the submissions and evidence it considers necessary to explain its reasoning.

PROCEEDINGS BEFORE THE NST

32. Upon the relevant appeal documents being lodged with the NST, an Arbitration Agreement was signed by the parties. That Agreement, inter alia, identified the main issues to be determined by the appeal and the terms of the Arbitration. Each of the parties, in that Agreement, accepted the jurisdiction of the NST Appeals Division to determine the appeal. Subsequently, directions were given in relation to the filing and service of an appeal brief by the Appellant inclusive of any further evidence he sought to rely upon. SIA and the AFL were directed to file and serve a Response together with any further evidence they sought to rely upon and a list of witnesses required to be

called. Time limits were imposed to enable a hearing to be promptly conducted. The hearing took place on 15 February 2023 and was conducted expeditiously on that day. At the conclusion of the hearing, the Panel adjourned for a short time and then announced its Determination and gave brief Reasons. The parties were advised that detailed Reasons would be provided at a later date.

33. By consent, the Hearing was conducted virtually by video with the procedural rights of the parties being fully respected. Each party was given full opportunity to be heard, to present evidence and to make submissions.

APPLICABLE RULES

34. Article 2.1 of the AF Code 2021 creates an ADRV of "Presence of a prohibited substance or its Metabolites or Markers in an Athlete's sample" ("**Presence**"). Article 2.1.1 of the Policy provides:

> *"It is the Athlete's personal duty to ensure that no Prohibited Substance enters their body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1."*

35. The Panel accepts that the active ingredient in Duromine, Phentermine, is a Non-Specified Stimulant prohibited in-Competition under Class S6.A of the Prohibited List 2021.

36. For the ADRV of "Presence" under Article 10.2.1 of the AF Code 2021, the sanction is four (4) years ineligibility, unless the Athlete can establish that the ADRV was not "intentional" (as defined in Article 10.2.3 of the AF Code 2021) in which case the period of ineligibility will be two (2) years, subject to any entitlement to a reduction under other Articles including, relevantly here, Article 10.6.2 for "No Significant Fault or Negligence".

37. SIA accepts the account given by the Appellant does not warrant a finding the ADRV was "intentional" in the sporting sense, and so it asserts that the "base sanction" is two (2) years ineligibility.

38. Article 10.6.2 provides an avenue for potential reduction of the period of Ineligibility where an Athlete can establish, on the balance of probabilities, that he or she bore "No Significant Fault or Negligence". If it can be so established, then the period Ineligibility can be reduced "*based on*

the Athlete's…degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable". In the context of this case, if the Appellant can establish "No Significant Fault or Negligence", he will be entitled to a reduction to no less than twelve (12) months Ineligibility.

39. The Appellant did not rely upon any other provisions of the AF Code 2021 in order to seek a reduction of the period of Ineligibility.

MAIN SUBMISSIONS OF THE PARTIES

APPELLANT'S EVIDENCE AND SUBMISSIONS

40. The Appellant did not dispute that he had committed the asserted ADRV. The only matter he sought to challenge was the sanction. He sought to reduce his period of ineligibility to less than 2 years, specifically, to a period of 18 months (or less).

41. He submitted that he did not ingest Phentermine to enhance his sporting performance. He did so, Out-of-Competition, for reasons related solely to overcoming extreme fatigue that he suffered as a confluence of factors including shift work in a physically demanding and dangerous job, a long commute on regional roads in the early hours of the morning to attend his employment, poor sleep patterns and limited sleep, and major (and largely untreated) psychological disorders arising from trauma suffered as a 16 year old. Further, it was submitted that he suffered considerable personal impairments at the time that he committed the ADRV and all factors combined including his youth, inexperience and limited anti-doping education, resulted in him having a lessened degree of fault in relation to the ADRV. In evidence that he gave before the Panel on the appeal hearing he stated that he was not aware that he was taking prescription medicine; he did not ask his sister where she got it from.

42. It was contended that, taking into account all of his circumstances, the period of ineligibility should be reduced on the basis that he bore No Significant Fault or Negligence for the ADRV.

43. In the appeal, the Appellant filed, served and relied upon an expert report prepared by Dr. Adam Deacon – a Consultant Psychiatrist and an expert report prepared by Dr. Tom Parker – a Clinical Psychologist, and the results of the tested sample issued by the Australian Sports Drug Testing Laboratory dated 7 September, 2021.

44. Reliance was placed upon the Appellant's character, the history of his football career, the fact that he did not derive any income other than a small payment of approximately $300 per game from his football, his sporadic employment history and his new employment (as from June 2021) at Alcoa as a water blaster operator. It was contended that he saw this job as an opportunity to pursue a career outside football at a recognised company in a role that did not conflict with his football obligations and he wanted to be a reliable employee. His football club had arranged that employment and he did not want to let the club down.

45. At Alcoa, the Appellant worked shifts of between 8 and 12 hours per day, up to 60 hours per week. It was undoubtedly difficult work. It was dangerous, physically demanding, of high pressure and required high levels of concentration.

46. In order to maintain his employment, he had to wake up at 4:00 a.m. or 5:00 a.m. (depending upon when his shift started) and drive for 50 minutes on dark regional roads and on occasions he had fallen asleep at the wheel. His sister suggested that he take medication which she was using to suppress her appetite and lose weight and had the effect of also being a stimulant to help one stay awake and increase energy. He accepted the medication. It was prescribed to his sister and not to him. His focus was to stay awake whilst driving and remaining alert at work whilst performing dangerous tasks. He trusted his sister and did not consider the potential for the medication to be a prohibited substance. However, in his evidence he conceded that it was risky behaviour for him to take the substance without checking. He took the substance between Monday to Friday in the week commencing 12 July 2021 and on the following Monday 19 July 2021. After taking the substances, he realised that it did not assist him. The substances were never intended by him to enhance his level of performance and there is no suggestion that the substances did so. The testing results indicated a low concentration of Phentermine in his system. He agreed in his evidence that it was careless on his part not to have listed the substance on his testing form at the time the sample was taken from him In-Competition.

47. In relation to his anti-doping education, his major recollection was that it dealt with supplements and he did not recall learning about prescription medicines. In his evidence he agreed that after his drug education sessions he knew some substances could be banned in sport, for example supplements. It was submitted that it was evident from his responses to SIA Investigators that he did not in fact understand the extent of his anti-doping obligations. He had no prior history of having been tested or of having any prior anti-doping offences or related criminal offences.

48. [redacted]

49. [redacted] Dr. Deacon's opinion of the Appellant's cognitive function at the time of the commission of the ADRV was:

> *"It is reasonable to assume that his mental state was so compromised that his overall mental functioning, including cognitive function was at least mildly impacted…It is likely that his capacity to think rationally and exercise reasonable judgment, in the context of his responsibilities as a registered footballer, was compromised."*

50. It was submitted that the severity of the ADRV was at the low end of the spectrum and that his last use of Phentermine was 5 days before playing in a football match. It was submitted that it was of significance that Phentermine was not prohibited for use Out-of-Competition. Further, there was no performance enhancing benefit and that he did not know or suspect that he had violated an anti-doping rule. It was submitted that considering the criteria for No Significant Fault or Negligence, the Appellant could not reasonably have known or suspected even with the exercise of the utmost caution that he had violated an anti-doping rule. The Appellant accepts that he fails the objective test but satisfies the subjective test namely, that he did not know or suspect that the tablets he consumed contained a prohibited substance and he did not know or suspect that by taking the tablets and playing football the following weekend he may violate an anti-doping rule.

51. In conclusion, it was submitted that the Appellant's violation ought to reflect no more than a normal or moderate degree of fault, namely a period of ineligibility of between 16 and 20 months. It was submitted that this accorded with the degrees of fault considered by the Court of Arbitration for Sport ("**CAS**") in Cilic v International Tennis Federation (CAS 2013/A/3327 and 2013/A/3335). In Cilic the CAS recognised three degrees of fault: a significant degree of, or considerable fault; a normal degree of fault; and a light degree of fault. Further, in that case, it was determined that fault may be assessed on objective and subjective bases. The objective element describes a standard of care expected from a reasonable person in the athlete's situation, whereas the subjective element describes what could have been expected from the particular athlete, in light of his personal capacities. The factors that can be taken into account in determining the level of subjective fault include an athlete's youth and/or inexperience, language or environment problems, the extent of anti-doping education received by the athlete and any other personal impairments, including whether the athlete is suffering from a high degree of stress or whose level of awareness has been reduced by a careless but understandable mistake. The level of severity of the ADRV itself is also a relevant consideration and a lighter standard of care is required when Out-of-Competition substances that are only prohibited In-Competition are taken.

52. The Appellant further relied upon the CAS decision in International Ski Federation v Johaug (CAS 2017/A/5015 and 2017/A/5110), where the CAS, after considering the decision in Cilic, considered that a greater degree of fault may lead to a sanction of 20 to 24 months, a normal degree of fault may lead to a sanction of 16 to 20 months and light degree of fault may lead to a sanction of 12 – 16 months.

53. Based upon the analysis contained in the above CAS decisions, it was submitted that the Appellant's level of fault ought to be regarded as a "normal degree of fault" leading to a sanction of between 16 to 20 months.

AFL's SUBMISSIONS

54. The AFL, in its submissions, was supportive of a reduction in the Appellant's period of ineligibility from 24 months to 18 months. The basis of that submission was that the Appellant's fault was diminished because he had a probable problem-solving deficit, he had considerable psycho social stressors in his life at the time that likely impaired his decision-making, the severity of the violation was at the lower end of the spectrum due to there being only a small concentration of the substance present In-Competition due to his ingestion Out-of-Competition, the substance was not taken for performance-enhancing purpose and nor did it have a performance-enhancing effect, and he otherwise had a clean record.

55. The AFL contended that the circumstances do not establish No Fault or Negligence however that the Appellant's fault was in "the totality of the circumstances" not significant in relation to the violation thereby enlivening the Panel's discretion to reduce his period of ineligibility pursuant to Article 10.6.2 of the AF Code 2021. It was submitted that consistently with CAS jurisprudence, the severity of the violation was not significant because ingesting Phentermine Out-of-Competition is not prohibited. In essence, the AFL supported the Appellant's submissions. Further, the AFL accepted that the Appellant failed the objective test because he could have exercised caution to avoid violating an anti-doping rule but that he satisfied the subjective test, namely that he did not actually know that he had breached an anti-doping rule and that that must be taken into account in his favour when assessing his fault in relation to the definition of "No Significant Fault or Negligence".

56. The AFL accepted that the Appellant's mental health did play a role in his decision-making at the relevant time and that there was a sufficient degree of impairment to enliven the discretion to reduce the period of ineligibility. The AFL was supportive of a reduction in the period based on a "normal degree of fault" to 18 months.

SIA SUBMISSIONS

57. SIA accepted that the Appellant had admitted his contravention at an early stage and that his ADRV was not on the most serious end of the spectrum of contraventions. It also accepted that the Appellant's circumstances were otherwise sympathetic. Notwithstanding, it was submitted that the AF Code 2021 provides for a standardised regime of sanctions which are modelled on the World Anti-Doping Code 2021 and that regime must be applied in this case in the same way as it is in other cases.

58. SIA did not dispute any part of the factual background relied upon by the Appellant nor did it dispute any of the Appellant's personal circumstances. SIA relied upon the fact that the Appellant had attended WAFL face-to-face anti-doping education classes in 2018, 2020 and 2021 and that he had said in his interview to investigators on 22 October 2021 that he used an SIA App to check whether any supplements he was using contained prohibited substances.

59. SIA accepted that the account of the ADRV given by the Appellant established that he used Phentermine Out-of-Competition in a context unrelated to sports performance and accordingly, a base period of 2 years ineligibility applied pursuant to Articles 10.2.1.1 and 10.2.3 of the AF Code 2021.

60. At the outset of the hearing before the Panel, SIA raised an issue concerning the nature of the jurisdiction of the Panel to consider fresh or new evidence. Pursuant to Article 13.1 of the AF Code 2021 "the scope of the review is not limited" and is not limited to "the issues or scope of review before the initial decision maker". Article 13.1.1 expressly provides that any "party to the appeal may submit evidence, legal arguments and claims that were not raised in the first instance hearing so long as they arise from the same cause of action or same general facts or circumstances raised or addressed in the first instance hearing". SIA raised the apparent conflict between that Article and Clause 95(2) of the National Sports Tribunal (Practice and Procedure) Determination, 2021 (Commonwealth) ("**the Determination**"), that provides that, unless the parties agree to dispense with the need for a hearing, the appeal is to be by way of re-hearing. That is not the same as an appeal de novo. It was contended that an appeal by way of re-hearing ordinarily requires an Appellant in the position of this Appellant to identify error in the decision at first instance. Judicial authority was cited for those propositions. Clause 95(3) of the Determination, provides the Panel with a discretion to exclude fresh evidence "if it was available to them or could reasonably have been discovered by them before the Determination or decision

appealed against was made". The Determination is made pursuant to Section 41(2) of the NST Act and is, by virtue of Section 41(1) of the NST Act, binding on the Panel.

61. Regardless of the disconformity between the AF Code 2021 and the Determination, SIA expressly indicated that it did not seek to exploit that disconformity to prejudice the Appellant. SIA did not object to the Panel receiving the evidence (in the form of the medical reports tendered supplemented by the Appellant's own oral evidence- indeed SIA had requested the Appellant give oral evidence) but contended that it was incumbent upon the Appellant to identify error in the decision of the Tribunal at first instance in order to found a successful appeal.

62. There is in practice little distinction between the position of the parties in the circumstances of this case, in relation to this issue. The Panel is of the opinion it does not need to resolve this issue because, in any event, during the course of the hearing it became apparent that SIA did not contend that the Panel could not give full force and effect to the contents of the medical evidence from Dr. Deacon and Dr. Parker that was tendered in support of the Appellant's appeal.

63. A future Panel may have to determine the effect of this disconformity in a similar case. However, this Panel considers that as the Determination made pursuant to Section 41 of the NST Act deals with matters of practice and procedure, the content of the Determination cannot determine the jurisdiction of the Panel conducting the hearing in relation to the nature of the hearing and the ability to apply the full force and effect of Article 13.1 of the AF Code 2021. It may be that a future Panel will have to consider "reading down" the relevant clauses in the Determination if it was argued that it precluded a Panel giving full force and effect to Article 13.1 of the AF Code 2021.

64. The primary contention of SIA was that the Appellant did not meet the requirement for a reduction in sanction on the basis that he bears "No Significant Fault or Negligence".

65. SIA submitted that the objective circumstances of the Appellant's ADRV involved a significant departure from the duty to exercise utmost caution to avoid having prohibited substances in his system In-Competition. Specifically, it was contended that he consciously took the substance, the substance was a prescription medication and he was aware that it had not been prescribed to him, he obtained no medical advice prior to taking the substance, he did not read the label or check the ingredients, he didn't do any research, it was not the result of a momentary lapse in judgement or the result of a single poor decision. Further, he took the medication repeatedly over a series of days and inexplicably he failed to declare that he had taken the substance on his doping control form in response to a question that required him to list medications, vitamins and supplements taken in the past 7 days.

66. In answer to the Appellant's contention that the ADRV was at the lower end of the spectrum because it did not involve an intention to take a prohibited substance, it was contended that that, of itself, was not sufficient to justify a finding of No Significant Fault or Negligence. It was emphasised that the absence of an intent to take a prohibited substance is already taken into account when setting the base sanction at an ineligibility period of 2 years rather than 4 years.

67. Reliance was placed upon the CAS decision in Radojevic v Federation Internationale de Natation (FINA) CAS 2018/A/5581 where it was stated, at [60], that a mere lack of intention to cheat does not mean that the athlete had acted without Significant Fault or Negligence and further that athletes are required to seek information actively and to take precautions in order to avoid the ingestion of prohibited substances. Further, the same decision was relied upon to emphasise the point that the effect of a substance on an athlete's sporting performance is extraneous in assessing both the commission of an ADRV and the degree of an athlete's fault; further the absence of a performance enhancing effect does not explain the departure from the expected standard of behaviour prior to the administration of the substance. Similarly, SIA submitted that the fact that the sample contained only a small concentration of the prohibited substance was not relevant to the degree of fault. SIA contended that this was a case where the Appellant took no steps to protect against the risk of an ADRV. Similarly in answer to the contention that the ADRV should be considered as less serious because it was a substance that was only prohibited In-Competition, SIA stressed that in Cilic, the CAS observed that even for a substance banned only In-Competition an athlete who takes a substance therapeutically is required to exercise a higher duty of care because it is well known that medicines are known to have prohibited substances in them. Therefore, it was submitted that the Appellant's degree of fault could not be described as not Significant.

68. SIA pointed to other factors which went to the issue of subjective factors to be taken into account and pointed out that the Appellant was an adult and capable of making his own decisions, he was not new to the sport and was aware of his anti-doping obligations, that he received online anti-doping training and attended at least three in-person seminars and that CAS jurisprudence made it clear that young and inexperienced athletes are not absolved from taking any steps whatsoever to avoid the ingestion of prohibited substances. Similarly, reliance on the unqualified advice of the Appellant's sister it was said did not provide any comfort to the Appellant.

69. In relation to the fresh or new medical evidence relied upon, SIA submitted that the evidence only provided some qualified support to the Appellant's contentions on appeal but did not satisfy the Appellant's burden that his fault was "not Significant" in relation to the ADRV and that the

evidence goes no higher than establishing that the Appellant's mental state may have been compromised or impacted to some extent and possibility to only a mild extent. It was noted that the new reports were prepared approximately 18 months after the relevant time and to a significant extent were dependent upon assumptions on the part of the experts.

70. SIA contended that the Appellant's general good character and admirable personal qualities, the prompt admission of the ADRV, his degree of remorse and the effect of the ADRV and the period of ineligibility upon him were irrelevant matters to be taken into account in assessing whether there was No Significant Fault or Negligence.

71. If No Significant Fault or Negligence was established, SIA contended that, as held in Cilic, the objective element should be foremost in determining into which of the three relevant categories a particular case falls. It was submitted that the subjective factors can then be used to move a particular athlete up or down within that category, but are not to be used – except in an exceptional case, to move an athlete between the categories of light, normal and greater degrees of fault. It was contended that the objective circumstances in this case showed a high degree of fault and that if No Significant Fault or Negligence was established the appropriate sanction would be in the range of 20 – 24 months.

72. SIA accepted that if a causal link between the mental health condition and the decision not to make enquiries as to the nature of the substance was established, then, in the circumstances of this case, a finding of No Significant Fault or Negligence could be made. SIA fairly conceded that it was open to the Panel on the evidence to find such a causal link.

MERITS

73. The principal issue to be decided by the Panel is whether No Significant Fault or Negligence has been established in the circumstances of this case. The secondary issue to be determined, if the primary issue is decided in favour of the Appellant, is the nature of the degree of fault and thereafter what the period of ineligibility ought to be in all the circumstances.

74. Pursuant to Article 10.6.2 of the AF Code 2021, if an athlete establishes that he bears No Significant Fault or Negligence, the otherwise applicable period of Ineligibility may be reduced based upon the athlete's degree of fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. In the circumstances of this case because the period of Ineligibility otherwise applicable is 2 years, the minimum period that could be imposed, if No Significant Fault or Negligence is found, is 12 months.

75. "No Significant Fault or Negligence" is defined in the AF Code 2021 as follows:

> *"The athlete establishing that any Fault or Negligence, when viewed in the totality of the circumstances and taking into the account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation."*

76. Further the athlete must establish how the prohibited substance entered his system.

77. Fault is defined in Article 1 of the AF Code 2021 as being any breach of duty or any lack of care appropriate to a particular situation. Further, the definition provides that factors to be taken into consideration in assessing the degree of fault include the athlete's experience, special considerations such as impairment, the degree of risk that should have been perceived by the athlete and the level of care and investigation exercised by the athlete in relation to what should have been the perceived level of risk. Of note is the requirement that in assessing the athlete's degree of Fault, the circumstances considered must be specific and relevant to explain the athlete's departure from the expected standard of behaviour.

78. The impact of these provisions is that in order to find No Significant Fault or Negligence, the Panel must be satisfied that the departure of the athlete from the required conduct under his duty of utmost care was "not Significant". It is only in those circumstances that the Panel can depart from the standard sanction.

79. It is clear from CAS jurisprudence that a young, inexperienced athlete is not absolved from taking any steps whatsoever to ensure that the substance he is taking is not prohibited. In the circumstances of this case, there were no steps identified by the Appellant that he took in discharge of his duty to avoid the presence in his system of prohibited substances. Whilst it is true that the ingestion of the substance Out-of-Competition was not prohibited and that there was no intention to obtain a performance enhancing effect, simple research by the Appellant would have revealed the possibility that the ingestion of the substance would result in the substance remaining in his system for a period of time after ingestion. The question that needs resolution is whether, based upon the fresh or new medical evidence, the mental condition of the Appellant rendered him cognitively impaired so as to adversely affect his ability to comply with his duty of utmost caution.

80. The Panel is satisfied that the fresh or new medical evidence does satisfy the burden cast upon the Appellant to establish that his mental condition rendered him cognitively impaired so as to

adversely affect his ability to comply with his duty of utmost caution. The combined effect of the medical evidence was that the Appellant's cognitive functioning was impaired in that his ability to think rationally and exercise judgment was compromised, as found specifically by Dr Deacon. This compromise establishes the necessary causal link and justifies a finding that No Significant Fault or Negligence has been established by the Appellant.

81. The next consideration is what degree of fault the Appellant displayed in the objective circumstances of the case. In the Panel's opinion, the objective circumstances show a high degree of fault. The Panel accepts SIA's submissions in that regard for the reasons identified by them. The subjective circumstances lead to a conclusion that, within the span of the periods of Ineligibility outlined in Cilic and applied in subsequent cases, it is open to the Panel to impose a period of Ineligibility between 20 – 24 months. The Panel has determined that the subjective circumstances which take into account all the particular factors relied upon by the Appellant in relation to his situation, lead to a conclusion that a just result in all the circumstances of the case is a period of Ineligibility of 20 months backdated to commence on 2 September 2021, which was the date of the Appellant's provisional suspension.

THE NATIONAL SPORTS TRIBUNAL THEREFORE DETERMINES:

1. The Appeal by the Appellant from a Determination made in the Anti-Doping Division of the National Sports Tribunal delivered on 14 November 2022 (Case Number: NST-E22-124881) that determined that a period of Ineligibility of 2 years be imposed on the Appellant, is allowed.

2. That, in substitution thereof, a period of Ineligibility of 20 months be imposed on the Appellant, pursuant to Articles 10.2.2, 10.2.3 and 10.6.2 of the AF Code 2021, for the Anti-Doping Rule Violation and that the commencement date of the period of Ineligibility be 2 September 2021 (when the mandatory provisional suspension of the Appellant commenced).

3. That there be no order for costs.

Dated: 13 March 2023

Mr David Grace AM KC
Presiding Member

Dr Carolyn Broderick

Mr Peter Kerr AM