Case number: NST-E22-124881

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

Determination

National Sports Tribunal

Anti-Doping Division

sitting in the following composition:

Panel Member/s

Mr Adam Casselden SC (Chair)
Dr Catherine Ordway
Mr Paul Czarnota

in the arbitration between

Michael Randall *(Applicant)*

Represented by Mr Tom Percy KC of Counsel, instructed by Mr Dean Turner, Authorised Representative

And

Australian Football League *(Respondent – Sporting Body)*

Represented by Mr Justin Hooper 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 of Counsel, instructed by Ms Emily Fitton, Director Legal and Ms Peta Rogers, Senior Lawyer

PARTIES

1. Michael Randall ("**the Applicant**") competes in the sport of Australian Rules Football as 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. In these proceedings, both SIA and the AFL assert that the Applicant returned an adverse analytical finding ("**AAF**") for a prohibited substance and that the Applicant has committed the ADRV of "Presence" contrary to Article 2.1 of the AF Code 2021.

6. The Applicant accepted the findings outlined in paragraph 5 above[1], and 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[2].

7. The Applicant asserts that the period of Ineligibility ought to be reduced from 24 months down to 18 months.

8. The AFL is supportive of a reduction in sanction to 18 months[3].

9. In contrast, SIA asserts that the Applicant does not qualify for any reduction in the period of Ineligibility under the AF Code 2021, and that a two-year Ineligibility period should be imposed from the date he was notified of his provisional suspension[4].

NST JURISDICTION

10. The NST has jurisdiction under Section 22 of the *National Sports Tribunal Act 2019* (Cth) ("**NST Act**") to determine this dispute. The jurisdiction arises because, pursuant to Section 22(1)(a) of the NST Act, the AFL has a Policy that has been approved by the CEO of SIA and, pursuant to Section 22(1)(b) of the NST Act, the Applicant is bound by that Policy because he is an "Athlete" within the meaning of Article 25.1.1 of the AF Code 2021.

[1] Applicant's submissions dated 14 June 2022, paragraphs 1.4-1.6.
[2] Applicant's reply dated 22 July 2022, paragraph 4.
[3] AFL's submissions dated 14 July 2022, paragraphs 2 and 28.
[4] SIA's submissions dated 14 July 2022, paragraphs 5-6 and 61.

11. Article 8.1.3 of the AF Code 2021 permits the dispute to be heard by the NST, noting that the AFL has delegated its "Article 8 responsibilities" to the Tribunal.

12. All parties have therefore consented to the jurisdiction of the NST, and no objection has been made to the jurisdiction of the NST to deliver a Determination.

13. The Chief Executive Officer of the NST appointed Adam Casselden SC as the Presiding Member and Dr Catherine Ordway and Mr Paul Czarnota to be Panel Members for the purposes of this hearing. No objection was made to the composition of the Panel.

FACTUAL BACKGROUND

14. The Applicant 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.

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

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

17. The Applicant 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.

18. In June 2021, the Applicant 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.

19. The Applicant'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 Applicant's sister gave him four to six tablets by cutting some off the blister pack. The Applicant did not see the medication box or his sister's prescription for the medication. The Applicant 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.

20. On 24 July 2021, the Applicant 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.

21. The Applicant's Part "A" Sample returned an AAF for Phenternine.

22. 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.

23. At the time of the doping control test, the Applicant did not have a therapeutic use exemption permitting him to use Phentermine.

24. On 2 September 2021, the AFL imposed a Mandatory Provisional Suspension on the Applicant.

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

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

27. On 22 October 2021, the Applicant participated in a voluntary interview with SIA investigators.

28. On 10 January 2022, SIA issued to the Applicant, 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**").

29. 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 Applicant, pursuant to Article 10.2.2 and Article 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 Applicant options for proceeding.

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

31. The Applicant sought a Case Resolution Agreement which, pursuant to Article 10.8.2 of the AF Code 2021, would be an agreement between the Applicant, 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.

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

33. As a result, the NST was requested to determine the appropriate sanction.

34. 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

35. Upon the matter being referred to the NST to hear the dispute, the NST conducted a preliminary conference and issued directions as to the provision of submissions by the Applicant and Respondents. The Parties agreed to the Terms of the Arbitration and accepted that the matter would be conducted in accordance with the AF Code 2021 and that it would be governed by the NST Act, the National Sports Tribunal Rule 2020 ("**NST Rule**") and the National Sports Tribunal (Practice and Procedure) Determination 2020 ("**NST Determination**") as provided for by Section

29 of the NST Act. It was also agreed that the law applicable to the merits of the Arbitration would be the law of Victoria.

36. The Applicant's submissions were filed and served on 14 June 2022. Submissions on behalf of each of the AFL and SIA were filed and served on 14 July 2022. The Applicant's reply submissions were filed and served on 22 July 2022.

37. The CEO of the NST determined that the hearing be conducted by video-conferencing media on 26 August 2022. The Panel convened the hearing on that date and all parties were represented by legal practitioners. At the conclusion of the hearing on 26 August 2022, the Panel reserved its decision and advised that it would publish its detailed Determination in due course. The findings are reflected in this Determination.

38. At the hearing conclusion, the parties confirmed that their procedural rights had been fully respected.

APPLICABLE RULES

39. 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.*"

40. The Tribunal 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.

41. 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".

42. SIA accepts the account given by the Applicant 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.

43. 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 of 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 Applicant can establish "No Significant Fault or Negligence", he will be entitled to a reduction to no less than twelve (12) months Ineligibility.

44. The Tribunal notes other provisions in the AF Code 2021 (for example, Article 10.5 (No Fault or Negligence) and 10.7 (Substantial Assistance, Admission in the absence of other evidence)), but the Applicant did not seek to rely on those other Articles. For completeness, the Tribunal has formed the view that the Applicant's election not to pursue arguments based on those articles was appropriate given the circumstances of the case here. With the AAF result here, he would not have been able to rely on Article 10.7.2, for example. Nor, given the lack of "exceptional circumstances" would he have been able to rely on Article 10.5.

MAIN SUBMISSIONS OF THE PARTIES

Applicant's Submissions

45. The Applicant did not dispute that he had committed the asserted ADRV. He accepted the findings and co-operated with the authorities.

46. The Applicant made the following submissions in relation to the circumstances of his offending:

a) Phentermine is the active ingredient in Duromine which was prescribed to his sister, who used it as an appetite suppressant.

b) The Applicant received the medication from his sister, who cut out a section that contained four or five tablets for him.

c) The Applicant consumed the Duromine tablets on the advice of his sister, who believed the tablets would assist him in staying awake during the drive to and from his work and whilst he worked as an Operator at Alcoa's Wangerup Refinery.

d) The Applicant recalls taking the Phentermine from 12-16 July 2021 and one tablet on 19 July 2021. He participated in an official WAFL match on 24 July 2021.

e) There is no suggestion that the Applicant took the substance with a view to enhancing his football performance; nor any suggestion that it did so.

47. The Applicant referenced comparative cases and made submissions as to sanction as follows:

a) In horse racing, human participants are not considered in breach of a non-specified stimulant limit unless a reading is in excess of 500ng/ml.

b) There are no cases that involve an AFL player facing an ADRV for presence of a substance such as Phentermine.

c) In 2009, the Court of Arbitration for Sport (CAS) overturned the 15 month ban on cyclist Nathan O'Neill, to increase the ban to two years after Phentermine was found in his system. In this case, the rider admitted to using the product for weight loss: Arbitrations Australian Sports Anti-Doping Authority (ASADA) v Nathan O'Neill, CAS 2008/A/1591 & World Anti-Doping Agency (WADA) v Nathan O'Neill, CAS 2008/A/1592, Cycling Australia (CA) & ASADA & Union Cycliste Internationale (UCI) v Nathan O'Neill, CAS 2008/A/1616, award of 16 January 2009.

d) In *WADA v Ali Nilforushan,* CAS 2012/A/2959, a show jumper returned an AAF for Phentermine, Hydrochlorothiazide and Carboxy-THC and, at first instance, received a 12-

month Ineligibility period. On appeal by WADA, which claimed that the athlete had taken no precautionary measures to not consume the prohibited substances, the CAS determined that the period of Ineligibility should be extended for an additional 12 months. The Applicant submitted that this case could be distinguished because the show jumper also used an illegal drug and masking agent, which placed the offending into a far higher level and category of offending.

e) Penalties imposed by racing authorities (for in competition offences) vary from case to case but may include fines or comparatively short riding suspensions, ranging from one to three months. He raised an example of Melbourne Cup winning jockey Michelle Payne who received a one month ban from racing after testing positive to Phentermine following a race on 11 June 2017 in which she had competed.

f) In cricket, Shane Warne was in 2003 suspended for 12 months (reduced from two years on appeal) for using a prohibitive diuretic, hydrochlorothiazide, in competition.

48. In respect of deterrence, the Applicant submitted that, from both a community standpoint and a personal perspective, imposing a two-year Ineligibility period would be unduly severe. In this regard, he made the following submissions:

a) Phentermine is only prohibited where it may potentially have some effect as a performance enhancer, and an elite sportsperson is not prohibited from consuming Phentermine outside of competition where no unfair advantage is likely or intended.

b) In 2016, the Applicant was diagnosed with clinical depression and has taken prescription medication since the diagnosis. His continued engagement with football is therapeutic and is an outlet which helps manage his depression.

c) Since the AAF and subsequent provisional suspension, the Applicant has experienced a number of changes in behaviour including changes in sleep, loss of appetite, weight gain, lack of energy and depression, including significant thoughts of suicide.

d) A prolonged absence from competitive football is having a serious effect on the Applicant's mental health.

e) There is no suggestion that the use of non-specified stimulants in football is rife, widespread or common and, accordingly, there is limited, if any, need for a general deterrent penalty.

49. The Applicant also submitted that there are a number of mitigating factors, including that:

a) there is no performance enhancement, either actual or intended;

b) the Applicant was entirely cooperative throughout the investigation conducted by SIA;

c) there is nothing to support the view that the Applicant is not remorseful, lacks insight, or is at risk of re-offending;

d) the Part "A" Sample returned a low analytical finding;

e) the Applicant is a young person with a good record and exemplary character;

f) the Applicant faces consequences for such a small quantity; and

g) his diagnosis with major depressive disorder, which is treated by prescription medication and his being able to play football, is a matter that can properly be taken into account and does not appear to have been before the authorities at first instance.

50. The Applicant therefore submitted that the penalty to be imposed might be one which would be less that the standard penalty.

AFL's Submissions

51. The AFL was supportive of a reduction of the Applicant's period of Ineligibility from 24 months to 18 months pursuant to Article 10.6 of the AF Code 2021 on the basis that the Applicant's fault is diminished in the following circumstances:

a) He has a problem-solving deficit.

b) He had considerable psychosocial stressors in his life at the time (including from high-pressure and dangerous work, lack of sleep, and major depressive disorder) that likely further impaired his decision-making.

c) The severity of the violation is at the lower end of the spectrum, being a small concentration of the substance.

d) The substance was not taken for a performance-enhancing purpose, nor did it have a performance-enhancing effect.

e) He otherwise has a clean record.

52. The AFL submitted that, although there is no dispute that the present circumstances do not establish No Fault or Negligence, the Applicant's fault was, in 'the totality of the circumstances' (Article 1 AF Code 2021), not significant in relation to the violation, thereby enlivening the Tribunal's discretion to reduce his period of Ineligibility pursuant to Article 10.6.2 of the AF Code 2021.

53. The AFL noted that the Applicant must establish that any Fault or Negligence was not significant in relationship to the ADRV, which necessitates a relative evaluation of the fault with the severity of the violation. In this regard, and consistently with *FINA v Filho,* CAS 2011/A/2495, the AFL submitted that the severity of the violation in this case is not significant because ingesting phentermine out-of-competition is not prohibited; the violation is presence in-competition.

54. The AFL submitted that the assessment of fault must be considered against the level of care "appropriate in the particular situation". Their view is that, although the definition of "Fault" (as defined in the AF Code 2021) notes some factors to be taken into account, the words "Factors to be taken into consideration…*include, for example*" demonstrate that those factors are neither mandatory nor exhaustive and, therefore, the assessment depends on the facts peculiar to each case.

55. The AFL referred to authorities (*Cilic v International Tennis Federation (ITF)*, CAS 2013/A/3327 and *FINA v Filho,* CAS 2011/A/2495) to submit that there are degrees of fault and that (pursuant to *Troicki v ITF, CAS 2013/A/3279*) absent circumstances evidencing a high degree of fault "bordering on serious indifference, recklessness, or extreme carelessness, a 24-month sanction would be at the upper end of the range of sanctions to be imposed".

56. It was submitted therefore that the Applicant's fault must be assessed in relation to the fact that the severity of the violation was on the lower end of the spectrum. To undertake this assessment, the Tribunal was requested to consider the 'totality of the circumstances' as follows:

    a) The Applicant was 21 years old, living at home with his parents and sister;

    b) He receives very little income from football.

    c) He does not recall being educated about prescription medicines, and did not know he could check them on the app (or he would have done so).

    d) He only took six tablets as a trial to stay awake for work.

    e) The Duromine was not taken for performance-enhancing purposes.

    f) Duromine is only prohibited in-competition.

    g) The Applicant has admitted fault at the earliest possible opportunity and assisted authorities throughout the process.

    h) He has demonstrated insight and contrition.

    i) He otherwise has a clear record.

57. The AFL submitted that the criteria for 'No Fault or Negligence' are a *subjective* test (i.e., that the Applicant did not know or suspect he had committed a violation) and an *objective* test (i.e., that the Applicant could not reasonably have known or suspected that he had committed a violation). The AFL further submitted that the Applicant fails the objective test but satisfies the subjective test, and this must be taken into account when assessing his fault.

58. In the course of oral submissions, counsel for the AFL made submissions about the relevance of the Applicant not being a full-time professional, as a matter which ought to be taken into account when assessing the degree of fault.

59. The AFL also made submissions in relation to the Applicant's response to a question posed by SIA investigators in relation to the effect that a sanction would have on him. They submit that his mental health played a role in his decision-making at the time and, in addition to significant psychosocial stressors and problem-solving deficits, the Applicant was at the time:

    a) Experiencing 'terrible' sleep, not waking refreshed.

    b) Waking at 4:00am or 5:00am to get to work 50 minutes by car from home for shifts of 8-12 hours, 6 or 7 days per week.

    c) Operating dangerous machinery that 'can cut your arm off' for extended period.

    d) At the same time, holding onto football as his 'therapy' and 'life'.

60. The AFL submitted that the above circumstances bespeak of a sufficient degree of impairment to enliven the discretion to reduce the period of Ineligibility. The Applicant endeavoured to manage a career outside of football, whilst training full time and going to the gym five times per week. He was self-evidently struggling to the point that his sister suggested he try Duromine to help himself stay awake on the drive to and from work; he did not ask for it.

61. Accordingly, whilst he must bear a level of responsibility, he might properly be considered careless but in the circumstances his actions do not demonstrate 'serious indifference, recklessness, or extreme carelessness'.

62. The Applicant's experiencing suicidal ideation, very low self-esteem, and anhedonia are indicative of his impaired decision-making at the time, and that ought to be considered in mitigation of any period of Ineligibility.

63. In conclusion, the AFL submitted that the relative comparison of the Applicant's fault with the severity of the violation enlivens the Tribunal's discretion in Article 10.6.2 of the Code and implies a reduction of the period of Ineligibility. The AFL was supportive of a reduction in the period based on a 'normal degree of fault' to 18 months, thereby enabling the Applicant to play in the 2023 WAFL season.

SIA's Submissions

64. SIA submitted that a two-year Ineligibility period should be imposed to reflect the fact that the Applicant did not engage in deliberate cheating (and is therefore not subject to a four-year sanction) but does not qualify for any other reduction in sanction permitted by the AF Code 2021.

65. SIA accepted that the Applicant admitted his contravention at an early stage, and that his ADRV is not on the most serious end of the spectrum. SIA also accepted that the Applicant's circumstances are otherwise sympathetic but submits that the standardised regime of sanctions in the AF Code 2021, which are modelled on the World Anti-Doping Code 2021, must be applied in this case in the same way as it is in other cases.

66. SIA submitted that the base period of Ineligibility applies pursuant to Article 10.2.1.1 and Article 10.2.3 of the AF Code 2021.

67. In arguing that there are no grounds for a reduction in base period of Ineligibility, SIA submitted:

No Fault or Negligence

a) Article 10.5 of the AF Code 2021 provides for elimination of the period of Ineligibility where the Athlete can establish that they bear No Fault or Negligence, but that this will only apply in exceptional circumstances.

b) In this regard, SIA submitted that the Applicant bears a significant degree of fault as he voluntarily consumed the Duromine and did so recklessly by taking a prescription medicine prescribed to another person. Further, he did not seek medical advice before consuming the drug and did not check the active ingredient in the medicine, or whether it was a prohibited substance.

No Significant Fault or Negligence

c) Article 10.6.1.1, 10.6.1.2 and 10.6.1.3 of the AF Code 2021 do not apply because the ADRV did not involve a Specified Substance or a Specified Method, or a Contaminated Product, and the Applicant is not a "Protected Person" or a "Recreational Athlete".

d) Article 10.6.2 may apply where Article 10.6.1 is not applicable and, subject to further reduction, the otherwise applicable period of Ineligibility may be reduced based on the Athlete's degree of Fault.

e) In assessing the Applicant's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's departure from the expected standard of behaviour. In this case, it is relevant that:

i. The Applicant was 21 at the time of the ADRV and had played in the WAFL since 2019; he was an adult capable of making his own decisions.

ii. He is not a protected person.

iii. He was diagnosed with depression in 2016 and had been taking Escitalopram since that time. There is no evidence of any impairment on the part of the Applicant regarding his decision to use the Prohibited Substance. There is also no evidence that his diagnosis and/or illness excluded or reduced his ability of cognizance (*Radjen*).

iv. He has undertaken anti-doping education by attending face-to-face sessions in 2018, 2020 and 2021.

v. His conduct was, at best, extremely careless and it is the Athlete's personal duty to ensure that no Prohibited Substance enters his body (Article 2.1 of the AF Code 2021). The fact that a prohibited substance may, in his view, lack a performance enhancing effect, does not explain the departure from the expected standard; an Athlete must demonstrate the same level of diligence with regard to all substances included in the WADA Prohibited List (*Radojevic*).

f) The Applicant's authorities and character references do not address any matter relevant to No Significant Fault or Negligence.

Case Resolution Agreement

g) As WADA has declined to enter into a Case Resolution Agreement, no reduction in sanction can be applied under Article 10.8.2.

Other

h) There is no other available basis to reduce the period of Ineligibility under the AF Code 2021.

68. Accordingly, SIA submitted that the Applicant should be subject to a period of Ineligibility of two years and the period should commence from the date the Applicant was notified of his provisional suspension (Article 10.13.2.1).

MERITS

Majority decision by Casselden SC and Czarnota

69. The AF Code 2021 states that it was "*adopted and implemented in accordance with the AFL's responsibility as a Signatory to the WADC, and in furtherance of AFL's continuing efforts to eradicate doping in sport*".

70. Further, as the CAS made clear in *WADA v Bellchambers,* CAS 2015/A/4059 [114], the AFL's obligations extend to a requirement to ensure that the provisions of any AFL anti-doping code implement the WADA Code provisions "*without substantive change*".

71. In those circumstances, the Tribunal considers that, in assessing whether the Applicant is entitled to a reduction in the period of Ineligibility on account of "No Significant Fault or Negligence", regard can be had to well-established CAS jurisprudence on the matter.

72. Consistent with well-established case law before the CAS, in interpreting and applying the WADA Code, a *duty of utmost caution* is imposed on all athletes to "*avoid that a prohibited substance enters his or her body*" (see, eg, CAS 2005/C/976 & 986, FIFA & WADA, Advisory Opinion [73]).

73. In the aforementioned Advisory Opinion (2005) considering the original WADC 2003, the CAS stated [73]:

> "*Case law of CAS and of other sanctioning bodies has confirmed these duties, and identified a number of obligations which an athlete has to observe, e.g., to be aware of the actual list of prohibited substances, to closely follow the guidelines and instructions with respect to health care and nutrition of the national and international sports federations, the NOC's and the national anti-doping organisation, not to take any drugs, not to take any medication or nutritional supplements without consulting with a competent medical professional, not to accept any medication or even food from unreliable sources (including on-line orders by internet), to go to places where there is an increased risk of contamination (even unintentional) with prohibited substances (e.g. passive smoking of marihuana). Further case law is likely to continue to identify other situations where there is an increased risk of contamination, and, thus, constantly specify and intensify the athlete's duty of care. The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition. However, the Panel reminds the sanctioning bodies that the endeavours to defeat doping should not lead to unrealistic and impractical expectations the athletes have to come up with. Thus, the Panel cannot exclude that under particular circumstances, certain examples listed in the comment to art. 10.5.2 of the WADC as cases of "no significant fault or negligence" may reasonably be judged as cases of "no fault or negligence""*

74. "No significant fault" involves a finding that the athlete has not fully complied with his or her duties of care, and only in circumstances which indicate the departure of the athlete from the required conduct under the duty of utmost care was "not significant", can the Tribunal depart from the standard sanction (CAS 2005/C/976 & 986, FIFA & WADA, Advisory Opinion [75]).

75. In another case of *Despres v CCES & WADA*, CAS 2008/A/1489 and 1510 [13], the CAS made it clear that the duty of utmost caution imposed on athletes is to show a "*good faith effort to leave no reasonable stone unturned*" to prevent the ingestion of prohibited substances.

76. The aforementioned passage from *Despres*, was cited with approval in another CAS award of *Joshua Taylor v World Rugby*, CAS 2018/A/5583 [92-93]. In that case, at [94], relevantly for our purposes, the CAS stated:

> "… *while the Panel acknowledges that the Appellant was not at the material time, an experienced, well-resourced, international athlete who would have been apprised as to the importance of leaving no reasonable stone unturned, it is unable to accept that his level of fault was low. While there is a greater obligation on the part of the experienced high-level athlete who has received anti-doping education on numerous occasions, to undertake due diligence, that does not absolve the young, inexperienced athlete at the other end of the spectrum from taking any steps whatsoever. The Panel is unable to identify any steps that the Appellant took in discharge of his duty to avoid the presence in his system of prohibited substances. In the Panel's view, the Appellant acted in a careless manner in consuming supplements without undertaking any form of research and demonstrated a perplexing lack of curiosity for someone who entertained the prospect of one day playing professional rugby."*

77. Similarly, in *Taylor*, the CAS cited with approval from the earlier CAS award of *Cilic v ITF*, CAS 2013/A/3327, as to the "three categories for sanctions that fell within the 0-24 months range", being "significant", "normal" and "light". *Cilic* was referred to by the parties in their submissions before the Tribunal.

78. Here, the Applicant bears the onus of establishing "No Significant Fault or Negligence", in order to be entitled to receive a reduction in his period of Ineligibility from twenty four (24) months, down to a "floor" of twelve (12) months.

79. Unfortunately, for the Applicant, we are not satisfied he bears "No Significant Fault or Negligence". To the contrary, and while we say so with sympathy of his situation, he has not demonstrated any steps whatsoever to comply with his duty of utmost caution.

80. Moreover, consistent with *Taylor* above, the fact that he was not a full-time professional footballer does not result in a lowering of the objective standard of reasonableness, so as to result in a finding that a person, who took no steps whatsoever to discharge their duty, is entitled to the benefit of a reduced suspension period on account of "No significant fault or negligence".

81. Further, while we accept the medical evidence before us that the Applicant was and is suffering from depression which pre-dated the ADRV, the Applicant has not, through expert evidence from a suitably qualified expert (such as a psychiatrist or psychologist), demonstrated that that condition rendered him cognitively impaired so as to adversely affect his ability to comply with his duty of utmost caution. Similarly, there is no evidence from a suitable expert that his extreme fatigue at the time he ingested the prohibited substance impaired his cognitive functioning.

82. For these reasons, while we are sympathetic to the Applicant's situation, we are not satisfied that he bears "No Significant Fault or Negligence". Accordingly, we find that there are no grounds for a reduction in the base period of Ineligibility of two (2) years. The Applicant's two (2) year period

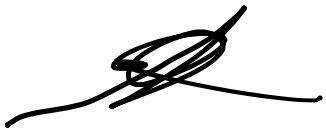
of Ineligibility commences on 2 September 2021 (which reflects the date the Mandatory Provisional Suspension began).

THE TRIBUNAL THEREFORE DETERMINES:

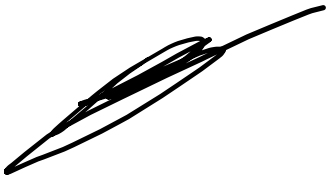
1. That a period of Ineligibility of two (2) years is to be imposed on the Applicant, pursuant to Article 10.2.2 and Article 10.2.3 of the AF Code 2021 for the Applicant's ADRV.

2. That the commencement date of the period of Ineligibility is 2 September 2021 (which reflects the date the Mandatory Provisional Suspension began).

Date: 14 November 2022



Mr Adam Casselden SC



Mr Paul Czarnota

MERITS

Minority decision of Ordway

83. The starting point in any sport integrity case must be, “What is the problem we are seeking to solve?” Going back to first principles, the answer to the question of “Why do we have an anti-doping system?” is “to prevent cheating in sport”. This is not a case of cheating in sport. Except for the sophistication of the analysis methodology used in WADA accredited laboratories which can detect small amounts of a substance used out of competition in an in-competition test, then this case is not even about sport. It is accepted by all parties that the applicant did not cheat and did not seek to achieve a performance enhancement in sport.

84. The applicant is a 21-year-old man who has had long term mental health issues. He is a reasonably talented AFL footballer. The applicant was playing for a team within the premier league competition for Western Australia (the level below the national league) and submitted an in-competition urine test. While he had just been nominated for the AFL draft, there is no evidence that he would have been selected in the national league, and thereby had the opportunity to play professionally. The AFL is also not a sport that is included on the Olympic or Commonwealth Games program, and so does not have an international-level pathway for athletes.

85. As a non-professional player then, sport was not the applicant’s primary focus, survival was: paying the rent and staying alive on the road, to travel long distances to do twelve hour shifts in an extremely dangerous, unpleasant job. The Applicant made the unfortunate decision to use the product containing Phentermine without the required medical oversight, which while a breach of the terms for therapeutic use prescriptions, is not a sport matter. Sport however serves to keep him alive, given his accepted medical conditions of depression, suicidal ideation and insomnia. In line with the WADA "spirit of sport" objectives outlined in the Code, sport brings him joy, health, fun and friendship, which is the focus for non-professional, community-level, recreational sport.

86. The applicant is not a professional athlete, must earn his income outside of sport, and in these circumstances where it is accepted that there was no attempt to cheat, this matter should have been expedited more quickly and inexpensively.

87. I'm prepared to accept based on the medical evidence, even in the absence of a formal expert’s report, such as a neuropsychiatrist, sleep specialist, or other psychiatrist, that this young man's decision-making abilities were impaired on the basis of his insomnia, depression, and suicidal ideation. Rather than referring this matter to the NST then, this case should have been resolved in line with other examples internationally, including the USADA “health approach” adopted for athletes competing at the recreational/ non-professional levels: “where there is no intention to cheat and no performance benefit, an athlete should not face any violation [sanction] or unnecessary public attention” (USADA 2019 March). This has been an approach supported by WADA on several occasions, including Hammond (2015) and Groves (2019).

88. The next best option would have been for this case to have been resolved in line with WADA’s stated human rights and ethics perspectives. Considering this matter wholistically, including economic rationalism, the concepts of “Fairness and Justice”, “Risk of harm” and “Proportionality” demanded that a Case Resolution Agreement be entered into (under Article 10.8.2 of the AF

Code 2021), which would have reduced the applicable Ineligibility period to 18-months from the date of the provisional suspension.

89. Instead, this request for a reduction of 18 months is the period the Applicant brings before the NST to consider. The Applicant has requested this reduced sanction on the basis of "no significant fault or negligence". The leading CAS case on "fault" in doping is *Cilic v ITF,* CAS 2013/A/3327.

90. For the reasons set out above relating to the overall circumstances, including the recreational/ non-professional relationship the Applicant had with his sport, and the impairment to the Applicant's decision-making abilities, I accept that this case can be considered within the category of a "light degree of fault."

91. The *Cilic* case sets out "the subjective element of the level of fault" that should be taken into account when assessing a sanction in doping (para 76; pages 20-21):

> *Whilst each case will turn on its own facts, the following examples of matters which can be taken into account in determining the level of subjective fault can be found in CAS jurisprudence (cf. also DE LA ROCHEFOUCAULD E., CAS Jurisprudence related to the elimination or reduction of the period of ineligibility for specific substances, CAS Bulletin 2/2013, p18, 24 et seq.):*
>
> *a. An athlete's youth and/or inexperience (see CAS 2011/A/2493, para 42 et seq; CAS 2010/A/2107, para. 9.35 et seq.).*
>
> *b. Language or environmental problems encountered by the athlete (see CAS 2012/A/2924, para 62).*
>
> *c. The extent of anti-doping education received by the athlete (or the extent of antidoping education which was reasonably accessible by the athlete) (see CAS 2012/A/2822, paras 8.21, 8.23).*
>
> *d. Any other "personal impairments" such as those suffered by:*
>
> *i. an athlete who has taken a certain product over a long period of time without incident. That person may not apply the objective standard of care which would be required or that he would apply if taking the product for the first time (see CAS 2011/A/2515, para 73).*
> *ii. an athlete who has previously checked the product's ingredients.*
> *iii. an athlete is suffering from a high degree of stress (CAS 2012/A/2756, para. 8.45 et seq.).*
> *iv. an athlete whose level of awareness has been reduced by a careless but understandable mistake (CAS 2012/A/2756, para. 8.37).*

92. Phentermine cases are rare. Prior to *Cilic*, there was another case involving Phentermine arising out of a 2007 in-competition test. Australian Nathan O'Neill was then an elite level cyclist; medalling in national and Commonwealth Games time trial events. On appeal, O'Neill was given a two-year ban and found to have "significant fault and negligence" on the basis that he "self-medicated with a view of gaining a competitive advantage" through weight loss. This case should be distinguished, not only on the basis that the fault test has developed since 2008 via Cilic, but because the Applicant is neither an elite level athlete, nor sought any competitive advantage. *Australian Sports Anti-Doping Authority (ASADA) v Nathan O'Neill,* CAS 2008/A/1591 and *World*

Anti-Doping Agency (WADA) v Nathan O'Neill, Cycling Australia (CA) & ASADA, CAS 2008/A/1592 and *Union Cycliste Internationale (UCI) v Nathan O'Neill,* CAS 2008/A/1616, award of 16 January 2009.

93. On this basis then, in the overall circumstances of being a non-professional/ community-level athlete, and taking into account the Applicant's "youth and/or inexperience", his "personal impairments", including "suffering from a high degree of stress", and other mental health issues, and accepting that his "level of awareness has been reduced by a careless but understandable mistake", he is thereby eligible for a no significant fault finding. I therefore accept the Applicant's application for a reduction in Ineligibility period to 18-months from the date of the provisional suspension.

Date: 14 November 2022

Dr Catherine Ordway