

Sport Ireland and Robert Powell

Reasoned Decision of Sport Ireland

The following is the reasoned decision of Sport Ireland pursuant to Article 7.6.4¹ of the Irish Anti-Doping Rules (the "**Rules**"). It concerns an anti-doping rule violation ("**ADRV**") committed by Mr Robert (Robbie) Powell (the "**Athlete**") and records the Consequences² to be applied.

1. Background and Facts

- 1.1 The Athlete is a 20 year-old swimmer who recently became part of the Sport Ireland Registered Testing Pool. He has represented Ireland internationally and is a university student. He was 19 at the time of Sample collection.
- 1.2 On 28 November 2019 the Athlete provided a Sample during Out-of-Competition Testing. The Sample he provided was split into A and B Samples. The A Sample was analysed by the World Anti-Doping Agency ("**WADA**") accredited laboratory in Cologne, the Deutsche Sporthochschule Köln Institut für Biochemie (the "**Laboratory**").
- 1.3 On 19 December 2019 Sport Ireland received a report from the Laboratory identifying the presence of a Prohibited Substance or its Metabolites or Markers in the "A" Sample – this is known as an Adverse Analytical Finding. The Prohibited Substance in question is clostebol (4-chloro-androst-4-en-3 α -ol-17-one). Clostebol is listed as an anabolic agent under S1.1. of the Prohibited List. Clostebol is a non-Specified Substance.
- 1.4 On 9 January 2020 Sport Ireland notified the Athlete that he was alleged to have committed a violation of Article 2.1 - "*Article 2.1 - the presence of a Prohibited Substance or its Metabolites or Markers in your Sample.*"
- 1.5 By way of letter dated 23 January 2020 from his solicitors, the Athlete admitted the ADRV while maintaining that it was not intentional. He also waived his right to have his "B" Sample analysed.
- 1.6 As set out below, following an exchange of detailed correspondence between Sport Ireland's solicitors and the Athlete's solicitors, Sport Ireland was satisfied that the Athlete had established that the ADRV was not intentional and further that he bore No Significant Fault or Negligence.

¹ Article 7.6.4 of the Rules provides that "*In the event that the Sport Ireland withdraws the Notification, or the Athlete or other Person admits the alleged anti-doping rule violation(s) and accedes to the Consequences specified by the Sport Ireland (or is deemed to have done so in accordance with Article 7.6.1), neither B Sample analysis nor a hearing is required. Instead, Sport Ireland shall promptly issue a reasoned decision confirming the commission of the anti-doping rule violation(s) and the imposition of the specified Consequences, shall send notice of the decision to the Athlete or other Person and to the Athlete's or other Person's National Governing Body and International Federation, WADA and the Irish Sport Anti-Doping Disciplinary Panel, and shall publish the decision in accordance with Article 15.*"

² Capitalised terms used throughout this decision shall have the meaning given to them in the Rules.

2. Intent and Source of Clostebol

- 2.1 Under the Rules, if the Athlete can establish that the violation was not intentional³, a ban (or period of Ineligibility) of 2 years would apply (Article 10.1.2) - otherwise a ban of 4 years would apply.
- 2.2 The Athlete provided detailed submissions, along with supporting briefs of documentation, jurisprudence and evidence in relation to how clostebol came to be in his system and on the issues of intent and No Significant Fault or Negligence.
- 2.3 In summary, the following were provided: a statement was provided from the Athlete's GP, medical records, other witness statements, [REDACTED] WhatsApp messages between the Athlete and his mother as well as messages between the Athlete and another coach with whom he shared coaching duties, a Fitbit record demonstrating poor sleep over the preceding number of nights and a full timeline of events detailing his personal circumstances and swimming schedule leading up to the ADRV, as well as evidence of his researching of previous medicines and supplements he had taken. The two tubes of cream relevant to the case were also provided to Sport Ireland's solicitors.
- 2.4 The Athlete provided medical evidence establishing that he had suffered from eczema since he was a child. He received various treatments from his GP over the years. During the 2018 Youth Olympics in Argentina he was prescribed a cream called 'Denvercort' by the Irish team doctor. 'Denvercort' does not contain any Prohibited Substances.
- 2.5 The Athlete was also in possession of a cream called Trofodermin, a topical cream - the branding and colour of the tube looks very similar to Denvercort. Trofodermin contains clostebol. Photographs of Denvercort and Trofodermin are provided at Appendix A to this decision. The Athlete cannot explain how he came to be in possession of Trofodermin, a cream which appears to only be available in Italy and Brazil.
- 2.6 During a flare-up eczema on 26 or 27 November 2019, the Athlete submitted that he applied a pea-sized amount of what he believed to be Denvercort to his hands (the affected area), but instead applied Trofodermin in error.
- 2.7 The WADA accredited laboratory in Rome is expert as regards clostebol. Following receipt of the Athlete's explanation, it confirmed that the concentration of clostebol -1.3 nanograms per millilitre (ng/mL) of a clostebol Metabolite - found in the Athlete's Sample was consistent with his explanation. A nanogram is one-billionth of a gramme.
- 2.8 Sport Ireland is satisfied that the Athlete had established⁴ that the violation was not intentional and that he had established how clostebol entered his system.
- 2.9 As regards how he came into possession of Trofodermin, the Athlete's position is that:

³ The term "intentional" is used to identify those who cheat. The term, therefore, requires that you engaged in conduct which the Athlete knew constituted an anti-doping rule violation, or the Athlete knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.

⁴ Where the Rules place a burden of proof upon an Athlete to rebut a presumption or establish specific facts or circumstances, the standard of proof shall be by a balance of probability.

- 2.9.1 He does not know where, from whom or in what circumstances he came into possession of the Trofodermin and that he did not purchase it and was not given it or prescribed it. He claims that it was used only once and that it was already open when he used it;
 - 2.9.2 He did not know he had Trofodermin in his possession at the time of the Test;
 - 2.9.3 It was only upon being notified of the ADRV that he began searching his toiletries bag and found Trofodermin;
 - 2.9.4 He does not have and does not recall seeing the packaging for Trofodermin; and
 - 2.9.5 Since the ADRV he has pursued every possible avenue to ascertain how he came into possession of the Trofodermin and believes he must have come into possession of the tube sometime between October 2018 and November 2019. He has contacted athletes he roomed with since 2018⁵ and every friend or family member he holidayed with since 2018. He has shared various rooms and changing rooms with different athletes and peers and he could have unintentionally and unknowingly come into possession of the Trofodermin cream at any point.
- 2.10 Sport Ireland was concerned that the Athlete could not explain how he came into possession of Trofodermin and how it came to be in his toiletries bag on 26 / 27 November. While this aspect of the case was not satisfactory, it arguably lends to the credibility of the Athlete's explanation as a fabricated explanation may well have sought to explain this anomaly.

3. No Significant Fault or Negligence

- 3.1 The Athlete accepted that he could not establish No Fault or Negligence. While the Athlete has made the case that it was a case of mistaken identity in terms of the two creams, clearly he bears some level of Fault in circumstances where he used a cream which lists clostebol as an ingredient.
- 3.2 If the Athlete could establish No Significant Fault or Negligence⁶, the otherwise applicable period of Ineligibility (2 years) could be reduced by up to one-half, depending on his degree of Fault⁷. In

⁵ From October 2018 to 2019, he competed in multiple competitions such as the European Long Course Championships in Glasgow, the European Junior Championships in Helsinki, the Irish Long Course Nationals in Dublin, the World Long Course Championships in South Korea and the European Short Course Championships in Glasgow. He also went on a holiday to Italy.

⁶ No Significant Fault or Negligence means "The Athlete or other Person's 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. Except in the case of a Minor, in order to establish No Significant Fault or Negligence for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system."

⁷ Fault is defined as "any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, 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. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or

other words, if the Athlete could establish No Significant Fault or Negligence, the applicable ban ranges from 1 to 2 years. Then, where on the spectrum the Athlete falls is determined by his degree of Fault. In order to establish No Significant Fault or Negligence, an Athlete must also establish how the Prohibited Substance entered their system. Sport Ireland was satisfied that the Athlete has done so in this case.

- 3.3 The Athlete made a number of arguments and submissions around factors such as inexperience⁸ and age, impairment and the degree of risk and level of care that should have been perceived:

3.3.1 He was under a great deal of pressure. He was studying engineering at DCU, had just been put on Swim Ireland's tier one panel (and Sport Ireland's Registered Testing Pool) and was also working part-time as a swim coach. [REDACTED]

[REDACTED] He says that he found it difficult to juggle his degree studies and swimming as well as his part time job as a swimming coach.

3.3.2 In late November 2019 he had a significant amount of coursework to complete. He had also competed in a number of swimming competitions over the preceding three weeks and was preparing for the Irish Nationals and European competitions which were to take place in December.

[REDACTED]
[REDACTED]
[REDACTED]

3.3.4 He wanted to apply the Denvercream on the night of 26/27 November 2019. When he saw a green and white tube with a minimal amount of it used, he was sure (in his head) it was the cream he had been prescribed in Argentina in 2018.

3.3.5 With regard to the degree of risk he should have perceived, it is argued that the Athlete simply did not realise that he was using an incorrect cream and wanted the itching on his hands to stop so he could sleep.

3.3.6 It is argued that his circumstances impacted his ability to perhaps be more cautious about how items are segregated in his washbag. He acknowledges that it was a mistake.

[REDACTED] Sport Ireland accepts the Athlete's evidence that he was under a great deal of stress and pressure around the time of the Test. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.4.1 or 10.4.2."

⁸ The Athlete received anti-doping education on quite a number of occasions, including in-person and online. However, the issue in this case falls more in the category of human error rather than any lack of education or understanding of the requirements of the Rules.

- 3.5 Sport Ireland was satisfied that there is a clear line of CAS⁹ and other jurisprudence¹⁰ which provides for a considered rather than literal interpretation of No Significant Fault or Negligence. On a strict or literal analysis, any Fault which is not absolutely minimal would be likely to be 'significant' and any Fault or negligence which contributed or led to the ADRV would certainly be 'significant'.
- 3.6 A literal reading of the definition of No Significant Fault or Negligence would provide for no flexibility and would arguably set the bar too high so that in practice a reduced sanction would be rendered unavailable. Sport Ireland is satisfied therefore that a considered interpretation of No Significant Fault or Negligence is correct and appropriate.
- 3.7 Sport Ireland is satisfied that the Athlete has established that he bore No Significant Fault or Negligence.

4. Consequences

- 4.1 The Athlete has established No Significant Fault or Negligence. This means that the otherwise applicable period of Ineligibility (2 years) can be reduced by up to one-half, depending on his degree of Fault.
- 4.2 While consistency of decision making is desirable, it is not possible to deduce authoritative guidance or precedent from other cases involving clostebol – these cases involve different sanctions different bodies have applied in different cases with different circumstances. Each case will have its own unique set of circumstances.
- 4.3 However, the CAS jurisprudence does establish that there are three categories of No Significant Fault or Negligence cases – low (12-15 months), medium (16-19 months) and high (20-24 months). It also suggests that in order to determine an Athlete's level of Fault, an objective and a subjective level of fault must be taken into consideration. The objective level of fault or negligence points to what standard of care could have been expected from a reasonable person in the Athlete's situation and the subjective level consists of what could have been expected from that particular Athlete, in the light of his/her particular capacities.
- 4.4 Sport Ireland finds that the objective level of Fault is low – a 'reasonable' athlete suffering from eczema may well have done the same - it would of course have been preferable had he examined the tube before applying it, but we not are dealing with a case involving No Fault or Negligence, rather it is No Significant Fault of Negligence. From a subjective perspective, the Athlete has made a compelling case regarding the pressures and stresses he was under at the time.
- 4.5 Accordingly, Sport Ireland finds that the appropriate period of Ineligibility is twelve months.
- 4.6 Based on the Athlete's timely admission, Sport Ireland has decided to backdate his period of Ineligibility to 28 November 2019 (Article 10.7.2), the date of Sample collection. This means that the period of Ineligibility will expire on 28 November 2020.

⁹ *Cilic v ITF* (CAS 2013/A/2237), the *International Ski Federation (FIS) v Therese Johaug and Norwegian OPC* (CAS 2017/A/50515) and *Maria Sharapova v ITF* (CAS 2016/A/4643).

¹⁰ For example, *RFU v Ashley Johnson* (SR/ NADP / 65 / 2018) (paragraphs 35-39 are of note) and *UK Anti-Doping v Robbie Turley* (SR/NADP/909/2017).

- 4.7 Pursuant to Article 10.8 of the Rules¹¹, during the period of Ineligibility, the Athlete remains subject to Testing. He may not participate in any capacity in any Competition or activity (other than anti-doping education programmes) organised by Swim Ireland or any club affiliated to Swim Ireland. This includes training and coaching.
- 4.8 Pursuant to Article 10.8.2, as an exception to Article 10.8.1 the Athlete may return to train with a team during the last 2 months of his period of Ineligibility i.e. from 28 September 2020.
- 4.9 In accordance with Article 7.6.4 of the Rules, a copy of this decision shall be sent to the Athlete, Swim Ireland, FINA, WADA, IOC and the Irish Sport Anti-Doping Disciplinary Panel.
- 4.10 Pursuant to Article 13 of the Rules, the Athlete, FINA, the International Olympic Committee and WADA have a right of appeal. Such an appeal must be made to the Chair of the Irish Sport Anti-Doping Disciplinary Panel within 21 days of the date of issuance of this reasoned decision, save as provided in Articles 13.2.10 and 13.2.12.

4. Summary

- 4.1 Sport Ireland issues this decision pursuant to Article 7.6.4 of the Rules.
- 4.2 For the reasons given above, Sport Ireland has issued this decision, which records that:
- The Athlete has committed a violation of Article 2.1 of the Rules by virtue of the presence of clenbuterol (S1.1. Anabolic Agents) in a Sample collected from him in Out-of-Competition Testing on 28 November 2019.
 - Sport Ireland was satisfied that the Athlete had established that the violation was not intentional and further that he bore No Significant Fault or Negligence.
 - Sport Ireland is of the view that the appropriate period of Ineligibility is twelve months, the imposition of which the Athlete has accepted.
 - This period of Ineligibility, which has been backdated in accordance with Article 10.7.2 to 28 November 2019 based on the Athlete's timely admission.
 - The Athlete's period of Ineligibility shall expire on 28 November 2020.

Dated the 22nd of May 2020

Síobhán Leonard

Sport Ireland

¹¹ Article 10.8.1 provides that an Athlete who has been declared Ineligible shall not participate in any capacity "in a Competition or activity, (other than authorised anti-doping education or rehabilitation programs) authorised or organised by any Signatory, Signatory's member organisation, or a club or other member organisation of a Signatory's member organisation, or by any National Governing Body or by a member or affiliate organisation or licensee of a National Governing Body or in Competitions authorised or organised by any professional league or any international or national-level Event organisation or any elite or national-level sporting activity funded by a governmental agency."

APPENDIX A

