

DECISION OF THE IAAF DISCIPLINARY TRIBUNAL

15 August 2017

In the matter of Mr Frank Fredericks and an appeal against an order for provisional suspension

DECISION

Introduction

1. This is a decision of the IAAF Disciplinary Tribunal on an appeal made by Mr Frank Fredericks pursuant to Rule 6 of the IAAF Athletics Integrity Unit – Reporting, Investigation and Prosecution Rules (Non-Doping) (the “**Rules**”) against an order of the Chairman of the Tribunal dated 12 July 2017 (the “**Order**”) for the provisional suspension of Mr Fredericks from his position as an IAAF Council Member (and confirming his voluntary self-suspension from his other positions within the IAAF) and any other position in the sport of athletics, pending, as appropriate, the outcome of the investigation against him and any (if any) disciplinary proceedings to follow.
2. Mr Fredericks is the subject of an investigation, more fully described below, concerning his suspected breaches of the IAAF Code of Ethics in connection with the payment of monies to an offshore company (Seychelles domiciled) owned and/or controlled by him, Yemi Limited (“**Yemi**”) from a company owned and/or controlled by Papa Massata Diack (“**PMD**”) (the son of the former President of the IAAF), Pamodzi Sports Consulting (“**Pamodzi**”), on or about the date of the IOC vote which awarded Rio de Janeiro the 2016 Olympics.

Procedural Background

3. On 1 June 2017 the acting Head of the Athletics Integrity Unit (the “**Integrity Unit**”) Mr Thomas Capdevielle wrote to Mr Fredericks stating that the Integrity Unit had

determined that there was a prima facie case warranting investigation against him and asked whether in the light of Mr Fredericks' voluntary withdrawal from the IAAF's Russian taskforce, Mr Fredericks also voluntarily consented not to undertake his responsibilities in respect of his positions as (a) an IAAF Council Member, (b) Honorary Chair of the IAAF Athletes' Commission and (c) Deputy Chair of the IAAF's Competition Commission, in order to assist the Integrity Unit in determining whether his case warranted an application for provisional suspension being made to the Disciplinary Tribunal.

4. On 2 June 2017 by way of a written response ("**Mr Fredericks' Response**"), Mr Fredericks stated that he was prepared voluntarily to step down as Honorary Chair of the IAAF Athletes' Commission and Deputy Chair of the IAAF's Competition Commission. In respect of his position as an IAAF Council member, he stated, *"I am not prepared to voluntarily consent not to undertake my duties in respect of the position I hold as IAAF Council Member. However, I will use my best judgment when considering if my attendance at Council Meetings is appropriate or not. I have decided not to attend the next Council Meeting that has been set to take place in London during the first week of August 2017, so as to afford you ample opportunity to undertake whatever investigations you deem appropriate. I reiterate that I categorically deny any wrongdoing."*
5. On 30 June 2017 an application was made pursuant to Rule 6 of the Rules by the Athletics Integrity Unit for an order for provisional suspension of Mr Fredericks, pending investigation of a prima facie case of breach of the IAAF Code of Ethics as in force at the relevant time ("**the Application**"). Together with its application, the Integrity Unit filed a Notice of Prima Facie Case made in accordance with rule 5.4 of the Rules ("**the Notice of Prima Facie case**").
6. On 12 July 2017 the Chairman of the Disciplinary Tribunal made the Order.
7. On 13 July 2017 the Order and the reasons for it were published.
8. On 14 July 2017 Mr Fredericks by an email sent by Léon del Forno ("**Mr del Forno**") his lawyer, exercised his right pursuant to rule 6.3 and 6.4 of the Rules to contest the Order ("**the del Forno email**").
9. On 24 July 2017 Mr Fredericks, pursuant to directions made on behalf of the Tribunal,

submitted a statement in support of his contest to the Order (“**Mr Fredericks’ Statement**”).

10. On 28 July 2017 the Integrity Unit submitted a response to Mr Fredericks’ Statement, (the “**the Integrity Unit Response**”) which was provided to Mr Fredericks.
11. On 6 August 2017 Mr del Forno confirmed that Mr Fredericks did not propose to avail himself of the opportunity offered to him to reply further to the Integrity Unit Response.
12. Between 10-14 August 2017 a Panel of the Tribunal, constituted pursuant to rule 6.3 of the Rules and consisting of the Chairman, Lauri Tarasti and Tom Murray considered Mr Fredericks’ contest to the Order. Mr Fredericks had agreed that the Panel could adjudicate upon his contest to the order by evaluation of the written material only and without the need for an oral hearing, a procedure vouched for by the Rules.

The Procedural Rules

13. Rule 6 of the Rules provides, *inter alia*, as follows:

“6. PROVISIONAL SUSPENSION

6.1 At any time where a prima facie case of a Non-Doping Violation of the Integrity Code of Conduct has been determined to exist pursuant to Rule 5 of these Rules, the Head of the Integrity Unit may make an ex parte application to the chairperson of the Disciplinary Tribunal to impose a Provisional Suspension on the Applicable Person pending the determination of the investigation and potential charge.

6.2 Upon an application made under Rule 6.1, the chairperson of the Disciplinary Tribunal may impose a Provisional Suspension if he considers that the integrity of the sport could otherwise be seriously undermined. Any Provisional Suspension imposed under Rule 6.1 will take effect from the date the chairperson’s decision is notified to the Applicable Person. At the same time as such notification, a copy of the decision to impose a Provisional Suspension on the Applicable Person shall be

6.2.1 notified to the Integrity Unit, the Applicable Person’s National Federation, and Area Association (if applicable); and,

6.2.2 Publicly Disclosed, unless the chairperson of the Disciplinary Tribunal decides otherwise.

6.3 *Where a Provisional Suspension is imposed, the Applicable Person will have the right, at any time, to make an application to contest such Provisional Suspension in a provisional hearing before a Panel of the Disciplinary Tribunal convened to hear his case. This Panel may include the Chairperson of the Disciplinary Tribunal provided that in this situation, the Panel comprises of three (3) members.”¹*

14. Paragraph 6.1 of the Rules refers to a prima facie case of a Non-Doping Violation of the Integrity Code of Conduct (the “**Integrity Code**”). Paragraph 5.5 of the Integrity Code specifies that where a prima facie case of breach concerns a predecessor Code of Ethics, such a matter shall be determined substantively in accordance with that predecessor Code, but subject to the current applicable procedural rules as set out in the application, providing expressly:

“Violations of predecessor Codes of Ethics

[...]

5.5 With respect to any Proceedings filed with the Ethics Board or the Integrity Unit after 31 December 2016 concerning an alleged violation of the Former Code of Ethics or any predecessor codes of ethics, such Proceedings will be governed by the substantive provisions of the Former Code of Ethics or predecessor code of ethics (as applicable) and other applicable IAAF Rules in force at the relevant time (unless the Disciplinary Tribunal determines that the principle of lex mitior applies in the circumstances of the case). All such Proceedings will be governed by the Procedural Rules Applicable Under This Code, including being transferred or referred to the Integrity Unit, as appropriate, with any charges being heard and decided by the Disciplinary Tribunal.”

15. The ‘Procedural Rules Applicable Under This Code’ are defined at paragraph 4.1 of the Integrity Code as “*rules setting out the procedures for dealing with alleged violations of the Code (or the Former Code of Ethics) including reporting, investigating, prosecuting and deciding such violations and includes the Integrity Unit Rules, the Reporting, Investigations and Prosecution Rules, the Disciplinary Tribunal Rules and the Anti-Doping Rules.*”

¹ Rule 6.4, which deals with the basis upon which such contest to an order may be made will, for ease of understanding, be set out below under the rubric ‘Analysis’.

The Parties' Cases

16. The Integrity Unit's case is set out in the Application, the Notice of Prima Facie case and the Integrity Unit Response, and the documents exhibited. Mr Fredericks' case is set out in Mr Fredericks' Response, the del Forno email and Mr Fredericks' Statement. The Panel has duly and carefully considered both parties' cases.
17. In essence the Integrity Unit's case is that:
 - (a) An article in the French newspaper, Le Monde asserted that the Payment (referred to in paragraph 2 above) was in the amount of US\$300,000 paid to Yemi by Pamodzi, a company of PMD on 2 October 2009, the eve of the IOC vote which awarded Rio de Janeiro the 2016 Olympics.
 - (b) As an IOC member, Mr Fredericks was one of the persons entitled to vote to award the 2016 Olympics to one of the candidate cities.
 - (c) PMD has been found by a Panel of the IAAF Ethics Board to have engaged in an extortion scheme in respect of the concealment of a positive drugs test by the Russian athlete Liliya Shobukhova. PMD is also subject to investigation by the French police, and is subject to an Interpol red notice, in respect of broader lines of investigation by the French police including in respect of the award of athletics and other sporting competitions. In those circumstances, the origination of the sums from PMD's company Pamodzi raises questions as to the propriety of the payment.
 - (d) There was therefore a prima facie case that the Payment received by Yemi from PMD's company was an improper payment (as he must or should have known) designed to or in fact influencing Mr Fredericks' exercise of his IOC voting rights.
 - (e) The integrity of the sport would be seriously undermined if in the above circumstances an order for provisional suspension were not made.
18. In essence Mr Fredericks' case is that:
 - (a) The sum of US\$300,000 paid to Yemi by Pamodzi was paid pursuant to the terms of a contract dated 11 March 2007 relating to legitimate work which he was doing in the period 2007-2011 relating to the IAAF marketing program and African athletics events and was similar to other contracts with Yemi for such work to at least one of which the IAAF were privy.

- (b) Despite the contract being concluded in 2007 he had been paid only limited sums since that time and he had therefore put pressure on Pamodzi for payment, including at a meeting with PMD during the 2009 IAAF World Championships in Berlin, culminating in the payment of US\$299,250 received on 9 October 2009.
- (c) In so far as the Integrity Unit relied upon findings made by the IAAF ethics board or other matters, adverse to PMD which, if true, cast doubt on PMD's own integrity, he could not have known, and did not know, of such matters at the time Yemi received the payment.

The Code: substantive provisions

- 19. The 2003-2012 Code of Ethics, applicable to *"persons acting in positions of trust within the IAAF"*, provided so far as material as follows:
 - (a) *"All persons subject to this Code shall use due care and diligence in fulfilling their roles for, or on behalf of, the IAAF. Such persons must not act in a manner likely to tarnish the reputation of the IAAF or Athletics generally, nor act in a manner likely to bring the sport into disrepute."* (Article 7).
 - (b) *"Only gifts of nominal value may be given or accepted as a mark of respect or friendship."* (Article 9).
 - (c) *"Save as may otherwise be permitted under this Section D, no-one in a position of trust within the IAAF shall, directly or indirectly, solicit, accept or offer any concealed remuneration, commission, benefit or service of any nature connected with their participation in Athletics or with their function as an IAAF official."* (Article 10).

The Order

- 20. In his explanation for the Order the Chairman stated, *inter alia*:

"It is sufficient for me to say that I am persuaded, for the reasons advanced by the Integrity Unit, that I should make the order sought. I note that the decision on such an application engages a discretion, not a duty: against the interests of the sport must be set and considered the interests and prejudice which an individual would suffer if an order for provisional suspension were made and the outcome of the investigation and any disciplinary proceedings were that no breach of the IAAF Code of Ethics were established. As at present advised, I find it not easy to see in what circumstances I would refuse to impose a provisional suspension if I

considered that, in its absence, the integrity of the sport could be seriously undermined, but such circumstances justifying my refusal certainly have not so far been shown to exist in the present case, even paying due regard to Mr Fredericks' proposals for voluntary abstention from Council business which are, in any event, incomplete."

Analysis

21. The grounds for Mr Fredericks to contest the Order are defined by rule 6.4 which provides:

"At any provisional hearing under Rule 6.3, the Provisional Suspension may only be lifted if the Applicable Person establishes:

6.4.1 that the charge(s) has/have no reasonable prospect of being upheld, e.g. because of a patent flaw in the case; or

6.4.2 some other facts exist that make it clearly unfair, in all of the circumstances, to impose a Provisional Suspension prior to a full hearing on the merits of the charge(s). This ground is to be construed narrowly, and applied only in exceptional circumstances (e.g. the fact that the Provisional Suspension would prevent the person from participating in a particular event will not qualify as exceptional circumstances for these purposes)."

22. It is therefore incumbent upon Mr Fredericks to establish (i) that the case against him has no reasonable prospect of being upheld or (ii) that it is otherwise unfair in all the circumstances to impose an order for provisional suspension prior to a full hearing on the merits of the charges (in context the word "*charge(s)*" must be construed to embrace potential charges; see Rule 6.1).
23. As to (i) the Panel notes that (a), whereas it is for the Integrity Unit to make a case why such an order should be made, it is for a person contesting such an order to make a case why it should be lifted; (b) whereas it is for the Integrity Unit to establish a prima facie case of breach of the Code as a basis for such an order, it is for the person contesting it to establish that such case has no reasonable prospects of success.
24. In the Panel's view rule 6.4 imposes a higher threshold to lift a provisional suspension order than rule 6.1 requires to impose one in the first place. Since additional evidence can

be adduced in the period between a suspension's imposition and any disciplinary proceedings, the rule does not require that "prospects" be assessed by reference to currently available evidence *in isolation*. The provision would permit, for example, a conclusion that "*reasonable prospects of being upheld*" exist where the material available to the Panel is itself insufficient to ground a charge, but nonetheless indicates misconduct for which further investigations hold out the prospect of sufficient proof. Demonstrating the converse proposition, of *no* reasonable prospects, therefore requires more than an assertion as to shortcomings of the current evidence, but rather a patent flaw in the case against the suspended person or something akin or analogous thereto.

25. As to (ii) the Panel notes that (a) it provides an additional or alternative ground for lifting an order free standing of (i); see the introductory phrase "*other facts*", (b) it is however a ground which can only exceptionally be engaged. The Panel has considered the Chairman's obiter dictum cited at paragraph 20 above ("*As at present advised, I find it not easy to see in what circumstances I would refuse to impose a provisional suspension if I considered that, in its absence, the integrity of the sport could be seriously undermined*") but does not interpret that observation as ruling out the possibility that such circumstances *could exist* as the Rule expressly envisages.
26. It is not in issue (i) that Mr Fredericks was subject to the Code at all relevant times, specifically in 2009, having served as a member of the IAAF Athletes' Commission continuously between 1999 and 2015 (ii) that the prima facie case, if established in point of fact, would amount to breaches of the Code of the kind identified by the Integrity Unit. There would indeed be a bizarre lacuna in the Code if receipt of monies designed to purchase a vote on a matter of such importance as the award of a host city fell outside its reach. In the view of the Panel no such lacuna in the Code existed at the relevant time (or exists now).
27. The Panel has sympathy with Mr Fredericks' argument that he could not have been aware of matters adverse to PMD at the time the controversial payments were made to Yemi, not least because those matters postdated the payments, though it recognizes that PMD's role and motive in making them will necessarily form part of the proposed investigation.
28. However, in the Panel's view, it is impossible for Mr Fredericks to show that the prima facie case against him has no reasonable prospect of success given (i) the coincidence of

the timing of the payments with the imminent vote on the selection of the host city for the Games – the Panel is unimpressed by the fact that the payment was received by Yemi only on 9 October 2009, since international bank transfers can take time (ii) (a) at most only limited sums were apparently paid during the first two years of the contract (if genuine), (b) the invoice rendered on 17 September 2009 (numbered 001) also concerns payment for consulting 2007-2010 i.e. including on its face future work (c) while documents relating to the genesis of the contract in 2007 have been disclosed, no documentary evidence has been provided to the Integrity Unit or, more significantly, to the Panel, indicating what, if any, earlier payments had been made or that Mr Fredericks had been pressing for any outstanding sums due.

29. The documents produced (as well as the absence of documents which might reasonably be thought to exist if Mr Fredericks' version of events were correct) raise more questions than they answer. The Panel emphasises that it may well be that satisfactory answers exist; but under the rules it is not for it to conduct some kind of mini trial of merits in advance of the investigation or the hearing of any (if any) charges brought in consequence. A provisional suspension is necessarily preliminary in nature, and its imposition under the Rules cannot, does not and, under the Rules is not intended to reflect a final view of those merits. Mr Fredericks has by now had ample opportunity to provide any material which he may contend damages or destroys the Integrity Unit's case against him or the basis for the Order made ex parte. So far in the judgement of the Panel, he has not hitherto done so. The Panel concludes that the Prima Facie case against Mr Fredericks of breaches of the Code remains unimpaired and devoid of patent flaw.
30. The Panel can identify no factors which would, notwithstanding its foregoing conclusion that the prima case is unimpaired, justify lifting the suspension, bearing in mind in particular that (i) the role of an IAAF Council Member is a senior position within the sport; such member participates in important decisions with wide impact on the sport and its administration (ii), the prima facie case warranting investigation of Mr Fredericks concerns a matter of the utmost gravity, namely the possibility that Mr Fredericks received substantial sums of money with the aim and/or effect of affecting his voting in the award of an Olympic host city, (iii) Mr Fredericks' voluntary withdrawal from various posts (as indeed his earlier self-referral to the IAAF Ethics Board) is a matter to his credit; but it cuts both ways and, in the Panel's view, deeper against him than in his favour. It amounts itself to a recognition that it is not in the interests of the sport that he remains in a position to

influence decisions within it while under a cloud of suspicion. The integrity of the sport, in the Panel's view, demands that his withdrawal must for the present be total, not partial. Especially in the present climate of concern, probity in sports administration must not only exist, but be seen to exist.

31. The Panel therefore declines to lift the order for provisional suspension. It reiterates that Mr Fredericks continues to enjoy the presumption of innocence; and he will have the opportunity during the investigation carried out by Sir Anthony Hooper, a former Lord Justice of Appeal of England and Wales, to show that there is no basis for charges for breach of the Code to be brought against him, and, if such charges were to be brought, a further opportunity to show that the prosecutor could not discharge the burden of proof which is under the Rules imposed upon it.
32. Mr Fredericks' contest to the Order is accordingly dismissed.

Michael J Beloff QC (Chair)

Lauri Tarasti

Tom Murray

15 August 2017