SPORT RESOLUTIONS (UK)
SPECIALIST INDEPENDENT DISPUTE SERVICE

SR/NADP/649/2016

NATIONAL ANTI-DOPING PANEL

Before:

Robert Englehart QC (Chairman)
Dr Kitrina Douglas
Dr Neil Townshend

BETWEEN:

Samuel Barlow

Appellant

- and -

UK Anti-Doping

Anti-Doping Organisation

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING REGULATIONS OF THE RUGBY FOOTBALL LEAGUE

NATIONAL ANTI-DOPING PANEL APPEAL DECISION

INTRODUCTION

1. We were appointed as the Appeal Tribunal to determine an appeal by the Appellant, Mr Samuel Barlow, against a decision of an Arbitral Tribunal consisting of Christopher Quinlan QC, Colin Murdock and Professor Dorian Haskard ("the

Tribunal") dated 27 June 2016. Pursuant to directions from the Chairman, the appeal was heard by us on 25 August 2016. The parties were in agreement that this was a true appeal by way of review. Accordingly, we heard no evidence and determined the appeal solely on the basis of submissions and the evidence given below. Mr Welch, who appeared for Mr Barlow, did, albeit without any great enthusiasm, suggest that we might have regard to some evidence which had not been placed before the Tribunal below. Such evidence certainly would not have been admissible on Ladd v Marshall principles, but, in any event, we decided not to admit this fresh evidence since we did not think it would be likely materially to affect our decision.

2. Both Mr Welch of Counsel and Ms Riley of Bird and Bird, who appeared for the Respondent ("UKAD"), put in written submissions and made brief oral submissions. We were grateful for the succinct and measured way in which the oral appeal submissions were made.

THE BACKGROUND

3. The Tribunal gave a full and detailed decision. It is unnecessary for us to do more than briefly summarise sufficient of the factual background in order to make our decision understandable. If more detail is required, reference should be made to the Tribunal's decision ("the Decision").

4. Mr Barlow is a semi-professional rugby league player who plays for Leigh Centurions RLFC. As a registered competitor of the Rugby Football League, he is bound by their Anti-Doping Rules ("ADR"). There was no dispute about this.

5. On 31 July 2015 a UKAD doping control officer, Mark Dean, attended at Mr Barlow's home at around 9pm for the purpose of conducting an out-of-competition test on Mr Barlow. Mr Barlow was at home with his partner, Ms Blackwell, but initially did not respond to Mr Dean's ringing of the doorbell. After a little time, Ms Blackwell came outside and spoke to Mr Dean. She then went back into the house. Mr Barlow then leaned out of an upstairs window shouting that Mr Dean was a burglar who was going to be arrested. Mr Dean returned to

the front door with his equipment bag. Mr Barlow eventually let him into the house where an altercation ensued. It is unnecessary to go into detail. There is no suggestion of Mr Dean having suffered physical injury, but Mr Barlow's conduct was such as to constitute common assault against Mr Dean. Indeed, he subsequently pleaded guilty to common assault on Mr Dean at the Bradford Crown Court, although it is right to record that he did so on the basis that he did not commit the assault with intent to avoid a doping control test. It was Mr Barlow's case that he thought Mr Dean was a burglar.

6. In consequence of the fracas, UKAD instructed Mr Dean to abort the doping control process. It is right to record that Mr Barlow did subsequently claim to be willing to undergo a test but, by then, Mr Dean had aborted the process. Before us Mr Welch accepted that, if there had been an anti-doping rule violation, it had already occurred.

7. In due course the police attended at Mr Barlow's house. He wanted Mr Dean to be arrested for burglary but the police decided not to do so. Mr Barlow was undoubtedly somewhat confrontational both at that time and thereafter, but the Tribunal expressly disclaimed any assistance from the evidence about this subsequent behaviour of Mr Barlow.

THE DECISION

8. Mr Barlow was charged by UKAD with the commission of the anti-doping rule violation of tampering on 31 July 2015. As the Tribunal observed, the word "tampering" is perhaps more apt to cover conduct such as interfering with a sample. However, as set out in Article 2.5 of the ADR it goes much further:

> Conduct that subverts the Doping Control process but that would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, intentionally interfering or attempting to interfere with a Doping Control official …..

The Appendix definitions within the ADR explain that "obstructing" falls within the prohibited conduct.

9. In fact, it was common ground that Mr Barlow's conduct towards Mr Dean was capable of constituting tampering. The Decision records:

> The parties were agreed on the correct interpretation of ADR Article 2.5. They submitted that it required proof by UKAD that the Respondent's conduct subverted the Doping Control Process and was intended to do so.

The Decision subsequently explained:

> The 'law' being settled, we identified the central issues were whether UKAD had proven (namely made us comfortably satisfied) that [Mr Barlow]:
> 59.1. By his conduct 'tampered' with the doping control process; and
> 59.2 Did so with the intention of subverting the doping control process.

10. The real issue between the parties was whether or not Mr Barlow had intended to subvert the doping control process. Before us Mr Welch, correctly in our view, accepted that Mr Barlow's behaviour towards Mr Dean had in fact subverted the doping control process. However, it was Mr Barlow's case that that this had not been his intention. He thought that Mr Dean was a burglar. This was the explanation for his confrontational behaviour. His partner, Ms Blackwell, also gave evidence that both of them thought that Mr Dean was a burglar rather than a doping control officer.

11. The Tribunal did not accept the evidence of Mr Barlow and Ms Blackwell. They found that neither of them had genuinely thought that Mr Dean was a burglar. They were satisfied that Mr Dean had both explained that he was at the house to carry out a drug test and displayed his identification badge. Mr Barlow had indeed known, when he confronted Mr Dean, that the latter was a doping control officer. And they rejected as incredible Mr Barlow's claim, supported by his partner, that he had thought that Mr Dean was a burglar. Having rejected what the Tribunal termed the "burglar explanation", the Tribunal could see no other rational explanation for Mr Barlow's conduct other than that it was intended to subvert the doping control process.

12. In the result the Tribunal was comfortably satisfied that Mr Barlow had committed the alleged anti-doping rule violation. Given that finding, it was not suggested that there was any basis for not imposing the standard four year period of ineligibility on Mr Barlow. This was the sanction imposed.

THE APPEAL

13. Mr Barlow now appeals the decision. He does so on the footing that the Tribunal were led into making irrational findings of fact in three critical areas by a process of false reasoning. Given that this is essentially an appeal on fact, we should remind ourselves of the proper approach to such an appeal.

14. We were referred by Ms Riley on behalf of UKAD to the National Anti-Doping Panel appellate decision in Bernice Wilson v UKAD, 19 January 2012. In our view the Appeal Tribunal in that decision at paragraph 35.2 accurately summarised the applicable principles as follows:

> Where the Appeal Tribunal is being asked to reverse findings of fact made by the Tribunal below, the following principles apply:
>
> 35.2.1 It is not the Appeal Tribunal's function to consider what findings and conclusions it would have made on the evidence before the Tribunal below, and substitute those findings and conclusions for the findings and conclusions of the Tribunal below.
>
> 35.2.2 This is particularly the case when those findings were based on assessment of the relative credibility of witnesses who testified below but are not testifying on appeal.
>
> 35.2.3 The Appeal Tribunal should only interfere with those findings and conclusions if it concludes that they were clearly wrong.

15. It is right to record that Mr Welch for Mr Barlow did not dissent from the general principle. He acknowledged that an Appeal Tribunal will be wary of interfering with factual findings. Nevertheless, his essential case was that the factual findings of which he complains were induced by errors of reasoning and, but for those errors, could not have been made.

SUBMISSIONS FOR MR BARLOW

16. Mr Welch advanced three categories of instance where the findings below were submitted to have been irrational.

17. First, he submitted that the Tribunal's approach to the evidence of Mr Dean was flawed. The Tribunal correctly said at paragraph 58 of the Decision that the

evidence of Mr Dean should not be given any greater weight simply by reason of his being a doping control officer. However, Mr Welch submitted that in reality the Tribunal merely paid lip service to this approach. It was plain that the Tribunal attached disproportionate weight to the evidence of Mr Dean and rejected the evidence of both Mr Barlow and Ms Blackwell purely because he was a doping control officer. This emerged particularly from what the Tribunal said at paragraph 65.1 of the Decision. Mr Welch referred us to some inconsistencies in Mr Dean's evidence and passages in the transcript of the oral evidence of Mr Dean where Mr Dean acknowledged that on occasion he might have been "getting mixed up" or "might have missed things out".

18. The second area where the Decision was said to be flawed related to the Tribunal's critical finding that Mr Barlow knew that Mr Dean was a doping control officer. This finding was, of course, inconsistent with Mr Barlow thinking that Mr Dean was, or even might be, a burglar. It appears that in oral evidence Mr Barlow said that in his own mind it was "50/50" as to whether Mr Dean was a doping control officer. At paragraph 65.4 of the Decision the Tribunal noted what Mr Barlow had said and had regard to that statement on the issue of what he knew. Mr Welch submitted that here the Tribunal fell into error. To say that someone suspects a possibility falls well short of saying that he knows it to be the case.

19. Thirdly, Mr Welch submitted that the basis on which the Tribunal rejected the evidence that Mr Barlow and Ms Blackwell believed Mr Dean to be a burglar was flawed. UKAD had to establish that Mr Barlow intended to subvert the doping control process. At most the evidence was consistent with Mr Barlow thinking that Mr Dean could have been a doping control officer or could have been a burglar. If Mr Dean were possibly a burglar, Mr Barlow could not have intended to subvert the doping control process. Mr Welch further submitted that the Tribunal's reasoning at paragraphs 65.5 – 66.7 showed too great a reliance on ex post facto rationalisation. It was only with hindsight that the Tribunal could come to the conclusion that Mr Barlow could not have believed Mr Dean to have been a burglar. But what matters is Mr Barlow's state of mind at the time; it is

scarcely surprising if he were not analysing matters with logical thought at the time.

UKAD'S SUBMISSIONS

20. For UKAD Ms Riley put at the forefront of her argument that it would be wrong for an Appeal Tribunal to reverse findings of fact by a Tribunal which had heard the evidence over two days and conducted a careful analysis of it. The Tribunal had not only had the advantage of hearing the witnesses; they had in addition been able to view the neighbour's contemporaneous CCTV of Mr Dean's attendance at the house. She agreed that it had been for UKAD to establish that Mr Barlow had intended to subvert the doping control process. But this was a case which depended essentially on the credibility of the witnesses. The Tribunal had made a clear finding that Mr Barlow knew that Mr Dean was a doping control officer. And they had rejected as incredible the claim that Mr Barlow could possibly have thought that Mr Dean was, or even might have been, a burglar.

21. The Tribunal had expressly stated that it applied exactly the same standards by which to assess Mr Dean's evidence as they applied to the evidence of other witnesses. There was nothing in the Decision to suggest that they had not done so. As for the Tribunal's reference to Mr Barlow saying at the hearing that he thought it was "50/50" whether or not Mr Dean was a doping control officer, that statement simply undermined Mr Barlow's previous case, i.e. that he thought Mr Dean was a burglar. As for the veracity of Mr Dean's evidence, it was notable that he had made a witness statement shortly after the event in contrast to the much later date when Mr Barlow and Ms Blackwell made their statements. Whilst there may unsurprisingly have been some discrepancy of detail, Mr Dean's evidence in all important respects accorded with his witness statement and was found by the Tribunal to be credible.

DISCUSSION

22. It is convenient to take each of the three categories of complaint in turn. We will then give our overall conclusion on the appeal.

23. At paragraph 58 of the Decision the Tribunal stated:

> If there are situations where an official's evidence might appropriately be cloaked with a 'presumption of credibility', this was not one of them. While the fact he was a DCO [doping control officer] explained why MD [Mr Dean] attended the property, there is no feature of that occupation or his experience which in our judgment warranted his evidence being afforded some (unspecified but) elevated status. We judged his evidence by exactly the same (fair) standards we applied to (for example) the Respondent's evidence.

We are unable to agree that the Tribunal did not do what it said. It is true that in accepting the evidence of Mr Dean the Tribunal did refer to his being an experienced doping control officer. But that was in the context of assessing the likelihood of his telling the truth. He would have had no reason not to. He would have been likely to have acted in accordance with the standard practice of anyone in his occupation.

24. The Tribunal noted that on a number of important matters both Mr Barlow and Ms Blackwell said that Mr Dean was lying. In rejecting this suggestion, the Tribunal pointed out:

> He would have every reason to tell the Respondent who he was and why he was there. We cannot see why he would not. Further, to do so would be in keeping with standard practice …

In our view, this was not to accord the evidence of Mr Dean some special status. The Tribunal was simply pointing out that Mr Dean would have had no motivation for not telling the truth. The same applies to the Tribunal's acceptance of Mr Dean's evidence about what Mr Barlow had said to him at the time. There was no reason why Mr Dean should be lying.

25. Ultimately, the Tribunal preferred the evidence of Mr Dean to the evidence of Mr Barlow and Ms Blackwell. The Tribunal were entitled to do so, and we can see no error in their approach or ground for interfering.

26. The second complaint advanced by way of appeal concerns the Tribunal's reference to what Mr Barlow said at the hearing about his mindset having been "50/50" whether or not Mr Dean was a doping control officer. The relevant passage from the Decision is at paragraph 65.4:

> On the issue of knowledge we also have regard to the Respondent's concession that at this point it was "*50/50*" as to whether MD was a DCO.

> He must have formed that view at the time and based on what he saw and heard. Therefore at the time and before he invited him in, on his own case, it was at least equally possible in his own mind that MD may very well have been a DCO (and not a would-be intruder).

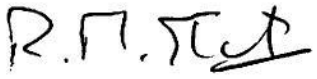
27. Mr Welch submits that for Mr Barlow to think Mr Dean might or might not be a doping control officer does not justify a finding that he knew Mr Dean was a doping control officer. However, it is important to bear in mind that this statement by Mr Barlow was not the only justification for the Tribunal's finding of knowledge; it was only one factor. The important feature of what Mr Barlow said at the hearing was that it undermined the case which he had been advancing up to the hearing, that is that he thought Mr Dean was a burglar.

28. The third Ground of Appeal is that the basis on which the Tribunal rejected the evidence of Mr Barlow and Ms Blackwell thinking Mr Dean to be a burglar was flawed. We should point out that the Tribunal could scarcely have held that Mr Barlow did definitely think that Mr Dean was a burglar when he claimed at the hearing to have been "50/50" about his being a doping control officer. We have carefully considered paragraphs 65.5.1 to 66.7 of the Decision, and in our view there was ample justification for the Tribunal deciding as it did. In reality, the points made by Mr Welch do no more than rehearse the factual arguments advanced at the hearing below. It seems to us that the assessment of the evidence, including the CCTV footage, was essentially a matter for the Tribunal. We do not think that the Tribunal can properly be criticised for their careful assessment of the facts by reference to the likelihood of events.

29. Whilst our own evaluation of the evidence is irrelevant, we have to say that we can quite understand how the Tribunal came to the view that various aspects of the evidence were quite inconsistent with any genuine belief by Mr Barlow or Ms Blackwell that Mr Dean was a burglar. However, it is not our function to trawl over the evidence in the absence of some error of approach or irrationality by the Tribunal. We agree with Ms Riley that no error of law or misapplication of principle can be shown.

CONCLUSION

30. For the reasons set out above we must dismiss the appeal. In our view no ground has been shown for interfering with the factual findings of the Tribunal. Neither party sought an order for costs.



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Robert Englehart QC
Chairman on behalf of the Appeal Tribunal
6 September 2016, London

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