

NATIONAL ANTI-DOPING PANEL APPEAL TRIBUNAL Case No. 120036 ON APPEAL
FROM THE DECISION DATED 12 OCTOBER 2010

David Phillips QC
Chris Quinlan
Judy Vernon

BETWEEN

MATTHEW DUCKWORTH

Appellant

and

UK ANTI-DOPING

Respondent

DECISION

Introduction

1. This Appeal Tribunal has been appointed to hear and determine an Appeal brought by Matthew Duckworth against the Decision of the National Doping Panel first instance Tribunal delivered on 12 October 2010. The Panel imposed a period of 2 years ineligibility for an anti-doping rule violation in the finding of a prohibited substance, methylhexanamine (MHA), in a routine anti-doping test carried out on 8 August 2010.
2. The Appeal centres on the fact that with effect from 1 January 2011 the WADA Prohibited list status of MHA will change. MHA will cease to be a S6 non-specified prohibited substance and will instead become a specified prohibited substance. Mr Duckworth invokes the principle of *lexmitior*, and argues that the case falls within Article 10.4 WADA Code. UK Anti-Doping accepts both the application of the principle of *lexmitior*, and that Mr Duckworth has brought himself within Article 10.4 WADA Code so that the Appeal Tribunal had discretion as to the sanction that should be imposed.
3. For the reasons explained below we were satisfied that although he was not without fault, Mr Duckworth had established substantial mitigation. We therefore concluded in

the exercise of our discretion that the appropriate sanction should be a period of 6 months ineligibility commencing on 1 September 2010.

Factual background

4. Mr Duckworth is 21 years of age. He lives in Ripley, Derbyshire. He has been playing rugby league since the age of 6, and at a professional level since the age of 15. He currently plays for the York City Knights. He has had numerous anti-doping lectures and is aware of the Rugby Football League guidelines, rules and regulations relating to drugs and supplement use. In August 2008 he had a car accident in which he sustained very serious injuries, breaking four bones in his neck and suffering a stroke which temporarily paralysed the left side of his body. He underwent physiotherapy rehabilitation, learning how to walk again, to walk upstairs and to run, became fit again and was able to return to rugby league in May 2009. It is a tribute to both his commitment and his physical abilities that he was able to do so.
5. Mr Duckworth led a physically demanding life. In the summer of 2010 he was working as a manual labourer. His work hours were 7am to 5pm, but he would get up at 5am in order to go to the gym before starting work. On 3 evenings a week Mr Duckworth trained at York: on the evenings that he did not train at York he would normally spend some further time at the gym.
6. In common with many other players Mr Duckworth took a variety of supplements. These included Jack3d, which he had seen advertised for sportsmen. In his witness statement prepared for this Appeal Mr Duckworth says that he believed that Jack3d would give him increased alertness and focus so as to help him through his early mornings. This is in contrast to what he had said in his witness statement prepared for the first instance hearing, where he had said that Jack3d was a *pre workout supplement to promote sports endurance*. Understandably, this was a statement to which the first instance Tribunal attached considerable significance.

7. Mr Duckworth gave details of the steps that he had taken to follow what he believed to be prudent anti-doping guidance before taking Jack3d. He checked every ingredient of Jack3d on the Global Drug Reference website, but received no warning. He sought what he believed to be independent advice from MonsterSupplements.com by way of an e-mail enquiry. That enquiry was made under an alias, because Mr Duckworth wished to protect his anonymity. The response was that Jack3d *conforms to all regulations so you will have no problems if you are tested....* Mr Duckworth was satisfied with the result of his enquiries and concluded that Jack3d could be taken safely. The Tribunal notes that Mr Duckworth did not seek to confirm the result of his enquiries with a suitably qualified sport professional, or other medical advisor.
8. Mr Duckworth began taking Jack3d in mid July 2010. He made no secret of the fact that he was taking Jack3d, but discussed it openly with other players. One such player, Jason Freer, confirmed that Mr Duckworth had discussed with him the fact that he was taking Jack3d. Mr Freer states that Mr Duckworth told him that he had confirmed the legality of Jack3d on the internet, and that he was taking it because it *helped him feel awake and helped him focus*. Mr Duckworth's evidence was that Jack3d *helped me wake up and get out in the mornings*, but that he did not take it on match days due to pre-match nerves.
9. Mr Duckworth was tested on 8 August 2010 after York City Knights had played Oldham at home. He completed Section 22 of the sample collection form by listing a variety of innocent products. He did not, however, mention Jack3d. Mr Duckworth's explanation for this omission was that he was put under pressure by the tester to hurry the completion of the form. That pressure, coupled with the fact that he needed to travel 90 miles to play in a 5 a side football match, led Mr Duckworth to curtail full completion of the section. Jack3d and another supplement (BCAA) were therefore not mentioned.

10. Mr Duckworth's sample proved positive for MHA. He was provisionally suspended with effect from 9am on 1 September 2010. On 16 September 2010 the Rugby Football League distributed a Warning Note to its member clubs, alerting them to the danger of the presence of MHA in a number of supplements. The Note sensibly drew attention to the obligation on any player to satisfy himself of the suitability of any substance that he intended to take. The Tribunal notes, however, that the tenor of the Note is that the risk of the presence of MHA in supplements is something that had only recently been fully appreciated.

11. The first instance hearing took place on 5 October 2010. Mr Duckworth's witness statement and skeleton argument had been prepared by Dave Woods, the head coach of York City Knights. The first instance Tribunal accepted that the *lex mitior* principle applied and proceeded to examine the three questions relevant to the exercise of its jurisdiction under Article 10.4 WADA Code, namely –

- (1) how MHA had entered Mr Duckworth's body;
- (2) whether it had been intended to enhance sports performance;
- (3) whether this was Mr Duckworth's first violation.

The first instance Tribunal accepted and adopted UK Anti-Doping's concession that MHA had entered Mr Duckworth's body when he took Jack3d, and that this was Mr Duckworth's first violation. However, the first instance Tribunal found that Mr Duckworth had taken MHA to enhance sports performance. Of the reasons given by the first instance Tribunal for that finding the first was the fact that in his witness statement Mr Duckworth had expressly accepted that to be the case. The first instance Tribunal therefore ruled that Mr Duckworth had failed to bring the case within the ambit of Article 10.4 WADA Code and imposed a period of 2 years ineligibility.

12. The Appeal was heard on 7 December 2010. Mr Duckworth was represented by Daniel Saoul; UK Anti-Doping was represented by Richard Redman. Both advocates had prepared succinct and helpful skeleton arguments, and both presented their respective

cases economically and realistically. The Tribunal is grateful to them both. The work that they had put in made our task correspondingly simpler. We also record our thanks and appreciation to Mr Duckworth's solicitors, Withers, who produced an appeal bundle that is a model of its type.

De novo hearing

13. Mr Duckworth submitted that the Appeal should be by way of a *de novo* hearing. He argued that the case came within the provisions of paragraph 12.4.1 of the National Anti-Doping Panel Procedural Rules. Mr Duckworth relied principally on the fact that the absence of legal representation before and at the first instance hearing led to an erroneous finding of fact, and that the interests of justice required that he should be permitted a rehearing with legal representation. UK Anti-Doping did not oppose that application. The Appeal proceeded by way of a *de novo* rehearing.

The issue

14. Mr Duckworth relied upon the *lex mitior* principle, and argued that the case fell within the provisions of Article 10.4 WADA Code, so that the Tribunal had a wide discretion as to penalty. UK Anti-Doping had accepted at first instance that Mr Duckworth had shown how MHA had entered Mr Duckworth's body, and that this was Mr Duckworth's first violation. Those concessions were maintained at the hearing of the Appeal.
15. Before the first instance Panel UK Anti-Doping had submitted (and the Panel had accepted) that Mr Duckworth had failed to discharge the burden of showing that he had not taken MHA with the intention of enhancing sports performance. However, after hearing the evidence at the hearing of the Appeal UK Anti-Doping accepted that Mr Duckworth had not taken Jack3d to enhance his sports performance: its position was that Mr Duckworth had adduced corroborating evidence to establish that absence of improper motive to its (UK Anti-Doping's) comfortable satisfaction.

16. We are satisfied that that concession was properly made, and that on the evidence presented on the Appeal (as distinct from that that was before the first instance Panel) Mr Duckworth has established to our comfortable satisfaction that he had not taken Jack3d with the intention of enhancing sports performance. Our reasons for this decision are as follows –

- (1) Mr Duckworth took reasonable (but not sufficient) steps to satisfy himself that Jack3d could be taken safely. We take into account that although he had received some anti-doping training there were no medical facilities at York City Knights from which immediate advice would have been available. Further, Mr Duckworth is a young man who would not have found it particularly easy to conduct his own research – we note that he required assistance from Mr Woods in the preparation of the witness statement and the skeleton argument for the first instance hearing. Having seen Mr Duckworth give evidence we accept that he had taken what he considered to be genuine steps to satisfy himself that Jack3d could be taken safely.
- (2) We are satisfied that the risk of the presence of MHA in supplements is not something that was widely recognised in the summer of 2010. The Warning Note issued by the Rugby Football League on 16 September 2010 demonstrates that this is an area in which knowledge is developing.
- (3) Mr Duckworth made no attempt to conceal the fact that he was taking Jack3d, but discussed it openly with, and recommended it to fellow players. This is not the action of someone who felt that he had something to hide.
- (4) We accept Mr Duckworth's evidence of the circumstances in which he came to complete the sample collection form. We are satisfied that there was no intention to conceal the fact that Mr Duckworth was taking Jack3d.
- (5) We accept Mr Duckworth's evidence that he had not taken Jack3d on the day of the match, which, if his purpose had been to enhance sports performance, he would have done.

17. We are therefore satisfied that Mr Duckworth has established that the case falls within the provisions of Article 10.4 WADA Code, and that we therefore have a discretion to reduce or to eliminate the period of ineligibility.

Disposal

18. Article 10.4 WADA Code provides that the criterion by which the disposal of the case shall be determined is the player's degree of fault. Although we have a wide discretion as to disposal, clearly that discretion must reflect that degree of fault. Further, it must take account of the caution expressed in the commentary to Article 10.4 WADA Code namely, *It is anticipated that the period of ineligibility will be eliminated entirely in only the most exceptional cases.* We must also ensure that the disposal in this case is consistent with the disposals in other similar National Anti-Doping Panel cases. We pay particular attention to the disposal and observations in the *Rachel Wallader* Appeal, which can properly be regarded as akin to a benchmark case.
19. Although Mr Duckworth has established that he took reasonable steps he remains, as he realistically recognises, at fault. As the Tribunal said in *Wallader* (at paragraph 48) –

Any athlete who takes a supplement without first taking advice from a qualified medical practitioner with expertise in doping control places herself at real risk of committing a rule violation. Only in the most exceptional cases could such an athlete expect to escape a substantial sanction if a Prohibited Substance is then detected.

With the benefit of hindsight it is now clear to Mr Duckworth that he should have sought independent, qualified advice before taking Jack3d. We consider that in failing to do so he was plainly at fault.
20. Ultimately each case must turn on its own particular circumstances. We have considered the facts and disposal in *Wallader* and have concluded that Mr Duckworth's degree of fault is greater than in that case. A lengthier period of ineligibility is therefore required. Having regard to that fact and our assessment of Mr Duckworth and the

particular circumstances his case we have concluded that the proper disposal is a period of ineligibility of 6 months.

Conclusion

21. We therefore allow the Appeal and substitute a period of ineligibility of 6 months commencing at 9am on 1 September 2010, the time on which the provisional suspension was imposed. As this is a Decision on Appeal under Rule 13 of the National Anti-Doping Panel Procedural Rules, neither the athlete nor UK Anti-Doping has any further right of appeal.

David Phillips QC
Chris Quinlan
Judy Vernon

Signed on behalf of the Tribunal

10 January 2011

A handwritten signature in blue ink, appearing to read 'D. Phillips', with a horizontal line underneath.

David Phillips QC