

FOOTBALL ASSOCIATION REGULATORY COMMISSION

In the matter of disciplinary proceedings brought pursuant to the Football Association Doping Control Programme for the season 2012-2013

THE FOOTBALL ASSOCIATION

- and -

LEWIS GIBBONS

Commission: Christopher Quinlan QC (Chairman)

Peter Clayton

Gary Mabbutt

Robert Marsh (Secretary to the Commission)

Date: 18 December 2012

Venue: Wembley Stadium, London

Present: Lewis Gibbons

John Bramhall, Professional Footballers Association ('PFA')

Liz Coley, Secretary Sunderland AFC

Football Association ('FA')

Amina Graham, Representative for The FA

Observers

Jason Torrance, UK Anti-Doping

Mr and Mrs Gibbons (parents)

DECISION

Introduction

1. We were appointed to hear and determine a misconduct charge brought against Lewis Gibbons ('LG') arising out of his commission of a doping rule violations contrary to Rule E25 of the Football Association's ('FA') Rules of Association when on 22 September 2012 he provided a sample of urine which contained benzoylecgonine (a metabolite of cocaine) and 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid. The letter by which he was charged states that he was being charged with "2 breaches of Regulation 3 of the FA Doping Control Programme Regulations 2012-2013 ('FADR').
2. This document records our decision and the reasons for it.

The Regulatory Scheme

3. Lewis Gibbons ('LG') was born on 22 November 1994. He is now eighteen years of age but was seventeen when he provided the sample. At the relevant time he was in his second year of a Scholarship at Sunderland AFC. Therefore he is bound by the Rules of the Football Association ('the Rules'). Part E of the Rules is headed "Conduct". Pursuant to Rule 1(b) defines "misconduct" to include a breach of "the Rules and Regulations of The Association and in particular Rules E3 to 28".
4. Rule E25, entitled "Doping Control" states: "A Participant shall comply with the provisions of any doping control regulations of The Association from time to time in force". FADR 2 provides that "committing a doping offence will be regarded as amounting to a breach of the [FADR] which must be complied with pursuant to Rule E25 of the Rules...".
5. Pursuant to FADR 3 an anti-doping rule violation is committed if a Prohibited Substance or its metabolites or markers is present or detected in a sample provided by a player. FADR 3(b) provides that it is the Player's duty to ensure no prohibited substance(s) or its metabolites or markers enters his body, tissues or fluids or is present or detected there. It further provides that a player is "strictly responsible" for any prohibited substance present in such a sample.
6. Prohibited Substances are defined in Schedule 3 to the FADR. Category S6aNon-Specified stimulants include cocaine; benzoylecgonine is a metabolite of cocaine and so is a Non-Specified stimulant for the purposes of the FAR. 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid is a cannabinoid and listed in Category 8 in Schedule 8.
7. Parts 5-10 of the FADR make provision for the imposition of penalties for doping offences. FADR 29 (Part 5) requires the imposition of minimum penalties set out in FADR 43-62 unless *the Player establishes* that there are grounds to eliminate or reduce such penalties in accordance with FADR 63-79 (Part 9).
8. Both cocaine and cannabis are "*social drugs*" for the purposes of the FADR (see paragraph 5 of the Preamble to the FADR and the definitions in Schedule 2 to FADR). In respect of a first "out of competition" violation a penalty within the following range must be imposed: a minimum of a warning and a maximum of six months suspension (FADR 44). In competition violations attract different penalties: the minimum penalty for a first offence is a minimum suspension of two years (FADR 43(a)). That is subject to the player establishing grounds to eliminate or reduce that period (FADR Part 9).

9. By FADR 63 (Part 9) the Regulatory Commission ('the Commission') "*may replace*" the minimum penalties if the player establishes any of the applicable conditions set out in FADR 65-78. FADR 65-66 apply only to Specified Substances. Cannabinoids are classified as Specified Substances; cocaine is a Non-Specified stimulant. The applicable conditions under FADR 65 require the player to establish:
 - a. The doping offence involves a Specified Substance;
 - b. How the Specified Substance entered his body or came into his possession; and
 - c. There was no intention to enhance sporting performance or to mask the use of a performance enhancing substance.

Subject to FADR 69, the penalty for a first offence can be reduced to "*a minimum penalty of a warning and reprimand without any period of suspension and a maximum of 2 years suspension*".

10. The burden rests upon the player to establish the 'reduction' provisions. In such circumstances the standard of proof is the balance of probabilities (FADR 22), except as required by Parts 8 and 9. By FADR 67 the player must produce corroborating evidence (in addition to his own word) that "*establishes to the comfortable satisfaction*" of the Commission that there was no intention to enhance sporting performance or to mask the use of a performance enhancing substance. Had it proved necessary the player could have sought to rely upon this provision.
11. FADR 68-70 apply where the player establishes no fault or negligence. Rightly it was not suggested that applied in this case.
12. In relation to the cocaine, LG relied upon FADR 71. If he establishes:
 - a. That he bears no significant fault or negligence and;
 - b. Proves how the Prohibited Substance entered his body

Then the minimum sanction for a first offence may be reduced but the reduced period of suspension may not be less than twelve months.

13. Alternatively he submitted that a suspension of two years was wholly disproportionate to the circumstances of his anti-doping rule violations and so the Commission should disapply the FADR and impose a proportionate sanction.

The Anti-Doping Rule Violation

14. LG admitted (in advance of the hearing and before the Commission) committing the anti-doping rule violation contrary to Rule E25 of the FA Rules of Association when on 22 September 2012 he provided a sample of urine that contained Prohibited Substances benzoylecgonine (a metabolite of cocaine) and 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid. The facts were not in dispute.

15. The sample was provided following an U18 Premier League Youth match played between Aston Villa FC v Sunderland AFC on 22 September 2012. LG played the whole of that match. Under the FA Anti-Doping Programme he was one of the players selected to provide a urine sample after the game. He did so. The sample was sealed and marked and the necessary and appropriate forms completed according to procedure. He did not declare that he had taken either substance.
16. There was no issue in respect of any aspect of the sampling and testing procedure, chain of custody, the laboratory analysis or results thereof.
17. The specimen was sent and the A sample tested. By letter dated 16 October 2012 the Director (Professor DA Cowan) reported that the A sample (A1104532) contained benzoylecgonine and 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid. By letter from The FA (Jenni Kennedy) dated 18 October 2012 LG was informed of the said result and provisionally suspended. The same letter advised him, *inter alia*, of his right to have the B sample analysed.
18. By a letter dated 22 October 2012 from LG, also signed by his father, he (a) declined to have the B sample analysed (b) admitted taking "the substances" and (c) indicated that he would provide a "detailed explanation" by the end of 26 October 2012.
19. In an email sent from his father's account at 17.48 on 25 October 2012 he set out his explanation. He said he tried "a small joint and a little bit of cocaine" at a party during the early evening of 21 September, the day before the match in question. He described it as a "moment of madness". As soon as he had done so he said he "felt sick...knew [he] had done something wrong and...felt such an idiot". He continued by describing what he did as "stupid" and expressed regret for the "shame" brought on him, his club and family. He ended the email by expressing the hope that he would be able to "put this mistake...behind [him] and progress [his] professional football career".
20. He was interviewed by Jenni Kennedy and Blake Lewendon (Football Regulation Administrator), in the presence of his father, Kevin Ball, Senior Development coach, Sunderland AFC and John Bramhall on 1 November 2012. He repeated his account, he said it was the first and only time he had taken drugs. Initially he refused drugs when offered to him by a friend. He then relented and took them knowing they were "banned". At the time he was experiencing relationship difficulties with his girlfriend, but he did not proffer that as an excuse.
21. The FA charged LG by way of a letter dated 19 November 2012. The letter states that he was "hereby charged in accordance with FA Rule E25 for two breaches of Regulation 3" of the FADR. He replied admitting the breach and requested a personal hearing.

22. The burden of proving an anti-doping rule violation rests upon The FA (FADR 21). In light of the player's admissions it discharged that burden and established the said violation.
23. It is LG's first such violation.

Lewis Gibbons's Case

24. His account remained as articulated in the said email and during interview. Mr Bramhall spoke on LG's behalf; he declined our invitations to speak. Mr Bramhall characterised this as the naïve behaviour of a young man, which he regretted very much. He argued that by the one mistake he risked losing the chance of a professional career. That was the overwhelming likelihood if he was suspended for two years. Such a period of suspension would be wholly disproportionate to what LG had done. This was not a case of a drug cheat, namely a person taking a Prohibited Substance to enhance sporting performance or otherwise gain an unfair advantage.
25. Assisted by Ms Graham (who produced the two decisions) Mr Bramhall relied upon following: *TAS 2007/A/1252 FINA c/Oussama Mellouli & Federation Tunisienne de Natation* and *CAS 2008/A/1490 WADA v USADA & Thompson*.
26. In *Thompson* (a cocaine case) the CAS Panel upheld the arbitrator's decision that the athlete bore no significant fault or negligence where the circumstances included his relative youth, inexperience and his reliance upon coaches.
27. In *Mellouli* the CAS Panel felt able to and did reduce a period of suspension from two years to eighteen months. It doing so it expressed the view that the athlete's case was "*part of those rare exceptional cases where the sanction prescribed by the strict anti-doping rules of a sporting federation may appear neither proportionate with the misconduct of the athlete nor would it be capable of achieving the envisaged goal – that is both to prevent abuse and educate – of the said rules*". Mr Bramhall invited us to reach the same conclusion in respect of LG.
28. He also relied upon (and we have read and considered) a report from Dr Khan (dated 15 November 2012) and the letter from Colin Bland.

The FA's Case

29. Ms Graham did not advance a positive case and did not dispute the circumstances in which LG said he took the Prohibited Substances. She drew our attention to a further decision, namely *CAS2007/A/1364 WADA v FAW and James*. That decision makes

clear (if it were necessary) that good character cannot mitigate culpability so as to reduce the otherwise applicable sanction. In that case CAS found that the player's apparent inability to resist "*peer pressure*" or his ignorance as to the effect of drugs was a circumstance mitigating his fault or negligence significantly or at all.

30. Ms Graham twice sought assistance from (we were told) senior colleagues as to how we should approach the multiple offending in this case. By that we mean the fact that LG's sample contained two Prohibited Substances, one of which was Specified and the other was not, and involving an in-competition sample, attracted potentially different penalties. With the assistance of Mr Torrance (who was present to observe) she drew our attention to FADR 56 but otherwise could not help.

Determination

31. We consider the appropriate way to deal with this case (of Misconduct) is to treat it as a single anti-doping violation committed by the presence of multiple substances in his sample. By virtue of FADR 56 the "*penalty imposed shall be the more severe penalty*". The minimum penalty for the presence of cocaine (in-competition) is a suspension of two years unless LG can establish that FADR 71 applies.
32. Cocaine is a powerful central nervous systems stimulant. The dangerous effects of cocaine are part of the reason for its prohibition. Whether snorted or smoked as crack, cocaine damages the nervous, respiratory and circulatory systems and its use can lead to addiction, dependency, anxiety and psychotic disorders. It is abused in sport both for its properties as a stimulant and for the psychological effects which can "permit" enhanced short term extreme physical activity. On use cocaine breaks down spontaneously into its metabolites. Those metabolites can remain detectable in urine for periods in excess of seven days. As a consequence of its capacity to act as a powerful central nervous system stimulant and the risk of serious injury resulting from its use it is not a Specified Substance.
33. We have no reason to doubt LG's contention that in this particular case the cocaine was taken the night before the match after which the in-competition testing took place. It was taken in a 'social' setting with no intention to improve his sporting performance. Nonetheless as he admits
- a. He knew he was taking cocaine;
 - b. He knew it was "banned";
 - c. He took it with another drug he knew also to be banned, namely cannabis; and
 - d. He has received some anti-doping education.
34. We note that the official commentary to WADA Code Article 10.5 (the derivation of FADR 71) is applicable in "*truly exceptional cases*". For example, a mislabelled vitamin or sabotage. This is a long way from those situations. He is young but not

naïve. He knew what he was doing and did it deliberately. In those circumstances we cannot say, applying the FADR 71 properly, that he has satisfied us that he bears no significant fault or negligence.

35. The second point argued for the player is that to impose a period of suspension ineligibility of two years for a first violation would be disproportionate.
36. It is clear that under the FADR, consistent with the WADA Code, there is no power to disapply or mitigate the mandatory sanction of two years' suspension imposed for a first violation, otherwise than under the provisions of FADR 65 (Specified Substances) or 68-72 (Exceptional Circumstances). We cannot improve upon the observations of the NADP in *RFL v George Flanagan*¹

“Those provisions are clearly intended to ensure that in appropriate cases, where it is established that the substance was not intended to be performance enhancing or the athlete was not at fault (or significantly so), there is discretion given to the anti-doping tribunal as to the period for which the player is suspended. So the scheme under the WADA Code 2009 does allow for acceptable exceptions to the necessary principle of strict liability with fixed penalties. If the player cannot produce the evidence to bring himself within the two relevant exceptions...then he has no grounds to challenge the imposition of a fixed period of ineligibility.”

37. The basis of his argument is that LG did not take the cocaine with the intention of enhancing his sporting performance. We accept that but the FADR enable a player to seek a reduction of the period of ineligibility on that ground, but only in respect of Specified Substances and only if he can satisfy FADR 66. If the player cannot satisfy the conditions in FADR 66 then in our view there is nothing unfair or disproportionate in imposing the fixed period of ineligibility required.
38. It also needs to be remembered and pointed out that S6 stimulants, such as cocaine, are prohibited in-competition, in contrast to anabolic agents and the other substances under categories S1 to S5 which are generally prohibited. In competition, cocaine has the potential in certain circumstances to have a performance enhancing effect and thus affects the principle of fair competition between athletes.
39. *Mellouli* is a decision defendant upon its own facts. Further, It is of note that the CAS Panel described it as one of “those rare exceptional cases” (paragraph 97). It was also a decision reached some years ago, under an older version of the WADA Code. Indeed the Panel observed that the WADA Code was “currently in a phase of revision...and the new [Code] will probably contain a more satisfactory system of sanctions”.

¹Decision 18 May 2009

40. Even if the proportionality argument runs, it would not avail LG. A suspension of two years in the context of the WADA Code derived sanctions is not disproportionate for LG where he
- a. Knowingly took cocaine;
 - b. Which he knew was “*banned*”;
 - c. And at the same time knowingly ingested another “*banned*” drug, namely cannabis.
41. FADR 80 provides that if “*aggravating circumstances*” are established which “*justify a period of suspension greater than the standard sanction*” the Commission is “*shall*” increase the sanction up to a maximum of four years. Examples of “*aggravating circumstances*” in FADR 82 include multiple substances involved in the anti-doping rule violation. That is precisely the situation here. However given the circumstances of this case not least his prompt admission (FADR 81) we concluded that an increase in the suspension of two years was not justified.

Commencement of suspension

40. The FA provisionally suspended LG by its letter 18 October 2012. We were invited by Mr Bramhall to apply FADR 35 & 36 and to backdate the start of the suspension to 22 September 2012, the day the sample was taken. The FA did not oppose that submission. However, once we established that he played a further game the following week (against Manchester United on 29 September) it seemed to us perverse for any period of suspension from football to include a period when he was playing. Therefore, in our judgment, the appropriate starting point for commencement of the suspension is the date of the FA’s provisional suspension, namely 18 October 2012.
41. His status during his suspension is as provided by FADR 37(a): he cannot participate in any football match or any other football related activity other than anti-doping education or rehabilitation programmes.
42. With effect from the 18th October 2014 (namely the day he is free to play) and for a period of two years thereafter, the Player will be subject to designated or target testing as provided for by FADR, Schedule 1, paragraph 9 and the FA Disciplinary Procedures Regulation 8.4.
43. The hearing fee is to be retained by the FA. We make no order for costs of the hearing.

Postscript

44. It is to be hoped that football players in particular and sportspersons in general, who may be tempted to use cocaine and other narcotics for 'recreational' purposes realise the very substantial risk that they run of an adverse analytical finding as well as appreciating the serious dangers to their physical and psychological health associated with the use of cocaine.

Summary

45. For the reasons adumbrated the Commission found as follows -

- a. Lewis Gibbons committed anti-doping rule violations, namely the presence in his urine sample taken on 22 September 2012 of benzoylecgonine (a metabolite of cocaine) and 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid.
- b. The appropriate penalty is a period of suspension from all football and football activities for a period of two years.
- c. The suspension is effective (i.e. commences) from the date the FA provisionally suspended the player, namely 18 October 2012.
- d. He will be subject to target testing for a period of two years from 18 October 2014.
- e. The hearing fee is to be retained by the FA.
- f. There is no order for costs of the hearing.

46. The Player has a right of appeal as provided by FADR Part 11 and the Disciplinary Regulations.

Christopher Quinlan QC
Chairman
Regulatory Commission



19 December 2012