

**IN THE MATTER OF RUGBY FOOTBALL UNION DISCIPLINARY
PROCEEDINGS CONCERNING REGULATION 20 OF THE RUGBY FOOTBALL
UNION
AND REGULATION 21 OF WORLD RUGBY (FORMERLY CALLED THE
INTERNATIONAL RUGBY BOARD)**

B E T W E E N:

THE RUGBY FOOTBALL UNION

-and-

PHIL ROBINSON

**DECISION OF THE INDEPENDENT
PANEL**

Panel: Peter Fraser QC
Christine Bowyer-Jones
Dr Julian Morris
Hearing: 5 February 2015

Representation:

For the RFU: Jane Mulcahy QC
For the Player: Daniel Saoul

Decision

1. The Panel imposes a two year period of Ineligibility on Mr Phil Robinson (“the Player”) commencing on 27 September 2014. The period expires at midnight on 26 September 2016. The Player’s status during the period of Ineligibility is as provided by IRB¹ Regulation 21.22.13. This is the unanimous decision of the Panel.
2. There are other factors associated with this Player that we consider below in our reasons, following a request to do so from the Player’s representative. The RFU did not demur from our providing such reasons. We do not consider that our analysis (as opposed to our Decision upon Ineligibility) should be elevated to the status of a

¹ Now World Rugby, IRB at the time the suspension came into effect

formal declaration, because we do not believe that we have jurisdiction to make declarations of that nature.

Factual background

3. A hearing was held in London on 5 February 2015 at which both the RFU and the Player made submissions through their representatives. The Panel also heard from the Player himself. The Player is employed by the Premiership Club Northampton Saints as an analyst. He plays rugby occasionally for Derby and on the occasion of his failed test, played for the Wanderers' team of Northampton Saints ("Saints"). The Wanderers' team is the name for the Saints Academy team, which plays in the A League.
4. Witness statements had been served on behalf of the Player by Mr Ross Appleton, the Head of Analysis at Saints; Mr William "Dusty" Hare, the Recruitment and Development Manager at Saints; Mr Jim Mallinder, the Director of Rugby at Saints; Mr Dickens, the Defence Coach at Saints; and Mr Roxy Fearon, the Head Coach at Derby RFC. A witness statement was also served by the Player himself. The RFU accepted all that evidence and there was no cross-examination.
5. There is no dispute about the facts, which can be recited shortly. The Player, as part of his work as an analyst, was travelling to Gloucester on Monday 8 September 2014 to video the A League match there. In transit on that day, he was asked unexpectedly if he would be a substitute because the team required cover on the bench in his position, namely scrum half. This appears to have been a fairly last-minute team switch caused by a telephone call between Mr Dickens (who was travelling in the car with the Player, driven by Mr Hare) and Mr Mallinder. The Player is not a professional rugby player, but does play for Derby. He was travelling in the car to the match as part of his employment for Saints and not intending to play. He is permitted to play as a so-called "guest player" in the A League even though he is not part of the Academy playing staff.
6. However, two days earlier on 6 September 2014, whilst on a non-rugby related night out with friends, he had taken cocaine. UKAD were in attendance at the match on 8 September 2014 and randomly selected two Saints players for testing, including the

Player. As a result of his recreational drug taking on 6 September 2014, he failed the test due to the presence in his system of a metabolite of Cocaine, category S6A and a Prohibited Substance.

7. This was notified to him in a letter of 26 September 2014 from Angus Bujalski, Head of Legal at the RFU, which provisionally suspended him from 27 September 2014 and notified him of his right to have his B sample tested. That letter also stated “this prohibition includes your work as a rugby analyst for Northampton Saints”. In an e mail dated 23 October 2014 from his representative, the Player admitted the charge and did not require his B sample to be tested.
8. It is therefore the case that this Player has failed a drug test and is guilty of an offence under World Rugby Regulation 21.2.1, namely “the presence of a Prohibited Substance or its Metabolites or Markers in a Player’s Sample”.
9. In November 2014 the IRB changed its name to World Rugby. However, this has no impact upon the regulations that apply in this case, which remain unchanged. Although the hearing was held in 2015 it is the Regulations and WADA Code that applied at the date of the offence that are relevant. The starting point for the period of ineligibility is therefore two years².
10. In our view there are no aggravating factors present in this case and the Player accepts through his representative that the “no fault” or “no significant fault” exceptions contained in the Regulations do not apply to his case. Accordingly, the correct decision is a period of two years’ ineligibility from the date of his suspension.

The issues raised by the Player

11. The Player’s status during the term of ineligibility is set out in the Regulations. In colloquial terms, these were referred to at the hearing as the terms of his ban:

“Status during Ineligibility

A. Prohibition Against Participating During Ineligibility

² With effect from 1 January 2015 this period became four years for a first offence

(i) No Player or other Person who has been declared ineligible may, during the period of Ineligibility, participate in any capacity in a Match and/or Tournament (International or otherwise) or activity (other than authorised anti-doping education or rehabilitation programmes) authorised or organised by [the IRB] or any Union or Tournament Organiser. Such participation includes but is not limited to coaching, officiating, selection, Team Management, administration or promotion of the Game, playing, training as part of a Team or squad, or involvement in the Game in any other capacity in any Union in membership of [the IRB]”.

12. For this Player the issue arises concerning the effect upon his employment with Saints as a consequence of his ineligible status – in blunt terms, given the terms of the ban, can he continue to be employed as an analyst?
13. Mr Saoul accepted on behalf of the Player that he must be banned from playing rugby. Indeed, there could be no sensible argument about that. However, he sought to persuade us that the Player could or should be permitted to continue in the activities required of his employment as an analyst, and he did so by arguing two main points. Firstly, that the terms of IRB Regulation 21.22.13 (in paragraph 11 above) in fact permitted him to do so as a matter of the proper construction of its terms; secondly, that the concept of proportionality could be used by us both as an aid to interpretation, but also generally, to militate against the particular severity of the ban in this Player’s case.
14. The first of those limbs is, with respect to the complex arguments advanced by Mr Saoul, in our view verging on hopeless. The Regulations state, in essence, that “*No Player who has been declared ineligible may..... participate in any capacity in a Matchor activity (other than authorised anti-doping education or rehabilitation programmes) authorised or organised by [the RFU]. Such participation includes but is not limited toadministrationof the Game.....or involvement in the Game in any other capacity in any Union in membership of [the IRB]”.*
15. Even if the first element of the Regulation we have extracted in paragraph 14 does not include, as a matter of construction, video analysis and coding, then the phrase “*involvement in the Game in any other capacity in any Union in membership..*” must

do so. The phrase “involvement in the Game in any other capacity” cannot be confined, as Mr Saoul would have us confine it, only to the following words, so that it covers only someone employed “in any Union”, ie employed by the RFU only. Saints are a Premiership club, and the RFU governs their rugby activities; their players are members of the RFU. The status of ineligibility does not have an effect only upon playing and coaching; it purports, in terms, to include *participation in any capacity in an activity authorised or organised by the RFU including (but not limited to) administration of the Game or involvement in the Game in any other capacity.*

16. A purposive approach to construction of the Regulations does not assist the Player either. We wish to draw specific attention, again, to RFU Regulation 20.1 which sets out the RFU position on doping as follows:

“20.1 RFU Position on Doping

The RFU condemns doping. It is harmful to the health of players, totally contrary to the spirit of Rugby and the RFU is committed to protecting all players fundamental right to participate in doping free rugby.”

In our view this also deals with the proportionality argument, or arguments, which are misguided. It is now well settled in many decisions under the WADA Code that the principle of proportionality is complied with in a ban of this nature. Further, we were referred to the legal opinion of M Jean-Paul Costa³ dated 25 June 2013 on the then-proposed draft 3.0 revision of the WADA Code. In our view, this establishes that the current period of ineligibility which this Player faces of two years is proportionate.

17. It was suggested on the Player’s behalf that the fact that the substance was not performance enhancing, and that the Player was not intending “to cheat”, were points in his favour. There is no doubt that, in all sports, the spectrum of those who fail drug tests will cover a wide range of cases, from at one end a cynical professional engaged in an orchestrated campaign of cheating and deception, to an “innocent” technical failure by an amateur or social participant at the other. However, doping is a strict liability offence, and it should be remembered that cocaine is a Class A drug, possession of which in the United Kingdom is itself a criminal offence. Cocaine may,

³ Amongst other accomplishments he served for 13 years on the ECHR in Strasbourg, five as the Court’s President

or may not, be in widespread use socially in some groups in society; that is rather off the point. It is a prohibited substance under the WADA Code and in rugby.

18. Some of the submissions on behalf of the Player came perilously close to asking us to condone the failed test because the Player did not know, when he took the cocaine on Saturday 6 September 2014, that he would be playing on Monday 8 September 2014; and also that he was assisting the club by agreeing to act as a substitute. These were described as “extremely unfortunate and unusual circumstances” and a “freak series of events”. Those descriptive terms are somewhat exaggerated in our view. The Player took cocaine; he played rugby two days later; he was selected for a test; and he failed. Nothing in that sequence appears extraordinary or freakish. They are undoubtedly unfortunate.
19. If rugby is to be a drug free sport then those who fail drug tests must be dealt with according to the Regulations. This, in our view, is a hard case in the sense that the consequences experienced by the Player will be more severe than if his profession did not involve such close contact with the game. However, if that is an argument at all, it is potentially one in favour of it being even more important that he did not breach the Regulations by failing a drug test, not an argument in favour of leniency and overlooking both the purpose and terms of the Regulations themselves.
20. Reliance was placed upon various authorities, none of which in our view assisted the Player. One previous decision in particular of an Anti-Drug Panel was concentrated upon, namely an earlier case of a PE teacher who has been able (to an extent which was not explored fully, and upon which we did not receive any direct evidence) to continue in his employment in that respect despite the ineligibility imposed upon him in 2013 for an adverse finding concerning Anabolic Steroids. He had a two year ban imposed upon him in the terms set out in the Regulations.
21. The decision of the Independent Panel in that other case told the PE teacher that “he must strictly observe the terms” of the Regulation, and both his employer and the relevant County were informed of his suspension and eventual sanction. There is no doubt that a PE teacher would probably have duties that do not include “involvement in the Game”, not least in teaching (and other activities) concerning sports that may

not subscribe to the WADA Code at all. However, even if this case did provide guidance – and in our view it does not – a PE teacher employed by a school is a world away from that of a technical analyst for a Premiership Club performing activities of the type identified generally by the Player in paragraph 10 of his witness statement.

22. We are not saying that in our view any employment whatsoever by Saints would fall foul of the terms of his ineligibility. At the very least, he would be permitted to continue employment in any authorised anti-doping education or rehabilitation programme, which is expressly permitted by the Regulation itself, and there may be other activities that are permitted. This is a matter for Saints, the Player, and to some extent guidance will doubtless be available from the Anti-Drug Department of the RFU, who are taking a constructive approach and appreciate (as does the Panel) that this Player genuinely intends to observe the terms of his ban. We heard from the Player and his remorse was sincere, as is his appreciation that his recreational drug-taking has led his life to take a dramatically different direction from the one he expected or intended.
23. We indicated our decision orally, after deliberation, at the conclusion of the hearing on 5 February 2015 so that the Player would know the outcome in advance. We indicated that we would provide our written reasons, as we are required to do in any event under the Regulations.

Conclusion

24. In all the circumstances the offence is admitted and given our findings in paragraph 10 above, the correct period of ineligibility is two years. This will run from the date of the suspension, namely 27 September 2014, and is in the usual terms in the Regulations set out in paragraph 11 above.
25. No order for costs was sought by the RFU and we do not make one.

Peter Fraser QC
Christine Bowyer-Jones
Dr Julian Morris

12 February 2015