

**NATIONAL ANTI-DOPING PANEL  
IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES  
OF THE WELSH RUGBY UNION**

*Before:*

Robert Englehart QC

Dr Neil Townshend

Blondel Thompson

B E T W E E N:

UK Anti-Doping Limited

*National Anti-Doping Organisation*

- and -

Shaun Cleary

*Respondent*

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**DECISION**

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**INTRODUCTION**

1. We were appointed as the Arbitral Tribunal to determine a Charge brought by the Anti-Doping Organisation ("UKAD") against the Respondent, Mr Cleary, an amateur rugby union player. Before us UKAD was represented by Mr Graham Arthur. Mr Cleary was represented by Ms Kendrah Potts of Mishcon de Reya who appeared on a *pro bono* basis. We would wish at the outset to pay tribute to Ms Potts for her able and measured submissions in what was far from being a straightforward case for her client. We are grateful to her and to Mr Arthur for their written and oral submissions.

2. The Charge faced by Mr Cleary concerned a metabolite of cocaine discovered when he underwent a urine test following a friendly pre-season fixture on 18 August this year between Maesteg Harlequins RFC, for whose first XV Mr Cleary plays as a hooker, and Bridgend Ravens RFC. Mr Cleary was served with a Notice of Charge from UKAD dated 18 September 2015. Paragraph 3.2 of the Notice read:

UKAD therefore charges you with committing an Anti-Doping Rule Violation ('the ADRV') in respect of the Presence of benzoylecgonine in a sample provided by you on 18 August 2015 numbered A1119265, in violation of ADR Article 2.1.

Mr Cleary immediately admitted the Anti-Doping Rule Violation but informed UKAD that he wished to avoid a sanction on the basis that he was not at fault. This was not acceptable to UKAD, and accordingly this Arbitral Tribunal was convened under the National Anti-Doping Panel Rules. The hearing had been fixed for 5 November 2015 but at the last minute Mr Cleary, who had been acting in person, instructed Ms Potts. In the result, we granted an adjournment of the hearing at Mr Cleary's request and with the consent of UKAD. The hearing was re-fixed for 17 December 2015.

3. The hearing before us raised a few relatively short points and concluded in half a day. Virtually none of the primary facts were in dispute, and there was only one witness who gave oral evidence, Mr Cleary himself. Witness statements from the other witnesses were not challenged and were admitted in evidence by consent. These were witness statements from Mr Ouseley and Professor Cowan for UKAD and a witness statement of Mr Lee Ronan for Mr Cleary.

## **THE FACTUAL BACKGROUND**

4. As mentioned, Mr Cleary plays rugby for Maesteg Harlequins RFC as a hooker. He is an amateur. He plays solely for enjoyment in order to keep fit and spend time with his friends. As a registered member of this club he is subject to the anti-doping rules of the Welsh Rugby Union. That is the governing rugby union body for Wales. It has adopted the UK Anti-Doping Rules ("ADR") in force since 1 January 2015.

These have been approved by the World Anti-Doping Agency ("WADA") as reflecting the WADA Code. All this was common ground between the parties.

5. On Saturday 15 August 2015 Mr Cleary played in a friendly pre-season fixture. Afterwards he consumed a number of beers with the opposition and with teammates before embarking on a night of revelry in Maesteg. Mr Cleary explained that in the course of the evening he not only consumed a fair amount of alcohol but also took cocaine on a few occasions throughout the evening. As he described it: "I took the cocaine purely for recreational purposes as I wanted to have a good night out".
6. Mr Cleary told us in evidence that he knew that cocaine was a banned substance in sport. Indeed, he was aware of Matt Stevens, a very well-known rugby player, having been banned for taking cocaine. He would never have taken cocaine if he had been due to play rugby the following day, for he did appreciate that cocaine remained in the body for some time after ingestion. He did not know for how long the effect remained but he was not due to play a match for another week. On this occasion he gave no thought at all to the consequences of using cocaine. He was simply having what he regarded as a good night out on the town. There was no question of his using cocaine to improve his sporting performance.
7. Mr Cleary's club normally trains on Tuesday evenings and plays matches on Saturdays. However, on Monday late afternoon he learned from a friend, whom he came across in Asda, that the training session scheduled for the following day, 18 August 2015, was to be converted into a friendly match against Bridgend Ravens RFC. Mr Cleary played some 20 minutes in each half of the game. Afterwards a doping control officer from UKAD conducted some random urine tests on a number of players including Mr Cleary. He was fully co-operative and quite unconcerned since he had never taken cocaine to improve his sport performance. The evidence was that the players at the club had never received any training at all in drug misuse. Indeed, the evening of 18 August was the first time that there had ever been any drug tests carried out at the club.
8. Following the urine test Mr Cleary's sample was submitted to the WADA approved laboratory at Kings College London. Analysis returned an adverse analytical finding

of the presence of benzoylecgonine, a metabolite of cocaine. Mr Cleary was charged with a contravention of ADR Article 2.1 due to the presence of a metabolite of cocaine, a Prohibited Substance, on an occasion of competition.

9. Mr Cleary's prompt reaction was an admission of the anti-doping rule violation with an explanation of his having ingested cocaine for purely recreational purposes in the circumstances described above. He wrote in an email to UKAD representatives on 20 September 2015:

Thank you for your letter of 11 September 2015 advising me of the charge against me of violating the WRU's anti-doping rules.

The letter states that the sample I provided on Tuesday 18 August showed positive for benzoylecgonine following a match between Bridgend Ravens RFC and Maesteg Quins RFC. This was a pre-season friendly game, arranged at very short notice and which I knew about just the day before.

I had taken a recreational drug at a social event at the weekend but would not have done so had I known that I would be playing that week. Furthermore had I known that the drug would stay in my system for that time I would not have played in that match. I would therefore ask that you please consider my case under Article 10.4 of the anti-doping rules as I firmly believed that I was out of competition when I took the drug.

This has been a salutary lesson for me. I am devastated that I may have brought embarrassment on myself, my family and my team mates. I have already missed close to 2 years out of the last 4 due to serious injuries including a snapped achilles tendon and a neck injury. I would be very upset to lose more time and sincerely hope that the matter can be resolved quickly.

Thank you for your consideration.

We should like to record that Mr Cleary has been wholly frank throughout. We have no hesitation in accepting that Mr Cleary used cocaine socially and without any thought whatsoever of improving his sport performance.

10. In the light of the above primary facts we now turn to some of the more material provisions of the ADR.

## THE ADR

11. Article 2 of the ADR stipulates *inter alia*:

.....

Athletes or other Persons shall be responsible for knowing what constitutes an Anti-Doping Rule Violation and the substances and methods which have been included on the Prohibited List.

The following constitute Anti-Doping Rule Violations:

**2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample, unless the Athlete establishes that the presence is consistent with a TUE granted in accordance with Article 4**

2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his/her body. An Athlete is responsible for any Prohibited Substance or any of its Metabolites or Markers found to be present in his/her Sample. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an Anti-Doping Rule Violation under Article 2.1; nor is the Athlete's lack of intent, Fault, negligence or knowledge a valid defence to a charge that an Anti-Doping Rule Violation has been committed under Article 2.1.

.....

In the present case it is not disputed that there was an anti-doping rule violation by reason of the presence of a metabolite of cocaine in Mr Cleary's sample. Cocaine is a Non-Specified In-Competition Prohibited Substance under S6a of the WADA 2015 Prohibited List. The issues before us concerned the applicable sanction for the violation.

12. Under Article 10.2 of the ADR the starting point for the period of ineligibility for the presence of a metabolite of cocaine is 4 years. However, this 4 year period would be reduced to one of 2 years if Mr Cleary can establish that the anti-doping rule

violation was not "intentional". Obviously, Mr Cleary's use of cocaine was a conscious and deliberate act. But, for the purposes of the ADR the word "intentional" is a term of art. It bears a particular defined meaning. Article 10.2.3 provides:

As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes or other Persons who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk. .... An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

13. The reduction in ineligibility from 4 years to 2 years may then be further reduced under Article 10.4 or 10.5. Ms Potts realistically does not suggest that Mr Cleary may benefit from Article 10.4; nor does Article 10.5.1 apply. But Ms Potts does contend that Article 10.5.2 is applicable here. This provides:

Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1:

In an individual case where Article 10.5.1 is not applicable, if an Athlete or other Person establishes that he/she bears No Significant Fault or Negligence, then (subject to further reduction or elimination as provided in Article 10.6) the otherwise applicable period of Ineligibility may be reduced based on the Athlete's or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight years.

14. It is also necessary to bear in mind some of the ADR definitions for the purposes of the reliance on Article 10.5.2. Thus, “No Significant Fault or Negligence” is defined as follows:

**No Significant Fault or Negligence:**

The Athlete or other Person establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relation to the Anti-Doping Rule Violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his/her system.

The criteria for “No Fault or Negligence” to which reference is made are:

**No Fault or Negligence:**

The Athlete or other Person establishing that he or she did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his/her system.

Finally under this heading we should set out the definition of “Fault”:

**Fault:**

Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person’s degree of Fault include, for example, the Athlete’s or other Person’s experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete’s or other Person’s degree of Fault, the

circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.

## **UKAD'S SUBMISSIONS**

15. Mr Arthur acknowledged that UKAD was not in a position to challenge Mr Cleary's evidence as to the circumstances in which he came to take cocaine. UKAD had no reason to doubt Mr Cleary's truthfulness. Mr Arthur did not concede that Mr Cleary took cocaine "in a context unrelated to sport performance". He submitted that this was a matter for us. Nevertheless, it was accepted that we might well accept Mr Cleary's evidence. In that case, the applicable period of ineligibility would be 2 years.
16. Mr Arthur submitted that there could be no question here of invoking Article 10.4 for a reduction in the period of ineligibility. There had been a deliberate consumption of cocaine, and Mr Cleary had not exercised any caution, let alone the "utmost caution".
17. The real question here was whether or not Mr Cleary could bring himself within Article 10.5.2 so as to have any ban reduced to a period below 2 years but more than 1 year. This would require Mr Cleary to demonstrate that there had been no significant fault or negligence on his part.
18. Taking each of the points relied upon by Mr Cleary in turn, it was submitted by Mr Arthur that an absence of significant fault or negligence could not be demonstrated:



- (1) The fact that Mr Cleary took cocaine out of competition, when the ADR does not proscribe its consumption, would be irrelevant; the fact of the anti-doping rule violation was not thereby diminished.
  - (2) Secondly, the fact that Mr Cleary did not intend to play a match for another week at the time when he took cocaine also had no relevance; on the evidence he never addressed his mind to the matter at all.
  - (3) Thirdly, the absence of an intent to enhance sport performance was material, if at all, to a reduction in a ban from 4 years to 2 years; it could not then be prayed in aid for a further reduction below 2 years.
  - (4) Fourthly, Mr Cleary's lack of awareness that the effects of cocaine would stay in his system for some 3 days could not assist him when he never applied his mind to this question.
  - (5) Finally, a lack of anti-doping education could scarcely help Mr Cleary when he knew that cocaine was a Prohibited Substance in sport.
19. Lastly, Mr Arthur urged us to bear in mind the evils of a hard drug such as cocaine. He drew our attention to a report of the Advisory Council on the Misuse of Drugs. In Mr Arthur's words: "Cocaine is a socially divisive, harmful and destructive narcotic". The use of cocaine by any sportsman is a significant violation of the anti-doping regime. It should only be sanctioned with a ban of less than 2 years in a most exceptional case. This was not such a case.

### **SUBMISSIONS FOR MR CLEARY**

20. Ms Potts commenced her submissions by inviting us to accept Mr Cleary's evidence and hold that his use of cocaine had not been "intentional" within the ADR meaning. We did rather curtail Ms Potts' submissions in this respect since we informed her that it was our clear view that there was no question here of a 4 year ban. We all firmly considered that this was a case where the starting point for a period of ineligibility was 2 years. Mr Cleary's use of cocaine had clearly not been in a context related to sport performance.
21. Ms Potts realistically did not suggest that we could consider this to be a case of "no fault or negligence" at all. Rather, her submission was that we might consider this

to be a case of “no significant fault or negligence”. On this basis, the 2 year period of ineligibility should be reduced to a rather shorter period, although ineligibility would still have to be for at least a year.

22. In support of her submission that there had been no significant fault or negligence Ms Potts invited us to consider the facts of this case in 2 stages. First, we should consider the question of fault on the Saturday night when Mr Cleary took cocaine. Secondly, we should consider fault on the Tuesday when Mr Cleary participated in a match when the anti-doping rule violation occurred.
23. As far as the Saturday night was concerned, Ms Potts stressed that under the WADA 2015 Prohibited List the use of cocaine was only prohibited in-competition. Mr Cleary would only have been precluded from taking cocaine under the ADR for 12 hours before the match on the Tuesday evening: see the ADR definition of “in-competition”. Of course, Ms Potts was not suggesting that we should signify our approval of cocaine consumption. However, we are not a court of either law or morals, and we were invited to disregard UKAD’s rhetoric on the evils of cocaine. The fact is that for the purposes of the ADR Mr Cleary was not forbidden from taking cocaine out of competition.
24. Turning to the Tuesday, Mr Cleary unexpectedly played in a pre-season friendly match arranged at very short notice. He could not be at fault for not appreciating that there would still remain, after some 3 days, traces of cocaine in his system. It was notable that he had received no anti-doping education at all from his club. This was confirmed by the evidence of Mr Ronan. He was a coach at the club. He had never given or received any training on anti-doping as either player or coach. Nor had he ever been approached by the Welsh Rugby Union about anti-doping training or raising awareness of anti-doping matters at the club.
25. In Ms Potts’ submission the only error made by Mr Cleary when he played in the match on 18 August 2015 was that he failed to appreciate the retention time for cocaine. That could not constitute “significant fault or negligence”, particularly bearing mind the stated criteria for “fault” under the ADR.

26. In support of her submissions, particularly on the relevance of Mr Cleary having received no anti-doping instruction, Ms Potts referred us to two CAS decisions, *Kutrovsky v International Tennis Federation CAS 2012/A/2804* and *Qerimaj v International Weightlifting Federation CAS 2012/A/2822*.
27. Ms Potts also referred us to another CAS decision, *WADA v (1) USADA (2) Thompson CAS 2008/A/1490*. In that case the CAS Panel dismissed an appeal by WADA from an arbitrator's decision to reduce the period of ineligibility to 1 year in the case of an athlete who had taken cocaine at a party two evenings prior to a competition. The decision showed that a finding of "no significant fault" could be justified even in the case of deliberate cocaine taking, especially where an athlete had never received any anti-doping instruction at all.
28. We were urged by Ms Potts not to set the threshold for demonstrating a lack of significant fault or negligence too high. She referred to the observations in the decision in *Hans Knaus v FIS CAS 2005/A/847* at [2]:

The requirements to be met by the qualifying element "*no significant fault or negligence*" must not be set excessively high. The higher the threshold is set, the less opportunity remains for differentiating meaningfully and fairly within the (rather wide) range of the period of ineligibility sanctioning the fault or negligence. But the low end of the threshold must also not be set too low; for otherwise the period of ineligibility of two years laid down for an anti-doping rule violation would form the exception rather than the general rule.

29. Overall, Ms Potts submitted that from the perspective of the ADR Mr Cleary was not to be criticized significantly. He had taken a drug out of competition when it was not prohibited. He had no idea that he was going to be playing competitively 3 days later when a game came to be unexpectedly substituted for the normal Tuesday evening training. Nobody, particularly someone without any anti-doping education, would have realized that the effect of cocaine taken 3 days previously would still remain.

## DISCUSSION

30. We can deal briefly with the first question that is whether the starting point here is a period of 4 or 2 years ineligibility. We are quite clear that this is a 2 year case. There is nothing to suggest that Mr Cleary has not been telling the truth about the circumstances in which he ingested cocaine. He has been entirely frank and open about what happened. It is notorious that cocaine is a so-called "recreational" drug. It would be quite unreal to consider that Mr Cleary was taking cocaine with an eye to improving his performance as a hooker for Maesteg Harlequins RFC. We accept Ms Potts' submissions on this point.
31. We turn, therefore, to consider whether ineligibility for less than 2 years but not less than 1 year would be appropriate under Article 10.5.2 of the ADR. In this regard we would have to be satisfied, before we could permit any reduction from 2 years, that Mr Cleary bears "no significant fault or negligence" for the anti-doping rule violation. In this consideration it is important to bear in mind the ADR definitions set out at Paragraph 14 above.
32. It appears to us that the starting point is the definition of "no significant fault or negligence". Only if that can be established can we proceed to consider any reduction by reference to the degree of Fault (as defined). In this context we have to consider the totality of the circumstances and also take into account the criteria for "no fault or negligence". As Ms Potts accepts Mr Cleary could not establish "no fault or negligence". He clearly knew that he had consumed the Prohibited Substance of cocaine. We accept that this is not the end of the inquiry, for "no fault or negligence" cannot be identical to "no significant fault or negligence". Indeed, the *Thompson* decision, albeit on very different facts, demonstrates that, even with the deliberate consumption of cocaine, it may be possible to benefit from an Article 10.5.2 reduction in the right circumstances. Nevertheless, we do have to bear in mind the criteria for "no fault or negligence".
33. We have noted the passage from the *Hans Knaus* decision on which Ms Potts relies. We agree that there must be some room for a finding of "no significant fault or negligence". The ADR and the underlying WADA Code do not envisage an inevitable

fixed period of ineligibility simply on account of an anti-doping rule violation. Nevertheless, the *Hans Knaus* decision itself noted at [16] that:

But the low end of the threshold for the element "*no significant fault*" must also not be set too low; for otherwise the period of ineligibility of two years laid down in Article 10.2 FIS-Rules would form the exception rather than the general rule (see also CAS 2003/A/484, marg. no. 47). It is this tension between the two limits which is precisely what the WADC wishes to reduce. In this regard the (official) comments on the WADC expressly read as follows:

*"Article 10.5 is meant to have an impact only, in cases where the circumstances are truly exceptional and not in the vast majority of cases".*

It is notable that the current version of the Commentary to the Code refers to both Article 10.4 and Article 10.5.2 only being applicable "in exceptional circumstances".

34. In Mr Cleary's case we are not persuaded by the strict dichotomy proposed by Ms Potts between the Saturday evening when the cocaine was ingested and the following Tuesday evening when the match was played. It is true that the taking of cocaine is only prohibited in-competition but that does not mean that the consumption of cocaine out of competition is to be ignored. The anti-doping rule violation in this case was the presence of a metabolite of cocaine rather than cocaine itself in Mr Cleary's system. Necessarily, the presence of a metabolite will depend on the anterior consumption of a prohibited substance.
35. Nor are we able to accept Ms Potts' beguiling submission that Mr Cleary cannot be considered to have been at fault on the Tuesday evening when he played in the match since he could not possibly have been expected to know how long the effects of cocaine would remain in his system. We agree that knowledge of how long metabolites of cocaine remain in the system after consumption was not to be expected. In any event, retention of the effects of cocaine is not fixed. It will depend on a variety of factors such as the frequency and amount ingested, as well as the physical attributes of the consumer. Professor Cowan's evidence notes the variability of the time frame. The fault in our view was not so much Mr Cleary not

knowing that a metabolite of cocaine would still be in his system. The fault was in paying no regard to a risk that the effect of the cocaine might still be in his system. The reality is that Mr Cleary gave no thought to the matter at all.

36. It is unfortunate that Mr Cleary has never received any instruction in anti-doping matters from his club or the WRU, although it is doubtful if any instruction would go into the detail of precisely how long the effect of cocaine remains in the human body. However, we do not regard this absence of education as excusing what happened on this particular occasion. The fact is that Mr Cleary was perfectly well aware that cocaine was a banned substance for sportsmen and that its effect remained in the body for some time after its ingestion, even though he did not know for how long.
37. Whatever sympathy one may feel for Mr Cleary's foolishness, the reality is that there is nothing exceptional about the present material facts. Mr Cleary benefits from the fact that his consumption of cocaine had nothing to do with improving his sporting performance. This is what reduces his ineligibility from 4 to 2 years. But, otherwise we can see no ground for any further reduction in the period of ineligibility. Mr Cleary deliberately ingested a Prohibited Substance. He did so in full knowledge that cocaine is a banned drug for sportsmen and in the knowledge that other rugby players, notably Matt Stevens, had been banned for taking cocaine. Moreover, Mr Cleary realized that the effects of cocaine remained in the body for some time, even though he would not have known for how long. Mr Cleary gave no thought to the matter at all.
38. The reality is that Mr Cleary was simply concerned with having what in his perception was a good night out. We are quite unable on the present facts to conclude that there was no significant fault or negligence. If we were to do so, this would be tantamount to saying that the conventional, rather than the exceptional, period of ineligibility is a period of less than 2 years.

## **CONCLUSION**

39. For the reasons set out above we find that:

- (1) the anti-doping rule violation is established;
- (2) Mr Cleary used cocaine "Out-of-Competition in a context unrelated to sport performance"; and
- (3) a case of "no significant fault or negligence" has not been established.

Accordingly, for Mr Cleary the period of ineligibility is one of 2 years. Mr Cleary has been provisionally suspended since 11 September 2015. The period of ineligibility should run from that date. Accordingly, it will expire on 10 September 2017. In accordance with the National Anti-Doping Rules, either Mr Cleary or UKAD may file a Notice of Appeal against this decision within 21 days of receipt of the decision.



Robert Englehart QC  
Chairman on behalf of the Appeal Tribunal

05 January 2016



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