BEFORE AN RFU ANTI-DOPING APPEAL PANEL

B E T W E E N:

UK ANTI-DOPING

The Appellant

and

THE RUGBY FOOTBALL UNION

The Respondent

and

DAN LANCASTER

The Player

Appeal Tribunal:
Hon. Sir Peter Fraser Chair
Christine Bowyer-Jones
Dr Gary O'Driscoll

For UKAD, the Appellant:
Graham Arthur
Tony Jackson

For the RFU, the Respondent:
Kate Gallafent QC
Stephen Watkins
Stuart Tennant

The hearing was held on 3rd February 2016 at the offices of Sports Resolutions, London.

The Player did not appear and was not represented

DECISION

1. This is an appeal brought by UK Anti-Doping ("UKAD") against a decision by an independent panel convened by the Rugby Football Union ("the RFU") in the case of Dan Lancaster ("the Player"). The Player was at all material times registered at Cleethorpes RFC and was under the jurisdiction of the RFU.

2. The issue on this appeal can be stated succinctly. It is whether the discretion identified in World Rugby Regulation 21.10.6.3[1], which permits in certain circumstances a period of ineligibility to be reduced below four years, is one which can be unilaterally exercised by the independent panel in the absence of consent from WADA and World Rugby (or the relevant Association or Union). The text of the Regulation is in paragraph 7 below.

3. It is an important point of construction and has potential consequences for the application of the Anti-Drug Regulations both by the RFU as the prosecuting authority, and by independent panels. The independent panel in this case decided that such discretion was available to them as a panel, regardless of the lack of consent from WADA, and reduced the Player's period of ineligibility from what would otherwise have been 4 years, to the lesser period of 3 years and 6 months. UKAD appeal against that decision.

Factual background

4. On 22 April 2015 a consignment of anabolic steroids was seized by the UK Border Force who notified the International Crime Team at the National Crime Agency. On 23 April 2015 UKAD received notification of this seizure in the usual way. The consignment that was seized contained 300 ampoules of anabolic steroids (300 x Testapron Testosterone Propionate 100mg/1ml injection ampoules). This had been sent from a company in Asia and was addressed to the Player at an address in Cleethorpes, Lincolnshire. Such anabolic steroids are not only prohibited substances as they appear on the Prohibited List under the WADA Code, they are also Class C drugs. Possession of such drugs, and their importation by post into the United Kingdom in this way, are criminal offences under the Misuse of Drugs Act 1971 (the latter offence, importation by post, having been added to the statute by way of amendment).

5. UKAD investigated the matter. UKAD had telephone contact with the Player. Following that phone call, in an e mail to the UKAD Investigator, the Player

[1] Which is in almost identical terms to Article 10.6.3 of the WADA Code

admitted that he had tried to buy steroids over the internet. This occurred on 29 April 2015. At a subsequent interview with UKAD on 7 May 2015, the transcript of which was available to the independent panel and to the Appeal Tribunal, the Player stated that he had given up playing rugby due to an injury. He also stated that he had ordered the anabolic steroids in question for the purposes of bodybuilding.

6. He also admitted previously having both ordered, and used (by injecting over a repetitive 10 week cycle) anabolic steroids, including testosterone propionate, testosterone enanthate and boldenone. He said that he had been injecting such substances over a period of about a year and a half. On his case therefore, the seized consignment was about one year's supply. UKAD passed their findings to the RFU, and the Player was informed by Angus Bujalski, the Head of Legal at the RFU, in a letter dated 5 June 2015, that he was being charged under Regulation 21.2.2 with Use or Attempted Use of a Prohibited Substance. He was also notified in that same letter that he was from that date provisionally suspended in the usual way.

7. The text of the World Rugby Regulation[2], 21.10.6.3 is as follows:

> *"A player or other person potentially subject to a four-year sanction under Regulation 21.10.2.1 or 21.10.3.1, by promptly admitting the asserted anti-doping rule violation after being confronted by World Rugby (or the Association, Union or Tournament Organiser handling the case as applicable) <u>and also upon the approval and at the discretion of both WADA and World Rugby</u> (or the Association, Union or Tournament Organiser handling the case as applicable) may receive a reduction in the period of ineligibility down to a minimum of two years, depending on the seriousness of the violation and the Athlete or other Person's degree of Fault."*

(emphasis added)

8. The RFU Regulations make it clear in Regulation 20.3.1 that World Rugby has adopted the WADA Code and implemented WADA Code compliant anti-doping regulations, namely World Rugby Regulation 21. World Rugby Regulation 21.10.6.3 is therefore to be read as consistent with the WADA Code. The text of

[2] This was introduced by World Rugby on 14 January 2015 and applies to this case

the WADA Code 2015 from which the World Rugby Regulation is taken is as follows, namely Article 10.6.3:

"Prompt Admission of an Anti-Doping Rule Violation after being Confronted with a Violation Sanctionable under Article 10.2.1 or Article 10.3.1.

An Athlete or other Person potentially subject to a four-year sanction under Article 10.2.1 or 10.3.1….by promptly admitting the asserted anti-doping rule violation after being confronted by an Anti-Doping Organization, and also upon the approval and at the discretion of both WADA and the Anti-Doping Organization with results management responsibility, may receive a reduction in the period of ineligibility down to a minimum of two years, depending on the seriousness of the violation and the Athlete or other Person's degree of Fault."

9. World Rugby Regulation 21 is adopted in its entirety by the RFU in RFU Regulation 20.5.1, together with additional regulations which are not relevant to this appeal.

10. The RFU, prior to the determination of the Player's case in question, sent an e mail both to World Rugby and to WADA. UKAD had asked the RFU to do this, and in the e mail dated 23 July 2015 from the RFU guidance was sought from both those world bodies. Both World Rugby and WADA were asked if Regulation 21.10.6.3/Article 10.6.3 was only for exceptional cases. The RFU as the prosecuting authority stated both to WADA and World Rugby that the Player "still merits a four year ban because his fault is very high but your guidance would greatly assist". It was also said by the RFU that given the Player was not represented, the RFU wished to make it clear to the independent panel that the RFU had "fully considered his prompt admission within the regulatory context".

11. Both WADA and World Rugby replied. WADA stated that the provision was not only for exceptional cases but "all possible reductions must be considered carefully on a case-by-case basis in order to ensure that they are applied consistently". WADA did not disagree with the RFU that the Player should not receive any reduction to his sanction under Article 10.6.3. World Rugby also stated "World Rugby would agree with your [ie the RFU's] view that no reduction is appropriate in the current case for the reasons you describe below".

12. It was therefore the case that none of the RFU, WADA (nor World Rugby, who were also asked) saw this as a case where the Player's period of ineligibility should be reduced within the framework contained within Article 10.6.3 of the WADA Code.

The decision of the independent panel

13. The independent panel however interpreted Regulation 21.10.6.3 as giving the panel a discretion to reduce the period of ineligibility, regardless of the lack of consent of both WADA and World Rugby. To be fair to the panel, they were expressly invited to consider Regulation 21.10.6.3 by the RFU in its written submissions of 20 August 2015. This invitation to the panel was made despite the RFU having expressed to WADA its view that a reduction was not appropriate. It was not therefore submitted to the panel that they had no jurisdiction to do so, which is effectively the issue on this appeal. There was no hearing, a procedure which is adopted in straight forward cases, where a player does not wish to have a hearing and has accepted responsibility for the violation. The independent panel did not therefore have the benefit of further argument or submissions as they might have done, had a hearing been held.

14. The panel concluded that a reduction under that Regulation *was* available to them, regardless of the lack of agreement from either WADA or World Rugby (and indeed, based on the views of the RFU in the e mail sent to both of those bodies, the RFU as well). They applied the power that they believed they had, and reduced the period of ineligibility below 4 years, to 3 years and 6 months. This was done despite the panel's sensible findings of aggravating features, which they identified in paragraph 15 of their decision. The reduction was stated to be "in light of [the Player's] acceptance of the charge at the earliest opportunity and noting his frankness upon questioning by an officer from UKAD".

15. UKAD bring this appeal by way of a notice to that effect dated 22 September 2015. Directions were agreed by UKAD and the RFU on 24 September 2015 which provided for the hearing of this appeal in the autumn of 2015. However, the appeal was not heard until 3 February 2016. The reason for the delay was WADA

itself wished to make representations on this appeal concerning Article 10.6.3 of the WADA Code and its operation. WADA asked for the parties' agreement to do this, which was forthcoming, but WADA was not able to lodge those reasons until the very end of January 2016. This was due to its extraordinary workload in the autumn of 2015 concerning certain investigations into other sports, predominantly athletics, and anti-drug matters concerning other countries.

16. We have therefore, for the hearing of this appeal, had written representations from WADA itself, and both written and oral submissions from both UKAD and the RFU, for which we are grateful.

17. The Player did not wish to take any part in the appeal, and in an e mail dated 7 October 2015 written in admirably frank (although curiously punctuated) "text speak" said: "i have no intentions of playing rugby or eny sport again thanks for update but u just wasting ya time and munie as i told you all at begining i no longer play due to injurys….." (sic)

18. The Player did not therefore appear and was not represented.

The competing arguments

19. The position of UKAD is very simple. It argues that the approval of WADA is required in order for the Regulation 21.10.6.3/Article 10.6.3 provision to be available. Unless such approval is available, UKAD submits then there is no ability under the Regulations or under the WADA Code for the period of ineligibility to be reduced below four years.

20. The position of the RFU both before the original panel and before us seems to have changed from that contained in the e mail to which both World Rugby and WADA responded in July 2015 – namely that the Player was not entitled to a reduction to less than four years – to one which can be summarised as follows:
    1. Regulation 21.10.6.3 and Article 10.6.3 give the RFU the discretion to reduce the period. The phrase "and upon the approval and at the discretion of

WADA" should be read as relating solely to whether an admission has been prompt, and to nothing else[3].

2. Regulation 21.10.6.3 does not confer what the RFU referred to as an "extra judicial" discretion to be exercised by WADA and the RFU and none on the independent panel. Both WADA and the RFU must agree in principle that a reduction in the period may be made, but it is for the anti-doping panel hearing the case to determine the appropriate length if any of the reduction.[4]
3. In principle therefore, if point 1 is upheld upon this appeal, the independent panel did not exercise a power they did not have, and the appeal should fail.
4. Alternatively[5], the appeal panel should determine the matter in principle and then decide "for itself whether, on the facts of this case, there should be any such reduction".

21. Although points 1 and 2 above appear to conflict, given this appeal raises a point of construction, we are prepared to consider them both. Depending upon our resolution of that point of construction, point 4 may not arise.

22. There is also, in addition to the point of construction, a practical element to the competing arguments on this appeal. This is prayed in aid by the RFU to this effect, namely to support the RFU's argument on construction. It is said that if any player admitted an offence promptly, but for whatever reason WADA were not prepared to consent, the interpretation urged upon us by UKAD would not give that player any right of appeal. Accordingly, given the admission that would in those circumstances already have been made by a player, there could be no possibility of a challenge by a player to the refusal by WADA to approve application of the Article. We shall deal with each of the RFU's points in turn.

The point of construction

23. The relevant passage in the World Rugby Regulation, is as follows: *"….by promptly admitting……<u>and also upon the approval and at the discretion</u> of both*

[3] RFU's oral submissions
[4] Paragraph 10 of the RFU's Written Submissions dated 15 October 2015.
[5] Paragraph 18 of RFU's Written Submissions

WADA <u>and</u> World Rugby (or the Association, Union or Tournament Organiser handing the case as applicable)"
(emphasis added)

24. There are therefore three components. Firstly, a prompt admission. Secondly, the approval of WADA (which is at its discretion). Thirdly, the approval of World Rugby (again, at its discretion) or the appropriate Association or Union handling the case, which in this case is the RFU.

25. The RFU submitted that the element "and also upon the approval and at the discretion" meant that WADA must agree that *the admission* had been prompt, and not to the reduction itself. In other words, on this analysis, there would not be three components, but only one, namely the prompt admission. It is said by the RFU that the reference to WADA means that their approval is required on the point of whether an admission qualifies as a "prompt admission". In our respectful view, such a construction is unsupportable.

26. Whether there has been a prompt admission or not is a matter of fact. In any judicial or quasi-judicial process, facts are either made out ("found") or they are not. The concept of approval by WADA to a fact is potentially possible, although such a word would be a curious choice and not normally used. But the concept of applying discretion to the finding of a fact is wholly misconceived. Discretion applies to the exercise of a power, not to the finding of a fact. The Regulation, on its normal words, plainly means that the approval relates to something other than the finding of a fact. This is obvious from the use of the phrase "*and also upon"*.

27. This argument also seems to have occurred to the RFU relatively late in the day. The e mails between the RFU and WADA and World Rugby in July 2015 do not seek the approval of either world body to whether the admission by the Player was prompt. The e mails relate to approval by WADA (and World Rugby) to the possibility of a reduction of the period of ineligibility. Of course, that does not alter the construction of the words in the Regulation, but it does provide evidential

support to an interpretation of the Regulation that relates approval to something other than the finding of a fact.

28. There is another reason that militates against the construction urged upon us by the RFU in this respect. If WADA were required to give their approval merely to findings of fact of this nature, it could impose a considerable logistical burden upon them. There is no justifiable reason, in our view, why approval of world bodies would be required on the question of whether an admission were, or were not, a prompt admission. In a case of this nature, that decision would be one taken by the RFU. If the RFU were to conclude that an admission was sufficiently prompt, and if the RFU also concluded on the facts of the case that a reduction under Regulation 21.10.6.3 were suitable, then the next step would occur. That step would be the seeking of approval by WADA to any proposed reduction at all, and if so, to the amount of reduction.

29. We now turn to point 2 in paragraph 20 above which summarises the RFU's further opposition to this appeal. The RFU characterise the approval required of WADA as an "extra judicial" discretion. However, even if it is, that does not mean that it is objectionable. WADA is the world body tasked with keeping sport drug free, and also with harmonising sanctions across the world for transgressions. The discretion, as with any exercise of discretion in any field, would have to be exercised on proper grounds. It is neither necessary nor desirable to identify definitively in this decision what all those possible grounds are or could be, although given the discretion is exercisable by WADA (which governs all WADA-accredited sports worldwide), consistency across different sports and different jurisdictions is bound to be one of the considerations. So far as lack of discretion on the part of the independent panel is concerned, that is one of the purposes, in our view, of the Regulation. That is why the approval of WADA is required. Operation of the Regulation does, after all, result in a reduction from the period of four years sanction to a lesser one. That is the period which has been introduced worldwide in order to achieve consistency, and is one shorter than some sports and jurisdictions wished to have, and greater than others. One

purpose of the WADA Code[6] is "to ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping". If every independent panel in every sport had its own discretion to go below the four year period, with no involvement or approval required on the part of WADA, then this purpose would be undermined.

30. In our considered view, the correct analysis of the Regulation is as follows:

1. To be even considered eligible, a player must have made a prompt admission. This is expressed by UKAD in its Written Submissions as a "pre-condition" for the Regulation to apply. We agree with that construction.
2. In order to be considered for a reduction beneath the four year period, the RFU must have concluded that the application of the Regulation is justified. That will be done based on the facts of each case. If the RFU decide that it is, the next step will then be followed.
3. WADA must be asked for their approval, both for application of the Regulation at all, and for the proposed reduction.
4. Such approval is at their discretion.
5. The independent hearing panel have no independent power to reduce the period below the minimum of four years in the absence of approval by WADA.

31. This construction is also consistent with the purpose of the WADA Code, which is to apply anti-drug provisions consistently across all countries and all sports. WADA's approval is required in order to achieve this consistency. There would also be no point in having a provision that would involve WADA in approving or helping to find a simple fact, namely was the admission, in any case across the world, a prompt one? We therefore reject both the different constructions proposed by the RFU.

[6] Page 11 of the WADA Code 2015

32. We therefore turn to the practical aspect of the Regulation. This does touch on the point identified in paragraph 22 above, but also the different approaches explained in both the WADA and UKAD submissions.

The Practical Issue

33. WADA in its written submissions makes it clear how it sees operation of the provision. WADA consider that if both it and the results management authority ("RMA") approve a reduction under Article 10.6.3, a proposal is submitted to the athlete (or other person)[7].

34. The athlete is free to reject or accept that proposal. If either no reduction is proposed by WADA and the RMA, or if the reduction proposed is not acceptable to the athlete, they are free to pursue their case before the first-instance tribunal - in this case, the independent panel convened by the RFU. WADA does not consider that such a proposal from WADA and the RMA would be subject to appeal under Article 13.2 of the WADA Code.

35. This differs from the approach of UKAD, which was explained to us as follows. UKAD considers the matter *would* have a potential appeal route to the National Anti-Doping Panel, although that would be after the period of reduction was proposed. In other words, the *approval* by WADA is not subject to appeal, but the amount of reduction would be. In neither instance, however, does the independent panel have the power to fix what the period of reduction should be.

36. The proposed period of reduction would be one that, in the first instance, would be decided in principle by the RFU as part of its function as the prosecuting authority. It would not be decided by an independent panel. Were it otherwise, and a decision for the independent panel, on our view of the correct construction of Regulation 21.10.6.3/Article 10.6.3, two stages of approval would be required. Firstly, the approval of WADA would be required as to whether a reduction were

[7] For the purposes of Article 10.6.3 the RFU fulfils a number of the functions afforded to an Anti-Doping Organisation with Results Management Responsibility

permitted. Secondly, an independent panel would fix the level of reduction. That period, however, would not have been the subject of any approval from WADA, because it would not be known about by WADA at the first stage. Therefore, in order to approve it, there would have to be a yet further stage when WADA either approve, or do not approve, the level of reduction.

37. In our view, that cannot be right, and cannot be discerned from any sensible reading of the Regulation. The Regulation requires approval from WADA at one stage only, and that approval must encompass both the application of the Regulation, and the amount of reduction below four years (down to a minimum of two years).

38. In summary therefore, the correct procedure is as follows:

1. If a player has made a prompt admission, the RFU will consider the facts of the case. If, upon consideration, the RFU is of the view that Regulation 21.10.6.3 applies, it will seek the approval of WADA. If the RFU does not take that view, the matter will proceed to an independent panel which cannot exercise any power under Regulation 21.10.6.3.
2. If the RFU does seek to apply Regulation 21.10.6.3, WADA must be asked if they approve that course of action, and as an exercise of their discretion, may agree the Regulation applies.
3. Both the RFU and WADA must approve the application of the Regulation and must approve the proposed reduction.
4. That proposed reduction must then be put to the player who is free to agree or disagree. If the player disagrees, then the matter will proceed to an independent panel. However, that independent panel has no power under Regulation 21.10.6.3. to set a period below four years.

39. We do not consider that the question of whether any appeal lies from a decision by WADA not to approve the proposed course of action by the RFU (were that to be the case in the future) is one for us. Firstly, it is academic and is not necessary to dispose of this appeal. Secondly, we have not heard in any detail from WADA on the subject; the point was dealt with in passing. It has potentially important

procedural consequences, not only for the World Rugby Regulations but also the WADA Code. Thirdly, we would not wish the judgment in this appeal to be misinterpreted as our ruling in any way on the extent of WADA's rights in any respect.

40. Given that in our view the independent hearing panel in this case had no power to reduce the period below the minimum, in the absence of the approval of WADA, and the independent hearing panel in this case in fact did so, it follows that the appeal brought by UKAD succeeds.

41. We therefore:

1. Uphold the appeal brought by UKAD.
2. Set aside the decision of the independent panel below dated 8 September 2015.
3. Impose a period of ineligibility of four years upon the Player commencing on the date of his provisional suspension, namely 5 June 2015. This period therefore expires at midnight on 4 June 2019.
4. Make no order in respect of costs.

Date: 9 February 2016

Hon. Sir Peter Fraser
Christine Bowyer-Jones
Dr Gary O'Driscoll