SPORT RESOLUTIONS (UK)

SPECIALIST INDEPENDENT DISPUTE SERVICE

SR/NADP/667/2016

NATIONAL ANTI-DOPING PANEL

IN THE MATTER OF PROCEEDINGS BROUGHT

UNDER THE ANTI-DOPING RULES OF

BRITISH WRESTLING ASSOCIATION

Before:

Mr Mark Hovell (Chairman)

Mr Colin Murdock

Ms Blondel Thompson

BETWEEN:

VAHID HOSSEINPOOR

Appellant

- and –

UK ANTI-DOPING

Respondent

DECISION OF THE NATIONAL ANTI-DOPING PANEL

I. Introduction

1. The Appellant, Mr. Vahid Hosseinpoor (the "Athlete"), is a 32-year old freestyle wrestler.

2. Since 2008, the British Wrestling Association (the "BWA") has adopted the Respondent's 'UK Anti-Doping Rules' (as amended from time to time) as its anti-doping rules (the "ADR").

3. By decision dated 6 August 2014 (the "Initial Decision"), the National Anti-Doping Panel ("NADP") found the Appellant to have committed an anti-doping rule violation ("ADRV") contrary to the ADR as a result of the identification of tamoxifen, a 'Specified Substance' for which the Appellant had not obtained a Therapeutic Use Exemption, in a sample he provided in-competition at the British Senior Wrestling Championships on 11 May 2014. As a result of the Initial Decision, the Appellant was not:

> *"…until midnight on 2 June 2016…permitted to participate in any capacity in a competition or other activity (other than Authorised Anti-doping Education or Rehabilitation programmes) organised, convened or authorised by the BWA or any body that is a member of, affiliated to, or licenced by the BWA."*

4. On 12 August 2016, the Respondent informed the Appellant that he had breached the terms of the Initial Decision and Article 10.12.1 of the ADR, which states:

> *"An Athlete or other Person who has been declared Ineligible may not, during the period of Ineligibility, participate in any capacity (or, in the case of an Athlete Support Person, assist any Athlete participating in any capacity) in a Competition, Event or other activity (other than authorised anti-doping education or rehabilitation programmes) organised, convened, authorised or recognised by (a) the NGB or by any body that is a member of, or affiliated to, or licensed by the NGB; (b) any Signatory; (c) any club or other body that is a member of, or affiliated to, or licensed by, a Signatory or a Signatory's member organisation; (d) any professional league or any international – or national-level Event Organisation; or (e) any elite or national-level sporting activity funded by a governmental agency…"*

5. The Appellant was therefore, pursuant to Article 10.12.5 of the ADR, sanctioned by the Respondent with a new period of Ineligibility of two years from 2 June 2016 until midnight on 1 June 2018 (the "Appealed Decision").

6. The Appellant appealed against the Appealed Decision by email on 23 August 2016 (the "Appeal").

7. Following directions issued by the Chairman, the Appeal was heard in Manchester on 20 December 2016. The Appellant was represented by Mr Diarmuid Laffan, of Counsel and his solicitor, Mr Warwick Shepherd. The Respondent was represented by Mr Nicholas Cotter, of Counsel, and Messrs Tony Jackson, Louis Muncey and Joseph Paterson from UKAD. In addition, Mr Matthew Berry from Sport Resolutions was in attendance. The Panel would like to put on record its thanks to the representatives of the Appellant for representing him on a *pro bono* basis.

II. Jurisdiction

8. In accordance with Article 4 of the 2015 Rules of the National Anti-Doping Panel ("NADP Rules"):

> "*The jurisdiction of the NADP over a matter shall be triggered in the following circumstances:*
>
> *4.1.3 Where an Appellant submits a Notice of Appeal to the NADP Secretariat in accordance with Article 13.5."*

9. The Panel notes that Appellant's email dated 23 August 2016 served as his Notice of Appeal and provided the NADP with jurisdiction in the matter at hand.

10. Further, Article 10.12.5 of the ADR states that any decision made by the Respondent may be appealed to the NADP pursuant to Article 13.4.1 of the ADR, which specifies:

> ***"13.4 Appeals from Other Decisions***
>
> *13.4.1 The following decisions - - […] a decision under Article 10.12.5 […] - - may be appealed by any one of the following parties exclusively as provided in this Article 13:*
>
> *(a) the Athlete or other Person who is subject of the decision being appealed."*

11. Finally, Article 8 of the ADR provides that the NADP shall have jurisdiction over matters arising under Article 13:

> *" 8.1.3 An appeal brought in accordance with Article 13."*

12. For all the above reasons, it follows that the Panel therefore has jurisdiction to determine the Appeal. For completeness, the parties confirmed at the hearing that they had no issue with the constitution of the Panel.

III. Background

13. The Initial Decision confirmed that the Appellant was at all material times subject to comply with the ADR for the duration of his period of Ineligibility and that the Appellant was to comply with Article 10.10 of the 2009 ADR (now Article 10.12 of the 2015 ADR, which came into effect on 1 January 2015).

14. The Initial Decision was sent to the BWA by the Respondent on 7 August 2014. The Appellant chose not to appeal against the Initial Decision.

15. On 1 January 2015, a third party (the "Whistle-blower") first contacted the BWA and informed them that the Appellant had been training at the YMCA Wildcats Wrestling Club (the "Club").

16. On 10 January 2015, the Appellant posted on Facebook an image of himself and other wrestlers at the Y Club in Manchester, all stood in a group on a wrestling mat.

17. On 20 January 2015, the BWA wrote to the Appellant and the Club stating that:

> *"…you should be aware that for the duration of your ban you are unable to train, coach or compete in Wrestling, or indeed any other sport…"*

18. On 3 March 2015, the Appellant posted another image on Facebook of himself, a coach from the Club and Jimmy Harbison, a mixed martial arts champion at the Y Club in Manchester, all stood in a group in the gym.

19. On 7 March 2015, Messrs Nicholson and Morley from the BWA spoke to the Appellant's wrestling coach, Mr Dale Murray, explaining that they had been told that the Appellant was training despite being banned.

20. Later in March 2015, Mr Murray saw the Appellant at the Y Club and told him that he could not train whilst Ineligible.

21. On 25 August 2015, the Respondent sent its standard letter to the Appellant reminding him of the terms of his ban.

22. On 20 September 2015, the Whistle-blower again contacted the BWA and, in turn, the BWA shared this information with the Respondent.

23. On 6 October 2015, the BWA wrote to the Appellant:

> *"you may not participate in any capacity in a Competition, Event or other activity (e.g. training/coaching)…"*

24. On 8 May 2016, the BWA received further information from the Whistle-blower suggesting that the Appellant may have engaged in further activities in contravention of the prohibition against participation set out in Article 10.12.1 of the ADR and attaching the screenshots from the Appellant's Facebook pages.

25. On 16 May 2016, the BWA sent these screenshots onto the Respondent. Acting on this information the Respondent opened an investigation into the Appellant and any potential breaches of the conditions of his period on Ineligibility.

26. On 2 June 2016, the Appellant was contacted on the telephone by Mr Graeme Simpson, the Respondent's Investigator, who informed the Appellant that the Respondent had opened an investigation into potential breaches of the conditions of his period of Ineligibility. Mr. Simpson asked that the Appellant attend an interview with the Respondent for the purposes of that investigation.

27. This conversation was later confirmed on 6 June 2016 by email sent from Mr. Simpson to the Appellant, with a letter attached confirming the Appellant had agreed to voluntarily attend an interview with the Respondent at the offices of

Bird & Bird solicitors on 8 June 2016 (the "Interview"). The letter explained the nature of the interview and set out the Appellant's rights.

28. On 8 June 2016, the Appellant voluntarily attended the Interview with the Respondent. The Interview was recorded and a written transcript was produced and later provided to the Appellant and to the Panel. The Appellant was told he could leave the Interview at any time. The Appellant was not represented by a solicitor nor was he accompanied by a friend or anyone from the Club or the BWA, but he was reminded by Mr. Simpson that he was entitled to be accompanied by someone at the Interview. The Appellant confirmed he was aware of that right but that he was happy to attend the Interview alone.

29. In summary of the Interview, the Appellant admitted he had received a letter from BWA in August 2014 setting out what he could and could not do during his period of Ineligibility as a result of the Initial Decision and the sanctions imposed on him. The letter stated that whilst Ineligible, the Appellant could not coach, mentor, instruct or assist his club, team or other athletes in any other way. The Appellant confirmed he had received the letter and had read the letter.

30. In the Interview the Appellant was shown images obtained from social media, including his own Facebook page. The images showed groups of wrestlers posing together on a wrestling mat in a gym, but not actually wrestling. The Appellant identified himself in the photos and admitted that he engaged in training sessions that took place at the Y Club in Manchester on 10 January 2015 and on 3 March 2015.

31. The Y Club in Manchester is home to the Club. The Respondent alleged that the Club was (and still is) a registered member of the BWA. The Y Club is a large sporting and gymnastics facility that the Club meets at and uses its facilities. Other clubs and individuals use its facilities too.

32. The Appellant confirmed that after the session on 3 March 2015, he was informed by the Club's head coach, Mr Murray, that he was not permitted to train with the Club. He was informed that he could use the weights area and gym facilities at the Y Club as an individual, but that he could not use the wrestling facilities or train with the Club.

33. Article 10.12.5 of the ADR states that it is for the Respondent to determine whether the Appellant violated the provisions of Article 10.12.1 of the ADR and to impose the relevant consequences, subject to any adjustment that might be appropriate based on the Appellant's level of Fault and the particular factual circumstances.

34. The Respondent, acting on this authority, came to the conclusion that the Appellant had breached Article 10.12.1 of the ADR, specifically for participating in training which was organised, convened, authorised and recognised by the Club.

35. The conclusion was submitted for Independent Review by the Respondent on 1 July 2016. The conclusions of the Independent Review were received on 6 July 2016, where Mr Max Baines of Red Lion Chambers supported the Respondent's determination that the Appellant had breached Article 10.12.1 of the ADR.

36. In assessing the Appellant's level of Fault pursuant to Article 10.12.5 of the ADR, the Respondent took into consideration that the Appellant had admitted he was aware of the prohibition against participation pursuant to Article 10.12.1 of the ADR whilst he was Ineligible. These restrictions were set out in the Initial Decision and were then reiterated to the Appellant by way of correspondence from the BWA, which the Appellant, admitted receiving during the interview. The Respondent considered that the Appellant was entirely at Fault for his breach of Article 10.12.1 of the ADR. Further, the Respondent did not consider that there were any other relevant facts or circumstances that entitled the Appellant to an adjustment in the period of Ineligibility to be imposed.

37. On 12 August 2016, the Respondent communicated the Appealed Decision to the Appellant by email confirming that the Appellant had committed a violation of the prohibition against participation set out in Article 10.12.1 of the ADR and imposing a new period of Ineligibility of 2 years on the Appellant from 2 June 2016 until midnight on 1 June 2018, pursuant to Article 10.12.5 of the ADR.

38. On 23 August 2016, the Appellant by way of email and pursuant to ADR Article 13 submitted his Appeal against the Appealed Decision.

IV. The Appellant's Submissions

39. The Appellant raised two grounds of appeal against the sanction.

(a) As the Club was not a member of or affiliated to the BWA in early 2015, the Appellant did not act in breach of Article 10.12.1 of the ADR

40. The Appellant noted through information obtained from the BWA during his investigations pending the Appeal that the Club was not "a member" of or "affiliated" to the BWA at the time he had been found to have trained in breach of his sanction in January and March 2015.

41. He had not (in the terms of Article 10.12.1 of the ADR) therefore participated in an activity (i.e. training) organised, convened, authorised or recognised by the NGB (the BWA) or by any body that is a member of, or affiliated to, or licensed by the NGB.

42. Under the BWA Articles of Association (the "BWA Articles"), a club becomes an 'affiliated club' for a given calendar year when it has paid its affiliation fee for that year, while the affiliation lapses at midnight on 31 December of that year. The Appellant, concluded that the Club was not affiliated to the BWA at the time of the alleged breaches as its affiliation was not reinstated until 15 September 2015, when the affiliation fee for 2015 was paid. This was confirmed in Mr Nicholson's (of the BWA) email to Ms Stacey Cross of the Respondent on 28 September 2015, in which he confirmed that the Club was at that time an affiliated club, "*having paid its fees a number of weeks ago*".

43. The Club was therefore not affiliated to the BWA when the Appellant is said to have trained in breach of his sanction in early 2015, and it was not otherwise a 'member' of the BWA as defined by the BWA Articles.

44. The Appellant stated the question as to whether a body is a member of, or affiliated to, or licensed by a national governing body, falls to be determined by the rules of that body, in this case the BWA and the BWA Articles.

45. The Appellant argued that he could not in early 2015 have acted in breach of Article 10.12.1 of the ADR as alleged by the Respondent and that the Appealed Decision must be quashed on the basis that it is vitiated by a fundamental error of fact, the inevitable implication of which is that the Appellant did not train in breach of Article 10.12.1(a) of the ADR.

(b) The Respondent erred in its application of Article 10.12.5; the Appellant's sanction should be reduced in line with his level of Fault and in view of all of the circumstances of the case

46. In the alternative, the Appellant argued that the Respondent manifestly misapplied the mitigating proviso in Article 10.12.5 of the ADR, which allows the automatically applicable additional sanction to be adjusted in line with the level of the Appellant's Fault (as defined by the ADR) and in view of all of the circumstances of the case at hand.

47. The Appellant submitted that the Respondent erred in finding at paragraphs 22-23 of the Appealed Decision that stated:

> *"UKAD has given due consideration to the facts of this matter. UKAD does not believe that there are any other relevant facts that entitle Mr Hosseinpoor to an adjustment in the period of Ineligibility to be imposed."*

(i) The Respondent misapplied the 'Fault' aspect of the mitigating clause in Article 10.12.5,

48. The Appellant alleged the Respondent misapplied the 'Fault' aspect of Article 10.12.5 of the ADR as the Appellant was not aware prior to March 2015 that he was not allowed to train at the Club.

49. Further, the admissions the Appellant did make in the interview were unsound for the reason that they were extracted from the Appellant in circumstances where, he had attended in good faith and had adopted an extremely open and cooperative attitude, the nature of the interview had been misrepresented to him, he was not a native English speaker and was at particular risk of being overly acquiescent to the lines of closed questioning put forward by the investigating

officers and the interviewers adopted a one-sided and oppressive attitude in questioning him.

50. The Appellant stated he repeatedly informed the Respondent that he had not been aware that he could not train with the Club until he was told this by his coach Mr Murray around March 2015.

51. Although the Appealed Decision concluded that the conditions of the Appellant's sanction were "*reiterated… by way of correspondence from both the BWA and UKAD*", the only letter which the investigators showed the Appellant during the Interview was UKAD's letter of 27 August 2015, which post-dates the infringements the Appellant admitted. The Respondent did not obtain the BWA's correspondence with the Appellant until 2 August 2016, the day before it issued the Appealed Decision, and it did not therefore put that correspondence to the Appellant during the Interview, before citing it as evidence that the Appellant was aware of the conditions of his ban.

52. In summary, the Panel should not, due to the manifest lack of thoroughness in the Respondent's investigation, be comfortably satisfied that the Appellant knew prior to March 2015 that he was not allowed to train with the Club. The Appellant invited the Panel to instead accept the Appellant's evidence that he did not properly understand his ban, which has been consistent, and was corroborated by the evidence of Mr Murray.

(ii) There are circumstances which mitigate the Appellant's level of Fault

53. The Appellant accepted that by training he was in breach of the Initial Decision but in circumstances where he did not know that he was not allowed to train at a BWA-affiliated gym, the Appellant stated he acted with some degree of Fault. However, he also submitted that the following considerations mitigated the level of Fault shown by him.

54. Firstly, the Appellant highlighted that although his spoken English comprehension is reasonable, his reading comprehension of English is poor. The Appellant noted that CAS authorities, on the assessment of fault, indicate that factors subjective

to the athlete, such as age, experience and mental health, can properly feature as factors mitigating the athlete's degree of Fault for the purposes of the anti-doping rules. The Appellant cited *CAS 2012/A/2804* and *CAS 2005/A/873* to support his argument. The Appellant submitted that his failure to understand his obligations was substantially attributable to his poor ability to read English.

55. Secondly, the Appellant submitted that the terms of the 2014 sanction were not communicated to him in clear terms at the time of the Initial Decision. The sanction was described in the Initial Decision in the terms of Article 10.10.1 of the then-in-force 2014 ADR. The wording of Article 10.10.1 (now 10.12.1 of the 2015 ADR) stands in stark contrast to the wording of the letter received by the Appellant from UKAD on 25 August 2015, which stated that:

> "*you are banned from… training with your club/team*."

56. The Appellant cited the recent award of *CAS 2016/A/4643 Sharapova v ITF*, stating that it demonstrated that the clarity with which a governing body communicates the requirements for an athlete to comply with their anti-doping obligations, can factor in the assessment of the athlete's fault for failing to comply.

57. The Appellant noted that in the present case, there was no reason why an unambiguous communication of the substantive requirements of his ban, similar to that in the Respondent's August 2015 letter, could not have been communicated to him and more particularly to someone who could explain the requirements to him around the time of the Initial Decision. The ADR are complicated and can be difficult even for professional lawyers and sports regulators to follow, as shown by the fact that different aspects of the anti-doping rules were misstated by both the BWA and by the Respondent in correspondence with the Appellant.

58. In summary, the Appellant stated that it was not his submission that an athlete's failure to understand his anti-doping obligations can excuse his failure to comply in the sense of entirely absolving him of any Fault. However, where an athlete's failure to understand results from poor linguistic ability, allied with the difficult

manner in which the Appellant's sanction has been communicated, he submitted that this mitigates his Fault in a manner which warrants a reduction in sanction.

(iii) The Respondent misapplied the proportionality aspect of the mitigating proviso to Article 10.12.5

59. The Appellant noted that the additional "*all the circumstances of the case*" aspect of the mitigating proviso to Article 10.12.5 of the ADR, allowed the decision-maker applying that provision to conduct a wider inquiry into the proportionality of the sanction to be imposed under the rule.

60. The Appellant cited *CAS 2007/A/1252* and amongst other things stated that the proportionality analysis which takes in all of the circumstances of the case can factor in considerations such as the seriousness and consequences of the athlete's infringement of the rules, as well as the athlete's contrition.

61. The Appellant submitted that there were a large number of considerations which, individually and cumulatively, indicated that in the circumstances of this case, a large reduction in the automatically applicable sanction under Article 10.12.5 of the ADR is warranted, including:

- The reaction of the BWA and of the Respondent in 2015 to send written letters to the Appellant and not charge or have a formal investigation when they received allegations from the anonymous Whistle-blower indicated unambiguously that they did not consider the Appellant to have committed a serious offence.

- The breaches did not affect competition in any way. The Appellant trained on two occasions, and stopped once the substance of his sanction was clarified to him. It would be grossly unfair to automatically impose an equivalent sanction for, on the one hand, training and, on the other, a doping infringement or indeed for a decision, while banned, to compete in an important national or international competition, and thereby distort the competition for eligible athletes. If the latter type of infringement warrants an additional two year sanction, it is submitted that the Appellant's activity warrants a significant reduction in sanction.

- The Appellant complied as soon as the position was explained to him, as evidenced by the fact that, in May 2016, the Whistle-blower could not point to any evidence of the Appellant training after early 2015.

- The Appellant trained, not with a view to remuneration or the benefits of winning in competition, but for the pure love of the sport.

- The Appellant was entirely cooperative with the Respondent's investigation. He attended the interview in good faith and his cooperative attitude was noted by Mr Jackson.

- The Appellant made a candid admission to having trained in breach of his sanction in circumstances where the Respondent had no other reliable evidence, as shown by the fact that the Appealed Decision was entirely dependent on the Appellant's admissions, which were by a non-native English speaker, who attended the interview without legal representation, and in response to an allegation (i.e. that he had been training other wrestlers in breach of his sanction) that was of a very different focus to the greater part of the interview, and in the face of oppressive questioning.

62. The Appellant submitted that the broader proportionality-based assessment mandated under Article 10.12.5 of the ADR allows the Panel to legitimately take into consideration the effects of the sanction on the Appellant. Wrestling is the Appellant's life and a sport which he has pursued to a high standard since he was a child and at this stage, been more than adequately punished by his long suspension from the sport. He can, through coaching wrestling, supplement his income as a carer for his brother so such Ineligibility has a serious financial effect on him and at 32, he does not have long left to compete at an elite level such that the automatically applicable 2-year sanction would have a disproportionately harsh effect on him.

63. The Appellant noted Article 10.12.5 implies that a reduction may be warranted in a case where the Appellant would not be able to satisfy the 'no significant fault or negligence' criterion, and thus may have failed to take an obvious precaution, but nevertheless warrants some degree of reduction in sanction in light of factors mitigating his or her level of fault.

64. The Appellant stated the restructuring of the rule contained in Article 10.12.5, such that a period equal to the initial period of ineligibility is added to the end of the Appellant's original sanction, inevitably required the inclusion in the same rule of a broad facility for the adjustment of the automatically applicable sanction.

65. For all of these reasons a 6 month additional period of ineligibility was more than sufficient to punish him, concluding that his additional sanction under Article 10.12.5 should be set to expire at midnight on 1 January 2017.

V. The Respondent's Submissions

(a) The Club was not a member of or affiliated to the BWA in early 2015; the Appellant did not act in breach of ADR Article 10.12.1

66. The Respondent submitted that the Panel should reject the Appellant's appeal on this specific ground and uphold the Appealed Decision.

67. The Respondent stated that the purpose of this provision was to limit the impact of national law as it would clearly be contrary to the fundamental harmonising purpose of the World Anti-Doping Code (the "Code") if the same Code-compliant anti-doping rules were to be given different meanings and legal effect in different jurisdictions and/or different sports.

68. The Code required hearing panels to construe and apply any Code-compliant set of anti-doping rules as an independent and autonomous text and when interpreting the ADR, it should also be borne in mind that the underlying objective of the Code is to protect the integrity of sport and that the Code is the result of a global sporting consensus that the Code represents what is necessary and appropriate to protect sport from doping.

69. The Respondent submitted in determining how the 2015 Code itself would apply to this case, it is necessary to also consider whether the Club is a "club" for the purposes of Article 10.12.1 of the Code. The term "club" is undefined in the 2015 Code. It is also undefined in the ADR. Absent any definitions in the Code or the ADR, the Panel should attribute the term "club" with its plain and ordinary

meaning stating that the Oxford Dictionary provides that a "club" is "*a group of people who meet regularly for a particular activity*".

70. The Respondent noted that the Witness Statement of Mr Murray dated 24 November 2016 refers repeatedly and consistently to the Club as "the club" and Mr Murray accepts that the Club met regularly on three days per week in order to engage in wrestling training. Plainly, this puts the Club squarely within the ordinary meaning of a "club" and additionally, the Respondent notes that the Club is identified as a wrestling club on the BWA website in the "FIND A CLUB" section.

71. The Club is (and was at all material times) a BWA "club" and therefore, that the Appellant's conduct in having "joined in with wrestling training on a couple of occasions in early 2015", means that he has breached the prohibition on participation. It is clear from the wording of Article 10.12.1 of the ADR that the inclusion of three distinct terms – "member", "affiliated" or "licensed" – is intended to capture a broad range of associations between sporting bodies and the NGB. This includes formal associations with an NGB, as well as more informal and loose associations with the NGB.

72. The term "licensed" was not relevant in these circumstances. The Panel should interpret the term "member" to convey some sort of formal association between the sporting body and the NGB. The BWA Articles should not be used to interpret the meaning of the terms "member" and "affiliated" as used in Article 10.12.1 of the ADR. However, the BWA Articles provide some assistance in determining whether the Club should be considered to fall within those terms.

Article 3.1 of the BWA Articles provides:

> *"The Association shall have four classes of Members, namely voting Members, English Sub-Region Associations… Affiliated Clubs and Individual Members."*

Article 1.1.2 of the BWA Articles further sets out:

> *"Affiliated Clubs means the companies, corporations and/or unincorporated associations in each of the Nations & Regions Associations which have paid*

the appropriate annual registration fee as determined by the Association from time to time."

73. The Respondent submitted although the BWA Articles use the term "Affiliated Clubs", it was clear from the above that "Affiliated Clubs" are in fact a class of Member and despite the late payment of the affiliation fee by the Club and the implication that the Club was therefore no longer a Member of the BWA for the purposes of the BWA Articles, the Club remained a "member" of the BWA for the purposes of Article 10.12.1(a) of the ADR for the following reasons:

- There is no evidence that the Club (as an Affiliated Club) formally withdrew and re-joined the BWA (as is permitted under Article 5.2 of the BWA Articles). At no time therefore was the Club removed or withdrawn from being a Member of the BWA by virtue of the late payment of the affiliation fee;

- The BWA confirmed (by email of 1 December 2016) that affiliation renewals are due between 1 January to 31 March each year and that BACS payments are requested from clubs by e-mail in December of the preceding year. The BWA also confirmed that "*nearly all clubs would fail to pay by 1 January*" meaning that on the Appellant's analysis, nearly all BWA clubs would no longer be "members of" or "affiliated to" the BWA for the purposes of the ADR on 1 January every year;

- The BWA confirmed that it took no action to remove the Club from its membership of, or to confirm that it was no longer affiliated to, the BWA;

- The Club has paid the BWA affiliation fee for at least the past three years on 1 June 2014, 15 September 2015 and most recently 3 March 2016 for the respective calendar year. The Club clearly intended to maintain its Membership with the BWA for each of those years, notwithstanding the late payment of the affiliation fee;

- The Club and its members continued to participate in BWA Competitions between 1 January 2015 and 15 September 2016. On 6 March 2015, Club

individuals participated in the 2015 BWA English Junior and Senior Championships;

- The Y-Club website suggests a clear ongoing association between the Club and the BWA including:

> *"The Manchester Wildcats Freestyle Wrestling Club formerly known as the Manchester YMCA Wrestling Club was formed in 1912 and became a founding affiliate of the then British Wrestling Association."* and
>
> *"Wherever possible, junior members are encouraged to participate in regional, national and international events. The "Wildcats" also help with the take-up of the sport in schools through the British Wrestling Association's "Grassroots" programme. Junior wrestling classes take place on Saturday mornings 11am – 12:45pm.*

74. The Respondent therefore invited the Panel to reject the submission that the Club was not a "member" of the BWA for the purposes of Article 10.12.1(a) of the ADR.

75. If the Panel does not agree with the Respondent that the Club falls within the definition of a "member" of the BWA, then the Club should be considered to be "affiliated to" the BWA. Since Article 10.12.1(a) of the ADR includes both the words "member" and "affiliated" separately, the BWA must have been intended to cover a different type of association between the body in question and itself. The submissions of the Appellant fail to draw the distinction between the term "member" and the term "affiliated" as clearly differentiated in, and for the purposes of, Article 10.12.1(a).

76. The Respondent submitted that the term "affiliated to" connotes a more informal link between the body and the NGB than that of a "member of" and if the Panel does not consider that the Club remained a member of the BWA for the purposes of the ADR, despite the late payment of the affiliation fee, the Respondent submitted that the Panel can be comfortably satisfied that the Club was "affiliated to" the BWA at the material time and for the purposes of the ADR.

(b) The Respondent erred in its application of Article 10.12.5; the Appellant's sanction should be reduced in line with his level of Fault and in view of all of the circumstances of the case

77. The Respondent noted the wording of the definition of Fault in the ADR and stated that if an athlete engaged in any breach of duty or lack of care (appropriate to the particular situation) then the athlete was at Fault.

78. The ADR provide for a personal responsibility placed upon an athlete and the Appellant was therefore under a strict duty to acquaint himself with the requirements of the ADR, which include the provisions of Article 10.12.1, when he was issued with a period of Ineligibility pursuant to the Initial Decision and he was also under a clear duty to comply with the provisions of Article 10.12.1 in all respects.

79. The Respondent noted the Appellant accepted that he has acted with a degree of Fault in his particular circumstances and therefore did not seek to argue that his degree of Fault is consistent with acting with No Fault or Negligence. However, he asked that the Panel find him to be at No Significant Fault or Negligence in his particular circumstances.

80. The Respondent made the following observations:

- The Appellant admitted that he continued to train at the Y Club from August 2014 but stated that he did not engage in training with the Club until his admitted participation in early 2015. The Appellant has provided no explanation for why he continued to train by himself in the Y-Club gym, but why he chose to no longer train with the Club between August 2014 and early 2015. The Respondent submitted that he did not train with the Club during this time because he knew that he was not permitted to train with the Club during that time.

- The Initial Decision was clear as to what the Appellant was not permitted to do during the period of Ineligibility which was confirmed by the letter of 20 January 2015 in which the BWA confirmed unequivocally and

unambiguously that the Appellant was unable to train whilst declared Ineligible.

- The Appellant relies on jurisprudence, including the CAS decision in *Sharapova* as authority that an Anti-Doping Organisation should take care to provide rules that are clear and easy to understand and "*that the clarity with which a governing body communicates the requirements for an athlete to comply with their anti-doping obligations can factor in the assessment of an athlete's fault for failing to comply*". The Respondent submitted that Article 10.12.1(a) is sufficiently clear to enable an athlete to determine the type of conduct that is not permitted during the period of Ineligibility and furthermore, Article 10.12.4(b) (which was a new term added to the 2015 Code) is unequivocal that an athlete may not "*return to train with a team or to use the facilities of a club until the last two months of the period of Ineligibility or the last quarter of the period of Ineligibility imposed (whichever is shorter)"*, the plain and obvious implication being that such actions are strictly prohibited before that time.

- Whilst the Respondent accepted in principle that in some circumstances an athlete's degree of Fault may be mitigated by a failure by an Anti-Doping Organisation to communicate the requirements of the ADR clearly, for the reasons given above those circumstances do not exist in this case.

- The definition of No Significant Fault or Negligence takes into account the criteria for No Fault or Negligence, i.e., the exercise of utmost caution by the athlete. The Appellant has fallen far short of exercising utmost caution and has not presented any evidence to demonstrate that he took any precaution or that he checked what he was permitted and not permitted to do during the period of Ineligibility before training with the Club.

- Additionally, the Appellant has submitted no evidence to support his assertion that his reading comprehension in English is poor and even if the Panel accepts that it is, this does not excuse what was a fundamental breach of his duty to acquaint himself with the requirements of the ADR (including what he was not permitted to do whilst declared Ineligible) and

what constitutes an ADRV (i.e. what activities constitute a breach of the terms of his period of Ineligibility). The Appellant accepted that his "spoken English comprehension is reasonable". It would have been open to the Appellant and indeed relatively simple for him to have asked either his coach, the BWA or the Respondent directly, whether or not he was permitted to train during his period of Ineligibility.

81. For the reasons given above, the Respondent submitted that the Appellant was at Significant Fault for breaching the terms of Article 10.12.1 of the ADR and that he should not be afforded any reduction in the period of Ineligibility to be imposed pursuant to Article 10.12.5 on account of his level of Fault. The Respondent respectfully disagrees and invites the Panel to dismiss the second ground of appeal and uphold the Appealed Decision to impose a period of Ineligibility of two years.

Other Circumstances/Proportionality

82. The Appellant has made a number of submissions in relation to his Appeal that the Respondent has erred in its application of the discretion afforded to it under Article 10.12.5 of the ADR to reduce the applicable period of Ineligibility based on the other circumstances of the case.

83. The Respondent invited the Panel to reject this part of his Appeal on the basis of the following:

- The Respondent took action by way of opening an investigation into allegations made against the Appellant as soon as it received corroborative evidence of previous allegations made against him. Prior to this date, the Respondent had no evidence to corroborate any allegations that had previously been made against the Appellant nor was it able to take any further action pursuant to the ADR and/or in compliance with the National Anti-Doping Policy.

- Any breach of Article 10.12.1 constitutes a breach that should be sanctioned according to the terms of Article 10.12.5. It is artificial to draw distinctions between different activities (i.e. between training and competing in a

national or international competition) in order to determine the appropriate reduction.

- There are clear policy objectives which justify the prohibition of training whilst an athlete is declared Ineligible. Doping in sport is cheating. If an Ineligible athlete engaging in training was not considered "serious", this would undermine entirely the sanctioning regime of the ADR and the nature of the period of Ineligibility and the fact that the ADR make specific provision for a return to training in Article 10.12.4(b) during the last two months (or the last quarter) of the period of Ineligibility (whichever is shorter) demonstrates that the ADR consider any act of training before that time as a serious breach/violation.

84. The Respondent did not consider that the following factors warrant any reduction in the period of Ineligibility to be imposed on the Appellant:

- his motivations for training in breach of Article 10.12.1;
- his cooperation with the Respondent's investigation;
- the impact of the period of Ineligibility that has already been imposed upon him;
- the financial consequences that an additional period imposed would have upon him; or
- the fact that he is 32 and "*does not have long left to compete at an elite level*"

85. In the alternative, the Respondent submitted that if the Panel does consider those factors to be relevant or that the Appellant should be afforded a reduction based on the other factors of his case, then that reduction should be no more than a reduction of 6 months such that the period of Ineligibility to be imposed is a period of 18 months from 2 June 2016.

VI. Evidence at the hearing

86. The Panel heard from the Appellant, Mr Murray and Mr Jackson at the hearing. The Appellant also produced a hard copy of the BWA affiliation form.

87. The Appellant confirmed his written statement and stated, *inter alia* that: he received the Initial Decision in August 2014; his brother helped him read it; he stayed away from the Club as he was upset; he eventually started training again at the gym at the Y Club; that he trained 2 or 3 times in January and February 2015 as he thought he could; once Mr Murray told him he couldn't, he stopped; he wasn't sure that he'd wrestled on 10 January 2015, when the first Facebook image was taken and posted; and he was only practising mixed martial arts on 3 March 2015, when the second Facebook image was taken and posted.

88. Mr Murray confirmed his written statement and stated, *inter alia* that: he never saw the Appellant train before the BWA spoke to him in March 2015; he then told the Appellant that he could not train and he stopped; the Club was still attending BWA events even though it hadn't paid the affiliation fee for 2015; and the benefits of affiliation were insurance, being able to compete at BWA events, Club members could go to BWA training camps and the use of the BWA name on websites etc.

89. Whilst Mr Jackson of UKAD had not been called as a witness, he was prepared to assist the Panel by answering some questions it had and answered questions from the Appellant too. He stated, *inter alia* that: he did not believe that the Respondent looked into whether the Appellant had breached his ban in 2014; the Respondent had only decided in May 2016, once it had received the images from Facebook, that it should investigate those; and the Appealed Decision was based on both those images and the Appellant's admissions during the Interview.

VII. Issues for the Panel

90. The Panel notes that it must address the following issues:

    a) Was the Club a member of or affiliated to the BWA in early 2015?

b) If so, did the Appellant breach Article 10.12.1 of the ADR and the terms of the Initial Decision?

c) If so, does the Appellant's degree of Fault lead to a reduction of the period of Ineligibility? and

d) Are there other circumstances in the case that may give rise to an adjustment of the period of Ineligibility?

a) Was the Wrestling club a member of or affiliated to the BWA in early 2015?

91. There seems little doubt to the Panel that the Club is a wrestling club, with individual members. In addition, the Panel notes that the Club has been affiliated to the BWA for some time – according to its website, it claims to be one of the longest affiliates of the BWA and the Panel heard the evidence of Mr Murray that it has been affiliated for the last few years, as he confirmed that he paid the affiliation fee late during each of those years.

92. Whether the Club was a formal member of the BWA can be left open, as affiliation suffices in the matter at hand.

93. The main question is whether the Club was or was not affiliated in early 2015, when the Appellant is alleged to have trained there. The Panel notes that the Appellant claims that as the BWA affiliation form confirms that affiliation runs from 1 January to 31 December each year and that payment of the affiliation fee is a condition precedent to becoming an affiliate (again or for the first time), then it was only on 15 September that the Club became an affiliate of the BWA.

94. The Panel does not take such a formalistic view. Rather it looks at what happens in practice and what the various clubs, their members and the BWA itself treat as affiliation.

95. The Panel was not made aware of when the Club filed its affiliation form, whether before the fee was paid or at the same time, but in either event, the Panel notes the evidence of Mr Murray, who confirmed that the Club and its members received the benefits of affiliation from 1 January 2015 and throughout that entire year,

regardless of when the form was filed and the fee paid. The Club was able to advertise its affiliation with the BWA on its website, to run 3 sessions a week under this banner, to enter its members (and to have them insured) at BWA events during the year and so on. There was no evidence that the BWA took any action against the Club, nor sought to remove the benefits of affiliation. The Panel does not accept that a delay in the Club paying the fee to the BWA should result in it deciding that the affiliation had temporarily been removed to the benefit of the Appellant, when neither the Club nor the BWA treated the affiliation as being so suspended or removed.

b) Did the Appellant breach Article 10.12.1 of the ADR and the terms of the Initial Decision?

96. As such, the Panel agrees with the position of the Respondent in the Initial Decision – the Appellant trained on a couple of occasions in early 2015 in breach of Article 10.12.1 of the ADR and the terms of the Initial Decision.

97. When considering the evidence before it, the Panel noted the admissions made before the Respondent during the Interview and additionally before it at the hearing. The Appellant admitted both times that he had trained at the Club. The Panel notes that he admitted during the interview that the occasions coincided with the Facebook postings. However, in his written statement and verbally at the hearing, he was less clear about those dates. At the hearing he admitted he had breached the ban on training a couple of times in January and February 2015 and this was enough for the Panel to be comfortably satisfied that he did indeed breach Article 10.12.1 of the ADR and the terms of the Initial Decision and, in accordance with Article 10.12.5 of the ADR, the standard sanction is a new period of Ineligibility of two years from 2 June 2016 until midnight on 1 June 2018.

98. The Panel did note that the Whistle-blower first made contact with the BWA on 1 January 2015. The Panel never heard from the Whistle-blower and the Respondent confirmed that it never looked into whether the Appellant's first breach was in 2014. Indeed, the Appellant only admitted to training in early 2015. The Appellant did point out the different regime under the 2014 ADR, which would have started the 2 years again from the Appellant's breach, as opposed to adding

the additional 2 years to the end of his original ban. The Panel notes that the concession made in the 2015 ADR is that the Panel is afforded discretion, which it now considers.

c) Does the Appellant's degree of Fault lead to a reduction of the Ineligibility period?

99. One such area of discretion is the ability of the Panel to assess the Appellant's degree of fault in the matter at hand. In assessing the Appellant's level of Fault, it is necessary for the Panel to give regard to the definition in the ADR which states:

> *"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."*

100. The Appellant submitted to the Panel that, firstly, his ability to read and understand written English was poor and, secondly, that the Respondent and the BWA should have communicated the terms of his sanction clearly, which they failed to do. The Appellant did concede that he bore some Fault.

101. The Panel notes that there was no evidence, apart from the Appellant's own say so, that he had any difficulty in reading. While it is prepared to take his statement at face value, it is clear to the Panel that at times the Appellant did ask his brother to help him read. He admitted that he received the Initial Decision and a

communication from the BWA and that his brother went through these with him. The Respondent noted that every athlete has a duty to familiarise themselves with the ADR, so the Appellant should have been aware of Article 10.12.1 of the ADR.

102. The Panel suspects that most athletes do not read the entire ADR, but would expect any athlete to read a decision banning them from their sport, such as the Initial Decision and any covering letter carefully. The Appellant had his brother help him here and if anything was unclear, he could have approached his coach, Mr Murray, the BWA or, indeed, the Respondent. He did none of those things, which is considerable Fault.

103. The wording of the ban in the Initial Decision and the ADR is not difficult to understand. In summary it says that the Appellant shall not *"…until midnight on 2 June 2016 be permitted to participate in any capacity in a competition or other activity … organised, convened or authorised by … any body that is …affiliated to… the BWA."*

104. The Panel notes that the Initial Decision or covering email could equally have said *"you cannot train for 2 years",* however, the wording was clear enough in the Panel's view that if it was read out to an athlete they would understand that they could not train with their club. Further, the Panel notes the point made by the Respondent that the Appellant managed to comply with the no training aspect of the ban for 4 months.

105. Ultimately, the Panel sees no reason to use the Fault of the Appellant to reduce the standard 2 year sanction.

d) Are there other circumstances in the case that may give rise to an adjustment of the Ineligibility period?

106. The Panel notes that the Appellant put forward a variety of circumstances that it should take into account. The Panel does not agree that training is not serious, or not as serious as competing. The Respondent is correct when it states that training in breach of a ban is cheating. The Panel does not consider that the effect of any additional ban are relevant either. Every athlete that is sanctioned will

claim that it can affect them financially, it deprives them of the sport they love and they will be older when they resume their sport, so less likely to be successful in the future. It is a feature of the Code and the ADR that athletes can, in certain circumstances, seek a reduction of their sanctions and thus reduce those effects. Additionally, the Panel would not say that the fact the Appellant stopped breaching the Initial Decision once Mr Murray had spoken to him is a relevant circumstance either. He was found out and he stopped, but only after the breaches.

107. All that said, where the Panel does find a circumstance relevant in the case at hand, is with the admissions and cooperation that the Appellant gave to the Respondent. The Panel recalls that at the hearing, counsel for the Respondent stated that, if the Appellant had said nothing during the Interview and made no admissions of training with the Club, it would have proceeded to sanction him on the evidence of the Facebook pictures alone.

108. This Panel would have not been comfortably satisfied that 2 pictures (only one of which was with a group of wrestlers all stood on a wrestling mat, whereby the other was a smaller group in the gym with a mixed martial arts champion) proved that the Appellant had taken part in a training session in breach of his ban. The crucial, and only reliable, evidence that resulted in the Initial Decision and thus far in this award, is the admissions made by the Appellant.

109. At the time these admissions were first made, there was no Charge against the Appellant, however, the Respondent had made the Appellant aware that he was being interviewed about a possible breach of his ban under the Initial Decision. He could have said nothing, worse lied, but he cooperated and gave the Respondent the evidence it required.

110. The Panel notes that under the ADR, Article 10.6.2, would allow a panel to reduce the sanction for most other ADRVs by up to half in identical circumstances. However, this Article is not brought into play by the ADR in these circumstances, rather the Panel is afforded a discretion under Article 10.12.5. The Panel determines that in identical circumstances, it should limit its discretion to the same ability to reduce the sanction, "*but not by more than one half*."

111. Whether naively or deliberately, the Appellant gave the Respondent what it required to prove the breach and without this admission, the Panel is satisfied that the Respondent would have been left with no case to pursue and the warnings issued by the BWA would have been the extent of the Appellant's problems. The Appellant has admitted to breaching the Initial Decision and the ADR on a couple of occasions, which is a serious matter, but his admission is a significant circumstance that the Panel has determined to take into account and it thereby reduces the standard sanction by half.

The Decision

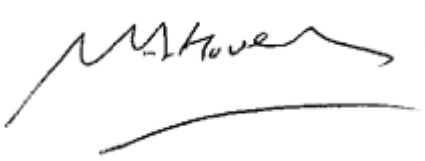
112. For the reasons set out above, the Panel makes the following decision:

112.1 An ADRV contrary to Article 10.12.1 of the ADR and the terms of the Initial Decision has been established;

112.2 In accordance with Article 10.12.5 of the ADR, a new period of Ineligibility of 12 months shall be added to the original period of Ineligibility contained in the Initial Decision, from 2 June 2016 until midnight on 1 June 2017.

112.3 As such, the Appellant shall not be permitted to participate in any capacity in a competition or other activity (other than Authorised Anti-Doping Education or Rehabilitation programmes) organised, convened or authorised by the BWA or any body that is a member of, affiliated to, or licenced by the BWA.

113. This decision shall be final and binding upon the parties.



Mark Hovell, Chairman

On behalf of the Panel

13 January 2017

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