SPORT RESOLUTIONS (UK)

NATIONAL ANTI-DOPING PANEL

SR/NADP/703/2016

Rod McKenzie (Chair)

Dr Terry Crystal MD

Dr Neil Townshend MD

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

BETWEEN:

UK ANTI-DOPING ("UKAD")

Anti-Doping Organisation

- and -

GRAHAM HALE

Respondent

REDACTED FINAL DECISION OF THE ARBITRAL TRIBUNAL ("THE TRIBUNAL")

Introduction

1. This is an extensively redacted version of the final decision of the Arbitral Tribunal ("the Tribunal") comprising three members of the National Anti-Doping Panel ("NADP") convened pursuant to Article 5.1 of the NADP Procedure Rules 2015 ("the Procedure Rules") to determine a Charge brought against Mr Graham

Hale ("the Respondent") for a violation of Article 2.3, failure or refusal to provide a Sample for Testing when obliged to do so, of the UK Anti-Doping Rules, Version 1.0, dated 01 January 2015, as adopted by the Welsh Rugby Union ("WRU") as its Anti-Doping Rules ("ADR").

2. The WRU is the national governing body for the sport of Rugby Union in Wales. Article 8.1 ADR confers jurisdiction on the National Anti-Doping Panel to determine matters arising under the ADR. The parties agreed and raised no objection at any time to the jurisdiction of the NADP in relation to the matters referred to below, or to the composition of the Tribunal.

3. The Respondent has been continually registered as a player with the WRU since 02 April 2009 and as at the date of the alleged Anti-Doping Rule Violation ("ADRV") on 27 September 2016 the Respondent was registered as a first team player at Cwmllynfell RFC, a member club of the WRU. He had been so registered since 24 September 2015. Having regard to the above and pursuant to ADR Article 1.2.1(a) the Respondent was subject to and was bound to comply with the ADR at all material times. Included amongst the obligations to which he was subject was the obligation to make himself available for Testing at all times upon request. This included Testing both In-Competition and Out-of-Competition, see ADR Articles 1.3.1(f) and ADR 5.2.1.

Facts Not In Dispute – [Significant Parts REDACTED]

4. In order to provide context to the procedural history in this alleged ADRV, it is necessary to first understand the factual background. For the most part, the facts were not, with one important exception, in dispute. All of the evidence, written and oral, documents, submissions, authorities and other material were carefully considered in full by the Tribunal in making its decisions. Only those parts of all of those materials which are directly relevant to the decisions made by the Tribunal are set out or referred to below. The following facts were not in dispute and were either admitted or held established by the Tribunal.

5. On Tuesday 27 September 2016 UKAD Doping Control Personnel ("DCP") attended at the ground of Tata Steel in Port Talbot, Wales ("the Venue"). The purpose in attending was to conduct Out-of-Competition testing on a random selection of the rugby union players who were participating in a training session for Tata Steel. Tata Steel is a leading semi-professional Rugby Union Club in Wales. The Lead Doping Control Officer ("DCO") was a Mr Allan Davies and he was provided with a list of names of those taking part in the training session by a representative of Tata Steel. From that list of names a several players were randomly selected to provide a Sample. Among the players selected was the Respondent who, whilst not a registered player of Tata Steel, had been invited to participate in the training session that evening with the members of the squad of Tata Steel. The Respondent was a young 'prospect' who was being evaluated for possible future advancement as a player perhaps with Tata Steel.

6. At or around 19:15 the Respondent was notified of the requirement to provide a Sample by a Chaperone engaged by the Applicant, a Mr Walter Hood. The Respondent signed the Doping Control Form ("DCF") confirming that he had been notified and that he understood that failing to comply with the request to provide a Sample might constitute an ADRV.

7. The Respondent was first accompanied to the Doping Control Station ("DCS") by another Chaperone engaged by the Applicant, a Mr Derek Price. The Respondent arrived at the DCS at 19:23 but left immediately, or at least very shortly thereafter, to return to training.

8. At approximately 19:40 the Respondent approached Mr Hood and informed him that he was ready to provide a Sample. The Respondent advised Mr Hood that it was his first training session with Tata Steel and that it was his first Anti-Doping Test and that he was nervous. It was explained to the Respondent by Mr Hood what the process of providing the Sample comprised of and that he was free to ask any questions that he wished as the Sample collection process took place.

9. The entry/exit log confirms that the Respondent arrived once again at the DCS accompanied by Mr Hood at 19:43. What is not in dispute is that the Respondent did not provide a Sample on this or on any other occasion on 27 September.

10. Having failed to provide a Sample, the Respondent was given the option of returning to training, provided that he was chaperoned by Mr Hood at all times. The Respondent initially accepted this arrangement and he left the DCS at 19:54 with Mr Hood. On making his way back to the training area the Respondent was informed that training had finished for the evening and the Respondent and Mr Hood then returned to the DCS, arriving at 20:02. At this point Mr Hood was then informed that he could leave the Venue by the lead DCO, Mr Davies. Mr Davies then took over personally dealing with the Respondent.

11. The Respondent stated to Mr Davies that he was unable to provide a Sample. The Respondent advised that he wished to leave the DCS without providing a Sample. Both DCP and Tata Steel coaching personnel encouraged the Respondent to remain at the DCS in order to provide a Sample. The father of the Respondent was contacted by telephone and he also spoke to the Respondent.

12. However, the Respondent was adamant that he could not provide a Sample, that he would not attempt to do so again and that he wished to leave the Venue which he proceeded so to do.

13. Mr Davies provided a written witness statement dated 06 January 2017. In all material respects that statement was consistent with the description of events set out above. At paragraph 9 of his statement Mr Davies goes into further detail regarding the discussions he had with the Respondent after the Respondent advised that he wanted to leave the DCS without providing a Sample. Mr Davies states that he advised the Respondent that "*You risk a ban from playing if you refuse to give a Sample, do you understand that*?" Mr Davies advises that the Respondent replied to the effect that "*he understood and acknowledged that he had been told that he might be banned for four years*". Mr Davies advises that he then stated to the Respondent, "*We can't say that the possible sanction will be, but it could be a ban from all sports*." (sic)

14. In paragraph 10 Mr Davies goes on to advise that he asked a Mr Price, who had accompanied the Respondent to the DCS to try and identify someone from the club to speak to the Respondent to encourage him to provide a Sample. He records that Mr Price returned shortly thereafter with a Mr Lewis who was

understood to be the Tata Steel coach. Mr Lewis then encouraged the Respondent to provide a Sample and it was Mr Lewis who contacted the Respondent's father by telephone and explained the situation to him. It was after that conversation that the Respondent then had a telephone conversation with his father but when that was complete the Respondent repeated that he wished to leave the DCS.

15. Mr Davies completed a supplementary report form dated 27 September 2016 setting out in considerable detail the sequence of events involving the Respondent and the procedures employed at the DCS on 27 September 2016.

16. Mr Price, who has been a DCO since 2008, also provided a witness statement dated 06 January 2017. Mr Price also completed a supplementary report form dated 03 October 2016.

17. Mr Hood, the Chaperone who accompanied the Respondent into the toilet cubicle during his second visit to the DCS, gave a witness statement dated 06 January 2017. In addition, Mr Hood completed a typed report dated 27 September 2016, provided information by email to the Applicant and gave oral evidence by telephone at the Hearing.

18. In the context of Mr Hood's evidence, it is appropriate to bear in mind the terms of the 2015 edition of the World Anti-Doping Code International Standard for Testing and Investigations ("the ISTI"). This has now been superseded by the 2017 edition but it was the 2015 edition which was force at 27 September 2016. There was no suggestion in these proceedings that there had been any disconformity with the provisions of the ISTI, but the ISTI contains detailed requirements regarding the collection of urine samples at Annex D.

19. The following paragraph references are all to Annex D of the ISTI:

> "***D.3 Responsibility***
>
> *D.3.1 The DCO has the responsibility for ensuring that each Sample is properly collected, identified and sealed.*
>
> *D.3.2 The DCO/Chaperone has the responsibility for directly witnessing the passing of the urine Sample.*

D.4 Requirements

D.4.6 The DCO/Chaperone who witnesses the passing of the Sample shall be of the same gender as the Athlete providing the Sample.

D.4.8 The DCO/Chaperone and Athlete shall proceed to an area of privacy to collect a Sample.

D.4.9 The DCO/Chaperone shall ensure an unobstructed view of the Sample leaving the Athlete's body and must continue to observe the Sample after provision until the Sample is securely sealed. In order to ensure a clear and unobstructed view of the passing of the Sample, the DCO/Chaperone shall instruct the Athlete to remove or adjust any clothing which restricts the DCO's/Chaperone's clear view of Sample provision. The DCO/Chaperone shall ensure that all urine passed by the Athlete at the time of provision of the Sample is collected in the collection vessel."

20. In discharging his duties as Chaperone of the Respondent, Mr Hood was required to carefully comply with the above requirements of the ISTI. If he failed to comply with those requirements, then there would be a risk that the Sample collection procedure would be regarded as invalid.

21. On returning to his home on 27 September 2016, Mr Hood typed up what he described as a "Supplementary Report". Mr Hood explained that he had done this because this had been an unusual circumstance where the Respondent concerned had not provided a Sample and he wanted to be sure that he had all the details recorded correctly.

22. Mr Hood records in his "Supplementary Report" having taken one of the Players selected to provide his Sample and then returning to the training area. On doing so, he was approached by the Respondent who advised that he, the Respondent, was ready to give his Sample. He records that the Respondent told him that he had not been tested before and that he was nervous. Mr Hood advised the Respondent that it was a straightforward process, that he was entitled to ask any

questions that he wished and that everything would be explained to him as the testing proceeded.

23. Whilst they were making their way together to the DCS, Mr Hood asked the Respondent if he had played with any other teams in the locality. The Respondent is said to have advised “that he had not really played for anyone else”. This was a somewhat odd response given the detail of the Respondent's playing history as subsequently advised during his oral evidence. The subject will be returned to below. However, Mr Hood records that at a later stage the Respondent advised him that he had played for Aberavon Green Stars RFC.

24. On arriving at the DCS, the Respondent told Mr Hood that he wanted to provide the Sample immediately as “*he wanted to get it over with*”. Mr Hood told the Respondent that he would be accompanying him to the place where Sample provision would take place and took him through the process of sample pot and lid selection. The Respondent chose to wear gloves after being given the option of washing his hands or wearing gloves

25. During the course of his oral evidence Mr Hood expressed the firm and repeated opinion that the Respondent's attempts to provide a Sample had been genuine. Mr Hood had personally been involved as a Chaperone since 2012 has been present at very many Sample collection sessions, approximately 400, at the time of this attempted Sample collection. He expressed himself as being well able to judge when an athlete was genuinely attempting to provide a Sample and one who was not. He was under no doubt that the Respondent had been genuinely attempting to provide a Sample on this occasion.

26. Mr Hood had no reason to be untruthful regarding events in the toilet cubicle. He was very sympathetic towards the position of the Respondent both at attempted Sample collection and at the Hearing.

27. The Tribunal was satisfied that the Respondent had the process fully explained to him on the day and that he understood what was required of him. The Tribunal was also satisfied that on his second visit to the DCS, the Respondent made a genuine attempt to provide a Sample for Testing in accordance with the ISTI. The Tribunal was further satisfied that at the time the Respondent left the venue on

27 September, the potential consequences of him not providing a Sample had been repeatedly and fully explained.

28. The Respondent then signed the usual certification to the effect that he was satisfied with the Sample collection procedures and that the information on the form was accurate and correct.

Pre-hearing Procedure

29. On 14 October 2016, the Applicant wrote to the Respondent notifying him of the commission by him of the alleged ADRV, providing a summary of the factual circumstances on 27 September 2016, notifying him of the terms of the Charge, in terms of ADR Article 2.3, and that in terms of ADR Article 7.9.2(a) the Respondent was Provisionally Suspended with immediate effect. The Respondent has been continuously Provisionally Suspended since 14 October 2016. The letter of 14 October 2016 also advised the Respondent that he had the choice of denying the Charge, admitting the Charge and of providing no response.

30. The Charge was set out at paragraph 3.3 of the letter in the following terms:

> "*UKAD therefore charges you with committing an Anti-Doping Rule Violation ("the ADRV") under ADR Article 2.3 in that on 27 September 2016, after being notified that you were required to submit to Sample collection authorised under the ADR, you failed, without compelling justification, to submit to Sample collection and to provide the required urine Sample*."

31. On 21 October 2016 the Respondent wrote to the Applicant responding to the Charge as set out in the Applicant's letter of 14 October 2016. **[REDACTED]**

32. On 31 October 2016, the Applicant responded by letter to the letter of 21 October 2016. The Applicant stated that it understood that the Respondent wished to proceed on the basis that he admitted the Charge of failing to submit to Sample collection but that he sought mitigation of the four year period of Ineligibility. The Applicant therefore notified that the matter be passed to the NADP.

First Hearing on Directions and First Directions

33. The Chair of the Tribunal convened a hearing on directions which took place by conference call on 21 November 2016. The Applicant was represented by Mr Tony Jackson, the Acting Head of Case Management at UKAD and the Respondent was represented by Ms Bonike Erinle, barrister, who subsequently represented the Respondent throughout the proceedings.

34. Parties agreed that the relevant ADR were the UK Anti-Doping Rules, version 1, dated 01 January 2015, as adopted by the Welsh Rugby Union, the relevant edition of the WADA Code is the 2015 Code and that the procedure rules for the Arbitration were the Procedure Rules. Parties went on to agree that the NADP had jurisdiction to determine the Charge made against the Respondent and there was no objection to the appointment of the Chair to the Arbitral Tribunal which was to determine the Charge. Further, the parties agreed that the hearing on directions could take place with the Chair sitting alone. Ms Erinle initially acknowledged that the Respondent had committed the charged ADRV as set out in paragraph 3.3 of the Applicant's letter of 14 October 2016. She advised that the Respondent would seek to establish that the commission of the ADRV was not intentional and that the Respondent bore No Fault or Negligence failing which No Significant Fault or Negligence for the commission the ADRV for the purposes of ADR Articles 10.4 and 10.5.

35. Mr Jackson on behalf of the Applicant advised that its position was that it was not open to an athlete to have a period of Ineligibility eliminated in a case where an ADRV was established/held to have been committed for the purposes of ADR Article 2.3. Ms Erinle advised that she would require some time to consider this issue.

36. The Chair then raised with Ms Erinle whether, based on the terms of the Applicant's letter of 21 October 2016, the Respondent intended to seek to argue that he had “compelling justification” for failing to provide a Sample. Ms Erinle advised that she also required time to consider this issue and further, to consider whether, if the Respondent did seek to argue that he had compelling justification

for having failed to provide a Sample, on which party the onus lay with respect to compelling justification.

37. In the circumstances, the Respondent was directed by the Chair that, by 18 November 2016, he was required to notify the Tribunal whether he intended to argue that he had compelling justification for not providing a Sample on 27 September 2016 and if he did intend to so argue, on whom lies the onus to establish compelling justification. The Respondent was also directed to clarify that, if he does intend to seek to establish that he had compelling justification for so failing, he admits the commission of the charged ADRV and if he agrees that it is not open to him to argue that he bore No Fault or Negligence for the commission of the ADRV charged if such commission is admitted or established.

38. The Hearing was assigned for 13 December 2016 or 19 January 2017, with the Respondent to advise which date was preferred. Both parties advised that it did not intend to lead any technical, expert or medical evidence at the Hearing and the Applicant advised that it did not anticipate leading any oral evidence at the Hearing. Ms Erinle for the Respondent advised that the only oral evidence that the Respondent anticipating leading was that of the Respondent himself. Dates were fixed for the provision of witness statements and copy documents plus for notification to the Tribunal as to the extent of oral evidence at the Hearing. The documents were to be provided in the form of a joint bundle and an agreed list of authorities was also to be provided in advance of the Hearing.

39. The Chair issued the Tribunal's first directions detailing all of the above on 10 November 2016.

40. By email of 16 November 2016, Ms Erinle advised that neither 13 December 2016 nor 19 January 2017 were suitable for the Hearing, that the Respondent now intended to provide additional oral evidence to his own and that the Respondent requested that an alternative hearing date be fixed.

41. On 17 November 2016, Ms Erinle, by email to the NADP Secretariat advised as follows:

"*1. The Athlete will be submitting at the hearing that he had compelling justification for not providing a urine sample on 27 September 2016. Given the absence of mention of onus of proof as to ADRV 2.3, the Athlete considers that the burden of proof must be neutral, i.e. that the question of compelling justification is one to be decided by the Panel, having regard to all of the circumstances of the case. If the burden was intended to be on the Athlete, then the Rules would have said as much, as set out in Articles 2.1.3, 2.6.1 and 2.10.3, for example. IF (*sic*) the Panel is of the view that the burden lies on the Athlete, notwithstanding the lack of any express statement of that responsibility in the Rules, then the standard of proof would be the balance of probabilities, in line with Article 8.3.2.*

2. For the avoidance of doubt, the Athlete denies commission of the ADRV charged, on the basis that there was a compelling justification for his failure to provide a sample.

3. The Athlete agrees that it would not be open to him to argue that he bore No Fault or Negligence in the event of admission or establishment of the ADRV charged.

4. **[REDACTED]**

5. The Athlete also intends to rely on lay evidence from his father, Jonathan Hale, whom he anticipates will give oral evidence at the hearing of this matter."

42. In response to Ms Erinle's email of 17 November 2016, Mr Muncey sent an email of 25 November 2016 to the NADP Secretariat. In that email, Mr Muncey advised:

(a) *that UKAD accepted that ADR Article 3.1 placed the burden of establishing ADRVs upon UKAD;*

(b) *that the ADRV is established prima facie by the failure of the Athlete to provide a Sample after notification without compelling justification on the basis of the following:*

(i) that Mr Hale failed to provide a Sample, the notification was proper and Mr Hale completed the relevant boxes of the DCF all of which was stated not to be in dispute;

(ii) that on the evidence available to UKAD, it had concluded that Mr Hale's explanation of his failure to submit to Sample collection did not amount to "compelling justification". That conclusion had been put to Independent Review pursuant to Article 2.7.3 of National Anti-Doping Policy. That Independent Review concluded that UKAD was correct that the evidence did not amount to a compelling justification; and

(iii) that UKAD considers that it has met the burden of establishing the ADRV pursuant to ADR Article 2.3.

(c) *that under reference to specified authorities the burden rests on the Athlete to demonstrate compelling justification (the relevant authorities are discussed below and not repeated here); and*

(d) *that UKAD considered the burden of proof lies on the Athlete to demonstrate compelling justification for his failure to submit to Sample collection, that the standard of proof is the balance of probabilities "i.e. that the Panel has to be satisfied on the balance of probabilities that Mr Hale's justification for failing to submit to Sample collection was itself "compelling".*

UKAD went on to reserve the right to call expert evidence if considered appropriate and requested that **[REDACTED]** be available for the Hearing to give evidence.

43. In light of these conflicting positions adopted by the Applicant and the Respondent, the Chair issued second directions dated 9 December 2016.

44. The Chair noted that the Respondent had not withdrawn the notification made at the first hearing on directions that he would seek to argue that if an ADRV is admitted or established, it was not intentional and in any event that he bore No Significant Fault or Negligence for the commission of the ADRV for the purposes of ADR Articles 10.4 and 10.5 respectively.

45. With respect to the issue of compelling justification: the Respondent submits that the burden of proof is neutral as between the Respondent and the NADO and UKAD submits that the burden of proof is on the Athlete to establish compelling justification and that the requisite standard of proof is "*balance of probabilities*". Accordingly the Chairman made no determination at that stage as regards the issue of the burden or standard of proof in this matter and the position of the Arbitral Tribunal was reserved. Parties were invited to make full submissions on these issues at the Hearing and to include relevant material in skeleton arguments.

46. Having regard to the nature of the evidence that would be relevant to the issue of compelling justification and the fact that the Respondent will continue to argue lack of intention as regards the commission of the alleged ADRV and that, in any event, the Respondent will continue to argue that he bore No Fault or Negligence, failing which, No Significant Fault or Negligence for any admitted or established ADRV, it was decided by the Tribunal, without objection by the parties, that the Respondent should lead first at the Hearing. It was also decided that the Respondent would be entitled to apply to recall any witness previously called by him and to call further witnesses in rebuttal following any oral evidence led by the Applicant.

47. Having regard to the more extensive evidence now anticipated, the Hearing was scheduled for 20 January 2017 with a full day being set aside.

48. A timetable was fixed with respect to the provision of technical or medical evidence, statements etc.

49. The Chair went on to observe that the Tribunal had no power to compel the attendance of any witness at the Hearing and that it would not seek therefore to compel the attendance of **[REDACTED]** to give oral evidence as had been requested by the Applicant. It was observed that parties would be able to make submissions with regard to the weight to be attached to evidence in circumstances where such evidence had not been subject to cross examination.

50. In advance of the Hearing assigned for 20 January 2017, additional written evidence was permitted to be submitted on behalf of both the Applicant and the Respondent.

51. For the Respondent a letter dated December 2016, which although unsigned was later confirmed to have come from the Respondent's father Jonathan Hale, was sent to the NADP Secretariat. In addition, a second unsigned and undated note with seven lines of text was also submitted and this also was established to have come from Mr Jonathan Hale.

52. At the full Hearing it was subsequently accepted on behalf of the Respondent that there was no alternative to the provision of a Sample of urine at a Sample collection session organised for the collection of urine Samples and that even where both types of Sample were to be collected at the same session, it was for the NADO to determine at its discretion which type of Sample, or both types, an individual athlete was required to provide. UKAD was entitled to insist upon a urine Sample being provided on 27 September 2016 and that very different facilities would have had to have been provided with different staff if a blood Samples were to be taken. In any event, Samples of blood are used for Testing for different Prohibited Substances from those for which urine is used.

[Medical Evidence – REDACTED]

The Adjourned Hearing of 20 January 2017

53. **[REDACTED]**

54. In all of the circumstances, the Tribunal agreed to adjourn the Hearing assigned for 20 January 2017, it being noted that the provisional suspension of the Respondent continued meantime.

Further Hearing on Directions and Third Directions

55. **[REDACTED]**

56. As recorded in the third directions, a reconvened Hearing was assigned to take place on 19 April 2017 and a timetable was specified for the provision of any further witness statements and/or reports. The Applicant was requested to endeavour to make Professor Peters available to give oral evidence at the Hearing on 19 April 2017 either in person or by telephone conference call.

57. Parties were required to notify skeleton arguments by not later than 12 April 2017.

[Medical Evidence – REDACTED]

The Hearing on 20 April

58. At the Hearing the Tribunal heard oral evidence by telephone from Mr Hood and oral evidence in person from the Respondent and from his father. **[REDACTED]**

59. The Tribunal has already set out in some detail Mr Hood's evidence.

60. On balance, the Tribunal unanimously prefers the evidence of Mr Hood on this issue rather than the evidence of the Respondent. The Tribunal finds Mr Hood's evidence to be wholly reliable and credible.

Evidence of Jonathan Hale

61. Mr Jonathan Hale is the father of the Respondent. He described his son as a quiet, shy but talented lad. He had played with the Osprey's under 16 team and had been the fastest, strongest and fittest member of the team but they would

not keep him on through to a professional stage because he was too shy and lacked assertiveness. The Respondent had a Welsh Boys Club cap and since he joined a local club he had also trained with a number of other 'larger' clubs. He was invited to train with Tata Steel because they recognised his qualities and they were a 'quality' club.

62. In cross examination Mr Hale provided more information about his son's playing history. He had played for Wales in his age grade as a Rugby League player against the likes of Leeds Rhinos and with Salford, both leading English Rugby League teams. He had also played with the Welsh Boys Club. He played post 16 with Aberavon Rugby Football Club and had been watched as a young player by Neath.

63. He advised that, to his knowledge, his son had never had any training or education in relation to Anti-Doping generally and Testing in particular.

[Oral Medical Evidence – REDACTED]

[Oral Evidence of the Respondent – REDACTED]

Submissions on Behalf of the Respondent

64. The primary position advanced on behalf of the Respondent by Ms Erinle was that the reasons for the failure of the Respondent to provide a Sample on 27 September 2016 amounted to "*compelling justification, such that no period of ineligibility should attach*".[1] The alternative position, without prejudice to the primary submission, was that in the event that the Tribunal finds that the ADRV charged, ADR Article 2.3, has been made out that the commission of the ADRV by the Respondent was firstly not intentional, pursuant to ADR 10.3.1 and, in any event, carried No Significant Fault or Negligence on the part of the Respondent pursuant to ADR Article 10.5.2.

65. If the alternative position was accepted by the Tribunal, but the primary position was rejected, then the period of Ineligibility should be one year.

[1] Quote from Skeleton Argument

66. What amounts to compelling justification is something which constitutes, submitted Ms Erinle, “truly exceptional circumstances” and this is to be informed by the particular facts in each individual case. The Tribunal should carefully consider the context in which the Respondent failed, after numerous attempts, to provide a Sample of urine on 27 September. **[REDACTED]**

Submissions on Behalf of the Applicant

67. Mr Cotter began by accepting that the burden of proof for establishing the commission of the ADRV was on the Applicant and that the standard of proof was to the comfortable satisfaction of the Tribunal. He asserted that the Respondent had *prima facie* accepted that he had failed to provide a Sample when requested and that the essence of the issue in relation to whether an ADRV had been committed or not was whether there was “compelling justification” for the non-provision of the Sample by the Respondent. Mr Cotter reiterated the Applicant's position which was that the burden of proof on establishing the existence of compelling justification as a defence to the charged ADRV rested with the Respondent and, as we have already observed, the Respondent now accepts through counsel that this burden rests upon him. The standard of proof in establishing compelling justification is the balance of probabilities. As authorities in support of this series of submissions, Mr Cotter referred to *Fazekas v IOC* (CAS 2004/A/714) at [22], *WADA v CONI, FIGC, Mannini & Possanzini* (CAS 2008/A/1557 at [6.2(73)]), *UKAD v Six* (NADP Decision dated 25 October 2012 at [21]) and *UKAD v Davies* (NADP Decision dated 16 September 2014 at [36]).

68. As regards whether compelling justification had been established, Mr Cotter first drew attention to the following asserted circumstances:

- that on the evening in question the Respondent was nervous;
- **[REDACTED]**

69. Mr Cotter went on to refer to the Respondent's letter of 21 October 2016 and, in particular, the Respondent's assertions that:

- **[REDACTED]**

70. Mr Cotter pointed out that on the evening of the Testing procedures at the Venue the Respondent had not disclosed that he was suffering from any medical difficulty that prevented him from taking a full part in Sample collection. **[REDACTED]**

71. Mr Cotter went on to refer to the statement provided by the father of the Respondent and, in particular, that it was stated:

- **[REDACTED]**

72. Mr Cotter then referred in detail to various parts of the report of Professor Peters.

73. Mr Cotter submitted that the threshold for establishing "*compelling justification is very high"*; indeed the word "compelling" highlights the nature of that very high threshold. The fact that the standard of proof is on the balance of probabilities does not affect how high the test is in terms of what has to be established in order for compelling justification to be held to have existed. Mr Cotter referred to the decision in *CCES v Boyle* SDRCC DT 07-0058 [of 31 May 2007], which established, in his submission, that compelling justification had to be "unavoidable". In that case it was suggested that the Athlete would have to establish something of the nature of being taken "*suddenly, violently and horribly ill*" such that he or she was completely unable to provide a Sample. This, he submitted, supported the proposition that the threshold was very high and was of the nature of "unavoidable" in terms of the failure to provide a Sample. Mr Cotter went on to refer to *WRU v Nathan Jones,* 9 June 2006 (NADP), in that case compelling justification was required to be something "exceptional" and "unavoidable", he referred also to: *ITF v Troicki*, 25 July 2013, *FEI v Bram* 2013/BSO3, *UKAD v Six*, 25 October 2012 and *RFU v Thomas Price*, 10 March 2016.

74. **[REDACTED]**

75. Mr Cotter went on to submit, in the alternative, that if the Respondent has demonstrated that the ADRV was not intentional but he has failed to establish

that there was compelling justification, then the relevant period of Ineligibility would be two years. However, ADR Article 10.5.2 afforded the Respondent the opportunity to mitigate that period of Ineligibility by up to 50%. This opportunity only arises in circumstances where the Athlete demonstrates on the balance of probabilities that the Athlete bore "*No Significant Fault or Negligence"* for the ADR established as having been committed. In assessing the degree of fault, Mr Cotter submitted that the Tribunal is required to consider whether there were any special considerations, such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care taken by the Athlete in relation to the degree of risk present. Mr Cotter went on to advise that the commentary to the WADA 2015 Code at page 63 was to the effect that "*No Significant Fault or Negligence*" only applies in "*exceptional circumstances"*.

76. Mr Cotter acknowledged that in previous cases the Applicant has accepted that an athlete can demonstrate No Significant Fault or Negligence where they establish that they suffered a cognitive impairment that diminished their appreciation of risk that their conduct may lead to the commission of an ADRV. However, in order to so establish the Athlete must, submitted Mr Cotter, show:

- a medical diagnosis of psychological disorder or mental illness; and
- cognitive impairment linked to the circumstances surrounding the commission of an ADRV

77. Mr Cotter submitted that, in the current circumstances, the Respondent had not established the existence of No Significant Fault or Negligence and that for the following reasons:

- **[REDACTED]**

78. In the light of all of the above Mr Cotter submitted that the Respondent had not established to the requisite standard (balance of probabilities) that the necessary exceptional circumstances existed and, accordingly, he is not entitled to the benefit of a reduction in his period of Ineligibility by reason of No Significant Fault or Negligence.

79. As to the period of Ineligibility, Mr Cotter noted that this was the Athlete's first ADRV and that the relevant period of Ineligibility under ADR Article 10.3.1 is four years where, as he submitted, the Athlete has not or cannot establish that the ADRV was not intentional. Assuming it is established that the offending was not intentional then the period of Ineligibility will be reduced to two years unless the Athlete can establish No Significant Fault or Negligence for the offending, in which case, there is the potential to reduce the period of Ineligibility by up to 50%, i.e. by up to the period of one year. In those circumstances the period of Ineligibility may be any period the Tribunal determines between two years and one year depending on the degree of fault, as determined by the Tribunal, on the part of the Respondent for the established offending.

Existence of a Disorder

80. **[REDACTED]**

81. In the case of *UKAD v Slowey,* 9 September 2016 (NADP) the Arbitral Tribunal reviewed the recent series of decisions of Anti-Doping judicial bodies in relation to psychiatric and/or psychological disorders suffered by athletes arising in cases where an ADRV was alleged and, in some of those cases, established. The decisions are listed at paragraph 74 in *Slowey* and are discussed in the paragraphs which follow. In most of those cases the Tribunal was primarily concerned with whether it was open to the Tribunal to exclude or reduce an otherwise mandatory period of Ineligibility through the application of the provisions of ADR Articles 10.5.1 and/or 10.5.2, i.e. that the Athlete in question bore No Fault or Negligence or No Significant Fault or Negligence for the ADRV committed. The earlier cases to *Slowey* had generally concerned circumstances in which it was considered whether a psychiatric disorder, generally but not exclusively depression, existed that resulted in a degree of cognitive impairment. In *Slowey*, the Tribunal held that in the context of making a decision as to whether No Significant Fault or Negligence existed for the purposes of ADRV Article 10.5.2, it was equally valid to consider the effect of an established psychological disorder on whether there was the requisite degree of cognitive

impairment as it was to consider a psychiatric disorder, see in particular paragraphs 79 and 80 in *Slowey*. The Tribunal in this case adopts the same approach.

82. **[REDACTED]**

Discussion

83. Turning now to the specific questions which the Tribunal is required to address having regard to the terms of the ADR. Logically, the first of these questions is whether it has been established that an ADRV, in particular, a violation of Article 2.3 ADR, was committed by the Respondent on 27 September 2016. If the commission of an ADRV comprising a violation of ADR 2.3 is not established to have been committed then the Charge will require to be dismissed.

84. The full terms of ADR 2.3 are as follows:

> "*2.3* ***Evading, Refusing or Failing to Submit to Sample Collection***
>
> *Evading Sample collection, or without compelling justification, refusing or failing to submit to Sample collection after notification of Testing as authorised in these Rules or other applicable anti-doping rules*."

85. It is first observed that "Evading Sample collection", which is not subject to the "without compelling justification" qualification, is not in issue in this arbitration and is not comprised in the Charge.

86. The terms of the Charge, i.e. the alleged ADRV, as set out in paragraph 3.3 of the letter from the Applicant to the Respondent of 14 October 2016, is that:

> "*… you failed, without compelling justification, to submit to Sample collection and to provide the required urine Sample.*"

The Applicant did not charge the Respondent with "refusing" as regards submission to Sample collection, but rather with failure to so submit. Looking at

the matter in terms of strict English, it should not be "**and** to provide the required urine Sample" but rather should be "**by** failing to provide the required urine Sample" (emphasis added). The alleged failure to submit to Sample collection is, in this case, asserted to be constituted by the non-provision of the Sample, a key element of what is required by the ISTI, rather than the non-provision of the Sample being a separate element of alleged non-compliance with the obligations of the Respondent in terms of ADR 2.3. The Respondent is, in effect, alleged to have failed to provide a Sample when required so to do, thereby failing to submit to Sample collection. However, this slight miss-formulation of the Charge is a mere matter of expression making no material difference to the essence of the alleged ADRV, it is clearly apparent what the Applicant intended were the elements of the alleged ADRV and, in any event, it was not a point taken on behalf of the Respondent.

87. **[REDACTED]**

88. There was no argument addressed to us on behalf of the Respondent that the actions of the Respondent on the date of question were sufficient in themselves to constitute "*submission to Sample collection*". The only defence offered to the alleged ADRV being that there existed compelling justification and therefore an effective qualification of the obligation to submit to "Sample collection". In any event, if such a case had been made, the Tribunal considers that "Sample collection" constitutes the totality of the procedure required by the ISTI for the production and delivery of the Sample by the Athlete to Doping Control Personnel at the DCS. In particular, it comprises the obligation, subject to the qualification, to provide the requisite Sample, in this case of urine, in full view of the Chaperone. Failure to complete the process by failing to execute the delivery to Doping Control Personnel of the requisite Sample, irrespective of how willing the Athlete may be to effect that delivery, is, in the context of the totality of a 'ISTI compliant' Sample collection process, sufficient, on the facts of this case, to constitute a failure to submit to Sample collection and therefore the establishment of the commission of an ADRV in terms of ADR Article 2.3.

89. **[REDACTED]**

90. Despite the indication given to Mr Hood that the Respondent was not a particularly experienced rugby player, quite the opposite is, in fact, the case having regard to the age of the Respondent. The Respondent's father gave a description of the clear talents of the Respondent at the sport, despite him being hampered by some aspects of his personality, which prevent him being as communicative and assertive as is required to progress to the highest levels. Notwithstanding these disadvantages, the Respondent has represented Wales at age representative level in both Rugby Union and Rugby League. He has been a member of and trained with a number of clubs, including Ospreys who are a fully professional club playing in the PRO12 and he was training on 27 September 2016 at the request of the club, at Tata Steel, a relatively high level club in Wales which finished third in the Welsh Championship Division in season 2016/2017. Further, whilst the Respondent might properly be regarded as a young man, he is by no means a child.

91. **[REDACTED]**

92. Whether there existed “compelling justification” for the Respondent's failure to submit to Sample collection on 27 September 2016, the Tribunal takes a wider view than simply looking at the events of that evening. It has also examined and assessed the relevant events and circumstances of the Respondent, so far as made available to the Tribunal, in the period leading up to the 27 September incident in order to consider whether there may have been failures, not wholly justified by his psychological disorder, on the part of the Respondent during that period which caused or materially contributed to the failure of the Respondent to submit to Sample collection on 27 September 2016.

93. The Tribunal was not particularly assisted with the different alternative descriptions of what “compelling justification” is suggested to constitute in some of the previous cases. For example, “exceptional circumstances” does not seem to the Tribunal to comprehend all of the situations in which it could be said that there existed compelling justification for failing to submit to Testing. A serious illness or injury, requiring, for example, a swift departure to hospital, is not exceptional. Such events are relatively commonplace. However it could, depending on the circumstances, constitute “compelling justification” for an

Athlete being unable and thereby failing, from a purely practical circumstance, to take part in Sample collection on a particular occasion at a specific DCS. Mental illness and psychological disorders are not in themselves particularly unusual. There are millions of people in the population who suffer such illnesses and disorders. **[REDACTED]**

94. In *CCES v Boyle* SDRCC No 07-0058, 31 May 2007, para. 53, the Tribunal concluded that, in a case where sudden onset illness was the claimed compelling justification for a failure to submit to Testing, to meet the requisite high standard to justify the failure to submit the Testing the failure must have been "unavoidable" in order for it to constitute compelling justification. The same standard was held to apply by an FEI Tribunal in *FEI v Bram* 12 November 2013 para. 11.4, although that was a case where the charge was of failing to submit a horse to Sample collection.

95. In *ITF v Troicki* CAS 2013/A/3276, where it was established that there had been a misunderstanding between a DCO and the Athlete as to what was required of the Athlete the Tribunal concluded, in the case of an alleged failure to provide a Sample in a manner compliant with the ISTI, the question as to whether a compelling justification for such failure has been established must be considered objectively. It is not a question of the good faith of the Athlete but rather whether he was justified by compelling reasons to forgo the provision of an ISTI compliant Sample.

96. That the case law has resulted in the threshold for establishing compelling justification being set at a very high level is confirmed in RFU v Price, Rugby Football Union Disciplinary, 10 March 2016, para. 69.

97. Furthermore, the provisions of ADR Article 1.3.1 (a), (b) and (f) are relevant; in particular (a). Knowing of **[REDACTED]**, in the case of the Respondent, the Tribunal would have expected him to have taken particular care to ascertain the requirements of the Rules and how those might affect him were he to be required to provide a urine Sample. **[REDACTED]** The Tribunal would have expected someone possessing the evident ability of the Respondent as a rugby player and in possession of a degree of insight into his condition to have taken positive steps

to investigate and then attempt to address what he would have learned would be a significant problem were he to be required to submit to Testing by the provision of an ISTI compliant Sample. There is ample material available on the internet and in paper form, to ascertain what would be expected of him if he were asked to take part in a Sample collection process so that he could be advised in advance of any difficulties which his psychological disorder might result in. The Respondent was clearly hoping to advance within rugby, including playing, at least alongside, professional rugby players for whom Anti-Doping Testing is a routine fact of life. In *Jones v WRU* 9 June 2010, the NADP Appeal Tribunal at paras. 63 - 68 held that all Athletes, professional and amateur, experienced and inexperienced, are required to familiarise themselves with the requirements of the Rules and that the absence of adequate Anti-Doping education will not ordinarily constitute a basis for compelling justification in failing to submit.

98. For all of these reasons the Tribunal did not consider that, in this regard, the Respondent had properly or fully addressed his responsibilities, in the period prior to Sample collection on 27 September 2016, as set out in ADR Article 1.3.1. That, of course, does not of itself constitute an ADRV, but the test of "compelling justification" is a high one. It means that the Tribunal must be satisfied on the balance of probabilities that his justification for not taking part in ISTI compliant Sample collection was one which was, looked at in the totality of the circumstances, compelling. The Tribunal concluded that the Respondent had not, for all of these reasons, discharged the burden, on the balance of probabilities, of satisfying us that he had compelling justification for failing to submit to Sample collection on 27 September 2016. In these circumstances the Tribunal was comfortably satisfied that the charged ADRV was committed by the Respondent.

99. The Tribunal found the question of whether that ADRV was committed intentionally to be a much more straightforward to answer. **[REDACTED]** Looking to the terms of ADR Article 10.2.3, the Respondent was not in any sense an athlete who was engaged in 'cheating'. **[REDACTED]**

100. **[REDACTED]**

101. The Applicant did not take issue with the principle of ADR Article 10.5.2 being capable of being established in the case of an ADRV in terms of ADR Article 2.3. Accordingly, without considering the issue further, the Tribunal proceeded in accordance with the NADP Tribunal decisions in *UKAD v Six*, 25 October 2012 paras 39 to 47 (inclusive) and *UKAD v Davies*, 16 September 2016 para 37 and turned its attention to whether the Respondent had established on the balance of probability that he bore No Significant Fault and Negligence for the established commission by the Respondent of an ADRV in terms of ADR Article 2.3.

102. **[REDACTED]**

103. No argument was addressed to the Tribunal that it was open to it to reduce the period of Ineligibility to be imposed to a period of less than 12 months, the minimum period prescribed by ADR 10.5.2. The Respondent's counsel made no reference to and did not seek to rely on the reasoning in the decision of the Commission in *FA v Livermore*, FA Regulatory Commission, 08 September 2015.

104. The Tribunal therefore followed the approach set out in *Slowey* paras. 82 to 87 (inclusive), recognising that the circumstances of every case are individual and that central to the decision on the extent of the period of the reduced Ineligibility are the specific facts of the case under consideration. **[REDACTED]** the Respondent's ability to make reasoned decisions between submitting and not submitting to ISTI compliant Sample provision on the date of Testing in his case was much more restricted than was the case with Mr Slowey when he elected to use cocaine. **[REDACTED]**

105. The Tribunal determined that the appropriate extent of the reduction in that period of Ineligibility is, in this case, and based on the “degree of fault” of the Respondent, 50%, i.e. a reduction from two years to one year. **[REDACTED]**

106. **[REDACTED]**

Disposal

107. There was no suggestion by the Respondent that there had been a timely admission by the Respondent of the commission of an ADRV. Accordingly, the Tribunal was unable to consider whether the period of Ineligibility should commence from a date earlier than the date of the Provisional Suspension of the Respondent. In any event, even if the matter had been raised with us, it is unlikely that the Tribunal would have concluded that there was an early admission of the commission of an ADRV since the Respondent maintained throughout that there had been "compelling justification" and therefore that no ADRV had been committed.

108. The Respondent has been provisionally suspended since receipt of the letter of 14 October 2016, which was delivered by courier. Accordingly, the Respondent's period of Ineligibility begins on 14 October 2016 and extends until midnight on 13 October 2017 (inclusive).

Rod McKenzie
17 August 2017
For and on behalf of the Arbitral Tribunal

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