

**IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES
OF THE RUGBY FOOTBALL LEAGUE**

Between:

UK ANTI-DOPING LIMITED

Anti-Doping organisation

and

ZAK HARDAKER

Respondent

DECISION

The proceedings

1. The Respondent, Mr Hardaker, is a professional Rugby League player, having played since 2009/10 for Featherstone Rovers RLFC and thereafter, Leeds Rhinos RLFC, Penrith Panthers RLFC and Castleford Tigers RLFC. Mr Hardaker has enjoyed

a very successful career to date including international caps, three Super League titles and a World Club Cup title.

2. On 5 October 2017, UKAD issued a Notice of Charge in relation to an ADRV pursuant to ADR 2.1. On 23 October 2017 Mr Hardaker accepted the charge through his representatives.
3. The Rugby Football League (RFL) is the National Governing Body of rugby league in the UK and has adopted the UK Anti-Doping Rules (ADR) in their entirety.
4. The Respondent, as a licensed competitor of the RFL and a participant in competitions and other activities organised, convened, authorised or recognised by the RFL, was at all times bound by and required to comply with the ADR:
 - a) By agreement dated 26 June 2017 the Respondent entered into a Rugby League Full Time Player's Contract of Employment with Castleford Tigers RLFC.
 - b) Clause 1.3 of the agreement made the completion of a Registration Form part of that contract.
 - c) The Registration Form was completed by the Respondent on 26 June 2017 with a signed declaration that Mr Hardaker "will be subject to the RFL Operational Rules including the Rules covering drug testing and misconduct".
 - d) Section C2:6 of the Operation Rules states that "Each Person subject to the Operational Rules agrees to be bound by and observe all of codes of conduct, regulations, rules and policies published by the RFL from time to time, including but not limited to: (a) The Anti-Doping Regulations
5. On 8 September 2017, Mr Hardaker was selected for In-Competition testing after a match between Castleford Tigers RLFC and Leeds Rhinos RLFC, held at the Mend-A-Hose Jungle stadium in Castleford.

6. Mr Hardaker provided a sample of urine that was split into two bottles. The A sample and the B sample were transported to the World Anti-Doping Agency ('WADA') accredited laboratory in London, the Drug Control Centre, King's College. The laboratory analysed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories. This analysis returned an Adverse Analytical Finding ('AAF') for benzoylecgonine, a metabolite of Cocaine.
7. Cocaine is classified as a Non-Specified Stimulant under S6(a) of the WADA 2017 Prohibited List. It is prohibited In-Competition only. As the Samples were obtained In-Competition, the detection of Cocaine amounted to an AAF. Mr Hardaker was charged pursuant to ADR Article 2.1 on 5 October 2017.

The relevant provisions

8. ADR Article 2.1 states:

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

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

9. The requisite evidence is detailed at ADR Article 2.1.2

2.1.2 Proof of any of the following to the standard required by Article 8.3.1 is sufficient to establish an Anti-Doping Rule Violation under Article 2.1:

a. Presence of a Prohibited Substance or any of its Metabolites or Markers in the Athlete's A Sample, where the Athlete waives his/her right to have his/her B Sample analysed and so the B Sample is not analysed; ...

2.1.3 Except in the case of those substances for which a quantitative threshold is specifically identified in the Prohibited List or other International Standard, the presence of any quantity of a Prohibited Substance or any of its Metabolites or Markers in an Athlete's Sample shall constitute an Anti-Doping Rule Violation, unless the Athlete establishes that such presence is consistent with a TUE granted in accordance with Article 4.

10. Mr Hardaker accepted the 'presence' charge on 23 October 2017. Mr Hardaker's liability for commission of the ADRV is therefore not in dispute, and the issue before the Panel is that of sanction.
11. This is Mr Hardaker's first ADRV. Accordingly, the period of Ineligibility to be applied is set out at ADR 10.2:

10.2 Imposition of a Period of Ineligibility for the Presence, Use or Attempted Use, or Possession of a Prohibited Substance and/ or Prohibited Method

The period of Ineligibility for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6 that is the Athlete or other Person's first anti-doping offence shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

(a) The Anti-Doping Rule Violation does not involve a Specified Substance unless the Athlete or other Person establishes that the Anti-Doping Rule Violation was not intentional.

(b) [...]

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

12. The definition of intentional can be found at ADR 10.2.3:

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

13. Mr Hardaker's case is that he committed the ADRV through the deliberate ingestion of Cocaine but that in all the circumstances he bears No Fault or Negligence (ADR 10.4) or No Significant Fault or Negligence (ADR 10.5). Alternatively, his ban should be reduced or annulled on proportionality grounds.
14. Articles 10.4 and 10.5.2 state:

10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence

If an Athlete or other Person establishes in an individual case that he/she bears No Fault or Negligence for the Anti-Doping Rule Violation charged, then the otherwise applicable period of Ineligibility shall be eliminated.

10.5 Reduction of the period of Ineligibility based on No Significant Fault or Negligence

...

10.5.2 Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1 [which relates to Specified Substances and Contaminated Products, so is not relevant to Mr Hardaker's case]

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

15. Insofar as Fault is concerned, the relevant definitions are set out in the Appendix to the ADR:

Fault:

Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete's [...] degree of Fault include, for example, the Athlete's [...] experience, whether the Athlete [...] 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 [...] degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete'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.

No Fault or Negligence:

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

No Significant Fault or Negligence:

The Athlete's or other Person's establishing that his Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relation to the Anti-Doping Rule

Violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his system.

16. There is also relevant commentary in the Code:

Comment to Article 10.4: This Article and Article 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.5 based on No Significant Fault or Negligence.

The circumstances of the doping offence

17. In April 2016 [REDACTED].
[REDACTED].
This event caused him great distress.
18. The evening of 6 September 2017 coincided with the first anniversary of [REDACTED]. Mr Hardaker was very upset by reason of the anniversary. Mr Hardaker does not normally drink mid-week and does not normally take drugs. After a training session, he went out drinking in the afternoon with his friend [REDACTED]. He knew his friend had access to drugs. He told Prof Catani, UKAD's expert, that he had 6-7 pints of lager, then shared a litre of vodka and a litre of whisky. He then continued drinking spirits with [REDACTED]. Two friends of [REDACTED] then offered him cocaine and he took four or five lines.

The medical evidence

19. We heard oral evidence from Dr Robert Baskind and Prof Marco Catani. Dr Baskind examined Mr Hardaker in June 2015 and diagnosed [REDACTED]. It was apparent that Mr Hardaker had suffered since childhood [REDACTED]
[REDACTED]. Dr Baskind advised Mr Hardaker as to strategies to deal with [REDACTED] and prescribed medication. He saw him on two or three follow up visits over the next few months. When he examined him again for the purpose of these proceedings he had not seen him since before April 2016. He diagnosed [REDACTED] had occurred in April 2016, [REDACTED]
[REDACTED]. He said that in September 2017, the symptoms [REDACTED] had recurred.
20. Although Mr Hardaker had been prescribed medication to minimise the effects of [REDACTED], Mr Hardaker's taking of his medication was somewhat erratic. He was not taking his medication on 6 September 2017.
21. Prof Catani, who examined Mr Hardaker for the purpose of these proceedings, agreed with the diagnosis [REDACTED], and also the diagnosis of [REDACTED] in April 2016. He said that although he agreed that on 6 September 2017 Mr Hardaker's mood was low, he pointed out that the evidence of a recurrence of [REDACTED] was not present in September 2017. Prof Catani said that the only reason to suggest that Mr Hardaker's decision to take cocaine could have been the result of cognitive impairment was because he was intoxicated after his decision to drink large quantities of alcohol.
22. Ultimately, there was little difference between the evidence of Dr Baskind and Prof Catani and we were much assisted by both experts. We accept Prof Catani's evidence that what occurred on 6 September 2017 did not in medical terms amount to [REDACTED], but do not consider that this conclusion is significant for the purpose of our findings.

The factual evidence

23. Mr Hardaker's evidence was impressive. It cannot have been easy for him to give oral evidence and be cross-examined given both the emotions involved in relation to what happened on 6 September [REDACTED]. He memorably said that when giving evidence he felt like a "caged animal." Very creditably, he made no attempt to downplay his conduct, and was utterly frank with the tribunal.
24. We should also note that evidence was led on behalf of Mr Hardaker from his mother, Zoe Hardaker, his partner Elisha Riley, Mark Bitcon, Performance Manager for the England Rugby League team, and Prof Christopher Brookes, who worked with Mr Hardaker as Chief Medical Officer for the England Rugby League team. None of this evidence was challenged and we found it of great assistance. In particular we should pay tribute to Mrs Hardaker for what appears to have been exceptional efforts in dealing with her son's issues.

No Fault or Negligence

25. It was argued on behalf of Mr Hardaker that his case fell within "No Fault or Negligence". To establish this the athlete must show that:

"he did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule."

26. We do not consider there is any possibility that this provision applies. Mr Hardaker rightly accepted that he was aware that he was taking cocaine and that it was a prohibited substance.

No Significant Fault or Negligence: the caselaw

27. If one looks at the words "*No Significant Fault or Negligence*" and treats them purely as a matter of English language, and even with considerable sympathy for Mr Hardaker, it is hard to see how the present case falls within the definition.

However, the caselaw suggests a different approach to *"No Significant Fault or Negligence"*.

28. In April 2016 the UCI Anti-Doping Tribunal gave judgment in *UCI v Paolini*. The single judge was Ulrich Haas, a German jurist who was involved in the drafting of the WADA Code. This was a cocaine case. Mr Paolini was an Italian professional cyclist. Prof Haas pointed out that cocaine was (unlike performance enhancing drugs) only banned in competition; there was thus no ban on recreational use of cocaine. No issue arose if the drug was ingested in a recreational context unrelated to competition so long as the athlete did not return to competition with the drug still present in his or her system. Relying on previous CAS authority, and after explaining the legislative history of the drafting, Mr Haas concluded that:

"in the case at hand the Rider may establish No Significant Fault by clearly demonstrating that the context of the use of cocaine was unrelated to sport performance."

29. It is hard to say that *Paolini* was a particularly exceptional or deserving case. He was a regular cocaine user who found himself in a difficult psychological situation and did not observe a long enough "cooling-off" period to get the cocaine out of his system before the Tour de France started. His ban was reduced to 18 months.
30. CAS took the same view in another cocaine case, *FIFA v CONMEBOL*, later in 2016. The President of the panel was Prof Haas. The player tested positive for cocaine in an Argentinean football match. The panel concluded at [69] that:

"in cases where an athlete establishes that he or she consumed cannabinoids in a recreational/social context unrelated to sport performance, the athlete qualifies for no significant fault."

They then went on to hold that there was no distinction between cannabis and cocaine. Again, a not especially meritorious case resulted in a reduction to 18 months: the player was a regular drug user who had consumed alcohol and whose lifestyle at the time was chaotic.

31. We were also shown the 2015 case *FA v Livermore*. Mr Livermore was a footballer who had lost an infant just after birth in tragic circumstances. For the first time in his life Mr Livermore took cocaine on the anniversary of the death. The FA Commission found that Mr Livermore "was not negligent or at fault in any real

sense” but held that “No Fault or Negligence” was inapplicable. Although a finding of No Significant Fault or Negligence only permitted them to reduce the ban to one year, nevertheless they ruled that on proportionality grounds it would be unconscionable to impose any period of suspension at all. The Commission said “this decision is not intended to set a precedent.” There was then an appeal to the FA Appeal Board; however, the appeal was by the FA who were unhappy with the introduction of the principle of proportionality (which is not referred to in the WADA Code) and invited the Appeal Board to vary the decision of the Commission so that there remained no period of suspension but so that the basis was “No Fault or Negligence” rather than proportionality. No party was contending that a suspension should be imposed on appeal. The Appeal Tribunal at [32] expressed real reservations as to the basis on which the Commission had reached their decision but, given the limited nature of the appeal and the Appeal Board’s unwillingness to find No Fault or Negligence, decided not to interfere with the conclusion of the Commission.

32. We were also shown *UKAD v Bailey*, a 2017 decision of a panel chaired by one of the members of the current panel. Mr Bailey was a rugby league player who refused to take a doping test after being offered and drinking bottled water by the UKAD officer which Mr Bailey genuinely but unjustifiably thought (after drinking it) might have been contaminated. In finding No Fault or Negligence the tribunal said about the no fault and no significant fault provisions at [50]:

“... the ADR test does not depend on how a reasonable man would have behaved. It is plain from the definition of fault that we are directed to an assessment of the individual circumstances of the individual committing the Anti-Doping Rule Violation. Indeed we note with interest that the definition directs us specifically to, amongst other considerations, “special considerations such as impairment.”

33. We also note that CAS has made it clear (CAS 2005/A/947) that

“... the requirements to be met by the qualifying element “no significant fault or negligence” must not be set excessively high”.

Discussion

34. We have rather struggled with the jurisprudence on No Significant Fault or Negligence. The natural meaning of the words of the rule does not easily support a

conclusion that an athlete who tests positive In-competition for recreational use cocaine is generally entitled to a finding that there was No Significant Fault or Negligence in ingesting the banned substance. Moreover, the scheme of the WADA rule is that the tribunal takes into account the lack of an intention to gain an advantage, or cheat, by the reduction from the four-year starting point to two years, so there seems a curious element of double counting to allow a further reduction below the two-year period in such circumstances.

35. Not surprisingly, Counsel for Mr Hardaker pressed us with factual similarities between the present case and that of Mr Livermore and urged us to follow that decision and reduce any ban to nil, or something below one year, on grounds of proportionality if we were unable to reach that conclusion by way of No Fault or Negligence.

36. We have great difficulty in understanding the *Livermore* decision. We note that the Commission stated in terms at [35] *"this decision is not intended to set a precedent"* and that the Appeal Board refers at [32] to the Commission's

"... decision not to apply the clear and unequivocal effect of [the rule] by employing an imprecise, unwritten and supra-regulatory concept or principle..."

It is sufficient for us to say that we consider the *Livermore* decision should be treated as a decision on its own facts and should not be followed.

37. However, the decisions in *Paolini* and *CONMEBOL* are in a different category. One of us did not think that the decisions in *Paolini* and *CONMEBOL* were consistent with either the scheme or plain language of the WADA code and the ADR and would not have followed them. Nevertheless, we are all agreed that, whatever our misgivings, it would not be fair to Mr Hardaker to depart from the principles set out in these cases and he should have the benefit of the rationale there given.

38. It follows that as Mr Hardaker ingested cocaine in circumstances where there was no question of performance enhancing benefit, he is entitled to a finding of No Significant Fault or Negligence.

39. We have explained above that we reject the submission of No Fault or Negligence. We also reject the contention that we should reduce the length of any ban on proportionality grounds.

Length of the Ban

40. We therefore have a discretion to reduce the two-year period of the ban to a period of not less than one year.
41. Mr Hardaker explained to us what happened in candid terms. He made a prompt admission. He has achieved great success in his sport despite very considerable obstacles in relation to his [REDACTED] which although he has suffered since childhood was only diagnosed comparatively recently. He deserves great credit for his achievements. He suffered a very distressing personal incident which preyed on his mind on the anniversary date and dealt with it by going out with a friend, drinking prodigious quantities of alcohol, and then taking cocaine at the end of the evening when he was thoroughly intoxicated. He was not a cocaine user and had only taken it before once or twice when he was young and a couple of times after the April 2016 incident.
42. In a sense, it might be said that it was almost fortuitous that it was cocaine that he ingested rather than, say, another bottle of spirits. There was no performance related benefit and if he had had another bottle of spirits instead, he would not be before us.
43. That said, we do not think the case is quite as exceptional as was submitted to us. Mr Hardaker was very upset on the anniversary date of a distressing personal incident and reacted to it by going out drinking with a friend whom he knew had regular access to drugs. When intoxicated, he took cocaine and it remained in his system when he was tested after a match a couple of days thereafter. No doubt [REDACTED] distress did not assist his decision making and the same may be said about the fact he was not taking his medication. But the real reason, in our view, that he took cocaine was because it was offered to him at a time when he was not thinking clearly because of his intoxication.

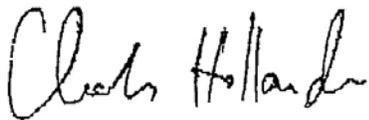
44. Each case is decided on its own facts, and care needs to be taken in relying on other cases as factual precedents when deciding the length of the ban. That said, it is notable that tribunals appear to have reduced bans to 18 months in several very unremarkable cocaine cases.
45. In all the circumstances we find the correct period of ban is 14 months.

Disposition

46. UKAD accepted that any ban should commence on the date of the test itself, 8 September 2017.
47. Accordingly the period of ineligibility extends until midnight on 7 November 2018.

Appeal

48. In accordance with the Rules, the Respondent or UKAD may file a Notice of Appeal against this decision with the Secretariat of the National Anti-Doping Panel within 21 days of receipt of this decision.



Charles Hollander QC

Chairman on behalf of the Tribunal

London, 06 April 2018



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