SPORT RESOLUTIONS (UK)

NATIONAL ANTI-DOPING PANEL

SR/NADP/804/2017

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF THE RUGBY FOOTBALL UNION REGULATION 20 AND WORLD RUGBY REGULATION 21

Before:

William Norris QC (Chair)

Dr Kitrina Douglas

Dr Neil Townshend

BETWEEN:

Rugby Football Union ***Anti-Doping Organisation***

-and-

Dean Ashfield ***Respondent***

DECISION OF THE ANTI-DOPING TRIBUNAL

INTRODUCTION

1. This hearing arises out of a reference by the Rugby Football Union ("RFU"), the governing body for the sport, with which Mr Ashfield is registered as a player. Pursuant to RFU Regulation 20.6, Mr Ashfield agrees to be bound by Regulation 20 and by World Rugby Regulation 21 ("WR Regulation").

2. The reference follows an in-competition test (a urine sample) which Mr Ashfield provided on 15 March 2017, after a match between Clevedon RFC and Bridgewater and Albion RFC.

3. On 10 April 2017, Mr Ashfield was notified that the sample he provided had tested positive for "*Drostanolone, Trenbolone (metabolite 17- epitrenbolone) and Clenbuterol, all Prohibited Substances as defined by the World Anti-Doping Agency Prohibited List 2017*". Accordingly, he was informed that he was charged with a breach of WR Regulation 21.2.1, which reads:

> "**21.2.1 Presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample**
>
> **21.2.1.1** It is each Player's personal duty to ensure that no Prohibited Substance enters his or her body. Players are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing use on the Player's part be demonstrated in order to establish an anti-doping rule violation under Regulation 21.2.1 (Presence)"

4. That letter also notified Mr Ashfield that he was provisionally suspended and he has remained suspended since.

5. Since Mr Ashfield has admitted the presence of the Prohibited Substance in his sample and the violation of WR Regulation 21.2.1, this Tribunal had to decide the appropriate sanction to be imposed.

6. As will appear in more detail hereafter, there are essentially three issues for us to consider:

(i) First, whether the sanction should be a period of Ineligibility of four years, pursuant to WR Regulation 21.10.2.1. That requires us to decide whether the player acted "*intentionally*" according to the meaning of that word as explained in WR Regulation 21.10.2.3.

(ii) Second, to what extent, if any, the player is entitled to a reduction in the period of Ineligibility on the basis of his prompt admission of liability. This requires us to consider the application of WR Regulation 21.10.6.3.

(iii) Third, the player raises the question of whether or not he has provided "*Substantial Assistance*" to the relevant regulatory body (here the RFU) following his admission of liability. As we shall explain further hereafter, it is common ground between the parties that, in the circumstances of the present case, this Tribunal would not be able to reduce the period of Ineligibility on this basis alone.

DIRECTIONS PRIOR TO THE HEARING

7. The Chair was appointed on 23 October 2017, pursuant to RFU Regulation 20.12.4. On 22 November 2017, a Directions hearing by telephone conference call was held which was attended by representatives of the RFU, Mr Ashfield, Mr Ashfield's Counsel (Ashley Cukier) and Ms Ellis (Case Manager of the NADP Secretariat).

8. The Order made on that occasion included the following provisions:

> "2. By 16.00 on 08 January 2018, the Respondent shall serve upon the RFU and the NADP Secretariat written notice explaining whether he intends to proceed and contest the charges brought against him, along with a summary of the defence(s) he wishes to advance.
>
> 3. By 16.00 on 26 January 2018, the RFU will serve upon the Respondent and the NADP Secretariat their witness evidence – whether regarding chain of custody or otherwise – upon which it will seek to rely at the hearing.

4. By 16.00 on 09 February 2018, the Respondent shall serve on the RFU and the NADP Secretariat the witness evidence regarding chain of custody and any other factual matters upon which he will seek to rely at the hearing."

9. As already noted, Mr Ashfield has never contested the issue of liability and, on 12 January 2018 (in accordance with paragraph 2 of the Order of 22 November 2017) he submitted a Written Response[1]. In that, he confirmed that he did not wish to contest liability, explaining that this had been his position from the outset and referring, amongst other matters, to his solicitor's email to the RFU dated 29 September 2017.

10. In the email of 29th September 2017, Mr Brooks, on Mr Ashfield's behalf, had written:

> "Mr Ashfield accepts the results of the 'A' Sample testing and, accordingly, he does not wish to contest liability; however, it is denied that Mr Ashfield knowingly introduced prohibited substances into his system (i.e. those that were found in the 'A' Sample). Further, it is denied that such prohibited substances were introduced into Mr Ashfield's system with the intention or purpose of enhancing his sporting performance. Mr Ashfield also wishes to impress upon the RFU that there has never previously been an Adverse Analytical Finding made against him."

11. In that same email, Mr Brooks reiterated that the issue would be one of intention, but also referred to the contentions about his client's "*timely admission*" of liability and his offer of "*substantial assistance*".

12. Mr Ashfield's Written Response of 12 January 2018 advanced those same propositions. Materially, in relation to what we shall call "*Issue 1*", he asserted:

> "8. Absence of Intention: Given that Mr Ashfield's anti-doping rule violation was not intentional (within the meaning of §21.10.2.3 of the World Rugby Anti-Doping Regulations ("WRADR")), it is submitted that the starting point for any period of ineligibility should, pursuant to WRADR §21.10.2.2, be two years. Indeed, this was the position articulated by the RFU in its letter dated 10 April 2017 ("the RFU Charge Letter") to Mr Ashfield when first setting out the charges."

[1] The deadline for the Response having been extended to this date.

13. It may be noted that this Written Response did not seek to particularise the basis upon which Mr Ashfield was going to assert that his Anti-Doping Rule Violation was not intentional.

THE EXCHANGE OF SKELETON ARGUMENTS / WITNESS EVIDENCE

14. Paragraph 4 of the Order of 22 November 2017 provided that Mr Ashfield should serve his witness evidence on the RFU by 09 February 2018. The Order also provided, at paragraph 3, that the RFU would have served its witness evidence on the 26 January 2018.

15. The RFU served nothing which could be characterised as "*witness evidence*" by that date. However, on 09 February, Mr Ashfield's Witness Statement for the first time set out the basis upon which he was going to assert that he had acted unintentionally.

16. He explained that at the relevant time he was working as a self-employed tradesman (a builder/bricklayer) and said that he had only had time to play rugby socially. Particularly, he said that during the relevant period he had had "*reconstructive knee ligament surgery and constant back pain*" which had "*prevented (his) regular participation still further*". He went so far as to say that he was in "*agony*" doing a physical job so he "*sought treatment from a local sports therapist who also runs a gym I know a few people from*".

17. Mr Ashfield added that various conventional treatments he had in the past had not helped to resolve his problems. Paragraph 13 of his Witness Statement is as follows:

> "13. The sports therapist mentioned that, given my acute pain, he could give me a shot to ease the pain in my back. I believed this would be some form of a cortisone injection and I agreed for him to give me a shot of the treatment. To be absolutely clear, we did not discuss the contents of the injection and I categorically did not have any idea what substances were to be introduced. I trusted the sports therapist and had no reason whatsoever to believe that the injection was going to

be anything untoward; it was proposed as a routine pain relief treatment and I took him at his word, at a point in my life where I was desperate to reduce the pain."

18. Following that single injection, he says that his back "*felt a little better*" and he was "*able to continue fairly normally at work*". He had no further treatment and he evidently continued to play rugby.

19. In a nutshell, he asserted that the only possible, or at least the most likely, means by which the banned substance (an anabolic steroid) had entered his system was through this injection.

20. Perhaps unsurprisingly, the RFU was gravely sceptical about that explanation, not least because it was wholly un-particularised in the sense that Mr Ashfield:

- had not given the name of the sports therapist;
- nor had he identified the date on which the injection was given;
- nor did he claim that it was an injection given in the course of any recognised medical treatment overseen by a proper medical practitioner (and it had not been reported to his GP); and
- nor had he made any enquiries of the sports therapist as to the content of the injection he was being given and, indeed, had not consulted him since.

21. The RFU evidently made certain enquiries of Professor Cowan, Director of the WADA accredited laboratory at King's College London. Suffice it to say that Professor Cowan's response, had it been properly put forward in evidence, might, if unchallenged, have entirely demolished the 'sports therapy injection' thesis.

22. In that same paragraph (13) of the RFU's Skeleton Argument[2], an additional point was made that the fact that the player had apparently "*participated in every match for Clevedon RFC from the start of 2017 until he was provisionally suspended by the RFU on 10 April 2017*". This, it would have been argued, was hardly consistent with the history of being in constant and unmanageable pain.

[2] From Ms Kendrah Potts, counsel for the RFU

23. At the beginning of the hearing, we invited the parties' submissions as to what, if any, attention we should pay to paragraph 13 of Ms Potts's Skeleton Argument. On any view, the reference to Professor Cowan's opinion could not sensibly be characterised as anything other than "*witness evidence*", in respect of which paragraph 3 of the Directions Order had made it clear that it should have been adduced by 26 January 2018.

24. On the other hand, Ms Potts was entitled to say, as she did, that the RFU had been placed in an impossible position. Until it saw Mr Ashfield's particularised explanation in his Witness Statement of 09 February 2018, the RFU had no (or at least very little) reason to have obtained anything from Professor Cowan (or, indeed, to have sought to look into Mr Ashfield's playing record, which is the point made at paragraph 13(b) of that Skeleton).

25. We were certainly not prepared to admit to paragraph 13(a) as relevant material in any form at the hearing. We also indicated that, in relation to the point made in paragraph 13(b), this might be put as a question to the player if he gave evidence, but that the RFU would be bound by his answer.

26. We also told Mr Cukier[3] that we would take no account in our deliberations of the passage referring to what Professor Cowan might be able to say. Nevertheless, bearing in mind that we had in fact seen it, we invited Mr Cukier to consider whether he wished the case to be adjourned so that it could be determined by another Tribunal which had not had sight of that paragraph. He declined that invitation.

27. In relation to the RFU's presentation of its case, we invited Ms Potts to consider whether she wished to apply to adjourn the hearing in order to introduce Professor Cowan's evidence in an appropriate way which, as a bare minimum, would have included a written account from him, exchanged with Mr Ashfield's legal representatives in good time for him and they to offer some response to it. Like Mr Cukier, Ms Potts preferred to continue the hearing, and the Tribunal was happy to do so.

[3] Counsel for Mr Ashfield. The Tribunal is particularly indebted to Mr Cukier and to his solicitor, Mr Brooks, who provided their expert services *pro bono*.

ATTENDANCE AT THE HEARING

28. In the event, the hearing was relatively short. As we have noted above, Ms Potts represented the RFU and Mr Cukier the Respondent. Both were content that their Skeleton Arguments stood as their openings.

29. Mr Ashfield, who was not able to attend in person, gave evidence by telephone and was, very briefly, cross-examined by Ms Potts and answered a few questions from the Tribunal. In the course of answering the Tribunal's questions, Mr Ashfield repeated that he was not willing to give the name of the sports therapist in question and indicated that this was because he was concerned about a possible threat of violence.

30. He said that the injection had been into his "*glutes*" and that at no stage had he been referred to nor had the process been supervised by his General Practitioner. He also accepted, as he had explained in his Witness Statement, that he "*did not have any idea what substances were to be introduced (but)… trusted the sports therapist and had no reason whatsoever to believe that the injection was going to be anything untoward*". Indeed, he thought that it was "*some form of a cortisone injection*".

ISSUE 1: THE PLAYER'S INTENTION

31. The Player's admission is to the presence of Drostanolone, Trenbolone (metabolite 17-epitrenbolone) and Clenbuterol in the sample given on 15 March 2017. These substances are non-Specified Substances: in the 2017 WADA Prohibited List Drostanolone, Trenbolone and Clenbuterol are listed in Section S.1 under "*Anabolic Agents*". WR Regulation 21.4.2.2 provides:

> "For purposes of the application of Regulation 21.10, all Prohibited Substances shall be Specified Substances except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List."

32. As Ms Potts explains at paragraph 7 of her Skeleton Argument, the starting point for determining the period of Ineligibility is set out in WR Regulation 21.10.2.1, which provides that:

> "The period of Ineligibility shall be four years where: 21.10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Player or other Person can establish that the anti-doping rule violation was not intentional."

33. WR Regulation 21.10.2.3 contains the following regarding the meaning of the word 'intentional':

> "As used in Regulations 21.10.2 and 21.10.3, the term 'intentional' is meant to identify those Players who cheat. The term therefore requires that the Player or other Person engaged in conduct which he or she knew constituted an anti-doping role 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 be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Player can establish that the Prohibited Substance was Used Out-of-Competition. 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 of the substance is not a Specified Substance and the Player can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance."

34. The effect of WR Regulation 21.10.2.1.1 is to place the burden on the player to establish that the Anti-Doping Rule Violation was unintentional. As the NADP held in the case of *UKAD v Buttifant* (SR/NADP/508/2016):

> "That evidential burden requires the athlete to put forward an explanation of the conduct which he asserts resulted, or might have resulted, in the violation of article 2.1. If the athlete cannot prove the conduct which resulted, or might have resulted, in the violation then the facts and circumstances specified in article 10.2.1.1 are not established. In such a case the tribunal, which must act on evidence, has no evidential basis on which to make a finding that the violation was not intentional." (at paragraph 24).

> "Article 10.2.3 does allow a tribunal to consider all relevant evidence in assessing whether the violation was intentional, but the most important factor will be the explanation or explanations advanced by the athlete. There must be an objective evidential basis for any explanation for the violation which is put forward. We reject the argument put by the Respondent that the athlete's contention that he does not know how the prohibited substance entered his body is consistent with an intention not to cheat and that the ultimate issue is the credibility of the athlete. The logic of the argument would be that where the only evidence is that of the athlete who, with apparent credibility, asserts that he was not responsible for the ingestion then on the balance of probability the athlete has proved that he did not act intentionally. Article 10.2.3 requires an assessment of evidence about the conduct which resulted or might have resulted in the violation. A bare denial of knowing ingestion will not be sufficient to establish a lack of intention." (at paragraph 27).

35. The decision in the *Buttifant* case has the effect that, in practice and in circumstances such as the present, the burden is on the athlete to establish, first, the probable means by which the prohibited substance entered his system and, second, that this means of entry into his or her system is consistent with an intention not to cheat.

36. This approach is also found in other cases in sports law jurisprudence, including those dealing with the application of the equivalent paragraphs 10.2.1 and 10.2.3 of the WADA Code. In that context, we were referred to a case of *UK Anti-Doping v Shila Panjavi* (SR/NADP/676/2016) and to *WADA v IWF* (CAS 2016/A/4377) and particularly to paragraphs 51 to 54 of that decision. We were also referred to the *Caicedo* case *World Anti-Doping Agency (WADA) v International Weightlifting Federation (IWF) & Yenny Fernanda Alvarez Caicedo* (CAS 2016/A/4377) and particularly to paragraphs 52 to 57. Reference was additionally made by Ms Potts to further decisions, including *WADA v IWF* (see particularly paragraphs 51 to 54 and the other CAS cases referred to therein).

37. Mr Cukier submitted that although the initial burden of establishing absence of intention by identifying a probable source may rest upon the player, once the player has provided an apparently credible explanation then the burden shifts to the governing body to rebut that contention. Indeed, as Mr Cukier submitted, that is exactly what the RFU was seeking to do through the evidence of Professor Cowan.

38. In support of his submission about the way we should approach this issue, Mr Cukier relied upon the NADP's decision in *UKAD v Turley* (SR/NADP/909/2017). To that contention, Ms Potts' first answer is that the substance in question there was a Specified Substance in respect of which a different regime is applicable. A more substantial point, however, is that *Turley* was a very different case on its facts. Mr Turley was a boxer who tested positive for Furosemide, a Prohibited Substance. He had declared his consumption of Ibuprofen on the Doping Control Form and the explanation he gave was that he took 2 tablets of what he assumed were Ibuprofen, which had been prescribed for his grandfather who had given them to him saying that is what they were. It later turned out that, in fact, they were Furosemide which the grandfather had been prescribed for high blood pressure.

39. The Tribunal in that case had evidence not only from the boxer but also his account was corroborated by the unchallenged witness statement from his grandfather. In those circumstances, the Tribunal accepted their account and, at paragraph 23 of the decision, held that the Furosemide had entered Mr Turley's system when he "*mistakenly consumed two tablets of his grandfather's Furosemide with the intention of taking Ibuprofen*". In a nutshell, the Tribunal found that he had discharged the evidential burden placed upon him.

40. We do not regard it as necessary or helpful to express any view as to whether there is any different approach to what is needed to be shown in relation to proof of intention, depending on whether one is dealing with a Specified or Non-Specified Substance. It is not necessary, in our view, because we wish to make it crystal clear that we consider that Mr Ashfield, unlike Mr Turley, has not established the evidential basis for asserting that he did not act intentionally within the meaning of WR Regulation 21.10.2.3.

41. It may or may not be true that it was through this single injection that these Prohibited Substances entered Mr Ashfield's system. We conclude only that Mr Ashfield's un-particularised account of the injection he was allegedly given by an unidentified (and medically unqualified) therapist on an unidentified date does not discharge the burden upon him which WR Regulation 21.10.2.3 in practice imposes, as explained in *Buttifant* and other decisions referred to above.

42. Even if we were to accept that it was probably the sports therapist's injection which was the means by which the prohibited substance entered his body, we are entirely clear that in allowing someone who was not a medical practitioner and who has not been identified to inject an unknown substance on an unidentified day constituted behaviour that Mr Ashfield must have known brought with it a *"significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk*". Accordingly, it still amounts to 'intentional conduct' as defined in WR Regulation 21.10.2.3.

43. In those circumstances, therefore, it follows that the starting point for the inevitable period of Ineligibility is 4 years.

ISSUE 2: PROMPT ADMISSION

44. We have already explained, we accept that the player did promptly admit liability. In that case, the relevant provision is WR Regulation 21.10.6.3 which provides:

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

45. The question that we are asked to resolve is whether that paragraph creates a discretion for this Tribunal (possibly contingent upon the prior approval / discretion of WADA and the RFU in the present case) or whether the discretion is entirely that of WADA / RFU and has nothing to do with us.

46. Despite the arguments that Mr Cukier has advanced, we intend to follow the approach taken in the *Buttifant* case at first instance at paragraph 42 (on which issue there was no appeal) and by the Anti-Doping Appeal Tribunal in the case of *UK*

Anti-Doping and the RFU v. Dan Lancaster (08 September 2015) – see also *UK Anti-Doping v. Donald Kudangiran* (05 December 2017) and *UK Anti-Doping v. Andrew Acton* (19 January 2018). In short, we agree with the decision in *Buttifant* as summarised at paragraph 42 that "*Art.10.6.3 is a matter for WADA and UKAD and outside the jurisdiction of this Tribunal*".

ISSUE 3: SUBSTANTIAL ASSISTANCE

47. For reasons we have already explained, we are not asked to resolve Issue 3 because it is accepted that the relevant provision (WR Regulation 21.10.6.1) grants the authority to suspend the period of Ineligibility on the basis of substantial assistance to the RFU rather than to this Tribunal.

48. In Mr Cukier's written submissions (though this point was not pursued orally), we were invited to make various recommendations to the RFU and/or UKAD. In the circumstances, we do not consider it appropriate to do so.

SUMMARY AND DECISION

49. It follows that the Anti-Doping Rule Violation has been proved and that the player has not established that it was not intentional. Accordingly, the appropriate sanction is 4 years. We determine that it will be served with effect from the date upon which the provisional suspension began and was notified, namely 10 April 2017. We reject the submission that it should be backdated to the date upon which the sample was given, not least because we see no reason to take that course of action and, in any case, we were told that Mr Ashfield actually played one game during that interim period.

50. In accordance with World Rugby Regulation 21.13, the relevant parties may appeal this decision by lodging an appeal within the applicable timelines.

WILLIAM NORRIS Q.C. (Chairman)

DR KITRINA DOUGLAS

DR NEIL TOWNSHEND

London, 22 March 2018

Sport Resolutions (UK)
1 Salisbury Square
London EC4Y 8AE

T: +44 (0)20 7036 1966

Email: resolve@sportresolutions.co.uk
Website: www.sportresolutions.co.uk