

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

Before:

Jeremy Summers (Chair)

Dr Mike Irani

B E T W E E N:

RUGBY FOOTBALL UNON (RFU)

Applicant

and

STEPHEN HIHETAH

Respondent

DECISION OF THE ANTI-DOPING TRIBUNAL

Introduction

1. The Applicant (the "RFU") is the National Governing Body for the sport of rugby union in England and has jurisdiction to prosecute this case. World Rugby is the International Governing Body for the sport of rugby union and the RFU is affiliated to World Rugby.
2. World Rugby has adopted the *World Anti-Doping Code 2015* (the "Code") and implemented the Code compliant Anti-Doping Regulations, known as *World Rugby Regulation 21* (the "WRR").
3. Pursuant to RFU Regulation 20, the RFU has adopted the WRR (including the appendices and schedules) in its entirety as its own Anti-Doping Regulations (the "ADR").
4. The Respondent, Mr Stephen Hihetah (the "Player") is a 28 year old rugby player, registered to Hull RFC (the "Club") who participate in the RFU National League 2 North (level 4) under the auspices of the RFU. The Player was at all times subject to the ADR.
5. Pursuant to the ADR, a urine sample was provided by the Player after a training session on 21 February 2019. The sample returned an Adverse Analytical Finding ("AAF") for:
 - i. The **stanozolol metabolites** (i) stanozolol-N-glucuronide, and (ii) epistanozolol-N-glucuronide
 - ii. The **metandienone metabolite** 17 β -hydroxymethyl-17 α -methyl-18-norandrost-1, 4, 13-triene-3-one.
 - iii. The **tamoxifen metabolite** 3-hydroxy-4-methoxy-tamoxifen.
6. Each of the above substances are Prohibited Substances as defined by the World Anti-Doping Prohibited List 2017. WRR 21.4.2.2 provides that "*...all Prohibited Substances shall be Specified Substances except substances in the classes of anabolic agents...*" The Prohibited Substances listed at i. and ii. above are listed above are anabolic agents, and thus are not Specified Substances. Tamoxifen the

third Prohibited Substance found is a Specified Substance.

7. The Presence of these Prohibited Substances in the Player's urine sample constitutes a violation of the WRR. By letter dated 12 June 2019, the RFU charged the Player with the following offence of the WRR:-

"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)."

8. The Player has been provisionally suspended since this date. The RFU understand this to be the Player's first Anti-Doping Rule Violation ("ADRV").
9. The Player responded to the Charge on 2 July 2019, acknowledging the AAF, but wishing to contest the period of Ineligibility. The Player waived his right to have the B Sample tested.
10. The Player did not have a Therapeutic Use Exemption.
11. Recognising the rights of the Player to have a doping allegation determined by an independent and suitably qualified body, pursuant to Article 21.7.12.2 of the WRR, the RFU, pursuant to Article 21.7.13 of the WRR and Regulation 20.13.4 of the ADR, elected to refer the matter to the National Anti-Doping Panel (the "NADP") for resolution.
12. The Tribunal was accordingly appointed by Charles Flint QC, President of the NADP. Due to travel disruption on the day of the hearing, one of the Tribunal members was unable to be at the hearing. With the consent of the Player, the hearing proceeded with a two person tribunal.
13. The hearing convened on 5 November 2019, when the Player was represented by

Mr Luke Pearce of counsel and the RFU was represented by Mr James Segan, also of counsel. The Tribunal records its gratitude to both advocates for their assistance in this matter.

14. In addition to the parties referred to above, present at the hearing were:

For the Player

Mr James Gardner – barrister

For the RFU

Mr Stuart Tennant, Legal Counsel (Discipline)

Mr Stephen Watkins, Anti-Doping Manager

Dr Chris Walker– witness.

Third Parties

Ms Anna Thomas – NADP Secretariat.

Mr Harry Chapman – trainee solicitor, note taker for the Tribunal.

Ms Nisha Dutt, UK Anti-Doping

15. This is the reasoned decision of the Tribunal.

Jurisdiction

16. Jurisdiction was not challenged, but for completeness, as stated, the RFU is the National Governing Body for rugby union in England. Regulation 20.6 of the ADR sets out the RFU's "Authority to Regulate" and enables the RFU to act as the Results Management Authority with responsibility to prosecute doping cases.
17. The RFU organises a number of competitions, including the RFU National Leagues. Individuals can only compete in such competitions if they are a registered member of a club affiliated to the RFU. The Player competed for and trained with the Club

who were affiliated to the RFU and the Player was registered with the Club.

18. Regulation 20.7.1 of the ADR provides that "*All Players under the jurisdiction of the RFU may be subject to In Competition...Doping Control by the RFU at any time, at any location and with No Advance Notice.*" Further, pursuant to Article 20.13.4 of the ADR, any Charge against a player by the RFU shall be determined by the NADP.
19. Accordingly, the Player was bound by the ADR, and the Tribunal has jurisdiction to determine this matter.
20. No preliminary points were raised by either party.

Relevant Regulations

21. It was common ground that this was the Athlete's first ADRV. As such WRR 21.10.2 applied:

21.10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method

The period of Ineligibility for a violation of Regulations 21.2.1 (Presence), 21.2.2 (Use or Attempted Use) or 21.2.6 (Possession) shall be as follows, subject to potential reduction or suspension pursuant to Regulations 21.10.4, 21.10.5 or 21.10.6:

21.10.2.1 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.

21.10.2.1.2 The anti-doping rule violation involves a Specified Substance and World Rugby (or the Association, Union or Tournament Organiser handling the case as applicable) can establish that the anti-doping rule violation was intentional.

21.10.2.2 *If Regulation 21.10.2.1 does not apply, the period of Ineligibility shall be two years.*

21.10.2.3 *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 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 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 if 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.*

22. It was common ground that WRR 21.10.5 - **Reduction of the Period of Ineligibility based on No Significant Fault or Negligence** – was not relevant for the purposes of this determination.

The Evidence

23. The Player gave live evidence before the Tribunal and confirmed the veracity of his undated written witness statement. He also produced four photographs taken in London in December 2019 which were marked SH/1-4.
24. In summary, the Player's case was that he travelled to London on 16 December 2018 and returned to Hull on 3 January 2019. During that time, he trained at Genesis Gym Acton together with a friend, Mr Adam Dowsett, on approximately six occasions, assuming this to be twice weekly for the three weeks he was in London.
25. Before most of these sessions began, he took a pre-workout drink from Mr Dowsett,

which Mr Dowsett had prepared. The Player believes that the source of his positive test result was the pre-workout drink prepared by Mr Dowsett, because Mr Dowsett had subsequently told him that it contained a powder supplied to him by a fellow weight lifter, Mr Carl Thompson, and that Mr Thompson had later told Mr Dowsett that the powder he provided contained substances that, if tested, would lead to a failed anti-doping test.

26. The Player did not provide any documents (bar the photograph SH1-4) to corroborate his evidence and in cross-examination said that he had no records to show that he had trained at the times he claimed or any relevant messages that he had exchanged with Mr Dowsett.
27. Mr Dowsett had (at an unspecified time) provided the Player with a white powder contained in a plain plastic bag. This had been given to Mr Dowsett by Mr Thompson (at an unspecified time) and Mr Dowsett understood that this was the same substance that he had previously been given by Mr Thompson. The Player had invited the RFU to test this substance.
28. Mr Dowsett did not attend the hearing, and the Player stated that he had not asked him to do so for fear of jeopardizing their friendship.
29. A written statement had previously been submitted by Mr Dowsett as follows:

To whom it may concern,

During the Christmas period 2018 Stephen and I trained together numerous times. Stephen and I regularly train together when he is back in London. During the time frame, I provided him with an old 'home made' pre work out powder. The pre-work out contained caffeine for energy, some BCAA for endurance and fatigue and the pre-mix supplement that was given to me from a gym member for increased strength. This is a workout powder I have personally taken in the past and continued to use after Stephen went back up north.

I recently in passing spoke to the lifter at Genesis Gym, regarding the pre-mix supplement he had given me. He said, (within the context of our conversation

regarding Stephen's drug test) without disclosing the exact ingredients, that if I was to be tested I or he would fail.

This was new news to me and in turn I informed Stephen, I was disgusted and appalled by this information.

I have known Stephen both personally and professionally for 7 years. We became friends due to our mutual passion for sport. He should be greatly admired for his dedication to his health, fitness and rugby. I have no reason to believe that he would put at risk a career that he has worked so hard for over many years.

30. Mr Dowsett was subsequently interviewed by the RFU and UKAD. Elements of the transcript of that interview were inconsistent with the above letter, and on behalf of the Player the Tribunal was invited to prefer the earlier (hearsay) evidence in Mr Dowsett' statement.

31. The Tribunal also had in evidence, which was not challenged, a statement from the Metropolitan Police. [REDACTED]

32. No evidence from Mr Thompson was before the Tribunal.

33. Dr Chris Walker of Kings College London gave evidence in which he confirmed the conclusions recorded in an undated written opinion as follows:

Given that there is no reliable information on the amounts of drug administered it is difficult to say exactly when they were last taken. However, I would estimate the last administration was not before late January – early February if doses consistent with those reported in the cited articles were taken.

The 3 reported administrations of the alleged contaminated supplement, over approximately 17 days, are equivalent to individual doses as there is little evidence to suggest that orally active steroids accumulate within the body.

Therefore, I do not believe the athlete's account that these drugs were last taken

more than 50 days prior to sample collection.

Submissions

34. The Tribunal was assisted in advance of the hearing by the provision of detailed written submissions from both parties, which are found in the Hearing Bundle, and the oral submissions which summarised those documents are therefore not set out in full. No discourtesy is intended to either advocate.
35. On behalf of the RFU, Mr Segan made two primary submissions:
- 1) The essentials of the Player's account had not been made out.
 - 2) There was no scientific evidence for the (Player's) hypothesis.
36. In respect of the first submission, Mr Segan's written skeleton argument noted:
- I. *The Player has failed to provide any documentary corroboration of his account even where that could easily have been provided. The Player says, for instance, that he trained six times with Mr Dowsett over Christmas 2018 whereas Mr Dowsett says three times. The Player has said, in different accounts, that he returned to Hull on both 2 January and 3 January (these cannot both be right). The Player says that he had various telephone calls with Mr Dowsett. All these things could presumably be established from documents which would give at least some confidence as to the surrounding elements of the account, but none have been provided.*
 - II. *The Player's account of events differs significantly from that of Mr Dowsett. In particular, they disagree as to (a) how often they trained at the same time over Christmas 2018 (the Player says approximately six times , Mr Dowsett three times); whether their respective sessions began at the same time (the Player says they did , Mr Dowsett says not); and which of them first posited that the pre-workout could have been the cause of the test (the Player says it was Mr Dowsett , whereas Mr Dowsett says the Player suggested this to him).*
37. Turning to the second submission, which Mr Segan argued was more fundamental,

he noted that there was no evidence to establish that Mr Dowsett's pre-workout shake actually contained Prohibited Substances. Further, that the consumption of two anabolic steroids and tamoxifen on three (or six) occasions in late December 2018 or 1-2 January 2019 could not possibly have led to a positive test in the relevant concentrations more than seven weeks later on 21 February 2019. In this regard he pointed to Dr Walker's conclusions as follows:

- The concentration of tamoxifen detected in the Player's sample was such that Dr Walker believes that **"ingestion is likely to have been closer to the day of the test than claimed by the athlete"**
- *There is no evidence which Dr Walker could find "to support the finding of the reported stanozolol and metandienone metabolites approximately two months after the last declared use".*
- *Dr Walker would "estimate the last administration was not before late January – early February if doses consistent with those reported in the articles were taken".*

38. In response on behalf of the Player, Mr Pearce confirmed that the Player accepted the ADRV and that accordingly the only issue to be determined was sanction.

39. In advancing his client's case, he submitted that the Player had established how the Prohibited Substances had come to be ingested and that he had not acted intentionally for the purposes of WRR.

40. In his written submissions, Mr Pearce argued that the core element of WRR 21.10.2.3 was the Player's subjective state of mind as to whether he had intended to cheat.

25. *It bears emphasis that this test is a purely subjective one. The focus is on the state of mind of the athlete, the question being whether he intended to cheat. It follows that an athlete who takes a substance without applying his or her mind to the question whether the substance may contain a Prohibited Substance cannot have intended to cheat within the above definition. It also follows that, in circumstances where Mr Hihetah denies that the ADRV was*

intentional, in order to find against him the Tribunal must find that he is lying.

26. *The standard of proof in assessing whether the ADRV was intentional is the balance of probabilities. In other words, the question which the Tribunal has to decide is whether it is more likely than not that Mr Hihetah intended to take the Prohibited Substance. For the avoidance of doubt, and contrary to dicta in some of the authorities, the choice is a binary one. Either the athlete intended to cheat, or he did not. There is no third option.*

41. In oral submissions, Mr Pearce expanded further on this line of argument, and appeared positively to assert that, notwithstanding the authorities, it was not necessary, as an essential prerequisite for an athlete seeking to discharge the burden arising in cases not involving a Specified Substance, to establish the source of the ingested substance.

42. Whilst that was the position in oral submissions, Mr Pearce also pleaded a case that asserted:

It is clear on the evidence (at least on the balance of probabilities) that the source of the Prohibited Substances was the Pre-Workout that Mr Hihetah consumed on multiple occasions between about 16 December 2018 and 2 January 2019.

43. In support of that position Mr Pearce made the following submissions:

(1) The starting point is Mr Hihetah's evidence that he trained with Mr Dowsett during the Christmas period 2018, and consumed the Pre-Workout prior to these sessions. There is no reason to doubt that evidence, which is in any event corroborated by the letter of Mr Dowsett dated 28 June 2019. Although (as set out below) the RFU seeks to suggest that there should be documentary evidence supporting these facts, that is (with respect) unrealistic.

(2) Mr Hihetah does not have first-hand knowledge that the Pre-Workout contained the Prohibited Substances. However, Mr Dowsett's clear evidence, as set out in his letter of 28 June 2019, is that it did. In particular, Mr Dowsett explains that the Pre-Workout contained the Powder which had been supplied to

him by Mr Thompson, and that this Powder contained banned substances. This is also what Mr Dowsett told Mr Hihetah in a phone call in mid-June 2019.

(3) Although Mr Hihetah does not have a sample of the Pre-Workout itself, he has been able to obtain from Mr Thompson a sample of the Powder which was given to Mr Dowsett and added to the Pre-Workout. This has been offered to the RFU for testing, but the RFU has apparently declined to take that offer up, notwithstanding that it has instructed an expert witness to opine as to the plausibility of Mr Hihetah's account.

(4) Other than the Pre-Workout, Mr Hihetah only uses branded supplements such as gold standard whey, and in any event only uses such supplements infrequently. As a result, he believes that the Pre-Workout must be the source of the Prohibited Substances subsequently found in his urine sample. Put differently, there are no other candidates.

44. Mr Pearce addressed the RFU's submissions and submitted that it was unreasonable to expect the Player to have records evidencing his training with Mr Dowsett; that any inconsistencies in Mr Dowsett's evidence were self-serving of Mr Dowsett and should be resolved in favour of the Player; that the Player's case did not contain "unexplained implausibilities"; there was evidence to show that the pre-workout drink was the source of the Prohibited Substances and; that Dr Walker's report should not in fact be relied upon.
45. On the issue of scientific evidence, Mr Pearce appeared to be critical of the RFU for not having sought to analyse the white powder, obtained via Mr Dowsett from Mr Thompson, that the Player had provided.

Decision on the ADRV

46. The Tribunal reminded itself that the burden of proof in this matter lay on the Player to establish, on the balance of probabilities, that he had not acted intentionally as defined by WRR 21.10
47. For the Player to discharge that burden, the Tribunal accepted the RFU's

submission that it would need to be comfortably satisfied as to the manner in which the Prohibited Substances came to be in the Player's body. In this regard the Panel noted the relevant authorities, in particular *UKAD v Buttifant*¹ and *WADA v IWF*². The submission on behalf of the Player that this was not required was accordingly rejected.

48. The Tribunal carefully considered all the written and oral evidence together with the submissions.

49. The Tribunal did not find the Player's account to be a credible explanation as to how the Prohibited Substances had been ingested.

50. In this regard it made the following findings:

- 1) The Player had adduced no evidence to which weight could be attached, other than his own evidence, to establish that he had taken the pre-workout shakes claimed. SH1-4 did not materially assist in this regard.
- 2) As Mr Pearce accepted, Mr Dowsett's evidence was at best hearsay, and in all the circumstances the Tribunal was not persuaded to attach any, or any significant, weight to it.
- 3) The evidence³ [REDACTED] was, in any event, in the view of the Tribunal a significant factor weighing against Mr Dowsett's credibility.
- 4) No evidence had been adduced from Mr Thompson.
- 5) The Tribunal rejected the Player's suggestion that the RFU should have analysed the white powder provided by the Player. Of note this had simply been provided in a transparent plastic bag. There was no detail to establish where the powder had come from, when it had been provided and, much less, that the powder was that which the Player had in fact ingested. It would have been an entirely pointless exercise to have conducted any analysis in those circumstances.

¹ SR/NADP/508/2016.

² CAS 2016/A/4377.

³ as referenced at paragraph 31 above

6) The scientific evidence adduced by the RFU, which had not been contradicted by the Player, was wholly inconsistent with the account advanced by the Player. In the view of the Tribunal, the time of ingestion appeared, on the evidence, to have been significantly later than as claimed by the Player.

51. The Tribunal was accordingly unable to feel comfortably satisfied that the Athlete had established how the prohibited substance had come to be in his body. Rather, the Tribunal was not satisfied that the Player had come close to satisfying the burden that fell upon him.

52. The Tribunal again reminded itself of the decision in *Buttifant (2016)* that has since been cited with approval in a number of high profile ADRV cases. That case established that, it will only be in rare cases that, where an athlete is unable to satisfy a tribunal as to the source of the Prohibited Substance concerned, (s)he will then be able to discharge the burden of establishing that the ADRV should be found as being unintentional. In particular it noted paragraphs 27-29 of that judgment excerpts of which are set out below:

27. 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....

[28]

29. There may be wholly exceptional cases in which the precise cause of the violation is not established but there is objective evidence which allows the tribunal to conclude that, however it occurred, the violation was neither committed knowingly nor in manifest disregard of the risk of violation. In such a case the conduct under examination is all the conduct which might have caused or permitted the violation to occur. These rare cases must be judged on the facts when they arise.'

53. In the view of the Tribunal this case did not come close being considered wholly exceptional such as to fall within the ambit of *Buttifant*.

54. Whilst not necessary given the above finding, had the Player been able to establish

how the Prohibited Substances had entered his body, the Tribunal would not have then gone on to find that he had not [known] *that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk*, pursuant to WRR 21.10.2.3. The risks of committing an ADRV that is posed by supplements is clear and well known. On the Player's own evidence, he had taken no steps whatsoever to satisfy himself as to the nature and content of the pre-workout shake offered to him by Mr Dowsett.

55. In those circumstances, the Tribunal would not have found, had it been required to do so, that the Player's conduct could be viewed as having been unintentional as defined by the WRR.

Conclusion

56. The arguments advanced on behalf of the Player having been rejected, the Tribunal found that the Player had acted intentionally and imposed a period of Ineligibility of four (4) years upon the Player as required by WRR 21.10.2.1
57. As to the commencement date, it was argued on behalf of the Player that this should be backdated to the date of sample collection. The RFU however submitted that, to back date to that time, would not be the correct approach as the Player had in fact played competitive rugby during the period following the Sample collection, including international 7-a-side rugby in May 2019.
58. The Tribunal agreed with the RFU's submission in this regard, and the period of Ineligibility was accordingly ordered to run from the date of the Player's Provisional Suspension, being 12 June 2019.



Jeremy Summers (Chair)

For and on behalf of the Tribunal

25 November 2019

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