SR/077/2020

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

Before:

William Norris QC (Chair)
Professor Dorian Haskard
Dr Tim Rogers

BETWEEN:

ELLIS RICHARDS

Appellant

and

UK ANTI-DOPING

Respondent

DECISION OF THE APPEAL PANEL

Introduction

1. In August 2018, the Appellant (hereafter "the Player") was studying Sports Physiotherapy as a university degree at the Cardiff Metropolitan University. He played rugby for the University and, as such, was a licensed competitor, subject to the Rules of the Welsh Rugby Union ("WRU"). This means he was bound by and required to comply with the Anti-Doping Rules ("ADR") of the WRU.

2. On 13 August 2018, the Player was the subject of a Sample collection, properly conducted in accordance with the ADR.

3. The day following that Sample collection, the Player was alleged to have told his Strength and Conditioning Coach (Mr Dai Watts) that he was concerned because, immediately before the test, he had taken a sip of a pre-workout drink which had been given to him by another person. The Player had a further conversation with Mr Watts on 16 August 2018, which was in fact the day after the Player received his first and only formal anti-doping session. This meeting was also attended (at Mr Watts's invitation) by Cardiff Met's Head Coach, Mr Ian Gardner.

4. In the course of those discussions, according to the recollection of Mr Watts and Mr Gardner, the Player told them he had taken some "*gear*" three weeks before the test. Mr Gardner's recollection was that the Player had said this was a steroid and that he had actually named it. However, when Mr Watts and Mr Gardner were interviewed by UK Anti-Doping ("UKAD") on 24 August 2018, they could not remember what substance the Player had named.

5. On 4 October 2018, the Player was informed that analysis of his urine Sample had not revealed the presence of any Prohibited Substance. He was interviewed by UKAD on 28 November 2018 and asked about the admission he had allegedly made. During the course of that interview, he accepted that he had made an admission of taking an illegal substance when he had spoken to Messrs Watts and Gardner. He also told UKAD that he had named the substance as Clenbuterol to Messrs Watts and Gardner.

6. By that stage, however, the Player's position was that he did not accept that it was Clenbuterol that he had in fact taken but that (in essence) he was not sure what he had taken and that his reference to Clenbuterol had simply been speculation. He said that he had reached that speculative conclusion on the basis of having taken some tablets that he had found in the changing room of a gym and then, having experienced chest pains and carrying out some research online, had concluded previously that it must have been Clenbuterol.

7. On the basis of what UKAD characterises as the Player's admission that he had taken Clenbuterol, he was issued with a Notice of Charge on 7 May 2019, alleging an Anti-

Doping Rule Violation ("ADRV") contrary to ADR Article 2.2, namely, his Use of a Prohibited Substance (Clenbuterol).

8. It is within the knowledge of this Panel, as Professor Haskard observed in the course of the Appeal Hearing, that although Clenbuterol may be regarded as a "*steroid-like compound*", it is not in fact a steroid. Rather, it is classed as an anabolic agent under Section S1.2 (Other Anabolic Agents) of the World Anti-Doping Agency ("WADA") Prohibited List. It is a Non-Specified Substance prohibited at all times and in respect of which the Player has not claimed to have had a Therapeutic Use Exemption.

9. Following the charge on 7 May 2019, the Player was provisionally suspended from that date.

Procedural History

10. Following his Provisional Suspension, the Player responded by making an application (on 4 July 2019) to lift it on the basis that the charge had no realistic prospect of being upheld. That application was dismissed by the Chair of the Tribunal appointed by the National Anti-Doping Panel ("NADP") President.

11. Further Directions were then issued, following which an oral hearing took place on 3 February 2020.

Oral Hearing & First Instance Panel Decision

12. The NADP hearing was in person and was attended by the Player and his then legal representative. UKAD was also represented and, as the Panel's decision records, it heard oral evidence from Messrs Watts and Gardner, as well as from the Player himself. The other evidence that was taken into account is summarised in paragraphs 28 to 41 of the Decision of the Anti-Doping Tribunal, against which the Player appeals.

13. The evidence of Mr Watts and Mr Gardner is summarised at paragraphs 30 and 31 (respectively) of the Decision but we shall not lengthen this Decision unnecessarily by repeating that which those other paragraphs of the Tribunal's decision record.

14. In the light of the evidence that UKAD had adduced, UKAD submitted that the Tribunal could be satisfied to the necessary standard that the ADRV, namely use of Clenbuterol, had been established. In support of that submission, UKAD relied upon what they characterised as the Player's "*unambiguous admission that he had told his coaches he had consumed Clenbuterol*", corroborated by:

    (i) his evidence that he had suffered from chest pains, which is known to be a side-effect of Clenbuterol;

    (ii) the anxiety / concerns that he had regarding test results;

    (iii) the fact that he did not contest his removal from the University Rugby Team;

    (iv) the lack of credibility that was attached to his attempt to retract the version of events that he had given to Messrs Gardner and Watts;

    (v) the fact that he did not challenge that he had made an admission of taking a particular substance, Clenbuterol, albeit he had endeavoured to explain that as based upon supposition.

15. The Tribunal's Decision contains a lengthy record of the parties' respective submissions and of the evidence upon which each side relied. The Tribunal's findings as to the issue of whether or not UKAD had proved that the Player had used Clenbuterol are set out in paragraph 103 of that decision. In particular, paragraphs 103 to 118 include a clear summary of the judgment the Panel made on the facts and their rejection of the Player's evidence about his mere 'speculation' as to his having taken Clenbuterol.

16. The Tribunal accepted that the burden of proof was on UKAD to establish to its "*comfortable satisfaction*" that the Player had used Clenbuterol. It held – and was entitled to find for the reasons it gave - that this could be found proven notwithstanding there was no Adverse Analytical Finding ("AAF"), so long as the Tribunal was satisfied that the Player's alleged admission was of itself genuine: if so, it was sufficient to prove the ADRV.

17. The Tribunal's key paragraph summarising its findings is contained at paragraph 111 and we shall quote it in full:

> "*The Tribunal believed the coaches with their version of events (in particular Mr Watts, which refers to the friend being the source of the Prohibited Substance), but UKAD might have fallen short of convincing the Tribunal of Use of clenbuterol, had the Player not unequivocally confirmed to UKAD in his interview that this was the substance he admitted using to his coaches*."

18. The Tribunal then went on to consider sanction. Here the issues were whether the Player, on whom the burden of proof as to this issue would lie, had demonstrated pursuant to ADR Article 10.2.3 that his ADRV had not been intentional, whether or not, pursuant to ADR Article 10.6.2, the Player's admission to his coaches and in interview were sufficient basis for a reduction of his sanction and whether or not any period of Ineligibility should be backdated to, say, the date of Sample collection on the basis of ADR Article 10.11.1.

19. ADR Article 10.2.1 mandates a four year period of suspension where:

> *"The Anti-Doping Rule Violation does not involve a Specified Substance unless the Athlete or other Person can establish that the Anti-Doping Rule Violation was not intentional"*

20. What is meant by 'intentional' in context is set out in ADR Article 10.2.3.

21. The Tribunal summarised its decision in paragraphs 119 to 122 as follows, which we shall quote in full:

> "*119. For the reasons set out above, the Tribunal makes the following decision:*
>
> *119.1 an ADRV contrary to ADR Article 10.2 has been established;*
>
> *119.2 the standard sanction of 4 years Ineligibility shall apply to the Player;*
>
> *120. In accordance with ADR Article 10.11.3, the Player is entitled to credit for his Provisional Suspension and so the period of Ineligibility shall be deemed to have commenced on 7 May 2019 and shall therefore end at midnight on 6 May 2023;*
>
> *121. The Player's status during Ineligibility is outlined in ADR Article 10.12. For the avoidance of doubt, this Ineligibility applies and extends to Competitions or Events*

organised, convened, authorised or recognised by WADA Code Signatories, any professional league or any international or national-level Event organisation and any club or other body that is a member of, or affiliated to, or licenced by, a Signatory or a Signatory's member organisation throughout the World.

122. In accordance with ADR Article 20.14, the Player has a right of appeal to the NADP Appeal Tribunal. In accordance with Article 13 of the Procedural Rules any party who wishes to appeal must lodge a Notice of Appeal with the NADP Secretariat within 21 days of receipt of this decision."

22. The Tribunal rejected the Player's submission that it should reduce the four year sanction on the basis that he had made a voluntary admission and should therefore be entitled to a reduction in the period of his Ineligibility of up to half (as per ADR Article 10.6.2). Its consideration of that provision is at paragraphs 113-115 of the Decision.

23. The Tribunal also decided that there should be no reduction of the period of Ineligibility, per ADR Article 10.11.1, to reflect procedural or other delays to the hearing process which were not the Athlete's fault. Its reasoning is at paragraph 116 of the Decision (notwithstanding the erroneous reference to an absence of submissions by the Player's representative).

24. Finally, the Tribunal concluded that it would not reduce the sanction from four to two years on the basis that the ADRV was unintentional (per ADR Article 10.2.3 set out above). It held, in accordance with ADR Article 10.2.1(a) and ADR Article 8.3.2, that the burden of establishing absence of intention was on the Player, which burden he had not discharged – see paragraphs 62 and 66 of the Decision.

The Appeal Process

25. As Article 13.4 of the NADP Procedural Rules make clear, and as the parties agree, the appeal is not a re-hearing of the issues determined by the Tribunal; rather, it is a review

in accordance with the test contained in paragraph 30 of the Decision in *Gabriel Evans v UKAD*[1] and *Adam Carr v UKAD*[2].

26. We do, however, have the power to admit fresh evidence if we consider it appropriate to do so, and it was in that context that the Player, who brings this appeal, sought permission to provide us with a further Witness Statement. UKAD did not object to that course of action, but submitted that we should attach only limited weight to it bearing in mind the extensive oral evidence that had been considered below. We endorse that approach.

The Appeal Hearing

27. We heard the appeal on Thursday, 15 April 2021 by *Zoom*. The Player, whose appeal this is, was represented by Mr Meakin and UKAD, as Respondent, by Mr Middleton. We are grateful to both of them for their written and their oral submissions. We wish to pay particular tribute to Mr Meakin, who acted for the Player with considerable skill and industry, and who provided his services *pro bono*.

28. In the course of the hearing, the Player did speak briefly on his own account, but only to explain that his degree course at Cardiff Metropolitan University was concerned with Physiotherapy rather than the broader subject of Sports Science, which might, absent such explanation, have implied a greater level of knowledge of doping than might be typical of someone of his age and experience.

The Grounds of Appeal

29. The Grounds of Appeal are four, and we shall deal with each in turn.

30. Ground 1, essentially, was to the effect that the Tribunal should not have found that UKAD had proved the charge under Article 2.2 because the evidence of Messrs Watts and

[1] SR/NADP/515/2016
[2] SR/NADP/197/2020

Gardner, even when combined with the evidence of the Player's admissions, was not "*sufficient to satisfy the legal standard to make out the charge*".

31. Mr Meakin developed that submission by concentrating on the transcript of the interview of 28 November 2018, as well as on the oral evidence that was heard by the Tribunal. Essentially, Mr Meakin contended that the Tribunal had no reasonable basis for its conclusion at paragraph 111 of the Decision which we have already quoted.

32. The basis for that conclusion is essentially summarised in paragraphs 103 to 110 of the Decision. We do not think it is necessary in this Decision to repeat the terms of those paragraphs but, to understand the Tribunal's reasoning, they need to be read carefully in conjunction with the full interview in November 2018, including, in particular, the record of questions between Q/A 131 and Q/A 168.

33. In our judgement, the Tribunal was entitled to reject the contention that the Player's reference to his having taken Clenbuterol as no more than "*speculation*". The Tribunal was entitled to conclude that the Player had indeed told Mr Watts and Mr Gardner that he thought he had taken Clenbuterol, notwithstanding that neither of them remembered the name of the specific substance he told them he thought he had taken. As is established by the authorities summarised by the Tribunal at paragraphs 46-51 and referred to at paragraphs 103-105 of its decision, it is permissible in such a case to find that an ADRV has been proved on non-analytical data and notwithstanding a negative test.

34. The Tribunal was also entitled to place weight upon what they saw (and most would see) as the fundamentally implausible explanation that the Player offered about having somehow found tablets in a gym that he just decided to take. They were also entitled to place some weight on the various other factors they took into account, particularly in the summary at paragraphs 103 to 118 of their Decision and as summarised by UKAD in paragraphs 20 and 21 of their written submissions on appeal. Further, in doing so, the Tribunal applied the correct standard of proof – see paragraphs 105, 112 of the Decision.

35. For those reasons, we consider that the Tribunal was entitled to hold that the charge under ADR Article 2.2 had been established and to treat the Player's admission, together with the other surrounding circumstances, as a sufficient basis for that conclusion.

36. The Appellant's Second Ground of Appeal is that the Tribunal applied Article 10.6.2 incorrectly.

37. Article 10.6.2 is in the following terms:

> "*Elimination, Reduction, or Suspension of the Period of Ineligibility or other Consequences for Reasons Other than Fault…*
>
> *10.6.2 Admission of an Anti-Doping Rule Violation in the Absence of Other Evidence:*
>
> *Where an Athlete or other Person voluntarily admits the commission of an Anti-Doping Rule Violation before having received either (a) notification of a Sample collection that could establish the Anti-Doping Rule Violation (in the case of an Anti-Doping Rule Violation under Article 2.1), or (b) a Notice of Charge (in the case of any other Anti-Doping Rule Violation), and that admission is the only reliable evidence of the violation at the time of the admission, then the otherwise applicable period of Ineligibility may be reduced, but not by more than one half.*"

38. The Tribunal's conclusion on this issue, which rejected the Player's arguments, are set out in paragraphs 113 to 115 of the Decision:

> "*113. Instead the Player advanced an alternative argument in relation to ADR Article 10.6.2. His position was that without his admission both to the coaches and them within his interview, UKAD would have lacked the evidence to pursue this case, so he should be entitled to a reduction of up to half of his sanction.*
>
> *114. UKAD strongly objected to this. The Tribunal noted that this "2 part" admission was the key evidence, but also noted that it was effectively retracted by the Player. He did not stand by it, rather he looked to change it to speculation and looked to rely upon a totally different version of events, namely the "gym" story.*
>
> *115. The Tribunal finds that ADR Article 10.6.2 is there to assist honest athletes and to encourage them to co-operate and to reward those that do. In the case at hand the Player rowed away from the admission, so should not then be able to attempt to rely upon it one his alternative "gym" story had been dismissed by the Tribunal.*"

39. Consideration of ADR Article 10.6.2 must recognise that the reduction in sanction on the basis of admission is a matter of discretion. An Appeal Panel such as this would only

interfere with the exercise of that discretion if it was exercised irrationally, without procedural fairness or was objectionable on any other of the recognised bases for challenging a discretionary decision.

40. Far from considering that the Tribunal was wrong in the way that it approached the Player's arguments, we think that the Panel was fully entitled to exercise its discretion as it did. As the Tribunal found, ADR Article 10.6.2 is there to reward an athlete who makes an early admission of the ADRV. Of course, the Player here did make such an admission, but it would be nonsensical to exercise the discretion in favour of someone who, having made such an admission, then sought to suggest that such admission had been misunderstood and / or to retract it.

41. We therefore endorse UKAD's submission on this appeal that the Tribunal was essentially following the World Anti-Doping Code ("WADC") commentary and guidance, as it appears in *RFU v Spelman* (a decision of April 2012, considering Article 10.5.4 of the 2009 WADC which became Article 10.6.2 of the 2015 Code) and the decision in May 2012 in *RFU v Parker*. As the Tribunal here found, ADR Article 10.6.2 is intended to "*assist honest athletes and to encourage them to cooperate and to reward those that do*". To reward someone such as the Player here who made an admission that he subsequently retracted would be contrary to the whole purpose of the provision.

42. Accordingly, we reject the Second Ground of Appeal.

43. The Appellant's Third Ground of Appeal was that the Tribunal was mistaken in its assessment of a further issue, namely, whether the commencement of the suspension should have been backdated to the date of Sample collection (in context, 13 August 2018).

44. The relevant provision here is ADR Article 10.11.1:

> "*10.11.1 Delays not attributable to the Athlete or other Person:*
>
> *Where there have been substantial delays in the hearing process or other aspects of Doping Control that are not attributable to the Athlete or other Person charged, the period of Ineligibility may be deemed to have started at an earlier date, commencing as far back as the date of Sample collection or the date on which another Anti-Doping Rule Violation*

last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified."

45. The Tribunal did make an error in paragraph 116 of its Decision, in that it "*noted that the Player cited ADR Article 10.11.1 but then failed to make any submissions regarding this either in writing or at the hearing*".

46. The Player understandably objects to that paragraph on the basis that a written submission in relation to ADR Article 10.11.1 was referred to in paragraph 31 of the submission which had been presented on 20 January 2020.

47. Notwithstanding that oversight, it is clear that the Tribunal did in fact consider this issue. We shall quote the paragraph 116 in full:

> "*The Tribunal also noted that the Player cited ADR Article 10.11.1, but then failed to make any submissions regarding this either in writing or at the hearing. In any event, the Tribunal noted the procedure to get before the Tribunal was not particularly quick, but that this was also an unusual case, which required some investigation. Likewise, the Player cited ADR Article 8.3, but again seemed to abandon this point. There was nothing before the Tribunal to consider the independent review one way or the other.*"

48. As with the provision considered under Ground 2, backdating the period of suspension to Sample collection (or to any time before the Player was provisionally suspended on 7 May 2019) is another matter of discretion. In our view, the Tribunal here was right to find no basis upon which that discretion should be exercised in the Player's favour, whatever oral submission might have developed the Player's written submission. In short, we consider that the Tribunal was fully entitled to reach the conclusion it did in paragraph 116 of its Decision. For what it is worth, if we had decided to exercise that Decision afresh ourselves, we would have reached the same conclusion.

49. The effect of the Tribunal's approach was to follow the ordinary approach to identifying the start date for the sanction, namely, that it takes effect from the date upon which the Player is actually suspended. The logic of that is that he cannot therefore get credit for a period (in this case, 13 August 2018 to 6 May 2019) during which he may have played or would have been able to play rugby.

50. In Ground 4, the Player argues that his sanction should have been one of two years as opposed to four years on the basis that his ADRV was not intentional, as defined by ADR Article 10.2.3.

51. ADR Article 10.2 provides as follows:

> "*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*
>
> *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… can establish that the Anti-Doping Rule Violation was not intentional.*"

52. Although it is noted that the Tribunal appears not to have been directly addressed on this issue on behalf of the Player, we are by no means satisfied that that was an oversight as opposed to a recognition by his legal representatives that, in context, such an argument would have been doomed to failure.

53. Be that as it may, UKAD did address the issue of intention as is apparent from paragraphs 65 and 66 of the Decision which we quote:

> "*65. UKAD submitted that Mr Richards cannot show on the balance of probability that his conduct was not intentional. That is, Mr Richards cannot demonstrate that he did not engage in conduct that he knew constituted an ADRV, or that he knew carried a significant risk that it might constitute an ADRV and manifestly disregarded that risk.*
>
> *66. In short, the absence of a compelling (or indeed any reasonable) explanation, Mr Richards has not discharged his burden of establishing his lack of Intention. As such, a sanction of four-years should be imposed.*"

54. Given Mr Meakin's submission that this matter should have been more fully addressed on the Player's behalf at the Tribunal hearing, we thought it appropriate to allow the Player to adduce the additional evidence, to which we have already referred and to which we can, as we have said, attach whatever weight we think appropriate.

55. As was recognised by the Tribunal at paragraph 112, the onus is on the Player who wishes to rely on this provision so as to establish an absence of an intentional violation. Pursuant to ADR Article 10.2.3, it was therefore his burden to show that, when he took what the Tribunal found he had thought was Clenbuterol, he did not know that his conduct constituted an ADRV or did not at least know that there was a significant risk that his conduct might constitute such an ADRV, and manifestly disregarded the risk.

56. In the light of the Tribunal's findings, it is barely conceivable that the Tribunal could have concluded other than that the ADRV was indeed intentional. Notwithstanding the Player's lack of formal anti-doping education (at least prior to 15 August 2018), it is simply not plausible that someone could take what they thought was Clenbuterol without realising that, at the very least, there was a substantial risk of an ADRV. Further, insofar as the Tribunal considered the alternative explanations that the Player offered in evidence, it is hardly surprising that (per paragraph 108 of the Decision) the Tribunal struggled to believe the Player's "*gym*" explanation. Indeed, it beggared belief that anyone would take some tablets they found in a gym, as he described, especially bearing in mind that he admitted in his interview with Mr Watts that he did know of some supplements which were regarded as "*dodgy*".

57. In short, we conclude that the Tribunal's analysis of what the Player had (or, more particularly, had not) established as regards to intention is sufficiently and satisfactorily summarised in paragraphs 103 to 112 of its Decision.

58. Accordingly, this Ground of Appeal also fails.

Conclusion

59. In those circumstances, we dismiss the Player's appeal and confirm that the Tribunal was entitled to find, as it did, that the Player had committed an ADRV under ADR Article 2.2 in that he used Clenbuterol.

60. The Tribunal was also entitled to conclude that he had failed to show that his use was not "*intentional*" within the meaning of ADR Article 10.2.3 and we consider that the Tribunal was also fully entitled to decide that the appropriate period of Ineligibility would be four

years, in accordance with ADR Article 10.2.1, such period to run from the date of Provisional Suspension (7 May 2019), in accordance with ADR Article 10.11.3.

William Norris QC
Chair, on behalf of the Panel
London
05 May 2021