SR/351/2022

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

Before:

Jeremy Summers (Chair)
Professor Gordon McInnes
Dr Tim Rogers

BETWEEN:

UK ANTI-DOPING LIMITED ("UKAD")
Anti-Doping Organisation

and

ASHLEIGH HYNDMAN
Respondent

DECISION OF THE NATIONAL ANTI-DOPING PANEL

Introduction

1. This is the unanimous decision of an Anti-Doping Tribunal (the 'Tribunal') convened under Article 5.1 of the 2021 Procedural Rules of the National Anti-Doping Panel (the 'Procedural Rules') and Article 8.1 of the UK Anti-Doping Rules dated 1 January 2021 (the 'ADR') to determine an Anti-Doping Rule Violation ('ADRV') alleged against Mr Ashleigh Hyndman (the 'Athlete').

2. The alleged ADRV was a violation of ADR Article 2.1 (Presence of a Prohibited Substance in the Athlete's Sample) and ADR Article 2.2 (Use or Attempted Use of a Prohibited Substance).

3. The Athlete was charged by letter issued by UKAD dated 5 August 2022. The Tribunal was appointed by Charles Flint KC, President of the National Anti-Doping Panel (the 'NADP').

4. The Athlete attended in person at a hearing convened on 24 April 2023, and was represented by Jason Torrance, solicitor at Tees Law. UKAD was represented by Mr Scott Smith, UKAD barrister. The Tribunal records its gratitude to both advocates for their assistance in this matter.

5. Additionally, present at the hearing on 24 April 2023 were:

For UKAD

Eleanor Purdy, Legal Officer (assisting Mr Smith).

Stacey Cross, Director Deputy of Legal and Regulatory Affairs (observing the hearing remotely).

For the Athlete

Laura Owens (Athlete's fiancé).

Charlotte Middleditch (trainee solicitor assisting Mr Torrance).

Courtney Cox (trainee solicitor Osborne Clarke LLP)

6. This is the reasoned decision of the Tribunal. Each member contributed to it, and it represents our conclusions. It is necessarily a summary. It is reached after appropriate consideration of all the evidence, submissions and other material placed before us. Nothing is to be read into the absence of specific reference to any aspect of the material or submissions before us. We considered and gave appropriate weight to it all.

7. Words and expressions defined in the ADR, unless the context otherwise requires, have the same meaning in this decision.

Jurisdiction

8. Jurisdiction was not challenged but for completeness the Athlete is a semi-professional rugby player, who at the material time was registered as a player with Llanelli RFC. Llanelli RFC compete in the Welsh Premiership.

9. The Welsh Rugby Union ('WRU') is the National Governing Body ('NGB') for rugby in Wales and has adopted the UK Anti-Doping Rules as the ADR. The ADR apply to all members of the WRU who, by virtue of that membership, agree to be bound by, and to comply with, them.

10. The Athlete was at all material times a registered WRU member.

11. ADR Article 1.2.1 provides that:

> *"1.2.1 These Rules shall apply to:*
>
> *[(a)]*
>
> *(b) all Athletes (including International-Level Athletes) and Athlete Support Personnel who are members of the NGB and/or of the NGB's members or affiliate organisations or licensees (including any clubs, teams, associations or leagues) or otherwise under the jurisdiction of the NGB (including Recreational Athletes);*
>
> *(c) all Athletes (including International-Level Athletes) and Athlete Support Personnel participating in such capacity in Events, Competitions, and other activities organised, convened, authorised or recognised by the NGB or any of its members or affiliate organisations or licensees (including any clubs, teams, associations or leagues), wherever held;*
>
> *[(d)(e)]"*

Application to adduce further expert evidence

12. Following a directions hearing held by way of telephone conference call on 5 December 2022, agreed directions were issued detailing the mutual filing of evidence (which was known would include expert evidence) and submissions in advance of a hearing that was listed for 21 March 2023. The hearing was to be held in person at the International

Dispute Resolution Centre in London, and the date was fixed having regard to the availability of a number of witnesses.

13. Those directions were later varied, again with the agreement of the parties, but the directions issued were fully complied with.

14. At 16:34 on 16 March 2023, being two working days before the hearing, the Chair received an email from the NADP secretariat attaching an application made on behalf of the Athlete for leave to call additional expert evidence.

15. The identity of the expert was not given, nor his or her field of expertise. It was accordingly not possible to be clear as to the basis on which the witness the Athlete sought to call, could be deemed to be an expert witness.

16. To the extent that any material detail was given as to the nature of the additional evidence to be called was included in the application, this was limited to the following:

> *"The additional expert evidence our client wishes to adduce goes towards the contamination of the product used by our client, and specifically will address the issue of the likelihood of the contamination occurring during the manufacturing process as opposed to being adulterated by our client. We have been advised that the expert report addressing this issue will be finalised by Monday 20 March 2023 at the latest, and will be filed and served as soon as it is available. The expert will be available for oral examination at the Tribunal on Tuesday 21 March 2023."*

17. The application then submitted that a refusal to grant leave to admit this evidence would result in unfairness to the Athlete, going so far as to assert that such a refusal would give rise to an immediate ground of appeal. In support of the Athlete's position, the application cited the following provisions:

> *"Furthermore, the UK National Anti-Doping Policy ("the Policy") provides as follows:*
>
> *2.1.6. pursuing diligently all potential anti-doping rule violations within its jurisdiction, including investigating whether Athlete Support Personnel or other Persons may have been involved*

in cases of doping by Athletes and (if so) ensuring the enforcement of appropriate Consequences;

……

2.10.2. In discharging these case presentation responsibilities, UKAD will endeavour at all times to respect the duty of procedural fairness owed to Athletes, Athlete Support Personnel, and other Persons who have been charged with the commission of anti-doping rule violations."

18. The application further stated that the Athlete had been put to *"significant additional cost"* to obtain the further expert evidence it now sought to rely upon.

19. In response to questions put by the Chair, the following additional detail was provided on behalf the Athlete:

    1. *"The name of the expert to be called is Mike Pusey.*

    2. *Mr Pusey's field of expertise is chemistry and microbiology, including the analysis of pharmaceutical and food products.*

    3. *Enquiries were first made to Mr Pusey on 7 March 2023 and following initial discussions as to whether Mr Pusey could assist, instructions were confirmed shortly thereafter.*

    4. *Mr Pusey has been instructed to opine on how the Contaminated Product (as that term is defined in the Athlete's Submissions) could have been adulterated by the Athlete and whether, in his opinion, contamination was more likely to have taken place during the manufacturing process or once in the possession of the Athlete."*

20. No application to adjourn the proceedings was made at this stage.

21. By letter dated 16 March 2023, UKAD objected to that application. In doing so it set out the procedural history and dealt with the circumstances in which the application had been raised and responded as follows:

    "UKAD was first informed of the intention to adduce this additional evidence in an email from the Athlete's lawyer to UKAD dated 16 March 2023 timed at 10:40am. UKAD's response was "I am rather surprised to hear of the intention to adduce further expert evidence at this late stage. UKAD will be opposing the introduction of any further evidence and as such invite an

application to the Chair." There was no indication in the Athlete's lawyer's email as to the nature of the expert evidence, the name of the expert, or what matter in issue it is said to speak to. The email was a plain assertion that such evidence would be served and relied upon, without seeking a further direction from the Chair."

22. It rejected the Athlete's assertion that to refuse the admission of the evidence would be unfair and submitted that to allow its admission at such a late stage would be unfair to UKAD. To the extent that the Athlete's application had suggested that evidence might have been withheld by UKAD (which was unfortunate) this was categorically rejected by UKAD.

23. Having given full consideration to the arguments advanced by the parties, the following ruling was released to the parties:

"Having considered the written application made on behalf of the Athlete dated 16 March 2023 and the response thereto from UKAD dated 17 March 2023, the application for leave to adduce additional expert evidence is refused. Reasons will be given in the final judgment.

Should either party require further directions, the Chair is available at 12 noon today. The directions call listed at that time will be vacated, unless either party advises UKAD that it requires further directions. If so, they are to please also specify the direction(s) sought.

The hearing will proceed as listed on 21 March 2023."

24. The detailed reasoning for that decision was as follows:

I. There was no evidence as to Dr Pusey's credentials as a relevant expert and, absent his report having been served, it was not possible to make a determination as to whether it would assist the Tribunal.

II. The application was made extremely late in the day.

III. It was noted that Dr Pusey had first been consulted on 7 March 2023, and no explanation was given as to why UKAD had not been approached until 16 March 2023.

IV. Even then, no attempt had been made to achieve a position whereby both parties could have adduced expert evidence on the point to assist the Tribunal; in effect

the application was for the evidence to be submitted "blind" and without UKAD having an opportunity to rebut it.

V. No explanation had been given as to why this evidence had not been sought previously, not least having regard to the history of the proceedings.

VI. Given the procedural history of the matter, and the untimely nature of the application, the argument that a refusal to accede to the application would be unfair to the Athlete was not accepted.

VII. To the extent that any unfairness might have arisen, this resulted directly from the delay in seeking the evidence and was offset by the unfairness to UKAD in requiring it to deal with expert evidence contrary to the manner prescribed by the Procedural Rules. It was noted that the report to be prepared by Dr Pusey was unlikely to have been served on UKAD before 20 March 2023, being the day before the hearing.

Application for adjournment

25. An application for an adjournment of the hearing was made on behalf of the Athlete shortly after notification that the application to adduce further expert evidence had been refused.

26. A telephone directions hearing was convened at 12:30 on 17 March 2023 when the Chair proposed a timetable for the sequential lodging of written submissions later that day, with that proposed timetable being agreed by the parties. Dr Pusey's expert report was further directed to be served by 17:30 on 20 March 2023.

27. The Chair noted that there was nothing at that time on the record to evidence Dr Pusey's status as a relevant expert witness. Details of Dr Pusey's experience were subsequently provided by letter from Mr Torrance later that day.

28. In the event, UKAD accepted that fairness dictated that the admission of Dr Pusey's evidence, and evidence in response should at least be considered, and that accordingly

it did not object to the application made to adjourn the hearing.

29. Following a directions call on 22 March 2023, further directions were issued with the agreement between the parties leading to the hearing being relisted in the window of 24-26 April 2023.

Background

30. On 21 April 2022, under Mission Order M-1782931273, a UKAD Doping Control Officer ('DCO') collected a urine Sample from the Athlete In-Competition at a Welsh Premiership match between Llanelli v Llandovery at Parc y Scarlets, Llanelli.

31. Assisted by the DCO, the Athlete split the urine sample into two separate bottles which were given reference numbers A1174960 (the 'A Sample') and B1174960 (the 'B Sample').

32. Both Samples were transported to the World Anti-Doping Agency ('WADA') accredited laboratory in London, the Drug Control Centre, Kings College (the 'Laboratory'). The A Sample was analysed in accordance with the procedures set out in WADA's International Standard for Laboratories. Analysis of the A Sample returned Adverse Analytical Findings ('AAFs') for the following metabolites of GW1516:

    i. GW1516-sulfone; and

    ii. GW1516-sulfoxide.

33. GW1516 is classified under section S4.4 of the 2022 WADA Prohibited List as a Metabolic Modulator. It is a non-Specified Substance prohibited at all times.

34. At all material times, the Athlete did not have a Therapeutic Use Exemption ('TUE') for GW1516.

35. On 10 June 2022 UKAD sent a letter to the Athlete formally notifying him in accordance with ADR Article 7.8, that he may have committed:

    1. An ADRV pursuant to ADR Article 2.1, in that Metabolites of the Prohibited

Substance GW1516, namely GW1516-sulfone and GW1516-sulfoxide, were present in a urine sample provided by the Athlete on 21 April 2022 numbered A1174960; and

2. An ADRV pursuant to ADR Article 2.2, in that he had Used a Prohibited Substance, namely GW1516, on or before 21 April 2022.

36. On 17 June 2022, UKAD was advised by the Athlete's legal representative that he wished to have his B Sample analysed.

37. On 5 July 2022, the Athlete attended the Laboratory to witness the opening of the B Sample and the B Sample was analysed.

38. On 12 July 2022, UKAD informed the Athlete's legal representative that the B Sample analysis results had confirmed the results of the A Sample analysis.

The Charge

39. As above, the Athlete was charged by letter dated 5 August 2022, which stated:

"UKAD therefore proceeds to charge you with the commission of:

1. An ADRV pursuant to ADR Article 2.1, in that Metabolites of a Prohibited Substance, namely GW1516, including:

a. GW1516-sulfone; and

b. GW1516-sulfoxide

were present in a urine Sample provided by you on 21 April 2022 numbered A1174960; and/or

2. An ADRV pursuant to ADR Article 2.2, in that you Used a Prohibited Substance, namely GW1516, on or before 21 April 2022."

Relevant Regulations

40. ADR Articles 2.1 and 2.2 provide as follows:

> ***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 personal duty to ensure that no Prohibited Substance enters their body. An Athlete is responsible for any Prohibited Substance or any of its Metabolites or Markers found to be present in their Sample. Accordingly, it is not necessary to demonstrate intent, Fault, negligence or knowing Use on the Athlete's part in order to establish an Article 2.1 Anti-Doping Rule Violation; nor is the Athlete's lack of intent, Fault, negligence or knowledge a valid defence to an assertion that an Article 2.1 Anti-Doping Rule Violation has been committed.*
>
> *[2.1.2-2.1.4]*
>
> *2.2* ***Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method, unless the Athlete establishes that the Use or Attempted Use is consistent with a TUE granted in accordance with Article 4***
>
> *2.2.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters their body and that no Prohibited Method is Used. Accordingly, it is not necessary to demonstrate intent, Fault, negligence or knowing Use on the Athlete's part in order to establish an Anti-Doping Rule Violation for Use of a Prohibited Substance or a Prohibited Method; nor is the Athlete's lack of intent, Fault, negligence or knowledge a valid defence to an assertion that an Article 2.2 Anti-Doping Rule Violation of Use has been committed.*
>
> *2.2.2 It is necessary to demonstrate intent on the Athlete's part to establish an Article 2.2 Anti-Doping Rule Violation of Attempted Use.*
>
> *2.2.3 The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. For an Article 2.2 Anti-Doping Rule Violation to be committed, it is sufficient that the Athlete Used or Attempted to Use a Prohibited Substance or Prohibited Method.*

2.2.4 Out-of-Competition Use of a substance that is only prohibited In-Competition is not an Article 2.2 Anti-Doping Rule Violation. If, however, an Adverse Analytical Finding is reported for the presence of such substance or any of its Metabolites or Markers in a Sample collected In-Competition, that may amount to an Article 2.1 Anti-Doping Rule Violation."

41. It was common ground that this was the Athlete's first ADRV. As such ADR Article 10.2 applied:

"10.2 Imposition of a Period of Ineligibility for the Presence, Use or Attempted Use, or Possession of a Prohibited Substance and/or a 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's or other Person's first anti-doping offence shall be as follows, subject to potential elimination, reduction or suspension pursuant to Article 10.5, 10.6 or 10.7:

10.2.1 Save where Article 10.2.4(a) applies, the period of Ineligibility shall be four (4) years where:

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

(b) The Anti-Doping Rule Violation involves a Specified Substance or a Specified Method and UKAD can establish that the Anti-Doping Rule Violation was intentional.

10.2.2 If Article 10.2.1 does not apply, then (subject to Article 10.2.4(a)) the period of Ineligibility shall be two (2) years.

10.2.3 As used in Article 10.2, the term "intentional" is meant to identify those Athletes or other Persons who engage in conduct which they know constitutes an Anti-Doping Rule Violation or they know that there is a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and they manifestly disregard that risk.

(a) An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a Prohibited Substance or a Prohibited Method which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the Prohibited Substance is a Specified Substance or the Prohibited Method is a Specified Method and the Athlete can establish

that the Prohibited Substance or Prohibited Method was Used Out-of-Competition.

(b) An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a Prohibited Substance or a Prohibited Method which is only prohibited In-Competition shall not be considered "intentional" if the Prohibited Substance is not a Specified Substance or the Prohibited Method is not a Specified Method and the Athlete can establish that the Prohibited Substance or Prohibited Method was Used Out-of-Competition in a context unrelated to sport performance.

10.2.4 Notwithstanding any other provision in Article 10.2, where the Anti-Doping Rule Violation involves a Substance of Abuse:

(a) If the Athlete can establish that any ingestion or Use occurred Out-of-Competition and was unrelated to sport performance, the period of Ineligibility shall be three (3) months; provided that it may be further reduced to one (1) month if the Athlete satisfactorily completes a Substance of Abuse treatment program approved by UKAD. The period of Ineligibility established in this Article 10.2.4(a) is not subject to any reduction pursuant to Article 10.6.

(b) If the ingestion, Use or Possession occurred In-Competition, and the Athlete can establish that the context of the ingestion, Use or Possession was unrelated to sport performance, the ingestion, Use or Possession shall not be considered intentional for purposes of Article 10.2.1 and shall not provide a basis for a finding of Aggravating Circumstances under Article 10.4."

42. The substances found in the Athlete's AAF were not Specified Substances for the purposes of the ADR. Accordingly, the burden rested on the Athlete to establish on the balance of probabilities that the ADRV was not intentional pursuant to ADR Article 10.2.1(a) above. For the purposes of meeting that test "intentional" being defined as in ADR Article 10.2.3 above.

43. The Athlete asserted that the ADRV should not be held as being intentional. He additionally sought to place reliance on ADR Article10.6, and specifically, ADR Article10.6.1(b), to further reduce any period of prohibition to be imposed:

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

10.6.1 Reduction of Sanctions in particular circumstances for Anti-Doping Rule Violations under Article 2.1, 2.2 or 2.6:

All reductions under Article 10.6.1 are mutually exclusive and not cumulative.

[(a) Specified Substances or Specified Methods]

(b) Contaminated Products

In cases involving a Prohibited Substance that is not a Substance of Abuse, where the Athlete or other Person can establish both that they bear No Significant Fault or Negligence for the violation and that the Prohibited Substance came from a Contaminated Product, the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two (2) years Ineligibility, depending on the Athlete's or other Person's degree of Fault.

[(c) Protected Persons or Recreational Athletes]"

44. In contrast, UKAD asserted that the Athlete's conduct should be found to be intentional. As such, neither ADR Article 10.2 nor ADR Article10.6 should be applied in favour of the Athlete.

Principal matters in issue

45. It was common ground that a Prohibited Substance had been found in the Athlete's Sample, and that accordingly he had committed an ADRV.

46. As set out above, the principal matter in issue was the question of the period of Ineligibility to be imposed.

Timeline

47. The matter has had a relatively long procedural history, which is set out in overview below:

- 21.4.22 - Athlete tested.
- 10.6.22 - Athlete notified of ADRV.
- 17.6.22 – UKAD informed that Athlete required the B Sample to be analysed.
- 5.7.22 - B Sample analysis.
- 12.7.22 - Athlete informed B Sample confirmed results of A Sample.
- 22.7.22 - Athlete advised UKAD that he was investigating the possibility that AAF was caused by supplements (no formal indication of plea).
- 5.8.22 - UKAD issued Charge Letter.
- 12.8.22 - UKAD notified that Athlete had changed legal representation and was requesting extension of time to respond to charge.
- 25.8.22 - Communication between UKAD and the Athlete's lawyers as to time needed for analysis of supplements.
- 7.9.22 - UKAD informed that the supplements had been sent by the Athlete for analysis in France.
- 4.10.22 – Athlete requested extension to 11.10.22 to respond to charge.
- 11.11.22 – UKAD informed that Athlete will be defending charges "by way of a contaminated supplement defence". No admission of either charge.
- 29.11.22 – Request for arbitration sent to NADP
- 1.12.22 – Directions issued.
- 5.1.23 – Athlete served evidence and admits both charges, restating that the AAF had resulted from a Contaminated Product.

The Evidence

Evidence of fact

48. UKAD opened its case by calling live evidence from Mr Nick Wojeck, Head of Science and Medicine at UKAD.

49. He confirmed the accuracy of his written statement dated 10 February 2023 and explained that in his view GW1516 could have had a performance enhancing effect for the Athlete in that, by changing receptors to enable muscles to burn fat rather than carbohydrates, endurance would be enhanced.

50. There was however limited data, because GW1516 had been withdrawn after a single clinical trial involving humans having been found to be carcinogenic.

51. UKAD next called Ms Nicky Edmonds, Director and owner of MSC Nutrition Ltd ('MSC'), who manufacture the supplement taken by the Athlete, which he alleged had been contaminated, who confirmed the accuracy of her written statement dated 17 February 2023.

52. Her company markets a number of products, eight of which, including ZMA-GH5, which had been taken by the Athlete, are certified by Informed Sport.

53. She stated that she would not use manufacturers who used prohibited products and agreed there would be a very negative impact for her business if a prohibited product got into the manufacturing process.

54. MSC had been using the manufacturer of ZMA-GH5 since 2012. It had purchased 200 pouches from the batch which had included that purchased by the Athlete and all had been sold. She thought it inconceivable that only one pouch from an entire batch could be contaminated.

55. She was entirely confident in the manufacturing process both due to the accreditation held by the manufacturer and the screening then undertaken by Informed Sport. The batch had been screened during production and then was later subject to a blind test. No contamination had been found in any test.

56. She had undertaken due diligence on the manufacturer, including visiting its site, and would have been entirely confident of the integrity of the product even without the Informed Sport testing. She had not been willing to disclose the name of the manufacturer to the Athlete's legal team because she had not known what the legal ramifications would be.

57. MSC provided products to between 12 and 18 elite sports teams each having around 35 athletes in their respective squads. She also sold products to individual athletes. No issue of contamination had ever arisen with any MSC product before the Athlete's allegations.

58. MSC had contracts with the sports teams concerned, and she believed there would be a requirement to notify them if a contamination issue, as opposed to an allegation, arose. In that event, there would be financial implications.

59. She was aware that products could become contaminated but was clear in her view that none of MSC's products had come into contact with GW1516.

Expert evidence

60. There was significant and detailed expert evidence before the Tribunal, consisting of four expert reports as follows:

    i. Professor Pascal Kintz dated 8 December 2022 (on behalf of the Athlete);

    ii. Professor David Cowan dated 16 February 2023 (on behalf of UKAD);

    iii. Dr Michael Pusey dated 20 March 2023 (on behalf of the Athlete); and

    iv. Professor David Cowan dated 6 April 2023 (on behalf of UKAD).

61. Each report was given due consideration by the Tribunal and each witness gave live evidence before the Tribunal. Professor Kintz also submitted a Testing Certificate of Analysis dated 11 October 2022.

62. Professor Kintz confirmed both the accuracy of the results he had conducted on samples supplied to him by the Athlete and his subsequent statement.

63. His test results were recorded as follows:

LABORATORY TESTS

GW1516 was tested by liquid chromatography coupled to tandem mass spectrometry on a Waters XEVO TQS micro system, after solubilisation in methanol.

The limit of quantitation is 1 ng/g for GW1516.

LABORATORY RESULTS

The following results were obtained:

Product	***Batch***	***Result for GW1516***
ZMA-GH5, MSC Nutrition, open	*132-112-10/2023*	*8.7, 9.7 and 10.9 ng/g*
ZMA-GH5, MSC Nutrition, sealed	*132-112-10/2023*	*Not detected*
Synthesis	*47S-114-02/2024*	*Not detected*
Synthesis	*47S-114-02/2024*	*Not detected*
Maximise	*40S-114-02/2024*	*Not detected*

64. Professor Kintz was satisfied that 10 ng/g was consistent with contamination and the fact that he had randomly tested three different parts of the open package with very similar results on each occasion corroborated his view.

65. In his opinion, the level of homogeneity across all three test results was inconsistent with the Sample having been deliberately sabotaged and was more likely to have been an industrial problem. In his view, to have achieved that level of homogeneity would have

required specialist equipment and expertise.

66. Whilst he had not reviewed the manufacturing process it did not surprise him that the sealed pouches had tested negative for GW1516. In his experience, differing test results across the same batch was normal. Sometimes manufacturers were not clear with batch numbers.

67. He was a forensic scientist not a food scientist and could not offer a view as to how the GW1516 got into the Athlete's supplement. He accepted that three tests might not be enough to be 100% sure of homogeneity, but it was rather indicative of full homogeneity.

68. He had based his assessment of the amount of GW1516 that was in the Athlete's body as recorded at the 8th page of his statement[1] by reference to information supplied to him by Mr Torrance but had not analysed the Athlete's urine.

69. He did not agree with the assertion made by Professor Cowan that some 2500 ng/g would have been necessary to account for the concentration of GW1516 found in the Athlete's urine. He thought the concentration was the result of repeated exposure through cumulative dosage over a number of weeks (which would be accounted for by reference to the Athlete regularly taking the supplement after training).

70. As noted above, the Athlete had sought additional expert evidence from Dr Pusey in response to the expert report prepared by Professor Cowan. UKAD's position as to this evidence was reserved but his written report recorded the following conclusions:

> ***"Conclusions***
>
> *Although the analysis of Mr. Hyndmans (sic) urine samples return results of GW1516 detected,*
>
> *the numerical results quoted are indicative or approximate and provided for guidance*
>
> *purposes only – as stated in the reports. According to published guidance regarding*
>
> *sensitivity of analytical methods, results greater than the Limit of Detection (LOD) and less*

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than the Limit of Quantitation (LOQ) must be reported as substance detected and concentration < LOQ. As in this case the LOQ is unknown, the report should state GW1516 detected but no numerical value may be assigned.

The results reported in the Expert Witness Report of Prof. Pascal Kintz are stated to be within the LOQ and may be accepted as valid and as such are reportable. The analysis, carried out in three times, returned closely grouped results for GW1516 of about 10ng/g.

Both Prof. Cowan and Prof. Kintz express the opinion that this is most likely the result of contamination of the ZMA-GH5 and I agree with this. The distribution seen is more likely to be the result of efficient industrial mixing of the GW1516 into the supplement during manufacture.

Efficient blending of low levels of GW1516 into a powder consisting of a mix of 11 ingredients would require a high level of knowledge and expertise which, I believe, would be beyond the capability of the layman.

Having assessed the various formats of GW1516 that are available to purchase and how they might be used to doctor the supplement to confuse the investigation, I believe it would have been impossible for Mr. Hyndman to achieve.

My opinion is that the presence of GW1516 in the supplement ZMA-GH5 is most likely the result of contamination somewhere in the manufacturing or supply chain."

71. Dr Pusey gave evidence before the Tribunal and, bar some minor changes, confirmed the accuracy of his report.

72. Whilst his experience was with plastics and foods, his position was that similar processes were used in pharmacological production.

73. In his view, the results evidenced by Professor Kintz were consistent with contamination

and in his opinion it would not have been possible for the Athlete to have mixed GW1516 into the supplement with the consistency shown in Professor Kintz's results. He had seen Professor Cowan's second report, and this did not alter his opinion. To achieve measurements in those amounts was beyond the Athlete's ability. Even with scientific expertise that consistency would have been very hard to achieve.

74. In cross examination he accepted that to the extent that at the 8th and 9th pages of his report[2] he had concluded it to have been unlikely that the Athlete could have doctored the supplement by reference to stated sizes of liquids, capsules and powder, he had not had access to any such samples to verify his conclusions.

75. He also accepted that he had no expertise in sports supplements or human bio-analysis, and so could not give evidence of excretion rates.

76. He had not considered the WADA testing code or minimum standard criteria.

77. He was aware that GW1516 was a non-threshold substance and therefore did not need to have a quantified test result. He did not dispute the presence of the Prohibited Substance, just its quantity. In his opinion it could have been any figure.

78. He remained of the view that the results shown could have been achieved by highly efficient industrial mixing and he could not see any other explanation. He did not think one would see homogeneity across a whole batch of a product and therefore the negative tests from the sealed pouches did not alter his opinion. It was possible to see different results in the same batch, but it was not possible for an ordinary person to have achieved the level of mixing found by Professor Kintz in the open sample he had analysed.

79. In his view there could have been accidental contamination during the manufacturing process.

80. As above, the expert scientific evidence adduced by UKAD was in the form of two reports served by Professor David Cowan. In his first report dated 16 February 2023, Professor Cowan opined on 8 specific questions put to him by UKAD and concluded his report in

[2] Hearing Bundle pages 426 and 427.

the following terms:

"CONCLUSION

13. I consider that Professor Kintz has provided a plausible explanation for the finding of the sulfoxide and sulfone Metabolites of GW1516 in the urine Sample 1174960 provided by the Athlete. That is to say, I find it to be consistent with the presence of GW1516 in small amounts as a contaminant within the open supplement. Furthermore, I consider it to be scientifically reasonable to accept that ingesting approximately 11 g of this open supplement about one day before the doping control urine Sample was provided by the Athlete would account for the Adverse Analytical Finding reported by the Laboratory. I agree with Professor Kintz that it is not possible to determine how the GW1516 came to be in the open supplement.

14. However, I consider it to be more likely, to account for the concentrations of the GW1516 Metabolites reported by the Laboratory, that a larger dose of GW1516 than the 110 ng estimated by Professor Kintz had been administered. Professor Kintz is of the view that the contamination was homogeneous based on his three very similar analytical results of the amount of GW1516 he measured. Nevertheless, I still think that it is possible that, if the contamination was not homogenous in the supplement, a larger dose of GW1516 could have been administered.

15. Finally, it is possible that a larger pharmacologically effective dose or doses of GW1516, on its own rather than in a Contaminated Product, had been administered days to weeks before followed by a smaller dose the night before the collection of the urine Sample. However, I find this highly unlikely based on the proportion of the sulfone to sulfoxide

Metabolites of GW1516. I cannot envisage any other scenario to explain the AAF."

81. An addendum to Professor Cowan's statement was served on 6 April 2023[3] in response to the evidence served from Dr Pusey. In summary this indicated that he remained of the view that GW1516 could have been mixed without specialist equipment or expert knowledge and that Dr Pusey's report had not caused him to alter his initial opinions.

82. In his oral evidence, Professor Cowan confirmed the accuracy of both his reports, subject to a limited number of minor non-material amendments. He explained the methodology of the back calculation he had carried out to arrive at his conclusion that the level of GW1516 was consistent with a single dose administration. In this respect he did not agree with the conclusion reached by Professor Kintz that a dose of 110ng had been administered. In his view, the administered dose was much larger and in the region of 2500ng.

83. He stated that it was normal to undertake a back calculation as he had done in this matter, and that this was often helpful to an athlete's case.

84. Professor Cowan noted that GW1516 disappears from the system very quickly. The level of sulfoxide present in the Sample made it unlikely in his opinion that there had been earlier administration, and all the information suggested a recent administration.

85. In his view, it was not that difficult to add GW1516 to the supplement and he was surprised by Professor Kintz's view in this regard. In his view it would be like following "a recipe" in terms of the level of complexity. He thought that someone might only need to know someone in the science department at a local university who "could tell you how to do it". In his view commonly found alcohol such gin or whisky would be enough to assist mixing, and that the smaller the remaining quantity (such as that in an open pouch), the easier it would be.

86. He gave the example of an artist mixing powder to get a consistent paint colour. In his view what was required was not "clever science".

87. He thought that it was possible that contamination had occurred during or after the

[3] Hearing Bundle page 447

manufacturing process, and was not able to give a firm view either way. He could similarly not give an opinion as to whether the contamination had been intentional.

88. He agreed that it was possible for different areas from a single batch of a product to return different test results.

Evidence from the Athlete

89. The final witness to give live evidence before the Tribunal was the Athlete, who confirmed the veracity of his written statement dated 19 January 2023.

90. He detailed his background both at work and as rugby player and explained the anti-doping education he had received.

91. He had used ZMA-GH5 because there was discount available through his club. He had been trying to gain weight not lose it. He was subject to random drug testing at work, which could lead to summary dismissal.

92. He described the testing process and how he had been notified of the ADRV some 8 week later. He had never previously heard of GW1516.

93. He had taken the ZMA-GH5 as per the instructions, taking two scoops before bed on an empty stomach. He did not take the supplement every night, and not after rugby training at the club because he would have eaten after the training.

94. He denied having adulterated the Supplement or having the knowledge to do so. He had GCSEs in Chemistry, Physics and Biology, but at grade C. He had never knowingly taken a Prohibited Substance.

95. In cross examination he stated that he was not tested for performance enhancing drugs as part of the testing system at work, and that these proceedings would not put his job at risk. He did not take recreational drugs.

96. He had been using MSC products for quite some time and was aware of other players who did so. He had spoken to his Club's Strength and Conditioning Coach about supplements but had not done so with anyone else.

97. Whilst he accepted that GW1516 could help endurance he did not think it would be of any benefit to his play. He agreed that his glandular fever and previous shoulder injury had resolved some time ago and so he would not have needed supplements to help with the recovery.

98. He had no independent corroboration that the sample he had sent to Professor Kintz was from the Supplement he had taken before he had been tested. He had not adulterated the open pouch and had not panicked having received the Notice of his ADRV. None of his teammates took Prohibited Substances. His partner did not take supplements. He thought there were about 20 servings in each pouch.

99. In response to questions from the Tribunal, he stated that he had ordered the ZMA-GH5 from the MSC website and so had no concerns about buying a Contaminated Product. He had not borrowed anyone else's scoop or let others use his. He had only taken two scoops as per the instructions, which was about 11g in total and had not taken a larger dose.

100. One other teammate (and two opponents) had been tested by the DCO. He had not asked any other teammates who took the Supplement to get their product tested.

101. Written evidence was also received and duly considered from the Athlete's fiancé, Laura Owens, and his coach, Philip John.

Submissions

102. The Tribunal was assisted in advance by the provision of detailed written submissions from both parties which are found in the Hearing Bundle. The oral submissions which summarised those documents are not therefore set out in full. No discourtesy is intended to either advocate, but all arguments advanced before the Tribunal were duly considered.

103. UKAD's primary case was that the Athlete had not established the source of the Prohibited Substance, and that this was not a matter which could be viewed as being wholly exceptional such as to enable the Tribunal to not require that aspect to be established. As such, the period of Ineligibility to be imposed should be four years.

104. Given that the Athlete's case asserted that he had taken a Contaminated Product, the Tribunal should follow the roadmap set out in *UKAD v Blair*[4].

105. This would require the Athlete to show that the GW1516 had entered the supplement during the manufacturing process or after it had been received by him in which case he would need to prove that he had not adulterated the supplement. The Athlete had not satisfied the burden upon him to do either.

106. Professor Cowan had not excluded the possibility of contamination in the manufacturing process but was neutral as to when it had occurred and so this did not assist the Athlete.

107. Ms Edmonds had however given clear evidence as to the integrity of the manufacturing process.

108. In UKAD's submission, Dr Pusey was not a suitably qualified expert, and so no weight should be attached to his evidence.

109. To the extent that the Athlete challenged the method capability of the UKAD testing, when one applied the back calculation used by Professor Cowan, the presence of GW1516 would have been detected by Informed Sport during either the test conducted during the manufacturing process, or the blind tests undertaken post-production.

110. Professor Kintz had declined to opine on the source of the contamination but accepted that adulteration post-production was a possibility.

111. In UKAD's submission the science as to source was neutral and therefore did not assist the Athlete in discharging the burden upon him. Similarly, there was case authority indicating that his protestation of innocence, clear record and attempts to discover the source did not help the Athlete.

112. In the event that the Tribunal was not with UKAD on its primary case, UKAD submitted that the Athlete had not established that he had acted without significant Fault or Negligence such as to entitle him to a reduction in the period of Ineligibility. That period should start from the date of the Athlete's Provisional Suspension, being 10 June 2022.

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[4] SR/NADP/1010/2017.

113. In contrast, the Athlete's case was that he had established that his ADRV was the result of a Contaminated Product.

114. The tests results from Professor Kintz showed that the supplement had been contaminated. If the Athlete had deliberately contaminated the supplement himself, it would have made no sense for him to have also submitted a sealed pouch for analysis.

115. Mr Torrance also addressed the non-contaminated pouches and noted that all experts agreed that there would not be consistent testing across a batch. Taking Professor Kintz's evidence, between 3-7% of any batch would be contaminated. On the basis that Ms Edmonds had said that there had been 200 pouches in the batch in question, the fact that only one of the tests administered by Professor Kintz showed a positive result was entirely consistent.

116. The fact that the sealed pouch was negative could therefore not be taken as showing that the supplement had not been contaminated during the manufacturing process.

117. The expert evidence called on behalf of the Athlete ruled out the possibility of the Athlete having been able to adulterate the supplement himself. Although Professor Cowan had stated that a person could follow a "recipe" to have doctored the product, the Athlete did not have a scientific background to have been able to do so.

118. UKAD could not rely on the Informed Sport testing because the method capability used in that testing was much higher than the levels of GW1516 found (by Professor Kintz).

119. Mr Torrance placed reliance on *UKAD v X*[5], in particular the findings in that decision that the fact that a product was taken for many years by many athletes did not mean that contamination could never occur, and that a batch test will necessarily be definitive for an entire production.

120. Each expert in this case accepted that there could be contamination in the manufacturing process and the Tribunal should prefer the evidence of Professor Kintz and Dr Pusey over that from Professor Cowan.

[5] SR/NADP/165/2018.

121. If the Tribunal was not with the Athlete on his primary submission, the Athlete has acted with No Significant Fault or Negligence. Notwithstanding that the Athlete had already served a Provisional Suspension of over 10 months, following the decision in UKAD v X the Tribunal should rule that the period of Ineligibility should in any event be one of under four months.

Decision on the ADR

122. The Tribunal reminded itself that the burden in this instance lay on the Athlete to establish that, on the balance of probabilities, he had not acted intentionally as defined in the ADR and, if so, that he had further not acted with Significant Fault or Negligence.

123. It was common ground that in discharging that burden, the Tribunal would need to be comfortably satisfied as to the manner in which the Prohibited Substance came to be in the Athlete's body.

124. The Tribunal carefully considered all the written and oral evidence, and having done so made the following findings.

125. Dr Pusey was clearly an experienced scientist but that expertise, in the finding of the Tribunal, did not extend to manufacture of sports supplements, and on his own evidence, he could not give expert evidence of human bio-analysis. Whilst the Tribunal was grateful for Dr Pusey's efforts, his evidence was therefore viewed as being of limited assistance. This was not least because Dr Pusey had opined that the concentration of GW1516 found in the Athlete's Sample was unknown and could have been any value. On that basis, it was not immediately clear how he could have arrived at the conclusions he did.

126. Dr Pusey also challenged the efficiency of the UKAD testing process, which follows the testing requirements prescribed by WADA. Whilst this aspect of Dr Pusey's evidence was not pursued during the hearing by Mr Torrance, it did again suggest that Dr Pusey did not have relevant experience such as could assist the Tribunal as an expert.

127. Turning to the evidence, the first question for the Tribunal to resolve was had the Athlete

demonstrated the source of the Contaminated Product that he alleged was responsible for his ADRV.

128. The Tribunal found that the presence of GW1516 had been found in the open pouch of ZMA-GH5 as examined by Professor Kintz. However, other than the Athlete's assertion, there was no evidence to establish that the sample sent to Professor Kintz came from the supplement claimed to have been taken by the Athlete prior to his Sample having tested positive for the presence of GW1516 on 21 April 2022.

129. In this respect there was a time lapse that was unhelpful to the Athlete. He had been notified of the alleged ADRV on 10 June 2022 and had been informed of the B Sample test result on 12 July 2022. The open pouch (together with the sealed pouches) were not then sent to Professor Kintz until 7 September 2022.

130. There was no continuity evidence establishing the integrity of the supplement in the intervening period, or indeed, that the supplement sent to Professor Kintz was that taken by the Athlete prior to his having been tested and returned an ADRV.

131. To the extent that the sample analysed by Professor Kintz was found to have been contaminated with GW1516, there was no conclusive evidence as to when that contamination had occurred. Both Professors Cowan and Kintz agreed that contamination could have occurred in manufacture of the supplement or thereafter with Professor Kintz considering it was more likely to have occurred during the manufacturing process, and Professor Cowan taking the opposite view.

132. In support of his view, Professor Kintz estimated that *about "110 ng of GW1516 could have entered"* the Athlete's body the evening before his test.

133. The basis of that conclusion was, however, brought into question by reference to the back calculation undertaken by Professor Cowan, which he had based on the level of GW1516 metabolites found in the Athlete's urine. The method of that calculation was effectively not challenged by Mr Torrance, who merely asked whether such a calculation was normal, and the Tribunal found no reason to call Professor Cowan's calculation into question.

134. Based on the Metabolite finding, Professor Cowan estimated that the Athlete must have

consumed at least 2500ng of GW1516 on the evening before testing for his urine to have registered the level of GW1516 found.

135. If the source of the GW1516 was the ZMA-GH5, as asserted by the Athlete, he would have needed to have consumed 250g (2500/10) that evening to produce the test result seen. The Athlete denied this stating that he never took more two scoops, being around 11g in weight.

136. Taking the Athlete's evidence on this point as accepted, then the level of contamination in the ZMA-GH5 must have been much higher than as estimated by Professor Kintz, and over 200ng/g as was the opinion of Professor Cowan.

137. On balance, the Tribunal preferred the, broadly unchallenged, estimate as provided by Professor Cowan.

138. That finding was relevant to two other matters that the Tribunal had to determine.

139. Firstly, the Athlete sought to question the efficacy of the Informed Sport testing in not detecting the presence of GW1516 on the basis that its method capability was only over 100ng/g.

140. However, having regard to the level of contamination estimated by Professor Cowan, the presence of GW1516 would have been detected by Informed Sport using that method capability.

141. The Tribunal accepted the evidence from both Professor Cowan and Professor Kintz that different test results can be found across the same batch of a product, in this case the ZMA-GH5. However, Informed Sport had tested the batch from which the Athlete's supplement had come, both during the manufacturing process and in a blind test after production, and none of the tests had shown the presence of GW1516. On the basis of the level of contamination estimated by Professor Cowan, the Tribunal was on balance satisfied that the GW1516 would have been detected by the Informed Sport testing.

142. Before leaving this point, it would have been open to the Athlete to have asked teammates at his club who were also known to use ZMA-GH5 to have had their product tested, but this was not done.

143. The second relevant point that fell to be determined was the Athlete's argument that it would have been virtually impossible to have adulterated the sample sent to Professor Kintz given the homogeneity shown in the test results without specialist equipment and knowledge.

144. Whilst that position was in any event not accepted by Professor Cowan, the Athlete's case was based on expert evidence formulated from Professor Kintz' estimate of the level of contamination. If the level of contamination was higher as per Professor Cowan's estimation, the ability to have doctored the sample would have been easier than it was asserted on behalf of the Athlete.

145. Although both these points were based on estimates, and so not capable of a conclusive determination by the Tribunal, they both left clear lacunae in terms of the burden that lay upon the Athlete to establish the source of the Contaminated Product and so the means by which it was ingested. That he was required to do so follows the decision in ***UKAD v Buttifant*** [6], which has been adopted with approval in a number of subsequent cases.

146. The Tribunal had regard to the decision in ***UKAD v X*** (above), which was relied upon by Mr Torrance. In that case, UKAD ultimately left the question of the source of the Prohibited Substance to be determined by the tribunal but was at least neutral on the point having served evidence from its expert which confirmed that the hydration tablets taken by the athlete concerned had indeed been contaminated. As such the case was readily distinguishable from the present matter, and so not of the assistance to Mr Torrance as he had suggested.

147. The Tribunal carefully weighed all the evidence and in particular noted:

    1) That the Athlete was unable to establish that the sample he had sent to Professor Kintz had come from the supplements he had ingested prior to his test;

    2) That the Athlete was unable to establish that contamination had occurred in the manufacturing process; and

    3) That the Athlete was unable to establish that any contamination occurring post-

[6] SR/NADP/508/2016.

manufacture had not resulted from any actions taken by him.

148. The Tribunal gave close consideration to the point advanced on behalf of the Athlete that, had he adulterated the supplement, it would have made no sense for him to have also sent the sealed pouch to Professor Kintz for analysis. Whilst there was force in that argument, in the view of the Tribunal it did not, ultimately, assist the Athlete in discharging the burden, which was an onerous one, of establishing the source of the Contaminated Product that he had ingested.

149. It follows that, in light of its findings, the Tribunal was unable to be satisfied that the Athlete had established, to the standard required, the source of the substance he had ingested.

Conclusion

150. The Tribunal found the Athlete to have been a credible witness and observed that the proceedings had plainly impacted him in a very adverse way.

151. Whilst perhaps of little consolation to the Athlete, there are valid and important policy reasons why the ADR imposes a high burden upon an athlete wishing to explain an ADRV on the basis of a Contaminated Product.

152. In this instance the Athlete was unable to discharge that burden, but this decision should not be taken as an explicit finding by the Tribunal that the Athlete had cheated in a way that would be commonly understood.

153. However, the arguments advanced on behalf of the Athlete having been rejected, the Tribunal found that the Athlete had acted intentionally, pursuant to the terms of the ADR and imposed a period of Ineligibility of four (4) years upon the Athlete as required by ADR 10.2.1.

154. The period of Ineligibility is ordered to run from 10 June 2022, being the dated on which the Athlete was given notice of his Provisional Suspension, and end at 23:59 on 9 June 2026.

Appeal

155. In accordance with Article 13.5 of the Procedural Rules, any party who wishes to appeal must lodge a Notice of Appeal with the NADP within 21 days of receipt of this decision.

156. Pursuant to ADR Article 13.4.2(b), the Appeal should be filed to the National Anti-Doping Panel, located at Sport Resolutions, 1 Paternoster Lane, London, EC4M 7BQ (resolve@sportresolutions.com).

Jeremy Summers
Chair, on behalf of the Panel
London, UK
17 May 2023