

National Anti-Doping Panel

Before:

Mr Jeremy Summers (Chair)

Dr Mike Irani

Dr Barry O'Driscoll

Between:

UK ANTI-DOPING LIMITED

Anti-Doping Organisation

And

KURT CLABBY

Respondent

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

**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 2015 Procedural Rules of the National Anti-Doping Panel ("the Procedural Rules") and Article 8.1 of the UK Anti-Doping Rules dated 1

January 2015 ("the ADR") to determine an Anti-Doping Rule Violation ("ADRV") alleged against Mr Kurt Clabby ("the Athlete").

2. The alleged ADRV was a violation of ADR Article 2.3 (Evading, Refusing or Failing to Submit to Sample Collection).
3. The Athlete was charged by letter issued by UKAD dated 29 January 2016 and the Tribunal was appointed by letter dated 29 March 2016 issued by the National Anti-Doping Panel ("the NADP").
4. As is detailed below, this matter has endured an unhappy procedural history. A Panel conference call was (ultimately) convened on 29 November 2016.
5. An e-mail dated 25 October 2016 was, however, sent to the NADP by the Athlete's solicitor which indicated:

'I have this afternoon been contacted by Mr Clabby who advises that he no longer seeks to challenge the UKAD violation charge. He will therefore not be attending the hearing scheduled for 31st October 2016 and will accept the appropriate penalty to be imposed.'
6. Despite extensive efforts made by both the NADP and the Athlete's solicitor to thereafter communicate with the Athlete and obtain his signed confirmation of the position, no further contact was received from the Athlete. The Tribunal concluded that this had been a purposeful refusal on the part of the Athlete to engage further with the process.
7. Notwithstanding the apparent admission of the alleged ADRV referred to above and given the lack of formal confirmation from the Athlete, the Tribunal proceeded to consider the matter on the papers in full but in the absence of the Athlete.
8. In so doing, the Tribunal had regard to Article 8.5 of the Procedural Rules and was comfortably satisfied that the Athlete, having been given proper notice, had declined to attend a hearing thereby enabling the Tribunal to proceed in his absence.
9. This is the reasoned decision of the Tribunal.

Procedural History

10. A directions hearing by way of a telephone call was convened on 1 April 2016. At that juncture the Athlete was represented by a Mr Adrian Withers, who was not legally qualified. The Athlete did not participate in the call. Mr Withers indicated that the ADRV would be challenged and directions were accordingly issued to enable a hearing to be held on 19 May 2016, which was agreed by all parties.
11. The NADP subsequently received a request on behalf of the Athlete for pro bono legal representation to be provided, and Mr Anthony Jones, of counsel was duly instructed. This, however, was sufficiently close to the listed hearing date to necessitate a request for an adjournment, which was granted.
12. The hearing date was re-fixed for 12 July 2016 with the directions timetable previously issued being varied accordingly.
13. Evidence and written submissions were served on behalf of the Athlete on 23 May 2016. This supported the Athlete's challenge to the alleged ADRV.
14. Final written submissions were served on 24 June 2016. These submissions further argued that, if an ADRV was established, the Athlete should receive a reduced period of ineligibility pursuant to Article 10.5.2 ADR.
15. A request for an adjournment of the relisted hearing was subsequently submitted by UKAD due to an urgent investigation having arisen which required the deployment of relevant personnel overseas. The matter was accordingly relisted on 19 August 2016.
16. On 18 August 2016 (one day before the relisted hearing) the NADP was informed that the Athlete had terminated his instruction of Mr Jones and therefore required a further adjournment to secure alternative representation. In the interest of fairness, although with reluctance, that request was granted.
17. Due to difficulties with the availability of all concerned, it was not possible to relist the hearing until 31 October 2016.
18. The Athlete subsequently instructed Bowden Jones solicitors. Through that firm he

submitted additional evidence on 20 October 2016 and requested that the hearing be moved to Cardiff, with that request being granted.

19. As noted at paragraph 5 above, on 24 October 2016 notice was received from Bowden Jones indicating that the Athlete was no longer intending to challenge the alleged ADRV.
20. The hearing on 31 October was then vacated to enable the NADP to obtain formal written confirmation of the position from the Athlete.
21. Despite extensive efforts to communicate with him, there has been no further communication from the Athlete. The Tribunal was informed that a letter was delivered by registered post to the Athlete's last known address and signed for by someone named "Clabby". The Tribunal also understands that further efforts were made by the Athlete's solicitors to contact the Athlete, again without success.
22. In those circumstances the Tribunal determined to proceed in the absence of the Athlete and the Panel conference call was convened on 29 November 2016.

Jurisdiction

23. The Athlete is a Welsh Rugby Union ('WRU') player. At the material time, the Athlete was dually registered as a player with both Bedwas RFC ("Bedwas") and Nelson RFC from 29 August 2015 and 10 September 2015 respectively (although at the time of the ADRV, the athlete was playing and training exclusively with Bedwas).
24. The WRU is the National Governing Body for rugby union in Wales. At its Board meeting held on 27 November 2008, the WRU resolved to adopt 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.
25. The Athlete was at all material times a registered member of the WRU.
26. ADR Article 1.2.1 provides that:

1.2.1 These Rules shall apply to:

(a) all Athlete and Athlete Support Personnel who are members of the NGB and/or of member of affiliate organisations or licensees of the NGB (including any clubs, teams, associations or leagues);

(b) all 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 member or affiliate organisations or licensees (including any clubs, teams, associations or leagues), wherever held;

27. Pursuant to ADR Article 1.2.1(a) and ADR Article 1.2.1(b), the Athlete was subject to and bound to comply with the ADR at all material times.

28. UKAD submitted a request for arbitration to the NADP by e-mail dated 24 March 2016.

29. At no time did the Athlete, or any of those variously representing him, seek to challenge jurisdiction.

Factual Summary

30. Prior to the Athlete disengaging from the process, an agreed statement of facts was lodged with the NADP as follows:

- I. UKAD Doping Control Personnel ("DCP") attended Bedwas RFC ("the Venue") at 19:00 on 1 December 2015 in order to undertake testing on Bedwas RFC.*
- II. The Athlete was present at the Venue and training with Bedwas RFC on 1 December 2015.*
- III. At approximately 19:15 the Athlete was informed by Mr Steve Law, Bedwas RFC Head Coach, that he had been selected for testing by UKAD and that he was required to provide a sample.*

- IV. *The Athlete knew that he was required to provide a sample for the purposes of testing by UKAD.*
- V. *The Athlete did not report to UKAD DCP for the purposes of notification or testing.*
- VI. *The Athlete left the Venue at approximately 19:30 on 1 December 2015. The Athlete did not provide a sample.*

The Charge

31. ADR Article 2.3 provides as follows:

2.3 Evading, Refusing or Failing to Submit to Sample Collection

Evading Sample collection, or without compelling justification, refusing or failing to submit to Sample collection after notification of Testing as authorised in these Rules or other applicable anti-doping rules.

32. Whilst ADR Article 2.3 is a single anti-doping rule violation, it contains three separate circumstances in which an anti-doping rule violation can be committed, those being:

- evading Sample collection; or
- without compelling justification, refusing Sample collection after notification of Testing; or
- without compelling justification, failing to submit to Sample collection after notification of Testing.

33. The ADRV of 'evading' Sample collection is distinct from the 'refusal' or a 'failure to submit' violations. For violations involving a 'refusal' or a 'failure to submit', formal notification (i.e., by UKAD DCP) is a pre-requisite. Once notified by DCP (in accordance with the International Standard for Testing and Investigations), if an athlete refuses to provide a Sample, or fails to do so, he or she will commit either a refusal or a failure to submit.

34. The Comment to Article 2.3 of the World Anti-Doping Agency Code notes:

For example it would be an anti-doping rule violation of "evading Sample collection" if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or Testing. A violation of "failing to submit" to Sample collection may be based on either intentional or negligent conduct of the Athlete, while "evading" or "refusing" Sample collection contemplates intentional conduct by the Athlete.

35. The Tribunal reminded itself that the burden was on UKAD to establish that the Athlete had committed the alleged violation. To meet that burden, UKAD had to establish the commission of the ADRV to the comfortable satisfaction of the Tribunal.

UKAD Evidence

36. In addition to the agreed statement of facts referred to above, UKAD submitted additional detail which can be summarised as follows:

37. At 19.00 on 1 December 2015, a team of UKAD DCP, being Allan Davies, Paul Armstrong and Walter Hood, attended the Venue in order to collect samples from Bedwas players pursuant to the ADR.

38. The DCP were acting under authority granted in a Mission Order number M-385855220. The Mission Order included a total of four Bedwas players to be subject to testing, two of which were named on the Mission Order as the subject of target testing. The Athlete was one of those named players.

39. Mr Davies and Mr Armstrong approached the side of the pitch where the Bedwas players were training to speak to Steve Law, Head Coach. Mr Davies requested assistance from Mr Law in selecting the players to be subject to testing.

40. Both men made their way to the Doping Control Station ("the DCS"), which had been set up in the clubhouse, to conduct the selection draw. Mr Armstrong remained pitch-side to observe the Bedwas players training.

41. In the DCS, Mr Law provided Mr Davies with a list of players who were present at

the training ground. The selection draw for testing was made and the Athlete was included as one of the players to be tested.

42. After the draw had been concluded, Mr Hood and Mr Law left the DCS to join Mr Armstrong pitch-side. Mr Hood informed Mr Armstrong that four players had been selected for testing. Mr Law collected the players on the pitch and told the four selected players that they had been selected to provide a Sample. These included the Athlete.

43. The training session ended at 19:30 and Bedwas players began to make their way off the pitch. One of the Bedwas players made his way towards Mr Hood and Mr Armstrong and informed them that he was now ready to provide a sample. Mr Armstrong escorted this player to the DCS and Mr Hood remained pitch-side in order to identify and escort the remaining players to the DCS for Testing.

44. Mr Hood asked Mr Law to assist him identify the remaining players to be tested, including the Athlete. Mr Law, having seen the Athlete and having informed him that he was required to provide a sample, assisted Mr Hood in attempting to locate the Athlete, but they were unable to do so.

45. Mr Hood advised Mr Davies that the Athlete could not be located at the Venue and Mr Davies instructed Mr Law to make contact with the Athlete by phone. Mr Law was similarly unable to contact the Athlete by phone.

46. The Athlete did not report to the DCS and did not provide a sample.

Evidence of the Athlete

47. Evidence from the Athlete comprised a witness statement dated 20 May 2016. This confirmed his employment with Dwr Cymru Welsh Water ('DCWW') and his responsibility to attend emergency call-outs as and when required.

48. A copy of a rota for the period 31 October 2015 to 26 March 2016 was provided. This showed that the Athlete was part of the team allocated for the week commencing Saturday 28 November 2015.

49. The Athlete asserted that on 30 November 2015 he was placed on standby, meaning that other members of the team identified on the rota would be allocated first to respond to any emergency calls, and that he would only be contacted if those members were busy attending other calls. He confirmed that he was not required to be stationed at work but needed to remain contactable in the event of an emergency call and he had therefore taken his mobile phone to training with him.
50. The Athlete believed that he could attend training on 1 December 2015, but that he would be able to leave if he received an emergency call.
51. On his own evidence, the Athlete confirmed that he was present at training with Bedwas at the Venue on 1 December 2015, and that, at approximately 19:15, Mr Law had informed him that he was required to provide a sample after training had ended.
52. The Athlete, however, asserted that, around the same time as being told that he was required to provide a sample, he also checked his mobile phone and noticed that there were messages from his supervisor at work, Mr Robert Jones, and from his colleague, Mr Leon Greenway. From those messages he deduced that he was required to attend an emergency call that had been logged at approximately 17:45.
53. The Athlete then contacted Mr Greenway and informed him that he would pick him up and left the training session either just as or just before training was ending at 19:30.
54. The Athlete's evidence included a written statement from Mr Robert Jones, dated 2 December 2015. This confirmed that at approximately 17:45 on 1 December 2015, he received two standby calls one of which required immediate response at an address given as 47 Carne St, Pentre.
55. Of note Mr Jones indicated that he called the Athlete on three occasions at approximately 17:50, but was unable to reach him.
56. At approximately 19:20 Mr Jones received a call from Mr Greenway who informed

him that he had been contacted by the Athlete and that the Athlete had informed Mr Greenway that he was on his way to pick him up.

57. The Athlete's evidence also includes an "Investigation Statement" taken by Mr Gareth Rowles on 3 December 2015, who it is understood is another employee at DCWW. In summary Mr Rowles' statement recorded a conversation between Mr Rowles and Mr Greenway in which Mr Greenway confirmed that he was unable to contact the Athlete after receiving a call from Mr Jones on the evening of 1 December 2015.

58. On 20 October 2016 a further statement was served from Mr Law. This confirmed that he had called out the Athlete's name during the training session on 1 December 2015 to notify him that he (and others) had been selected for testing, and that he had been unable to reach the Athlete by phone when it was later discovered that he had left the Venue.

Decision on the ADRV

59. Notwithstanding the Athlete's apparent admission of the ADRV alleged against him, the Tribunal carefully considered all the evidence.

60. The Athlete's case as considered by the Tribunal was that he had needed to leave the Venue immediately in order to fulfill his employment obligations. He had believed that he had no other option but to leave to attend to work and that he was not able to ignore or fail to comply with an instruction to attend the emergency call out.

61. The Tribunal was comfortably satisfied that the Athlete:

- I. knew that he had been selected to provide a sample for testing;
- II. deliberately avoided the DCP; and
- III. did so to evade being tested

62. In reaching such findings the Tribunal found that:

- I. On his own evidence the Athlete had been aware that he been selected for testing;
- II. The Athlete had made no attempt whatsoever to liaise with the DCP, or even his own club, to discuss with them his purported work emergency before leaving the Venue;
- III. To the extent that the Athlete's evidence asserted that it was critical he was able to attend any call outs that he was notified of, the Tribunal found it significant that the Athlete's own evidence indicated that the first call had been made to the Athlete's phone at 17:50, some 40 minutes before the training session had commenced. The failure to have been aware of, let alone to have responded to, that call plainly contradicted the Athlete's case that he was simply acting responsibly and in accordance with his work obligations.
- IV. In this regard it was similarly in contradistinction to the Athlete's case that, having left the Venue, he had apparently turned his phone off and/or was not answering calls. The evidence of Mr Law was that he had tried to call the Athlete having discovered that he had left the Venue but had been unable to reach him.

Sanction

63. In light of the findings above, the Tribunal was comfortably satisfied that the Athlete had committed the ADRV as alleged and accordingly proceeded to consider the question of sanction.

64. ADR Article 10.3.1 states:

10.3.1 For an Anti-Doping Rule Violation under Article 2.3 or Article 2.5 that is the Athlete's or other Person's first anti-doping offence, the period of Ineligibility shall be four years, unless, in a case of failing to submit to Sample collection, the Athlete can establish that the commission of the Anti-Doping Rule Violation was not intentional (as defined in Article 10.2.3), in which case the period of Ineligibility shall be two years.

65. As such the prescribed period of ineligibility is four years in the case of intentional conduct.

66. ADR Article 10.5.2 also provides that a period of Ineligibility may be reduced by the Athlete or other Person demonstrating 'No Significant Fault or Negligence':

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

67. The comment to Article 10.5.2 of the Code, however, states:

Article 10.5.2 may be applied to any anti-doping rule violation, except those Articles where intent is an element of the anti-doping rule violation (e.g., Article 2.5, 2.7, 2.8 or 2.9) or an element of a particular sanction (e.g., Article 10.2.1) or a range is already provided in an Article based on the Athlete or other Person's degree of Fault.

68. Article 10.5.2 therefore does not apply violations where intent is an element of the ADRV.

69. In this regard, the Comment to Article 2.3 of the Code states:

For example, it would be an anti-doping rule violation of "evading Sample collection" if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification of Testing. A violation of "failing to submit to Sample collection" may be based on either intentional or negligent conduct of the Athlete, while "evading" or "refusing" Sample collection contemplates intentional conduct by the Athlete.

70. As such the Code envisages that evading Sample collection constitutes intentional conduct by an Athlete. Whilst the comment to Article 10.5.2 does not include an express reference to an Article 2.3 violation, the Tribunal concluded that Article 10.5.2 applies to a violation of Article 2.3 where, as in this instance, the Tribunal had determined that the Athlete had acted intentionally.

71. As noted, the Comment to Article 2.3 of the Code in any event makes it clear that the Code envisages that evading Sample collection would constitute intentional conduct by an Athlete.
72. The Tribunal considered the final written submissions dated 24 June 2016 lodged on behalf of the Athlete (by counsel then instructed). These argued that the Tribunal should (in the event that it found an ADRV has been committed) impose a reduced period of ineligibility applying Article 10.5.2. ADR. In the view of the Tribunal, Article 10.5.2 was not applicable to an intentional violation of Article 2.3 for the reasons set out above. In circumstances where intentional conduct has been found, it must follow that there can be no question of an athlete being able to rely upon the no significant fault or no significant negligence provisions.

Conclusion

73. The Panel imposed a period of Ineligibility of four (4) years on the Athlete.
74. The period of ineligibility was ordered to run from 28 January 2016, being the date that the Athlete was notified that he was made subject to a Provisional Suspension as detailed in the Notice of Charge.



Jeremy Summers
Mike Irani
Barry O'Driscoll

20 December 2016



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

T: +44 (0)20 7036 1966
F: +44 (0)20 7936 2602

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

Sport Resolutions (UK) is the trading name of The Sports Dispute Resolution Panel Limited