SR/399/2021

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

Before:

Mark Hovell (Chair)
Neil Townshend
Gordon McInnes

BETWEEN:

UK ANTI-DOPING LIMITED

Anti-Doping Organisation

and

MR MARC SHACKLEY

Respondent

DECISION OF THE NATIONAL ANTI-DOPING PANEL

I. Introduction

1. The Applicant, UK Anti-Doping Limited ("UKAD") is the National Anti-Doping Organisation in the UK and has claimed jurisdiction to prosecute this case. In accordance with Article 7.2 of the UK Anti-Doping Rules (the "ADR"), UKAD acts as the Results Management Authority in this matter.

2. Marc Shackley (the “Player” or the “Respondent”), was a professional rugby league player in England. The Player had been registered with the Rugby Football League (the “RFL”) as a player for Whitehaven RLFC (“Whitehaven”). Whitehaven are a professional rugby league club who play in the Championship League. It is the second-tier competition organised by the RFL.

3. The RFL is the National Governing Body for the sport of rugby league in England. The RFL has adopted the ADR as its Anti-Doping Rules. Pursuant to the ADR, UKAD has the responsibility for bringing enforcement proceedings where an athlete subject to the ADR provides a positive test.

4. Pursuant to the ADR, the Player was tested Out-of-Competition at his home address on 14 September 2021. His Sample returned an Adverse Analytical Finding (an “AAF”) for clenbuterol, a Prohibited Substance.

5. On 8 October 2021, UKAD formally notified the Player that he may have violated ADR Article 2.1, in that a Prohibited Substance or its Metabolites or Markers were present in his A Sample and ADR Article 2.2, in that he used a Prohibited Substance, namely clenbuterol, on or before 14 September 2021 (the “Notice Letter”). The Player has been provisionally suspended since 8 October 2021. UKAD understands this to be the first occasion that he has been charged with any Anti-Doping Rule Violation (“ADRV”). The Player had no Therapeutic Use Exemption in place.

6. On 18 October 2021, UKAD received the Player’s response to the Notice Letter within which he confirmed that he admitted the violations but contested UKAD’s jurisdiction. The Player provided an explanation for the source of the AAF, explaining that he had purchased and taken ‘fat metabolisers’ to assist with weight loss in anticipation of surgery. However, he asserted that as of 23 August 2021 he had informed Whitehaven that he would be retiring from the sport on medical advice and would not continue playing beyond the season. He further asserted that as he had retired it was his understanding that he was no longer bound by the RFL’s Operational Rules however, since the test was taken, he had discovered that this is not the case. He noted that he had surgery booked for 29 October 2021 and decided to lose weight to benefit his recovery and allow a faster return to work and a quick start of his new position of

assistant coach. He alleged that he purchased fat metabolisers online to help get a "kick start" with his weight loss and had taken advice from a friend on the effectiveness of the product. It was his position, that he had taken the product for no longer than 3 days before he was tested and had no intention of taking a banned product, nor was he aware that he had until receiving letters from the RFL and UKAD.

7. On 19 November 2021, UKAD proceeded to charge the Player with violating ADR Articles 2.1 and 2.2.

8. On 23 December 2021, UKAD requested that a National Anti-Doping Panel ("NADP") Tribunal be convened to determine the charge in this case.

9. On 23 December 2021, Mark Hovell was appointed as the Chair of the Tribunal. Neil Townshend and Gordon McInnes were appointed as Tribunal Members on 9 March 2022.

10. In accordance with Article 7.8 of the Rules of the NADP (2019 edition), the Chair of the Tribunal agreed various directions with the parties on 19 January 2022, with a view for the hearing of the matter to take place virtually in April 2022. Additional directions were issued on 28 February 2022.

11. This matter was determined following the oral hearing that took place virtually on 12 April 2022 (the "Hearing"). The Player attended the Hearing and was represented by Tom Horton of Squire Patton Boggs UK LLP. The Tribunal would like to place on record its gratitude for him representing the Player on a *pro bono* basis. UKAD was represented by Ailie McGowan. Stacey Cross and Tom Middleton were present as observers for UKAD. Alisha Ellis, from Sport Resolutions, was also present to assist the Tribunal.

II. Jurisdiction

12. The RFL is the National Governing Body of rugby league in England. The RFL has, pursuant to its Operational Rules, adopted the ADR. All rugby league players in England playing for a member club of the RFL are subject to the ADR under the jurisdiction of the RFL. Whitehaven is a member of the RFL and the team the Player played for.

13. ADR Article 1.2.1 sets out the scope of the application of the ADR. It states:

"*1.2.1. These Rules shall apply to:*

[…]

(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) …"

14. As a result of the above, the Player was therefore bound when he signed for and was registered by Whitehaven subject to the ADR and bound to comply with the ADR.

15. Pursuant to ADR Article 7.1.3, UKAD has responsibility for results management of this case. This meant UKAD could deal with the charge against the Player and prosecute this matter.

16. Further, pursuant to ADR Article 8.1, any charge against an Athlete playing under the auspices of the RFL shall be determined by the NADP.

17. However, in his response to the charge, the Player has asserted that UKAD had no jurisdiction to collect a Sample from him or to bring anti-doping proceedings against him, on the basis that on 23 August 2021, prior to the UKAD test, he informed Whitehaven that he was retiring from the sport on medical advice.

18. Therefore, a primary issue in dispute in this matter is whether the Player was subject to and bound to comply with the ADR on 14 September 2021, when UKAD collected the Sample from him. His position is that he retired on 23 August 2021. The burden of proof rests with UKAD to establish, to the comfortable satisfaction of the Tribunal, that he was subject to the ADR at the material time, and therefore that UKAD has jurisdiction to bring these proceedings.

19. The Tribunal notes that UKAD submitted that the Player was bound by the ADR at the material time on two separate bases, being:

    19.1. by way of his membership with the RFL; and

19.2. by virtue of his Employment Contract.

20. UKAD's position is that the Tribunal only needs to be satisfied that he was bound by the ADR on one of the above bases. If the Tribunal is satisfied that UKAD has established jurisdiction and that the Player was subject to the ADR at the material time, the Panel will then be required to determine the appropriate consequences to be applied in accordance with ADR Article 10.2.

21. UKAD noted that the RFL operates a registration system in order to provide certainty as to which players (and other participants) are under its jurisdiction at any one time. In the anti-doping context, that is desirable to ensure certainty of application and ensure that players cannot "come and go" in a transient manner to circumvent anti-doping provisions.

22. Whether or not the Player was a player (for the purposes of the ADR) is a straightforward, binary issue. In order to determine that matter, UKAD relies upon:

22.1. the RFL's membership database, which showed that he was a registered Player for Whitehaven on the date of Sample collection;

22.2. ADR Article 1.4.1 which stipulates that: "*Each Athlete will continue to be bound by and required to comply with these Rules unless and until they are deemed under the NGB's rules to have retired from the sport so that they are no longer subject to the NGB's authority*"; although, the RFL Operational Rules do not directly assist in this regard, as they are silent on the process a player must follow to formally effect retirement. However, UKAD submitted that it is illogical to suggest that rules cease to apply to athletes simply because they are injured and indicate an intention to give up participating in sport;

22.3. The Player cannot retire from sport during a period of membership by way of a verbal conversation with their team coach and a complete absence of any formal communication either to or from their club or governing body;

22.4. The Player accepted that he was not de-registered at the time of Sample collection and so appears to accept that the RFL was not informed of his asserted retirement;

22.5. The Player failed to check that his club had officially notified his retirement to the RFL, prior to the date of Sample collection;

22.6. He was at all material times registered with the RFL and therefore bound to comply with the ADR pursuant to ADR Article 1.2.1.

23. Additionally, UKAD submitted that it has jurisdiction by virtue of the Player's professional employment contract with Whitehaven dated 25 November 2020 (the "Employment Contract"), due to expire on 30 November 2022. UKAD noted there is no evidence to suggest that the Employment Contract was properly terminated or that any attempt to terminate it was made by the Player in accordance with the express terms of the contract.

24. The Player also signed a RFL Professional Registration Form. This included the following declaration: "*I apply to be registered as a professional Player with the RFL…I have read the contract and registration guidance notes and I understand that by signing this form, I will be registered as a professional Player. I understand that I will be subject to the RFL Operational Rules including the Rules covering drug testing and misconduct. I have received a copy of the RFL's Anti-Doping booklet*."

25. The Professional Registration Form also included the following note: "*A Player shall be bound by the Operational Rules upon submission to the RFL of a correctly completed official registration form and other required documents. Twelve months after a player is declared a free agent under the Operational Rules he shall no longer be bound by the Operational Rules provided he had not completed another official registration form.*"

26. By virtue of signing the Professional Registration Form he agreed to be subject to the RFL's Operational Rules, including the ADR, from the date he signed the Professional Registration Form until (i) twelve months after being declared a Free Agent by the RFL; or (ii) twelve months after he ceased to hold any role that would make him a Person subject to the Operational Rules. At the material time, he had not been declared by the RFL as a Free Agent nor had a period of twelve months past.

27. Furthermore, clause 26 of the Employment Contract relates to the position regarding Registration. Clause 26.3 stipulates: "*The Regulations including but without limitation*

those Regulations relating to the re-engagement and transfer of players shall apply to the Club and you during the currency and after the expiration of this Agreement and shall continue to apply until such time as you/and or the Club request that you be removed from the register of players." The term "Regulations" is defined in the Employment Contract as: *""Regulations" means the Constitution and Operational Rules…and the Anti-Doping Regulations of the League…"*

28. UKAD submitted that at the material time, neither the Player nor Whitehaven had requested that the RFL remove him from the register of players.

29. The Player submitted that the only involvement he had with the Employment Contract and the Player Registration Form was reading them, completing any relevant information and signing his name. Gary Eilbeck, the majority shareholder and a director of Whitehaven, who appeared as a witness at the Hearing, confirmed that it is Whitehaven's responsibility to handle its players' registrations. The Player's position is that the Employment Contract was mutually terminated on 23 August 2021 following the Player's decision to retire from the sport. Any further required steps in respect of his retirement was to be dealt with by Whitehaven. Mr Eilbeck was unaware of any formal retirement or deregistration process under the Operational Rules that needs to take place when a player retires.

30. Whilst the RFL may say that it did not become aware of his retirement until 20 December 2021, the retirement had been publicly announced, by Whitehaven and the RFL itself, on 20 September 2021.

31. The Player's last appearance for Whitehaven was on 22 August 2021. On that same day, following the advice he had received from the club's medical team (primarily Dr Dornubari Lebari) and Professor Jari, and other factors, the Player submitted that he informed Whitehaven's Head Coach (Gary Charlton) that he had decided to medically retire from RFL. On 23 August 2021, the Player confirmed to Mr Charlton his decision to medically retire from RFL and this decision was later approved by Mr Eilbeck.

32. An entry included in the Player's injury report form provided by Dr Lebari, registered club doctor at Whitehaven, stated: "*23.8.21 – Player messaged – pain ++ both knees wants*

to stop and book surgery for left knee – agreed that he had tried and played on as long as able and now time to stop and consider surgery."

33. The Player's position is that the injury caused his retirement and this occurred before the Sample test was taken on 14 September 2021, as such he was no longer subject to the RFL's Operational Rules or the ADR.

34. ADR Article 1.4.1 states: "*Each Athlete will continue to be bound by and required to comply with these Rules unless and until they are deemed under the NGB's rules to have retired from the sport so that they are no longer subject to the NGB's authority*". The RFL's Operational Rules provided no process for retirement and/or deregistration.

35. The Tribunal heard from the Player himself and evidence from Mr Charlton, Mr Eilbeck and Dr Lebari. Whilst the evidence was at times inconsistent and some facts could not be remembered at all, yet others could be with incredible clarity, the Tribunal was left with the impression that the Player had looked to retire on 23 August 2021. His own evidence was clear, in that he could no longer continue at a professional level, having had a number of injuries and, in particular, having tried injections to his left knee. Dr Lebari stated that she encouraged him to retire after the match the week before 22 August 2021, although her notes were lacking so as to support her testimony and the Tribunal did wonder why she would not have referred him back to Professor Jari for his opinion. Both Mr Charlton and Mr Eilbeck recalled him telling them that he was retiring. Mr Charlton said it was after the game on 22 August and confirmed the next morning. He then told Mr Eilbeck of the Player's decision and the Player and Mr Eilbeck met up shortly after, when the Employment Contract was apparently terminated. These three agreed (although the Player denied being aware) to keep the news of the retirement from everyone until the regular season, but not the entire season (as Whitehaven made the play offs), had concluded.

36. The Tribunal had some doubts as to whether the Employment Contract was actually terminated, but UKAD was not in a position to provide any evidence to counter all that was said on the Player's behalf. It did produce the Doping Control Officer (the "DCO"), Mr Packham, who's recollection of the Sample collection was that the Player did not say

he had retired, rather he was considering retirement. This conversation occurred after the Player had provided the Sample.

37. The Tribunal was certainly left with a number of doubts as to whether the Player retired on 23 August 2021 or not. Ultimately, as can be seen from what follows, it is not particularly material to the Tribunal's decisions.

38. The Tribunal will leave open whether the Player terminated his Employment Contract. He certainly seemed to be receiving some medical benefits after August 2021, but he, Mr Charlton and Mr Eilbeck all stated any contractual payments stopped. There was no settlement deed or compromise agreement, no mutual termination form to complete (as is often found in other sports), which the Tribunal might have expected to see, as the Player was forgoing over a year's remuneration. The Tribunal also noted the debate as to whether clause 26 in the Employment Contract applied when a contract was mutually terminated, as opposed to when its term expired.

39. The Tribunal found the argumentation around registration more compelling.

40. It seemed uncontested that there is no clear procedure in the RFL's Operational Rules to be followed when a player retires. The RFL may look into that further. The Tribunal requested Peter Stephenson from the RFL to attend the hearing. He could not direct the Tribunal to such a procedure, but was clear that the practice was for clubs to email or notify the RFL before the end of each season with the details of which players were finishing with each club. Indeed, UKAD had produced an email that was sent by Whitehaven to the RFL on 2 September 2021 listing various players that were finishing, but omitting to mention that the Player had retired. This email was sent by Ashley Kilpatrick, another director at Whitehaven, who was not brought by the Player to give evidence. Mr Eilbeck stated at the Hearing that he had not informed Mr Kilpatrick about the retirement, as part of his decision to keep it a secret until the end of the season.

41. Mr Eilbeck also stated at the Hearing that he had kept some players' names off that email/list in the past, as he didn't want them to become Free Agents. He explained that in the past a player was deemed a Free Agent and then signed with another club and Whitehaven missed out on a transfer fee.

42. Mr Stephenson directed the Tribunal to Operational Rule C.2.5, which states:

"*Twelve months after a Player is declared a Free Agent under the Operational Rules he shall no longer be bound by the Operational Rules provided he has not completed another registration form. In the case of all other Persons Subject to the Operational Rules, twelve months after he/she ceases to hold any role that would make them a person subject to the Operational Rules, he/she shall no longer be bound by the Operational Rules…"*

43. The Tribunal noted that Operational Rule C.1.1.5 deals with Free Agents:

"*A Free Agent is a Player whose name has been removed from those sub sections of the Register which represent each Club's list of Registered Players…A Free Agent may seek registration with any Club of his choice without compensation being due to his former Club."*

44. The Tribunal was left with the impression that Mr Eilbeck was not entirely convinced that the Player had retired. It suited him to keep the Player's name off the list of retiring players that was sent to the RFL, as it stopped the Player becoming a Free Agent and potentially joining another club if he was to have a successful operation and look to play again.

45. In any event, Whitehaven actions or inactions resulted in the Player not becoming a Free Agent. The relevance of this is that, in the Tribunal's determination, the Player had not reached the point where the 12 month clock started to run. He was still bound by the Operational Rules (and the ADR) at all material times, as he remained registered by Whitehaven at the RFL. This should not have come as a surprise to the Player, as the note on the Professional Registration Form stipulated this.

46. The Tribunal noted the Player's position that he had retired, but had not become a Free Agent, as such the 12 month rule didn't apply to him. He was simply free of the ADR as soon as he told the coach he was retiring.

47. The Tribunal finds that logic somewhat absurd. As a registered player he is bound by the Operational Rules (including the ADR). If he wants to be removed from this, then he needs to de-register. The first step is to become a Free Agent; the second step is to wait for 12 months to pass. Until he takes that first step, he remains bound by the ADR and the clock doesn't even start to run.

48. Whilst the Player may have believed that he had retired and that all he had to do was to tell his coach, the reality is there is a process to follow, even if it is not set out in the Operational Rules explicitly. On a player's retirement, the club would pass this information on to the RFL (Whitehaven knew this and decided for whatever reason, known best to Mr Eilbeck, not to do this here when passing on to the RFL the names of other retiring players on 2 September 2021), who would then remove the player's registration from the Register, making him a Free Agent and 12 months later the player would be free of the Operational Rules and the ADR.

49. The Tribunal determines that at all material times the Player was subject to the ADR and UKAD had jurisdiction to bring this case. It follows that the Tribunal therefore has jurisdiction to determine this matter.

III. Background

50. On 14 September 2021, the DCO attended the Player's home address in Sandwith, Whitehaven to collect a urine Sample from him Out-of-Competition. The urine Sample was split into two separate bottles which were given reference numbers A1172172 (the "A Sample") and B1172172 (the "B Sample").

51. On his Doping Control Form (the "DCF"), completed at the time the Samples were collected, the Player wrote the following in the Declaration of Medication section: "*VICS (medicine to help breath thought I had COVID) Struggling with airwaves Paracetamol + Ibuprofen Fish tablets*"

52. The Player also added the following comment in the Athlete Comment section of the DCF: "*Why my house. Is it random*?"

53. The urine Samples were transported to the WADA accredited laboratory, the Drug Control Centre, King's College London (the "Laboratory"). The Laboratory analysed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories (the "ISL") and Technical Letter – TL23. This analysis returned the AAF for clenbuterol at an estimated concentration of 7ng/mL.

54. Clenbuterol is listed under section S1.2 of the WADA 2021 Prohibited List as an Anabolic Agent. It is a non-Specified Substance that is prohibited at all times. Clenbuterol is a Class C drug under the UK Misuse of Drugs Act 1971. It is not licensed for use as a medicine in the UK.

IV. UKAD's Submissions

55. The remaining issue for the Tribunal to determine is that of sanction to be applied.

56. This is the Player's first ADRV. The period of Ineligibility to be applied is set out in ADR Article 10.2:

"… 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…

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."

57. Whilst not expressly set out in the ADR, a number of determinations of previously constituted panels have considered that, save in exceptional and rare cases, in order for an Athlete to establish that an ADRV was not intentional for the purposes of ADR Article 10.2.1(a), he/she must first establish how the prohibited substance entered his/her system.

58. Given the evidence available, and particularly in light of the evidence of Professor Cowan, UKAD is not in a position to advance any positive case to gainsay the account given by the Player as to the means by which he ingested clenbuterol.

59. Under the ADR, (1) a presumption arises that the Player ingested clenbuterol intentionally to enhance his performance; (2) it is his burden to rebut that presumption by adducing evidence that satisfies the Tribunal that it is more likely than not that his

ingestion of clenbuterol was not intentional; and (3) if he cannot discharge that burden, a four-year ban must be imposed in accordance with Article 10.2.1(a) of the ADR.

60. Intentional is defined in ADR Article 10.2.3 as:

> *"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*."

61. UKAD submits that the assessment of whether the Player's conduct was intentional considers: 1) whether he engaged in conduct that he knew constituted an ADRV; or 2) whether he knew that there was a significant risk that his conduct might amount to an ADRV and he manifestly disregarded that risk.

62. His case on intention is predicated upon the suggestion that he genuinely (but presumably mistakenly) believed that he had retired from sport and was no longer subject to the ADR at the time that he ingested clenbuterol. Therefore, he submits that any deliberate but ultimately 'unintentional' ingestion can be excused because he misunderstood his status and responsibilities at the material time.

63. Even if the Tribunal accepts that he had verbally notified Mr Charlton of his retirement, he was aware, or should have been aware, that:

    63.1. he had neither received nor sent any written communication to Whitehaven regarding his retirement;

    63.2. he had neither received nor sent any written communication to Whitehaven regarding the termination of his Professional Contract which was due to run until November 2022;

    63.3. he had not notified the RFL of his retirement or the termination of his Professional Contract;

    63.4. no public announcement had been made regarding his retirement;

    63.5. he intended to take up the position of assistant coach; and

63.6. the ADR apply to coaches.

64. In spite of this, he, a professional RFL player for over 15 years, seemingly took no steps to establish whether or not he might be committing an ADRV. In addition, the Player is a player of significant experience and holds a leadership position within his team. He has received anti-doping training.

65. On his own account, the Player did not ask the man at the gym exactly where he got these tablets from and appears to have simply accepted that they were purchased online. In particular, he made no enquiries into the commercial name of the tablets despite them allegedly being given to him in a plain white bottle. On any reading he must satisfy the second limb of ADR Article 10.2.3: (a) he must have been aware that there was a significant risk of an ADRV in taking the tablets; and (b) he consumed unlabelled tablets without a single query to what they were or any enquiry as to his registration status in a sport he had played professionally for 15 years. This, UKAD submits, demonstrates a clear manifest disregard for that risk.

66. If the Player overcomes the hurdle of establishing that his ADRVs were not intentional, ADR Article 10.2 contemplates a two-year (rather than four-year) period of Ineligibility subject to elimination, reduction or suspension pursuant to Article 10.5 (No Fault or Negligence) or Article 10.6 (No Significant Fault or Negligence). UKAD's position is that this is not a case in which the Player can be said to bear No Fault or Negligence or No Significant Fault or Negligence in respect of the ADRVs.

67. The effect of ADR Article 10.5 is that if the Player can establish, on the balance of probabilities, that he bears No Fault or Negligence in respect of the ADRVs, then the period of Ineligibility shall be eliminated. If, however, he is unable to establish that he bears no Fault whatsoever in respect of the ADRVs, but is able to establish that the Fault or Negligence on his part was not significant, then the period of Ineligibility to be applied is between one and two years.

68. The Player does not seek to assert in his written submissions that he bears No Fault or Negligence. Rather he advances No Significant Fault or Negligence. For a plea of No Significant Fault or Negligence, the Player must establish that his Fault was 'not significant' in relation to the violation, 'when viewed in the totality of the circumstances

and taking into account the criteria for No Fault or Negligence'. That duty is only discharged (as stated in the World Anti-Doping Code "WADC") 'with the exercise of utmost caution', and the Player must make 'every conceivable effort to avoid taking a Prohibited Substance'[1] and leave 'no reasonable stone unturned'[2].

69. If the Tribunal finds that the Player can meet the strict pre-conditions of firstly showing how the clenbuterol entered into his system and secondly that he did not act intentionally, the two questions the Tribunal needs to answer are as follows:

    69.1. To what extent did he depart from his duty to use 'utmost caution' to ensure that no Prohibited Substance entered his body?

    69.2. Does he have an acceptable explanation for that failure?

70. The Player does not appear to allege that he took 'utmost caution' to ensure that no Prohibited Substance entered his body. He instead seeks to argue that his (incorrect) belief that he had retired is an acceptable explanation for that failure. It is notable that:

    70.1. the Player took no steps to confirm that his asserted retirement had taken effect. If in any doubt, he could and should have contacted the RFL to check before taking any unlabelled tablets;

    70.2. he took no steps to formally terminate his Employment Contract that was scheduled to continue until 30 November 2022;

    70.3. he took no steps to satisfy himself that he was no longer subject to the jurisdiction of the RFL and bound to comply with the ADR;

    70.4. he took no steps to enquire about what he was taking when he ingested tablets from an unlabelled tub given to him by a man at the gym;

    70.5. he took no steps to ensure that what he was taking was not a Prohibited Substance.

[1] Knauss v FIS – CAS 2005/A/847 para 7.3.1
[2] Depres v CCES – CAS 2008/A/1489 &1510

71. Such failures by the Player are all the more striking given that he intends to continue with a career in sport, and in particular in coaching other athletes.

72. Even if the Player is able to establish, on the balance of probabilities, the source of the AAF and that he acted without intention, he cannot establish that he exercised utmost caution to avoid committing an ADRV or that he had an acceptable explanation for that failure. This is not a case where ADR Article 10.6.2 can be applied.

73. ADR Article 10.13 requires that, usually, sanction starts on the day of a decision save for a number of exceptions that are outlined in the ADR. Article 10.13.2 requires that a player receives credit for any period of (respected) Provisional Suspension. The Player was Provisionally Suspended on 8 October 2021. There is no evidence to suggest that he has breached the terms of his Provisional Suspension to date and accordingly the Tribunal may wish to direct that any period of Ineligibility should be backdated to commence on 8 October 2021

V. Respondent's Submissions

74. The Player's position is that he admits taking clenbuterol however, his position is that his taking of clenbuterol was not intentional and therefore the starting position for any period of Ineligibility should be two years pursuant to ADR Article 10.2.2.

75. The circumstances in which the Player took clenbuterol on 22 August 2021 are that he suffered an exacerbation of his existing knee injury against York Knights which was severe enough to be advised to retire immediately by the club's medical staff and an independent specialist. He accepted this decision and after speaking to his family, his coach, and Whitehaven's board he announced his retirement immediately from the sport.

76. To have a decent standard of life after the injury which would enable him to carry on working, he required surgery. Due to the nature of the injury, he had gained weight. The rehabilitation process would be much quicker if he was to lose the weight gained before having the surgery therefore allowing him to return to work earlier and start a career as a coach. He believed that he had retired and would no longer be a professional player

bound by the Operational Rules so decided to take a fat burner, which he later found out contained clenbuterol, to aid the weight loss.

77. In determining whether his use of clenbuterol was not intentional within the meaning of ADR Article 10.2.3, the Tribunal is to apply the following tests:

77.1. '*It is clear from the wording of article 10.2.3 that whether conduct is intentional is to be judged on the actual knowledge of the player, not on the basis of what she ought to have known or understood… The first element is based on knowledge, the second on manifest disregard of the known risk. The second element may involve considering what steps the player took or ought to have taken, but the first element depends on the actual knowledge of the player…*'[3]

77.2. '*Intent is established… if the athlete knowingly ingests a prohibited substance. However, it suffices to qualify that athlete's behaviour as intentional if the latter acts with indirect intent only, ie the athlete's behaviour is primarily focused on one result, but in case a collateral result materializes, the latter would equally be accepted by the athlete. If – figuratively speaking – an athlete runs into a "minefield" ignoring all stop signs along his way, he may well have the primary intention of getting through the minefield unharmed. However, an athlete acting in such (reckless) manner somehow accepts that a certain result (ie an adverse analytical finding) may materialize and therefore acts with (indirect) intent*'[4].

77.3. '*The classic case for application of the second limb of article 10.2.3 is where an athlete uses a contaminated supplement. In some such cases an athlete may be found to have knowingly taken a risk of committing an actual violation and acted regardless of that risk. In such cases the known risk that the substance ingested might contain an ingredient which is prohibited'*[5].

78. In respect of the first limb of 'Intentional' and whether the Player had '[engaged] *in conduct which they know constitutes an Anti-Doping Rule Violation*', his evidence is clear that he did not know that his conduct amounted to an ADRV. The thought of the

[3] ITF v Sharapova, Independent Tribunal Decision dated 6.6.16, para 68-69
[4] Qerimaj v IWF – CAS 2012/A/2822, para 8.14
[5] ITF v Sharapova (as above) para 69

ADR, being bound by the Operational Rules and/or what or what was not a Prohibited Substance was not on his mind whatsoever because of his justifiable belief that he had retired from the RFL. It is submitted that he comfortably demonstrates that he was not acting within the first limb of 'Intentional'.

79. In respect of the second limb of 'Intentional' and whether he '[knew] *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*', his evidence is again clear that he did not know that his conduct might constitute an ADRV and he did not manifestly disregard any risk. His evidence demonstrates that he was unaware of any risk whatsoever because of his justifiable belief that he had retired from the RFL. It is submitted that the Player also comfortably demonstrates that he was not acting within the second limb of 'Intentional'.

80. Considering the above, the Player invited the Tribunal to find that he did not intentionally use clenbuterol and ADR Article 10.2.2 applies.

81. If the Player is successful in respect of proving that he did not intentionally use clenbuterol, he invited the Tribunal to find that he '[bears] no Significant Fault or Negligence for the Anti-Doping Rule Violation' pursuant to ADR Article 10.6.2.

82. The Player reminded the Tribunal that it should consider the totality of the circumstances when assessing whether No Significant Fault or Negligence is established by the Player.

83. In determining whether he bears no Significant Fault or Negligence for his ADRV, the Tribunal is to apply the following test: '*Therefore, in assessing whether the Player was at fault for purposes of Articles 10.5.1 and 10.5.2, the starting-point is the strict requirement on an athlete to ensure that a prohibited substance does not enter his system… A plea of No Fault or Negligence under Article 10.5.1, or No Significant Fault or Negligence under Article 10.5.2, is to be assessed by determining to what extent the athlete has discharged those specific responsibilities, and to what extent he has failed to take steps that he could and should have taken to discharge those responsibilities, which steps, if taken, would have led to him avoiding committing the violation in question. The difference between the two, as set out below, is one of degree: to establish No Fault or Negligence, the athlete must show that he took every step available to him to avoid the*

violation, and could not have done any more; whereas to establish No Significant Fault or Negligence, he must show that, to the extent he failed to take certain steps that were available to him to avoid the violation, the circumstances were exceptional and therefore that failure was not significant'[6].

84. Clearly the Player did not take steps to avoid taking clenbuterol: he did not enquire as to what the tablets contained, he did not ask what the dosage of each tablet was, he did not question why the bottle had no label or why the product had no name, he did not purchase the tablets from a trusted source, he did not check the ADR or WADA's Prohibited List. However, the circumstances which caused his failure to take such steps were exceptional and permit the Tribunal to make a finding that he bears No Significant Fault or Negligence for his ADRV. He was in the position where he justifiably believed that he had retired from the RFL and that he had done all that was required of him to retire. Further, in such circumstances the RFL understandably believed that he was not bound by the Operational Rules and/or the ADR.

85. Considering the above, the Player invited the Tribunal to find that he bears No Significant Fault or Negligence for his ADRV, and the Tribunal therefore is entitled to exercise its discretion to reduce any period of Ineligibility down to 12 months pursuant to ADR Article 10.6.2.

86. In determining the appropriate period of Ineligibility, ADR Article 10.6.2 identifies that this is to be determined by 'the degree of Fault'.

87. The ADR Article 1.5.3 also states: '… *These Rules are intended to implement the Code in a harmonised manner, and are distinct in nature from criminal and civil laws. They are not intended to be subject to or limited by any national requirements and legal standards applicable to criminal or civil proceedings, although they do respect and reflect, and are intended to be applied in a manner that respects and reflects, human rights and the principle of proportionality'*. Considering the totality of the exceptional and unique circumstances that he found himself in at the relevant time, it is submitted that his conduct falls somewhere between a normal and light degree of Fault, and that in any

[6] IBAF v Luque, IBAF AD Tribunal decision dated 13.12.21, para 6.9-6.10

event considering the exceptional circumstances the principle of proportionality should also be given weight.

88. Considering all of the above, the Player submitted that the appropriate period of Ineligibility should be 12 months.

VI. The Tribunal's findings

89. Having already reached the determination that there is jurisdiction to deal with this matter, the issues before the Tribunal were:

    89.1. has the Player met his burden to rebut the presumption that he ingested clenbuterol intentionally to enhance his performance by adducing evidence that satisfies the Tribunal that it is more likely than not that his ingestion of clenbuterol was not intentional;

    89.2. if so, what was his degree of Fault; and

    89.3. what sanction shall be applicable to the Player?

90. The Tribunal notes that if the Player had retired and if he was no longer bound by the Operational Rules (specifically the ADR), then he would be free (at least in a sporting sense) to take whatever substances he liked. It would no longer be a concern of his sport or UKAD.

91. However, he was not free of the ADR, for the reasons set out above, he was bound by it at all material times.

92. The Player's position is that he did not think that was the case and presumably he felt he could take what he liked. In this case fat burners.

93. Using the dictionary definition, his position is that he intended to buy and take fat burners to aid his post operation recovery. However, the Tribunal notes that it is the ADR definition of "intentional" that needs to be applied. Indeed, the WADC 2021 has the specific footnote (number 59) that states:

"*Article 10.2.3 provides a special definition of "intentional" which is to be applied solely for the purposes of Article 10.2."*

94. ADR Article 10.2.3 has been set out above, but is repeated here:

"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."

95. The position of the Player is that he genuinely believed that he had retired and was no longer subject to the ADR when he took the Prohibited Substance.

96. That in itself poses the question when did he take the Prohibited Substance? He claims he took a tablet on each of 12, 13 and 14 September 2021. However, there is no evidence at all to support this position advanced by the Player. Initially the Player's position was that he spoke to a friend and bought the tablets online himself; he then clarified this, with him buying the tablets off someone in his gym. There is no evidence from any friend or the person in the gym that could support him acquiring the tablets and seeing when he first took them.

97. UKAD produced evidence from Professor Cowen that says this version of events is possible, when considering the timelines and the concentration of the Prohibited Substance in his body, but it is also possible that he was taking the Prohibited Substance before those dates.

98. The Tribunal was surprised that UKAD did not request the bottle and the tablets (which the Player insisted he had kept, although he couldn't remember where, when asked at the Hearing) from the Player to carry out some further analysis, which might have been determinative for the Tribunal. As such, and due to what follows, the Tribunal will accept the Player's admission that he took the Prohibited Substance on 12, 13 and 14 September 2021 and treat this as the method of ingestion.

99. Turning next to the issue of "intentional" conduct. As set out above, the Tribunal has serious doubts as to whether the Player thought he had retired before that ingestion. Why did he take the test if he had already retired? Why wouldn't the DCO use the

helpline in the event the Player insisted he had retired as opposed to stating he was considering retirement? Why not mention retirement or the fat burners on the DCF? Wouldn't the Player attempt to go back to Professor Jari before retiring for an update opinion?

100. But all these questions can be left moot. The Player has to, on the balance of probabilities, demonstrate that his conduct was not such that he intended to commit the ADRV. The second limb of ADR Article 10.2.3 seems more relevant to the case at hand, as it is practically impossible for the Player to prove what he did or didn't know. He has stated that he believed he had retired, but retirement is not the same as being free of the ADR.

101. The Player was an experienced professional. He had received anti-doping training. He would have known that there would be a significant risk that a fat burner could contain a Prohibited Substance and that to take it could lead to an ADRV, if he was still subject to the ADR. The risks the Player was facing were two-fold, was he still subject to the ADR and then, if so, would taking a fat burner be likely to lead to an ADRV?

102. The Player simply (manifestly) ignored these risks and acquired fat burners in an unmarked tub from a stranger in the gym. He could easily have contacted Whitehaven to see if it had informed the RFL of his retirement, but even then, would that have removed him from the ADR?

103. The Professional Registration Form, that the Player acknowledged signing, stated: "*I understand that I will be subject to the RFL Operational Rules including the Rules covering drug testing and misconduct."* Further, it contained the warning: "*Twelve months after a player is declared a free agent under the Operational Rules he shall no longer be bound by the Operational Rules…".* The Player's case was that as he hadn't been declared a Free Agent, then the 12 month rule didn't apply to him, so why didn't he check with Whitehaven whether they had included him on the RFL notification email with the other retired players or not – he produced no evidence to demonstrate that as at 12 September 2021, when he started to take the fat burners, he had bothered to find out if he was a Free Agent or not. He didn't check to see whether he was somehow free of the RFL and the ADR. The club could have just as easily added him to that email (in which

case he would have been a Free Agent) or left him off it (which logically means he's still registered and subject to the ADR). He didn't contact the club or the RFL. He thought that telling his coach was enough to remove him from the ADR, but with no basis for coming to that decision. Rather, he had signed a form that said he was subject to the ADR when registered and if he was de-registered, then he'd become a Free Agent and would have to wait 12 months. At best, there was a significant risk that he was still subject to the ADR and he ignored it.

104. Having ignored that risk and actually being subject to the ADR on 12 September 2021, he then decided to take the fat burners. With his experience and education, he should have known that there was "*a significant risk that the conduct* [taking fat burners] *might constitute or result in an Anti-Doping Rule Violation and* [he] *manifestly disregard*[ed] *that risk"*.

105. Quite simply, it is irrelevant whether the Player believed he had retired by 12 September 2021. Even if he had started the process by then, he was still subject to the ADR one way or the other. If he had re-read the forms that he had previously signed and/or make some basic enquiries he would have been certain.

106. The Tribunal has to apply the ADR and the conduct that matters is the taking of the fat burners. The Tribunal has no evidence that he did not know that this would lead to an ADRV. Fat burners are not in the same category as supplements, but even with supplements, the Tribunal would expect a player to have undertaken some basic tests and research to alleviate the risks that taking these could result in an ADRV. Fat burners are often cited as examples of products containing steroids and other Prohibited Substances. Not only did the Player not ask what the name was of what he was getting, what was in the tablets, what the dosage was etc, he seemed prepared to buy a totally unmarked bottle of these tablets from a stranger down the gym. In the Tribunal's determination taking fat burners would constitute a real risk of committing an ADRV and he manifestly disregarded the risk that taking the tablets could lead to an ADRV, carrying out absolutely no checks whatsoever. He has provided no evidence to the contrary and is simply relying upon the claim that he mistakenly believed he was not bound by the ADR. This is insufficient to satisfy his burden of proof.

107. As such, the Player has failed to rebut the presumption against him and there is no need for the Tribunal to further look into his degree of Fault. ADR Article 10.6.2 is not applicable when the Player has failed to satisfy his burden of proof regarding intention.

108. Rather, the Tribunal notes pursuant to ADR Article 10.2.1 (a) the sanction upon the Player is a period of Ineligibility of Four years.

VII. The Decision

109. For the reasons set out above, the Tribunal makes the following decision:

109.1. an ADRV contrary to ADR Articles 2.1 and 2.2 has been established;

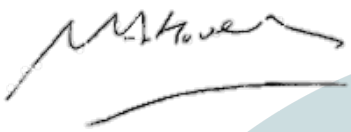
109.2. the standard sanction of 4 years Ineligibility shall apply to the Player;

110. The Tribunal notes that ADR Article 10.13.2 requires that an Athlete receives credit for any period of (respected) Provisional Suspension. The Player was Provisionally Suspended on 8 October 2021. UKAD have confirmed that there is no evidence to suggest that he has breached the terms of his Provisional Suspension to date and accordingly the Tribunal direct that this 4 year period of Ineligibility should be backdated to commence on 8 October 2021 and end 11:59 on 7 October 2025.

111. The Player's status during Ineligibility is outlined in ADR Article 10.14. 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.

112. In accordance with ADR Article 13, the Player has a right of appeal to the NADP Appeal Tribunal. 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 Secretariat within 21 days of receipt of this decision. The Appeal should be filed to the National Anti-Doping Panel,

located at Sport Resolutions, 1 Paternoster Lane, London, EC4M 7BQ (resolve@sportresolutions.co.uk).



Mark Hovell (Chair)

For and on behalf of the Tribunal

10 May 2022

London, UK