SPORT RESOLUTIONS (UK)

NATIONAL ANTI-DOPING PANEL

SR/062/2020

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

Before:

Christopher Quinlan (Chair)

Professor Kitrina Douglas

Dr Terry Crystal

BETWEEN:

Mike Burgess ***Appellant***

-and-

UK Anti-Doping ***National Anti-Doping Organisation***

DECISION

A. INTRODUCTION

1. This is the final decision of the Anti-Doping Appeal Panel ('the Appeal Panel') convened pursuant to Articles 5.3 and 13.6.1 of the National Anti-Doping Panel ('NADP') 2019 Procedural Rules ('the Procedural Rules') to determine an appeal brought by Mike Burgess ('the Appellant/Athlete') against the decision of the first instance Tribunal to impose a period of Ineligibility of two years on the Appellant.

2. On 20 October 2018, the Appellant provided a urine Sample during an In-Competition test, after a match between Bargoed RFC and Aberavon RFC. The Sample was analysed and returned an Adverse Analytical Finding ('AAF') for benzoylecgonine, a metabolite of cocaine. The Athlete was subsequently charged with a breach of the WRU Anti-Doping Rules ('ADR') Article 2.1, Presence of a Prohibited Substance.

3. On 12 December 2018, the Athlete served UK Anti-Doping ('UKAD') with a written response, accepting the Anti-Doping Rule Violation ('ADRV'), but submitting that this was not intentional and there was No Significant Fault or Negligence.

4. The matter was referred to the NADP for determination. The first instance Tribunal ('the Tribunal'), that consisted of a sole arbitrator found that the Appellant had failed to establish, pursuant to ADR Article 10.5.2, that he bore No Significant Fault or Negligence for the admitted ADRV. The Tribunal imposed a period of Ineligibility of two years on the Athlete, in accordance with ADR Article 10.2.2. That decision was promulgated in a document entitled 'Notification of Determination" dated 7 October 2019.

5. The said Tribunal Chair was unable, due to health reason to deliver a full decision with his reasons. In light thereof, the President, on 18 February 2020 exercised his power under Article 5.7 of the NADP Procedural Rules to revoke the appointment of the Tribunal Chair on the grounds that he is unable due to health reasons to continue to act as arbitrator. The effect of that revocation was that an order has been made, but without reasons. The President granted the Athlete 21 days to serve any Notice of Appeal.

6. Under Article 15.1 of the Procedural Rules the President directed:

    a. *"The Athlete is not required under Article 13.5 to state any grounds for his appeal, beyond stating that in the absence of reasons he is entitled to appeal, or to comply with any other requirement of Article 13.5, unless requested by the NADP;*

    b. *In the circumstances of this case justice requires that a hearing before an Appeal Tribunal must take place as a rehearing de novo, if the Player seeks a rehearing;*

    c. *An Appeal Tribunal will be convened for a 1 day hearing in Cardiff as soon as possible;*

    d. *the parties are requested to state as soon as possible on what dates counsel and witnesses would be available within the next 21 days; and*

    e. *the decision of the Appeal Tribunal is to be delivered within 7 days of the hearing*."

7. By Notice dated 6 March 2020 the Athlete appealed the Tribunal's decision.

8. The appeal was due to be heard by us in person at the Principality Stadium, Cardiff on 21 April 2020. However, in light of Government's advice relating to travel and social distancing as a result of the coronavirus pandemic, both parties and the Appeal Panel agreed that the appeal should proceed as by way of video conferencing. That is what occurred.

9. The appeal hearing was conducted *de novo*. It was attended by the following:

    a. The Appellant;

    b. Mr Matthew de Maid, the Appellant's solicitor;

    c. Mr James Laing and Ms. Nisha Dutt, UKAD;

    d. Ms Alisha Ellis, NADP Case Manager; and

    e. Mr Jeremy Rogers, WRU, observing.

10. This document constitutes our final reasoned decision, reached after due consideration of the evidence, submissions and the Arbitral Awards placed before us. It is necessarily a summary of that material. We have considered the entirety of the materials that each party has put before us in relation to each issue. If we do not explicitly refer to a particular point, document or submission, it should not be inferred that we have overlooked or ignored it; as we say, we have considered the entirety of the materials put before us.

B. ANTI-DOPING RULE VIOLATION

11. The WRU is the National Governing Body of rugby union in Wales and is a Member Union of World Rugby (the International Federation for the sport of rugby union). The WRU has adopted the UK Anti-Doping Rules as its own anti-doping rules.

12. Article 2.1 of the ADR makes it a doping offence to provide a Sample that shows "the presence of a Prohibited Substance or its Metabolites or Markers" unless the Athlete establishes that the presence is consistent with a Therapeutic Use Exemption ('TUE'). The Appellant does not have a TUE.

13. The Appellant is registered with the WRU as a rugby union player at Aberavon RFC in Wales and at all times bound by the ADR.

14. On 20 October 2018 UKAD Doping Control Personnel attended Bargoed Park, Moorland Road, Mid Glamorgan, Wales, CF81 8UJ. Following the WRU National League Premiership match between Bargoed RFC and Aberavon RFC ('the Match') they collected an In-Competition urine Sample. In the usual way, the said Sample was split in two and sent for laboratory analysis.

15. The Appellant's Sample returned an AAF for benzoylecgonine ('BZE'), a metabolite of cocaine. The presence of that Prohibited Substance in his Sample constitutes a violation of ADR Article 2.1. UKAD charged the Appellant in those terms on 28 November 2018.

16. Cocaine (and its metabolites) is listed under section S6a (Stimulants) of the WADA 2018 Prohibited List. It is a non-Specified Substance that is prohibited In-Competition only.

17. On 12 December 2018, the Appellant formally accepted the ADRV and indicated that sanction was in dispute.

18. ADR Article 8.3.1 requires that the burden rests upon UKAD to establish the commission of the ADRV charged to the comfortable satisfaction of the Appeal Board. The Appellant admitted the ADR and with that admission UKAD discharged that burden.

C. <u>ADR</u>

19.The period of Ineligibility to be applied is set out in ADR Article 10.2:

> *"**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 reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:*
>
> *10.2.1 The period of Ineligibility shall be four years where:*
>
> *(a) The Anti-Doping Rule Violation does not involve a Specified Substance, unless the Athlete … can establish that the Anti-Doping Rule Violation was not intentional.*
>
> *(b) …*
>
> *10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.*
>
> *10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes … who cheat. The term, therefore, requires that the Athlete … engaged in conduct which he … knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition…"*

20.The Appellant relied upon ADR Article 10.5, which provides:

> ***Reduction of the period of Ineligibility based on No Significant Fault or Negligence***
>
> *10.5.1 Reduction of Sanctions for Specified Substances or Contaminated*
>
> *…*

10.5.2 Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1:

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 period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight years.

21. The Appellant has the burden of establishing No Significant Fault or Negligence on the balance of probability (ADR Article 8.3.2).

22. It is the Appellant's first ADRV.

D. UKAD'S CASE

23. The Appellant provided UKAD with details of his ingestion of cocaine in a signed statement dated 25 January 2019. In short, He submitted that he consumed approximately 3grams of cocaine overnight on 14/15 October 2018. His last ingestion was at approximately 7am. He next played rugby on 20 October, when he was tested. He stated that he took cocaine in a social context rather than a sporting one.

24. UKAD provided the details of the account to Professor David Cowan, who considered the information provided and stated in an email on 4 March 2019:

"[Mr Burgess] *is more likely than not to have consumed cocaine more than 12 hours before the 12 hour "In-Competition window" started at 02:30 on 20 October 2018. I have based this opinion based on the estimated concentration advised by the Laboratory of 70 ng/mL and the specific gravity of 1.008 amongst other factors such as the alcohol consumption."*

25. Accordingly, UKAD accepted that the ADRV was not committed intentionally.

26. UKAD relied upon the Appellant's acceptance that he received anti-doping education, in particular:

    a. His attendance at anti-doping education sessions on 14 June 2016, 17 August 2017 and 21 August 2018; and

    b. That the PowerPoint presentation for the 2018 session proves that the session dealt specifically with 'recreational' substances.

27. UKAD did not accept that any reduction should be made for considerations of No Significant Fault or Negligence. As such, a period of Ineligibility of two years should be imposed.

E. THE APPELLANT'S CASE

28. The Appellant gave an account during the hearing. He relied on his witness statement and was questioned by Ms Dutt and by us. He also relied, *inter alia,* upon his statements dated 25 January 2019, 31 July 2019 and Mr de Maid's undated written submissions at pp28-29 of the bundle and those dated:

    a. 3 May 2019,

    b. 6 August 2019, and

c. 14 April 2020.

29. The Appellant's case is that he committed the ADRV through the deliberate ingestion of cocaine. He took the cocaine overnight 14/15 October 2018, five or six days before the Match. He did so while on a night out with friends. He had consumed "*quite a bit of alcohol, including pints of lager, shorts and shots.*"[1] He snorted a number of lines of cocaine during the night.

30. He argued that his level of Fault was reduced by the following factors:

    a. His belief that when he consumed cocaine there was no risk that it would still be in his system by the time of the next rugby match days later.

    b. At the time he had real and not insignificant concerns for his mother's health, with whom he lived, which he said made him more prone to ingesting cocaine.

        i. Between August and November 2018, his mother was unwell and he feared she had cancer, with which she had suffered previously.

        ii. The attendant stress and worry made him, he said, "*more susceptible*" to taking cocaine. It was also the first time he had been out in some time, having spent much of time home with his mother.[2]

    c. His relative youth (22 years old), immaturity and inexperience.

31. In paragraphs 8-9 of his 31 July 2019 statement he said this:

[1] Witness statement [3]
[2] *Ibid.,* [5]

"I am aware that […] cocaine is a banned substance when in competition. I am also aware from courses I have attended that "in competition" means the period 12 hours before a match […] when I took cocaine […] I did not think I would be committing an anti-doping offence as I did not have another rugby match until the following Saturday (20th October 2018). I believed that when I took cocaine, I was doing so out of competition.

[…] I really did not think that it would remain in my system until the following Saturday when I was due to play again. I believed that cocaine was eliminated from a person's system within a couple of days of taking it. As a result, I did not think there was any risk of cocaine remaining in my system by the following Saturday. I obviously now understand that I was wrong about this and that was my fault."

32. The Appellant was questioned by Ms Dutt. He was referred to the evidence he gave before the Tribunal. He said he recalled telling the Tribunal that he believed the cocaine would stay in is system for "*..two-three days, sometimes seventy-two hours".* He told the Tribunal he had carried out Internet checks and found the information on a website named "Frank". He agreed with Ms Dutt that he had no physical evidence of that search. He told us that he conducted the search after he woke up later that day. It was then that he started "*thinking of the consequences of* [his] *actions*". That included how long the cocaine would stay in his system both in the context of rugby, and otherwise. He did not accept Ms Dutt's suggestions that such thinking was "unlikely". He agreed he had not produced any evidence, such as screenshots, to support his assertion that he carried out such research.

33. It is to be noted that he told the Tribunal this:

"PL[3]: And did you perform any checks on cocaine before you took it?

MB: No, after."

[3] PL – UKAD solicitor and Mike Burgess

34. He was questioned by the Appeal Panel. He said he shared 3 grams of the cocaine with a friend whom he named. The cocaine belonged to his friend and they consumed it overnight 14/15 October. Before taking it, he said (as he had before the Tribunal) he asked his friend how long the cocaine would remain in his system. On the basis of what he told him, he believed it would be out of his system in time. He said that enquiry was not made in the context of rugby, but having to work on Wednesday. He said he had no idea what, if any, research that person had carried out. As he put it, "*I just went off his word of mouth.*"

35. He knew before he took the cocaine that it was 'banned' In-Competition. He told us he made that enquiry as he was conscious, he had to work the following Wednesday and because of his playing commitment in the Match. His friend, and supplier of the cocaine, has no medical qualifications and is a welder. He told the Tribunal that so far as he knew, his friend had no medical or pharmacological qualifications, though had been drug tested in the context of his employment.

36. He said he finished taking cocaine at about 07.00, then slept. That same afternoon he said he used the Internet to search for how long cocaine would remain in his system. He found a website named "Frank" and that it would remain for "*up to four days*". On that basis he did not go to work, he said, on Wednesday 17 October but did play in the Match.

37. Mr de Maid relied upon:

    a. *UCI v Luca Paolini* (case ADT02.2015) ('*Paolini*')

    b. *FIFA v Conmebol and Fernandez*, *CAS 2016/A/4416* ('*Conmebol*')

    c. *ITF v Daniel Evans (Decision issued 03 October 2017)*

    d. *UKAD v Zak Hardaker* SR/NADP/988/2017 ('*Hardaker*')

38. He submitted the jurisprudence demonstrated an inconsistency of approach in relation to sanctioning of what he called "*recreational drugs, such as cocaine"*. He observed that the ADR allows for a reduction in the period of Ineligibility (from four years to two years), if the ADRV was not committed intentionally. He submitted that the 2015 World Anti-Doping Code ('WADC') created a greater distinction between those who cheat in terms of obtaining an unfair advantage in a sporting context, as opposed to those who take recreational drugs for social purposes and which provide no sporting advantage. He submitted that the tribunals in the *Conmebol* at al, have applied the definition of No Significant Fault in a way consistent with that approach.

39. He also pointed to and relied upon relevant changes in the 2021 WADC. He submitted that athletes who commit an ADRV involving 'social' or 'recreational drugs' unrelated to sports performance, will receive a significantly reduced sanction. He pointed to the 'new' Article 10.2.4 which will provide:

> *"10.2.4 Notwithstanding any other provision in Article 10.2, where the anti-doping rule violation involves a Substance of Abuse:*
>
> *10.2.4.1 If the Athlete can establish that any ingestion or Use occurred Out-of-Competition and was unrelated to sport performance, then the period of Ineligibility shall be three months Ineligibility.*
>
> *In addition, the period of Ineligibility calculated under this Article 10.2.4.1 may be reduced to one month if the Athlete or other Person satisfactorily completes a Substance of Abuse treatment program approved by the Anti-Doping Organization with Results Management responsibility. The period of Ineligibility established in this Article 10.2.4.1 is not subject to any reduction based on any provision in Article 10.6."*

40. While readily accepting the 2021 WADC was not yet in force, Mr de Maid suggested that the foreshadowed less draconian approach in respect of 'social' or 'recreational drugs' unrelated to sports performance, further supported the

interpretation of No Significant Fault for which he contended. That interpretation was supported by the cases upon which he relied, including *Hardaker*.

F. DETERMINATION

(1) Discussion

41. UKAD did not dispute the route of ingestion. We accept it was through taking cocaine on 14/15 October 2018. While the ingestion was deliberate, we accept it was not intentional within the meaning of ADR Article 10.2.3. We accept that it was not related to sport performance.

42. Rightly, the Appellant did not argue that he bore No Fault or Negligence (ADR Article 10.4). To establish this, he would have been required to establish he did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he had used cocaine. He therefore accepted he was at Fault. The issue is the extent to that Fault or his admitted departure from the exercise of utmost caution.

43. The jurisprudence on No Significant Fault or Negligence is not without its challenges. The appropriate starting point is the WADC. No Significant Fault or Negligence is defined in Appendix 1:

> *"No Significant Fault or Negligence: The Athlete or other Person's establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system."*

44. There is a comment to that definition which reads thus:

> *"For Cannabinoids, an Athlete may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance."*

45. From reading that comment one would have been forgiven for concluding it does not apply to cocaine. However, the Appellant relies upon and asserts that even though the drug is cocaine, the principle applies *mutatis mutanda.*

46. He relies upon the case of *Paolini,* who was an Italian professional cyclist. He was a regular cocaine user who had taken sufficiently close to the start of the Tour de France to commit an ADRV. His ban was reduced to 18 months. The case was decided by Professor Haas, sitting alone. He observed that cocaine was only banned In-Competition; there was thus no ban on recreational use of cocaine. Relying on previous CAS authority, and after explaining the legislative history of the drafting, he concluded that:

> "*in the case at hand the Rider may establish No Significant Fault by clearly demonstrating that the context of the use of cocaine was unrelated to sport performance*."[4]

47. Professor Haas chaired the CAS panel which decided *Conmebol.* That player tested positive for cocaine in an Argentinean football match. The WADC comment was not reproduced in the anti-doping rules it was considering. However, the Panel concluded that:

> "*…in cases where an athlete establishes that he or she consumed cannabinoids in a recreational/social context unrelated to sport performance, the athlete qualifies for no significant fault.*"[5]

[4] [48]
[5] [69]

48. It also held that the comment applied equally to cocaine and there was no distinction to be draw between them.[6] The Panel concluded:

> *"In view of all of the above, the Player may establish* [no significant fault] *in relation to his Cocaine use by clearly demonstrating that the context of such consumption was unrelated to sport performance."*[7]

49. Applying those conclusions, the period of Ineligibility was reduced to 18 months. *Conmebol* was a regular drug user who had consumed alcohol and whose lifestyle at the time was disordered.

50. Both of those cases were considered by the NADP Tribunal that decided *Hardaker*, a professional Rugby League player. Not unlike the instant case, Mr Hardaker took cocaine having been drinking, on the anniversary date of a distressing personal event. The cocaine remained in his system when he was tested after a match a couple of days thereafter. The Tribunal concluded:

> *"Each case is decided on its own facts, and care needs to be taken in relying on other cases as factual precedents when deciding the length of the ban. That said, it is notable that tribunals appear to have reduced bans to 18 months in several very unremarkable cocaine cases*."[8]

51. Neither party relied on *The FA v Livermore ('Livermore')*.[9] Mr de Maid positively disavowed reliance upon it. Its facts are a long way from those of this case. The Chair of this Appeal Board also chaired The FA Appeal Board which observed that the Regulatory Commission had decided:

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[6] [70]-[73]
[7] [74]
[8] [44]
[9] 8 September 2015

"... *not to apply the clear and unequivocal effect of [the rule] by employing an imprecise, unwritten and supra-regulatory concept or principle..."*[10]

52. The FA Appeal Board also observed, as did that Tribunal in *Hardaker* that the decision in *Livermore* should be confined to its own facts. We agree.

53. *ITF v Daniel Evans*[11] has no value as a precedent. Although entitled "*Decision*", as is clear from paragraph 5 of that document it was an agreement reached between the parties, not a judgment of an Independent Tribunal.

54. As for Mr de Maid's reliance upon the 2021 WADC, a short response is that it is not yet in force. This is not a case where the principle of *lex mitior* applies. Considering it further, the Prohibited List is not yet finalised so we know not whether cocaine will be listed as a "*substance of abuse*" for the purposes of Article 10.4.2.1. We cannot speculate, though we note the point Mr de Maid makes about sanctioning in the context of ADRV unrelated to sporting performance. We must apply the ADR as they presently are, not as they might become.

55. UKAD relied upon *UKAD v Cleary* SR/NADP/470/2015 ('*Cleary*'). *Cleary* used cocaine at a party. The NADP Panel found that his Fault was in taking cocaine and not giving any thought to the risk that cocaine might still be in his system when he played in a match two days later. In particular, the Panel said:

"35. Nor are we able to accept […] that Mr Cleary cannot be considered to have been at fault on the Tuesday evening when he played in the match since he could not possibly have been expected to know how long the effects of cocaine would remain in his system. We agree that knowledge of how long metabolites of cocaine remain in the system after consumption was not to be expected. In any event, retention of the

[10] [32]
[11] 3 October 2017

effects of cocaine is not fixed. It will depend on a variety of factors such as the frequency and amount ingested, as well as the physical attributes of the consumer. Professor Cowan's evidence notes the variability of the time frame. The fault in our view was not so much Mr Cleary not knowing that a metabolite of cocaine would still be in his system. The fault was in paying no regard to a risk that the effect of the cocaine might still be in his system. The reality is that Mr Cleary gave no thought to the matter at all.

[…]

37. Whatever sympathy one may feel for Mr Cleary's foolishness, the reality is that there is nothing exceptional about the present material facts. Mr Cleary benefits from the fact that his consumption of cocaine had nothing to do with improving his sporting performance. This is what reduces his ineligibility from 4 to 2 years. But, otherwise we see no ground for any further reduction in the period of ineligibility. Mr Cleary deliberately ingested a Prohibited Substance. He did so in full knowledge that cocaine is a banned drug for sportsmen and in the knowledge that other rugby Athletes, notably Matt Stevens, had been banned for taking cocaine. Moreover, Mr Cleary realized that the effects of cocaine remained in the body for some time, even though he would not have known for how long. Mr Cleary gave no thought to the matter at all.

38. The reality is that Mr Cleary was simply concerned with having what in his perception was a good night out. We are quite unable on the present facts to conclude that there was no significant fault or negligence. If we were to do so, this would be tantamount to saying that the conventional, rather than the exceptional, period of ineligibility is a period of less than 2 years."

56. Neither *Cleary* nor *Price* appear to have been cited in *Hardaker.* UKAD also pointed to *RFU v Price*[12] ('*Price*') in which the Athlete ingested a drug – without asking what it was – at a party around 72 hours before a match. A Sample collected from him after the match tested positive for BZE. However, *Price* is an old case[13] decided under a different incarnation of the WADC and in which there

[12] 30 April 2007
[13] Chaired by the Chair of this Appeal Board

was no real consideration of No Significant Fault or Negligence. It does not assist on the central issue in this appeal.

57. Like the NADP Panel which decided *Hardaker* we do not find the jurisprudence on No Significant Fault or Negligence easy to follow[14]. The natural meaning of the words *"do not easily support a conclusion that an athlete who tests positive In-competition for recreational use cocaine is generally entitled to a finding that there was No Significant Fault or Negligence in ingesting the banned substance."*[15]

58. The NADP Panel in *Hardaker* also observed:

> *"However, the decisions in Paolini and Conmebol are in a different category. One of us did not think that the decisions in Paolini and Conmebol were consistent with either the scheme or plain language of the WADA code and the ADR and would not have followed them. Nevertheless, we are all agreed that, whatever our misgivings, it would not be fair to Mr Hardaker to depart from the principles set out in these cases and he should have the benefit of the rationale there given."*[16]

59. In [27] the Panel observed:

> *"If one looks at the words 'No Significant Fault or Negligence' and treats them purely as a matter of English language, and even with considerable sympathy for Mr Hardaker, it is hard to see how the present case falls within the definition. However, the caselaw suggests a different approach to 'No Significant Fault or Negligence'."*

60. Thereafter, that Panel concluded:

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[14] [34]
[15] *Ibid.*
[16] [37]

> *"It follows that as Mr Hardaker ingested cocaine in circumstances where there was no question of performance enhancing benefit, he is entitled to a finding of No Significant Fault or Negligence."*[17]

61. It appears to us, with respect, that the Panel in *Hardaker* concluded that it was constrained by the case law to approach his case in the way it did. It felt so constrained by fairness notwithstanding (1) the violence that interpretation did to the ordinary English meaning of the words No Significant Fault or Negligence and (2) that the caselaw seemed inconsistent with the scheme of the WADC. It was in that context that the Panel assessed the degree of Mr Hardaker's Fault.

62. We do not understand *Hardaker* or any of those cases to mean that in all cases where the use of cocaine was unrelated to sport performance the athlete is *ipso facto* or automatically entitled to a finding of No Significant Fault or Negligence. That would be contrary to the clear words of WADC and ADR Article 10.5.2, namely:

> "…the otherwise applicable period of Ineligibility **may be** reduced based on the Athlete's or other Person's degree of Fault…" [emphasis added]

63. Further, it is contrary to plain words of the comment in question. Putting to one side the fact it refers only to cannabinoids, it states that an athlete "…***may establish No Significant Fault or Negligence".*** It does not, for example, state that they shall establish No Significant Fault or Negligence in such circumstances.

64. Further such an approach would be (as the *Hardarker* Panel noted) contrary to the scheme of Article 10, which takes into account the lack of an intention to enhance sporting performance or cheat, by reducing the four-year starting point to two

[17] [38]

years. To discount further below the two-year period because the use of cocaine was unrelated to sport performance involves an element of double counting, we find difficult to understand.

65. Still further, as UKAD submitted the 2015 WADC was twice amended post-*Conmebol,* yet on neither occasion was the comment amended to include cocaine. Had WADA intended the comment to apply to cocaine that was two opportunities for it to have said so in terms.

66. None of the caselaw relied upon by Mr de Maid is binding on this Appeal Panel. Every case must be decided on its own facts, by application of the WADC and relevant ADR. The extent of the reduction, if any, is to be assessed by reference to the degree of the athlete's Fault or Negligence. As *Cleary* demonstrates it may be such as to merit none at all. As the comment to Article 10.4 and 10.5.2 WADC makes clear those provisions apply only in "*exceptional circumstances."*

67. We must therefore assess the degree to which this Appellant was at Fault.

(2) <u>Period of Ineligibility</u>

68. When assessing Fault, both the Appellant's objective and subjective level of Fault should be considered. The objective element describes what standard of care is expected from a reasonable person in the Appellant's situation, exercising the duty of utmost caution expected of him. The subjective element describes what could have been expected from the Appellant, in light of his personal capacities.[18]

69. These are the indisputable facts relevant to assessing the degree of his Fault:

[18] *See Cilic v ITF,* CAS 2013/A/3327 [71]

a. He deliberately ingested cocaine.

b. He did so over the course of some time, consuming his share of 3 grams.

c. He had received anti-doping education which included express reference to cocaine and other 'recreational drugs' more widely. In light thereof, as he admits, at the time he was taking the cocaine he knew it was a substance prohibited in competition. That is an important consideration in this case.

70. Insofar as any steps he took to address the risk of it being in his system when he played on the following Saturday, we have significant doubt as to whether he asked his friend at all. We agree with Ms Dutt that it is unlikely in the context in which the cocaine was being consumed that he would pose that question. Further, had he have done so we would have expected him to have mentioned it expressly in his written statement made in advance of the hearing before the Tribunal, which he did not. That is especially so since he addressed that subject of elimination in his statement dated 31 July 2019. The closest he got to it was this:

> *"I believed that cocaine was eliminated from a person's system within a couple of days of taking it. As a result, I did not think there was any risk of cocaine remaining in my system by the following Saturday"* [19]

71. However even if he did make the enquiry, it was not in the context of rugby but his employment. Further, and more importantly, it was a wholly inadequate step to take. The rate of elimination of cocaine is variable as between individuals and subject to different factors, such as for example the quantity and rate of ingestion. His friend, a welder, had, on the available evidence no qualifications at all upon which to express any such expert opinion. There was no sensible basis for the Appellant to accept any such assurance he was given. Therefore, insofar as he took any checks before or when taking the cocaine, they were inadequate and do not alleviate the risk he took or mitigate his Fault.

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[19] [9]

72. So far as the check he claims to have made during the afternoon of 15 October, once more we have considerable doubt about that. No mention was made of doing so in his witness statement, when we would have expected it to have been. Further, no objective proof, such as screenshots, has been produced. In any event, even if carried out, it was not from an expert or expert website. More importantly, it was after the taking of the drugs. It is not relevant to the assessment of his Fault before and while he was taking the cocaine.

73. As for the subjective element, his age at the relevant time is not material. The fact he had consumed alcohol does not reduce his Fault, where it was taken voluntarily and in the circumstances in which it was consumed. As for his understandable concern about his mother's health, there was no evidence she was suffering from any medical or other condition at the relevant time. Mr de Maid confirmed in writing on 1 August 2019 that he was not seeking to argue that the Appellant was suffering any cognitive impairment at the material time.

74. In our judgment, for the reasons we have identified, the Appellant's degree of Fault was significant. It follows that he failed to establish that he had acted without significant Fault or Negligence. Therefore, the appropriate period of Ineligibility is two years.

(3) Commencement of the sanction

75. ADR Article 10.11 provides:

> ***Commencement of Ineligibility Period***
>
> *The period of Ineligibility shall start on the date of the final decision providing for Ineligibility, or if the hearing is waived, or there is no hearing, on the date Ineligibility is accepted or otherwise imposed, save as follows:*

10.10.1…

10.11.2 Timely Admission:

Where the Athlete or other Person promptly (which means, in any event, before he/she competes again) admits the Anti-Doping Rule Violation after being confronted with it by UKAD, the period of Ineligibility may start as early as the date of Sample collection or the date on which another Anti-Doping Rule Violation last occurred. In each case, however, where this Article is applied, the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the datethe Athlete or other Person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed. This Article shall not apply where the period of Ineligibility has already been reduced under Article 10.6.3.

76. The Appellant made a timely admission of the ADRV. Even though we heard the appeal *de novo* we do not disturb the Tribunal's finding that is appropriate to start the period of Ineligibility on the date of collection, namely 20 October 2018. It expires at midnight on 19 October 2020.

77. The Respondent's status during the period of Ineligibility is as provided in ADR Article 10.12.

G. SUMMARY

78. For the reasons set out above, we find the period of Ineligibility imposed is two years commencing on 20 October 2018.

Christopher Quinlan QC (Chair)

On behalf of the Appeal Tribunal
29 April 2020

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