

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

Before:

Michelle Duncan (Chair)

Blondel Thompson

Professor Peter Sever

BETWEEN:

UK Anti-Doping Limited

Anti-Doping Organisation

-and-

Jesse Patton

Respondent

**DECISION OF THE ANTI-DOPING
TRIBUNAL**

INTRODUCTION

1. The Applicant ("UKAD") is the National Anti-Doping Organisation in the UK and has jurisdiction to prosecute this case.
2. The Respondent, Mr Patton (the "Player" or "Respondent") is a rugby union player, from Wales. As a licensed competitor of the Welsh Rugby Union (the "WRU") and a participant in competitions and other activities organised, convened, authorised or recognised by the WRU, he was at all times bound by and required to comply with the Anti-Doping Rules of the WRU (the "ADR").
3. Pursuant to the ADR, a urine Sample was provided by the Player on 24 September 2019, Out-of-Competition at an Ystalyfera RFC training session. The Sample returned an Adverse Analytical Finding ("AAF") for five metabolites of metandienone. Metandienone is classified under section S1.1(a) of the 2019 WADA Prohibited List as an Anabolic Androgenic Steroid. It is a non-Specified Substance that is prohibited at all times.
4. On 8 November 2019, UKAD issued a Notice of Charge (the "Charge") in relation to the Player's alleged Anti-Doping Rule Violation ("ADRV").
5. The Player has been provisionally suspended since 8 November 2019. This is the Player's first ADRV.
6. The Player responded to the Charge on 28 November 2019. The Player denied the Charge and stated *"Please accept this written notice that I am requesting to be heard by your panel of the NADP, as I wish to prove this substance found within my urine sample was absolutely unintentional"*.
7. On 6 January 2020, the Player confirmed to UKAD that he wished to proceed to a hearing. This case was referred to the National Anti-Doping Panel ("NADP") for resolution, on 7 January 2020.
8. On 17 January 2020, Michelle Duncan was appointed as the Chair of the Tribunal. Blondel Thompson and Peter Sever were appointed as Tribunal Members on 11 February 2020.

9. This matter was determined following the oral hearing that took place on 21 May 2020.

PROCEDURAL BACKGROUND

10. A telephone directions hearing was held on 4 February 2020. James Laing appeared for UKAD. The Player was not in attendance but was represented by Mr Paul Hill. With the agreement of the parties the following directions, amongst others, were issued:

"3.1 By 16.00 on 18 February 2020, the Respondent is to serve his response on the NADP Secretariat and UKAD including any witness statements, exhibits or documents he wishes to rely upon.

3.2 By 16.00 on 03 March 2020, UKAD shall serve their reply upon the Respondent and the NADP Secretariat and include any further witness statements, exhibits or documents it wishes to rely upon.

3.3 By 16.00 on 17 March 2020, the Respondent shall serve a further response (if required) upon the NADP Secretariat and UKAD he wishes to rely upon.

3.4 By 16.00 on 07 April 2020, the Respondent is to serve on the NADP Secretariat and UKAD, his written submissions (skeleton argument), and copies of an Arbitral Awards of Decisions he wishes to rely upon..."

11. The Player did not comply with Direction 3.1. On 24 February 2020, Mr Hill informed UKAD that he would serve his response on 25 February and that the delay was caused by the theft of his laptop and telephone. In the event, no response was served although on 6 March 2020, UKAD received an unsigned, undated letter from Mr Hill's firm, setting out the steps that the Player had taken to identify the medication that he believed had caused the AAF. Enclosed with that letter was a witness statement from a friend of the Player.
12. On 6 March 2020, UKAD, having obtained a short extension of time for service of its evidence, served the witness statement of Nick Wojek, Head of Science and Medicine at UKAD and the expert report of Professor David Cowan.

13. On 17 April 2020, the Player, having failed to comply with Directions 3.3 or 3.4, informed Sport Resolutions that he was no longer represented by Mr Hill, and that he would now be dealing with this matter himself.
14. UKAD served its submissions on 17 April 2020.
15. On 20 April 2020, UKAD emailed the Player and asked him to confirm whether he had any further evidence he wished to rely on, whether he had any witnesses who would be giving evidence at the hearing and whether he would be assisted by anyone at the hearing. The Player responded on 22 April 2020, stating that he had been unable to secure new legal representation and requesting that the hearing be adjourned in order to enable him to identify and instruct new representatives. Following that request, the hearing scheduled for 23 April 2020 was vacated and the Chair issued further directions listing a final hearing on 21 May 2020.
16. Pursuant to the further directions, the Player was directed to serve any further evidence he intended to rely upon by 6 May 2020. The Player did not comply with that direction. However on 14 May 2020, he sent his response to the Charge by email to Sport Resolutions, together with a character reference from Reverend L Davies.
17. UKAD served updated submissions on 19 May 2020. The Player did not serve any written submissions.
18. Pursuant to the Tribunal's directions agreed with the Parties, the Hearing was convened remotely, via video conference, on 21 May 2020. Mr Paul Renteurs, Ms Nisha Dutt and Ms Alison Peacock attended for UKAD along with their expert witness, Professor Cowan and Mr Wojek, both witnesses attending at the request of the Player. The Player attended alone without representation.

JURISDICTION

19. Jurisdiction was not challenged.

FACTS

20. On 24 September 2019, a Doping Control Officer operating under mission number M-1037921216 collected a urine Sample from the Player Out-of-Competition, at an Ystalyfera RFC training session at 3 Ffordd Glandwr, Ystalyfera, Swansea.
21. The Player provided a Sample of urine that was split into two separate bottles which were given reference numbers A1154760 (the "A Sample") and B1154760 (the "B Sample").
22. Both samples were transported to the WADA accredited laboratory in London, 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. This analysis returned an AAF for five metabolites of metandienone. Metandienone is listed under section S1.1(a) of the 2019 WADA Prohibited List as an exogenous Anabolic Androgenic Steroid. It is classified as a non-Specified Substance that is prohibited at all times.
23. The Player did not request a test of the B Sample and therefore the B Sample has not been tested.
24. UKAD confirmed that the Player did not have a Therapeutic Use Exemption for metandienone.
25. On 8 November 2019, UKAD charged the Player with violating ADR Article 2.1 in that a Prohibited Substance or its Metabolites or Markers were present in his Sample.
26. The Player responded on 28 November 2019. He denied committing an ADRV. He said that he understood that the use of any form of steroids was prohibited and that he could be randomly tested and that he would never have put his role at the club into jeopardy by taking a banned substance. He said that:

"I have reflected and thought about this matter, whether it was maybe a supplement I had bought online, a pre work out drink I had bought at the gym? Its really bothered me to try and find out the detail behind this. The only tablet/medication I have ever taken other than a paracetamol over the last 10 years was back in May this year. I had caught a sexual disease off a woman I had been dating, I was embarrassed to go to the

doctor and I assume it was either "thrush" or "Chlamydia". I confided in one of my friends and he told me he had medication to help clear it which he had bought online, he then gave me a few tablets and he told me to take them for the next 5 days to clear it. I thought nothing of it, my irritations had healed and I felt much better. I rang him last week out of curiosity, I asked him what he had given me and did he know if they were safe? He said he had ordered them online, he wasn't sure of the pharmaceutical company that made them, but the tablets were called "Fluconazole". I did some google research into this and I found out that "Methandienone" was a compound that was labelled under the medical umbrella "Fluconazole".

The Player concluded by stating he wished to go to a hearing as *"I wish to prove this substance found within my urine sample was absolutely unintentional"*.

27. On 6 March 2020, the Player's lawyer wrote to UKAD setting out the steps that the Player and he had taken to try and identify the brand of Fluconazole that the Player had taken. In that letter Mr Hill explained that:

"Our aim was to find that package that stood out, purchase those Fluconazole tablets and forward them to yourselves to get tested, therefore identifying that compound contained traces of Metandienone. We even spent tireless hours looking at tablet formats themselves, as possibly the tablet itself could be better identified than the packaging itself"... "With regards to the next stage I will happily take your direction on this, I feel we have had enough time a fair extension into gathering evidence and trying to find the right tablet Mr Patton took. Within google research of "Metandienone" results that appear are of links between "Fluconazole and Metandienone", these articles/subjects written gave us that hope that the compound found within Mr Patton's urine sample was the link" Mr Patton made an error of having an encounter with a woman whilst on his rugby tour during dully 2019..."

Mr Hill's letter was accompanied by a witness statement from Mr Roberts who said:

"After contracting a STD myself I had medication called Fluconazole which I gave to Jesse Patton and I told him to take a week's worth. To the best of my knowledge the tablets what I had taken were fluconazole. I worked with Mr Hill from Ludorum Associates and he explained that Jesse Patton had a banned substances in his system and I definitely was not aware that the tablet contents. I told Mr Hill that I could not find any packaging or left over tablets. I know that they were quite small and white but that's all".

28. UKAD's evidence consisted of witness statements from Nick Wojek and Professor David Cowan. Mr Wojek's evidence was that the presence of metabolites in the Player's Sample is an indication that the metandienone had been administered from a synthetic source as the human body does not naturally produce it; that metandienone is used illicitly in sport for its anabolic effects and that there are no preparations containing metandienone that are licensed for use as a medicine in the UK. Mr Wojek also explained that metandienone may appeal as a doping substance to enhance a rugby player's physique, power and/or strength or to hasten recovery following an injury.
29. Professor Cowan testified that Fluconazole and metandienone are chemically and pharmacologically different compounds. He disagreed that metandienone is "labelled under the medical umbrella Fluconazole" as the Player had claimed. He also stated that the metabolites identified in the Player's Sample are detectable for days rather than weeks after oral admission and that in his opinion the finding of metandienone metabolites in the Player's Sample *"is not explained by the account of the possible ingestion by the athlete in May 2019."*
30. On 15 May 2020, the Player emailed a further statement to UKAD. The substance of that statement was identical to the statement the Player had provided on 28 November 2019 with the Player again confirming that he had taken a dose of unprescribed medication prior to the testing which he had obtained from a friend after he caught a sexually transmitted disease from a woman he had been dating.

UKAD's SUBMISSIONS

The Charge

31. UKAD submitted that the findings of the Out-of-Competition Test clearly demonstrate that metabolites of metandienone were present in the Sample collected from the Player on 24 September 2019 and that as such, an ADRV contrary to ADR Article 2.1 was committed by the Player.

32. UKAD submitted that although the Player indicated in his 28 November 2019 Response that he denied the Charge, he has not challenged the ADRV. Accordingly UKAD submitted that the commission of an ADRV contrary to ADR Article 2.1 can be proved. As to this UKAD submitted that ADR Article 2.1 creates a strict liability offence and Article 2.1.1 expressly states that it is not necessary for UKAD to prove intent, Fault, negligence or knowing Use of the Prohibited Substance by the Player in order to sustain a charge for Presence. Further, an alleged lack of intent, Fault, negligence or knowledge on the part of the Player is not a valid defence to such a charge.
33. UKAD submitted that the principal issue for the Tribunal to determine is sanction.

Sanction

34. UKAD submitted that its records indicate that this is the Player's first ADRV. Accordingly, the period of Ineligibility to be applied is set out at ADR Article 10.2.1 (a):

"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 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, the period of ineligibility shall be two years."

35. UKAD's position is that in this case the period of Ineligibility is four years unless the Player can demonstrate on the balance of probabilities, that his actions were not intentional. UKAD pointed to the definition of "intentional" at ADR Article 10.2.3:

"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..."

36. UKAD submitted that although 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.
37. UKAD referred to *UKAD v Buttifant (Appeal) SR/NADP/508/2016* where the Panel recorded at paragraph 31 of the Decision:

"It is only in a rare cases that the athlete will be able to satisfy the burden of proof that the violation of article 2.1 was not intentional without establishing on the balance of probabilities, the means of ingestion".

UKAD also referred to the decision in *WADA v FIFA and Jose Paolo Guerrero CAS 2018/A/5571, Jose Guerrero v FIFA CAS 2018/A/5546* in which the CAS Tribunal set out the five principles it considered relevant in establishing the source of the Prohibited Substance as follows:

"65. The Panel considers the relevant principles to be as follows:

- (i) It is for an athlete to establish the source of the prohibited substance, not for the anti-doping organisation to prove an alternative source to that contended for by the athlete;...*
- (ii) An athlete has to do so on the balance of probabilities. Evidence establishing that a scenario is possible is not enough to establish the origin of the prohibited substance...*
- (iii) An athlete had to do so with evidence, not speculation...*
- (iv) It is insufficient for an athlete to deny deliberate ingestion of a prohibited substance and, accordingly, to assert that there must be an innocent explanation for its presence in his system;... and*
- (v) If there are two competing explanations for the presence of the prohibited substance in an athlete's system, the rejection of one does not oblige (though it may permit) the hearing body to opt for the other. There is always available to the hearing body the conclusion that the other is not proven..."*

38. Further decisions relied upon by UKAD included *UKAD v Songhurst, SR/0000120248*, *UKAD v Graham, SR/0000120259* and *UKAD v Williams, SR/0000120251* all of which support the proposition that in order for a player to establish that an ADRV was not intentional he/she must first establish how the Prohibited Substance entered his/her system.
39. UKAD submitted that the only explanation the Player had provided regarding the potential source of the AAF was medication which he claimed to have taken to treat a sexually transmitted disease earlier in 2019.
40. UKAD submitted that the Player had not met his burden of establishing that the ADRV was not intentional and that the four year period of Ineligibility must be imposed on the Player under ADR Article 10.2.1(a). In support of this submission, UKAD made the following points:
 - 40.1. The Player had failed to establish how the metandienone had entered his system. His explanation amounted to speculation and did not account for the presence of the Metabolites in his Sample because he had not been able to identify the batch or brand of medication and nor had he provided any tablets nor any evidence as to its ingredients. Further Fluconazole is a different compound from metandienone and the Player had produced no evidence to establish that any form of Fluconazole contains metandienone.
 - 40.2. Further, even if the Player had ingested metandienone in May or July 2019 that would not account for the concentrations of Metabolites found in the Sample collected on 24 September 2019 as it is clear from the evidence of Professor Cowan that the ingestion of metandienone in May and July 2019, even at levels higher than the normal dosage, does not account for the AAF in the Sample collected on 24 September 2019.

No Significant Fault or Negligence

41. UKAD also made submissions regarding No Significant Fault or Negligence, in essence submitting that as the Player was unable to establish how the metandienone came to be present in his system he cannot establish that he acted with No Significant Fault or Negligence. UKAD provided detailed submissions on this point to be considered in the event that the Tribunal was minded to consider these provisions of the ADR but concluded: *"Ultimately for the reasons set out above, Mr Patton cannot establish, on the balance of probabilities how the Metabolites of metandienone came to be present in his system and therefore it is not possible to make a cogent assessment of Mr Patton's Fault in response to his ADRV. For a Player to obtain a reduction in sanction without proving how the prohibited substance entered into his body would go behind the rationale of the ADR, UKAD submits that this cannot be a case where ADR Article 10.5.2 can be applied"*.

Commencement of Sanction

42. UKAD submitted that the sanction should commence on 8 November 2019, the date of the Player's Provisional Suspension.
43. UKAD concluded its submissions with the relief sought as follows:

"For the reasons set out above, UKAD respectfully requests that the Panel:

a) Finds that Mr Patton has violated ADR Article 2.1 in that Metabolites of a Prohibited Substance were present in a Sample he provided on 24 September 2019;

b) Finds that Mr Patton has not discharged the burden on him under ADR Article 10.2.1(a) to establish that the ADRV was not "intentional" as that term is defined in Article 10.2.3;

c) Imposes a period of Ineligibility of four years under ADR Article 10.2.1, such period to run from 8 November 2019 (unless ADR Article 10.11.2 applies);

d) Grants such other and further relief as it deems appropriate."

RESPONDENT'S SUBMISSIONS

44. No formal submissions were received from the Respondent in accordance with the Tribunal's directions. However, the Tribunal took note of the various emails that the Player sent to UKAD, in particular his emails of 28 November 2019 (set out at paragraph 25 above) and 14 May 2020.

45. In his email to UKAD on 14 May 2020, the Player said:

"As a small business owner and father of a young child, I can assure you that I would not put my reputation into disrepute intentionally, and implore you to reconsider your decision for my future as a player at Ystalyfera RFC.

I am aware that even though this substance that was found in my system is not prohibited, I would confidently test clear again.

I have never used anabolic steroids, and my physical appearance is a true reflection of that.

I have already suffered enough stress, anxiety and missed enough of the sport I love, I just wish to put this whole matter behind me..."

46. The Tribunal also took into account the statements made by the Player during the hearing. As to this:

46.1. At the hearing, the Player confirmed that he did not deny the presence of a Prohibited Substance in his system but stated that he had not knowingly taken a Prohibited Substance. However he was unable to provide any further evidence or detail regarding the medication he claimed to have taken other than in relation to timing. Although he had stated in his 28 November 2019 and 15 May 2020 emails that he had taken the medication in May 2019, during the hearing he explained that although he had participated in a rugby tour at the end of May, he did not realise that he had contracted a sexually transmitted disease until July and did not take the tablets until August. He confirmed during the hearing that he had not sought medical help or advice prior to taking the tablets.

46.2. When questioned about whether there might be any other explanation for the AAF, he said that although he purchased supplements online on a regular basis he always checked the ingredients and did not buy anything that said it contained steroids. However he also acknowledged that he did not check the ingredients of the supplements that he purchased but simply checked the labels to see if they referred to steroids; he did not check the individual ingredients against the WADA Prohibited List and nor had he sought any advice or assistance regarding the supplements that he purchased.

46.3. Professor Cowan, when questioned by the Player stated that in his view, even if the metandienone had been consumed in mid-August 2019, that would not account for the level of metandienone found in the Player's system on 24 September 2019 when the Sample was taken. Professor Cowan's view was that whatever substance the Player had taken he had taken within a few weeks of the Sample collection time. Professor Cowan also stated that fluconazole is eliminated very quickly and that it would have disappeared completely if it was ingested 6 weeks before the Sample was taken.

THE TRIBUNAL'S FINDINGS

47. The Tribunal is satisfied that the Player committed an ADRV. The test results were clear and although the Player initially denied the Charge, he did not at any point contest the presence of Metabolites of metandienone in his Sample.
48. Metandienone is a non-Specified Substance and is prohibited at all times. As such, pursuant to ADR Article 10.2.1(a), a four year period of Ineligibility must be applied unless the Player is able to establish that the ADRV was not "intentional".
49. The Tribunal accepts UKAD's submission that save in exceptional and rare cases, in order for the Player to establish that the ADRV was not intentional for the purposes of ADR Article 10.2.1(a), he must first establish how the Prohibited Substance entered his system.

50. As to this, the Tribunal finds as follows:

50.1. The only explanation offered by the Player was that he had taken medication, which he had obtained from a friend, to treat a sexually transmitted disease. The Player was not clear as to when the medication was taken – in his November 2019 response he claimed it had been taken in May 2019; during the hearing he claimed to have taken it in July 2019 and even as late as August. Mr Roberts' witness statement suggests it was taken in July 2019.

50.2. The Player did not seek medical advice for treatment of his sexually transmitted disease and nor did he seek any advice regarding the medication and/or its components before he took it. It was not until after he was charged that the Player asked Mr Roberts for details of the medication and was told that it was fluconazole. The Player subsequently carried out "google research" and learned that metandionene was "labelled under the medical umbrella "Fluconazole".

50.3. The Player did not produce any documentary or physical evidence to support his explanation of how metandienone had entered his system. He did not produce the tablets he claimed to have taken or the packaging for the tablets and was apparently unable to identify the tablets through his online research. He did not produce any Sample for testing.

50.4. Professor Cowan's evidence was clear that (i) fluconazole could not have been the source of the metandienone detected in the Player's Sample; and (ii) a substance containing metadienone administered by the Player in May or July 2019 could not account for the finding in his urine on 24 September 2019.

50.5. The Player offered no other explanation for as to how the metandienone had entered his system.

51. Having taken the above matters into account, the Tribunal determined that the Player has not been able to establish how the metandienone entered his system.

52. The Tribunal moved on to consider whether this is one of those rare or exceptional cases in which it is satisfied that the ADRV was not intentional notwithstanding that the Player had failed to establish how the metandienone entered his system. The Tribunal determined that it is not: – even if the Player did not deliberately ingest metandienone, he did not seek medical advice regarding his sexually transmitted disease and nor did he seek advice regarding the medication he took to cure his sexually transmitted disease. Further he did not check the components of the medication prior to taking it and made no inquiries at all regarding the components until after he was charged. He exercised no caution whatsoever and was reckless as to what he was ingesting. Further, he adopted a similar approach to the supplements he purchased online and the drinks he bought at the gym. He sought no advice or assistance and did not check the ingredients of any of the products he consumed other than to satisfy himself that they were not labelled as steroids. Again, he was reckless.
53. The purpose of the ADR is to punish cheats. In this case, as the substance was a non-Specified Substance, the burden of proof was upon the Player to demonstrate that he was not cheating and/or did not intend to cheat. That is a burden that the Player has failed to discharge.
54. As the Player has failed to demonstrate that the violation of ADR Article 10.2.1(a) was not intentional, there is no need for the Tribunal to consider whether the Player acted with No Significant Fault or Negligence.

THE DECISION

55. For the reasons set out above, the Tribunal makes the following decision:
- 55.1. An ADRV contrary to ADR Article 2.1 has been established;
 - 55.2. As the Player has failed to satisfy his burden to establish that the ADRV was not intentional, pursuant to ADR Article 10.2.1 the standard sanction of four years Ineligibility shall apply to Mr Patton;

55.3. The period of Ineligibility started on 8 November 2019, the date on which Mr Patton was provisionally suspended and shall therefore end at midnight on 7 November 2023;

55.4. As such, Mr Patton shall not be permitted to participate in any capacity in a competition or other activity (other than Authorised Anti-Doping Education or Rehabilitation programmes) organised, convened or authorised by the WRU or any body that is a member of, affiliated to, or licenced by the WRU;

55.5. Pursuant to ADR Article 10.8, all competitive results Mr Patton obtained between the date of Sample Collection and commencement of his Provisional Suspension shall be Disqualified with all resulting Consequences, including forfeiture of any medal, title, points and prizes; and

55.6. In accordance with ADR Article 13, the Parties have 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.



Michelle Duncan (Chair)

For and on behalf of the Tribunal

11 June 2020

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