SR/031/2020

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

Before:

Jeremy Summers (Chair)
Blondel Thompson
Dr Tim Rogers

BETWEEN:

UK Anti-Doping Limited — **Anti-Doping Organisation**

and

Danial Roberts — **Respondent**

DECISION OF THE ANTI-DOPING TRIBUNAL

Introduction

1. This is the unanimous decision of an Anti-Doping Tribunal (the 'Tribunal') convened under Article 5.1 of the 2019 Procedural Rules of the National Anti-Doping Panel ('the Procedural Rules') and Article 8.4 of the UK Anti-Doping Rules (the 'ADR') to determine Anti-Doping Rule Violations ('ADRV') alleged against the Athlete.

2. The ADRVs relate to alleged violations of ADR Article 2.3 (Evading, Refusing or Failing to Submit to Sample Collection) and Article 2.5 (Tampering or Attempted Tampering with any part of Doping Control).

3. The Athlete was charged by letter issued by UKAD dated 24 December 2019 and the Tribunal was appointed by the President of the National Anti-Doping Panel (the 'NADP').

4. At a hearing on 27 and 28 July 2020, which was held remotely during the COVID crisis, the Athlete was represented by Mr Timothy Meakin of counsel, and UKAD appeared through Mr Paul Renteurs of counsel. The Tribunal records its gratitude to both advocates.

5. Case management conferences were held by way of telephone conference calls on 14 February and 12 May 2020 at which the parties were represented. Directions were thereafter issued, all of which were fully complied with.

6. Terms not specifically defined in this decision are defined by reference to definitions with the ADR or The World Anti-Doping Code Standard for Testing and Investigations ('ISTI').

Preliminary Issues

7. Applications were additionally made on behalf of the Athlete seeking firstly to dismiss the charge brought under Article 2.5 on the basis that there was no evidence on which the charge could reasonably be upheld, and secondly for an in person hearing to be allowed. UKAD opposed both applications.

8. Both applications were carefully considered but rejected. The Tribunal could find no provision set out in the ADR enabling the summary dismissal of a charge, but in any event was satisfied that there was sufficient evidence on which the Tribunal was required to make findings. Given the COVID-19 crisis, which in any event had caused the proceedings to be subject to lengthy delay, the Tribunal was not willing to order a personal hearing at some unknown future time. The hearing therefore proceeded remotely.[1] At its conclusion the Athlete confirmed that he had been content with the process and had been able to make all the points he had wished to advance.

[1] The Panel had endeavoured and hoped to conduct an in person hearing in the near future but the current circumstances made this impossible.

9. For completeness, the Athlete had been subject to a Provisional Suspension imposed by UKAD, which took effect from 24 December 2019. Following an application made on behalf of the Athlete, the Provisional Suspension was lifted by an order made by the Chair dated 5 February 2020.

Jurisdiction

10. Jurisdiction was not challenged but for completeness the Athlete is a 37-year-old male. At the material time he was registered as a player with Cambrian Welfare RFC.

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

12. At all material times the Athlete was a registered player with the WRU, and thus subject to, and bound to comply with, the ADR.

Brief Facts

13. The facts set out in the Notice of Charge dated 24 December 2019 contained the following allegations.

14. Under Mission Order M-950293670, UKAD Doping Control Personnel ('DCP') attended a training session on 25 April 2019 to conduct an Out-of-Competition squad test upon Cambrian Welfare RFC.

15. The Athlete, who was a player and coach at Cambrian Welfare RFC, was selected for Sample collection. Upon entering the Doping Control Station ('DCS') he was formally notified by the Lead Doping Control Officer ('DCO') Mr Wesley Spencer and signed a Doping Control Form ('DCF') to confirm this notification.

16. The Athlete was chaperoned during Sample collection by Mr Michael Norton. He initially engaged with the Sample collection process and allegedly provided approximately 85mL of urine (the 'partial Sample'), which is below the Suitable Volume of Urine for Analysis (a minimum of 90mL). He was therefore advised that a further Sample was required of at least 90mL (to meet the Suitable Volume of Urine for Analysis).

17. The Athlete then became aggressive and repeatedly told the DCP to *'fuck off'*. He threatened to dispose of the partial Sample unless the DCP accepted the urine provided as an adequate Sample. The DCP warned the Athlete that the partial Sample was not adequate and that he was required to provide a further Sample. The Athlete then poured the partial Sample into a urinal.

18. The Athlete refused to sign the DCF to confirm that he had refused to provide a further Sample. He then left the DCS without having provided a further Sample of a Suitable Volume of Urine for Analysis.

19. The Athlete was interviewed by UKAD on 10 July 2019. He accepted disposing of the partial Sample into a urinal and indicated that the reason for this was because his young son was present, and in particular that he needed to be returned to his mother, with whom the Athlete was in dispute at the time.

The Charge

20. ADR Article 2.3 provides as follows:

> ***2.3 Evading, Refusing or Failing to Submit to Sample Collection***
>
> *Evading Sample collection, or without compelling justification, refusing or failing to submit to Sample collection after notification of Testing as authorised in these Rules or other applicable anti-doping rules.*

21. ADR Article 2.5 provides a separate ADRV:

> ***2.5 Tampering or Attempted Tampering with any part of Doping Control***
>
> *Conduct that subverts the Doping Control process but that would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, intentionally interfering or attempting to interfere with a Doping Control official, providing fraudulent information to an Anti-Doping Organisation or intimidating or attempting to intimidate a potential witness.*

UKAD Evidence

22. UKAD called a number of DCOs to give evidence in support of the charges. For the purposes of this decision only a summary of that evidence, both written and oral, is recorded below, but the totality of their evidence, and that of all other witnesses, was fully and carefully considered by the Tribunal.

Wesley Spencer

23. As noted above, Mr Spencer was the lead DCO for the Mission. He confirmed the content of his two witness statements dated 11 November 2019 and 2 December 2019.

24. He had spoken with the Athlete initially on the pitch and asked him to provide a list of the players who were present. A number of the players who had been pre-selected for Testing were either not present or subsequently left the venue. As the Athlete was named on the reserve list on the Mission Order Mr Spencer notified him that he was required for Testing.

25. When later told by Mr Spencer that he been selected for Testing, he replied "*Come on let's get on with it then."* Mr Spencer then formally notified the Athlete that he had been selected inside the main changing room that was being used as the Doping Control Station ('DCS'). The Athlete signed the Doping Control Form ('DCF') that contained a declaration that he understood that if he refused or failed to give a Sample then he would commit an ADRV. Mr Spencer then handed responsibility to his colleague Mr Norton before temporarily leaving the DCS.

26. As he returned to the DCS he heard shouting. He then saw the Athlete holding his Sample pot shouting at Mr Norton and a further DCO Mr Hood. The Athlete was aggressive and intimidating and shouted words to the effect of *"it's only 5 mils fucking short, stop being childish, fuck off."* Mr Hood tried calmly to explain the consequences of failing to provide a further Sample but the Athlete said "*fuck off*" and walked toward the urinal.

27. Another club coach, Mr Jack Dunning, who was in the DCS tried to stop the Athlete saying "*Don't do that*" but was ignored. The Athlete then poured away his Sample and shouted that the DCP were all "*muppets*". The Athlete then left the DCS refusing a request from Mr Norton for him to sign the DCF.

28. In response to further questions from Mr Renteurs he said that the Athlete had appeared agitated when told he was to be tested. Mr Dunning had been about 4-5 meters away from the Athlete and in Mr Spencer's view it would have been audible to the Athlete when he told him not to throw the Sample away.

29. Whilst Mr Spencer did not accept that the Athlete had asked if he could take his son home, he conceded that whilst, not ideal, such a request could have been accommodated provided that the Athlete had been chaperoned and had been able to walk there as opposed to going in a vehicle.

30. In cross examination he confirmed that position and that no request had been made by the Athlete

to take his son home. The Athlete had been notified and had provided a Sample almost immediately. He had then been informed the Sample was 5mL short at which point he became aggressive.

31. He was not able to tell whether the Athlete was willing to be tested but had handed over to Mr Norton and then left the DCS.

32. He had come back in when he heard raised voices and had seen the Athlete holding the Sample before witnessing him return to the urinal and throw it away.

33. Although Mr Spencer initially suggested in his oral evidence that the Athlete had been warned by DCOs not to throw the Sample away he then agreed that this had not happened and that, in fact, only Mr Dunning had said that to the Athlete.

34. He did not recall the Athlete asking repeatedly if the DCOs were going to process the Sample and Mr Hood refusing to accept the Sample. He had not seen the Athlete's son as being visibly upset.

35. He thought that his colleague Mr Hood had tried to explain what would happen if he did not provide a further Sample, but that this had not been successful because the Athlete was not listening.

36. In response to questions from the Tribunal, he confirmed that he had simply read the warning on the DCF and asked the Athlete to sign it, but that he had not (therefore) provided any other briefing or detail to the Athlete.

37. Mr Spencer accepted that it would have been possible to have analysed the partial Sample, but this had not been explained to the Athlete because he had thrown it away and left. He accepted that had any DCO said "don't throw that away" the Athlete would have had that opportunity and that the Sample would have been analysed.

38. Mr Spencer was able to produce a specimen bottle and show the gradations marked on the side. A photograph of the bottle was subsequently provided and was marked as exhibit WS/7.

<u>Michael Norton</u>

39. Mr Norton confirmed the content of his written statement dated 23 October 2019.

40. He had been asked to chaperone the Athlete. The Athlete did not appear happy but had provided a Sample in the urinals as requested whilst refusing to wash his hands or wear gloves when doing so. He returned to the changing room with the Athlete where the Sample pot was placed on a bench for him to measure it.

41. He informed the Athlete that the Sample only contained 85mL and so he would need to provide a "*further Sample to meet the required volume of 90mL*".

42. The Athlete had then become increasingly aggressive telling him to "*fuck off*". His colleague Mr Hood then came over to assist and had said words to the effect "*with that amount it wouldn't normally be long before he was able to provide a second sample and achieve the required volume*". The Athlete was however similarly aggressive towards Mr Hood and not really listening.

43. The Athlete said that he could not provide a further Sample because his son, who was present in the DCS, was with him. Mr Norton offered to take the boy outside and supervise him whilst a further Sample was provided.

44. The Athlete asked Mr Norton and Mr Hood something to the effect of *"Are you going to process this?"* When Mr Hood responded by saying that the partial Sample could not be processed, Mr Roberts said words to the effect of *"If you won't, I'll chuck it down the toilet."*[34]

45. Mr Dunning told the Athlete not to throw away his Sample but he walked into the urinal and poured the Sample away.

46. Mr Norton asked the Athlete to sign the Doping Control Form ('DCF'). The Athlete said "*fuck off*" and left the DCS with his son.

47. In response to further questions from Mr Renteurs, he confirmed that he had gained a general sense that the Athlete was not happy being tested from his body language.

48. The Sample provided by the Athlete was taken to the bench in the main changing room. He had then read the gradation and seen it was under the required 90mL. It had been roughly halfway between the 80mL and 90mL lines.

49. He had tried to explain that he needed at least 90ml to constitute a Sample, but the Athlete had become aggressive. His colleague Mr Hood had intervened and tried to explain calmly what was required and that it was the same for all athletes, but the Athlete was not listening. He was agitated and his swearing had been quite prolific.

50. In cross examination he confirmed that his statement had been written 6 months after the event and contained a lot of additional detail. His recollection had become hazy in the intervening period.

51. He was the chaperone and came into the process after the Athlete had been notified by Mr Spencer.

52. The Athlete had not refused to be tested but had refused to wear gloves or wash his hands before giving his Sample.

53. He accepted that he had to make sure that the Athlete was fully aware of the rules and needed clear guidance. He had not told the Athlete how much urine he needed to provide having assumed someone else had done this. He agreed that it was relevant that the Athlete was told that he needed to provide at least 90mL, and that the Athlete had the right to be informed what would constitute a Sample. He accepted that he had not advised the Athlete of that detail.

54. He had not taken the Sample but had asked the Athlete to place it on the bench. He accepted that this detail was not recorded in his statement.

55. He agreed that the Sample was measured in the changing room not the urinal. As such the Athlete could not have been aware that the Sample was short until he was in the changing room and so would not have complained and started swearing whilst he was in the urinal.

56. He had a PhD in chemistry and was confident that he had accurately measured the Sample. He had not recorded the process in his statement, because he had not been asked for that detail, but he had followed the standard procedure. He would never take a photograph of the Sample bottle because that was not part of the process.

57. He stated that "*the bench was fairly level and that was why I crouched down to the level of the meniscus*". He accepted that the meniscus curved up but had taken that into account. He thought the level of accuracy was, on his visual measurement, plus or minus 1mL. He could not tell if it was 84 or 86 mL but was sure it was between 80 and 90mL.

58. He could not remember how the Sample had got back into the possession of the Athlete but was clear he had not given it to him and that he would never touch a Sample.

59. He did not accept that the Athlete had not been told that he only needed to provide another 5mL as opposed to having to give another full Sample. In this respect he thought that his colleague Mr Hood had advised the Athlete of that position. He thought this was set out at paragraph 17 of his statement.

60. He did not see what other options the Athlete had, as he had not provided a Sample. He did not agree that it would have been possible for the Athlete to have taken his son home and then come back to complete the test.

61. The situation had got quite heated and he thought that the argument about the Sample had lasted about 3-4 minutes in total. He could not recall the Athlete offering to take his son home and come

back. He was in any event clear that he did not think the Athlete was allowed to leave the DCS.

62. Whilst he had DBS clearance, he would not have tried to look after the Athlete's son unless other people had been around.

63. He did not agree that he and others had refused to accept the Sample, stating that they had refused to process it. This was because he did not think that it was possible to process the Sample because at least 90mL was needed to do so.

64. He agreed that no one from UKAD had told the Athlete not to throw the Sample away.

65. He reiterated that the Athlete was getting increasingly abusive.

66. It was put to him by the Tribunal that Mr Spencer had indicated that it would have been possible to have taken his son home, and he fairly conceded that he had been wrong in his understanding on this point.

67. He had not had any concerns over the provision of the Sample itself, save for the Athlete not washing his hands.

68. He hoped that the Athlete had not thought that he had needed to provide another full Sample but could not recall the words used to explain the position to the Athlete.

Gareth Hall

69. Mr Hall confirmed the accuracy of his written statement dated 23 October 2019.

70. He had been responsible for another athlete within the DCS but had heard the Athlete shouting and swearing in the toilet area about the volume of his Sample. He did not observe the Athlete's son as being upset.

71. He could not recall the precise wording, but his evidence was that he had heard the Athlete being told he that had only provided 85mL. The Athlete became increasingly loud and foul mouthed.

72. In cross examination he confirmed that he had not prepared any statement until October 2019, six months after the incident.

Walter Hood

73. Mr Hood confirmed the accuracy of his written statement dated 8 November 2019.

74. He had been in the DCS with another athlete when he saw the Athlete and Mr Norton emerge from the urinal. The Athlete was holding his Sample bottle. Mr Norton was trying to explain that the Sample volume was insufficient at which point the Athlete became abusive. He approached the Athlete and told him that the process was the same for all athletes and that he would be required to provide another Sample. He too was told to "*fuck off*".

75. His written statement recorded that when the Athlete indicated that if the DCOs did not accept his Sample he would throw it away, Mr Dunning had said "*Don't do that*". With reference to the Athlete's Sample, it also contained the words "*when we refused to accept it*".

76. Although he had tried to explain the process and offered to do so he had not been successful as the Athlete would not listen and was just abusive. He had therefore not got much further with him. He had never experienced the conduct demonstrated by the Athlete in his previous 888 missions.

77. In a question from Mr Renteurs he sought to clarify that Mr Norton had not refused to accept the Sample but had said to the Athlete "*we can't process that amount*".

78. In cross examination he however confirmed that the words "*we can't process that amount*" came from Mr Norton not himself.

79. He again stated that despite the fact that the wording of his statement did not say this, they had not refused to accept his Sample per se but had refused to process it.

80. He had first heard the argument in the toilet area, and whilst he could not now recall the words it related to Mr Norton telling the Athlete his Sample was insufficient.

81. Mr Hood had not witnessed Mr Norton measure the Sample. It was put to him that Mr Norton's evidence was that he had measured the Sample in the changing room not the urinal. Mr Hood agreed that the Athlete would not have known that the Sample was short until Mr Norton had told him, but again stated that he had not seen Mr Norton measure the Sample whilst in the changing room.

82. He was clear that he had never mentioned 80mL or 90mL and had just asked the Athlete whether he would like him to explain the process. He did not get the chance to do so because the Athlete had told him to "*fuck off*".

83. Mr Norton had not told the Athlete in his presence that that 90mL was acceptable but that 85mL was not. Mr Hood could not therefore explain how the Athlete would have understood that the issue was only about providing another 5mL.

84. He agreed that the Athlete had asked them to process his Sample, but that when they had refused to accept it for processing, he had thrown the Sample away. The Athlete did not offer the Sample to him and he could not take it away as it did not have enough urine. He had simply offered to explain the process but had been told to "fuck off".

85. In response to questions from the Tribunal, Mr Hood confirmed that he had not explained to the Athlete the consequences of throwing the Sample away and that he had not heard any of his colleagues do so.

86. He further described the overall situation as "shambolic" because of issues that had arisen before his team had arrived.

87. Whilst he had never experienced aggression as exhibited by the Athlete in previous missions, he did not think the Athlete was trying to intimidate him but was just angry about having to give another Sample.

88. He confirmed that the bench was a continuous feature around the changing room walls and was not in the urinal.

89. The Chair summarised his evidence as being that he had not seen Mr Norton examine the pot; neither he nor Mr Norton had explained the difficulty with 85mL as opposed to 90ml and that only another 5mL was needed; neither of them had explained to the Athlete the consequences of throwing the Sample away. Mr Hood agreed with that summary.

Derrick Price

90. Mr Price confirmed the accuracy of his written statements dated 26 April 2019 and 31 October 2019.

91. He had been in the DCS processing another athlete. He heard shouting and then saw the Athlete come out of the urinal holding his Sample pot. The Athlete became increasingly loud and he described him as being aggressive and intimidating. He was worried that the Athlete might become violent and was upset that this behavior was witnessed by the Athlete's son.

92. His written statement recorded that Mr Dunning had later apologised for the Athlete's conduct.

93. He had been a DCO for 11 years and considered the Athlete's conduct to have been the most intimidating he'd ever experienced.

94. In response to cross examination, he confirmed that the Athlete had never verbalised violence, but his demeanor would have made him personally feel intimated.

95. He had not heard anything beyond the Athlete swearing and had no recollection of the words used by the parties. He agreed that the Athlete would have to be informed about the measurement but had no recollection of any discussion around 85mL or as to the Athlete saying “are you going to process this?”.

96. In response to questions from the Tribunal, he confirmed that the procedure needed to be explained to the Athlete and then assisted by saying how he would do so including the need to provide 90mL. The necessity to wash hands or wear gloves was for the Athlete’s own protection. For athletes who had not been tested before he would go more slowly in explaining the process including pointing out the 90mL line. If an athlete gave a short Sample this would be taken and sealed. The athlete would then give a further Sample that would then be added to the original sealed Sample and processed.

97. He said there was a script issued by UKAD if an insufficient Sample is given. There was a process whereby a short Sample could be sent in, although this was very rare. He had been involved in a previous mission where a Sample of 70mL had been submitted.

Anthony Thomas

98. Mr Thomas confirmed the accuracy of his written statement dated 24 October 2019.

99. He had been in the DCS with another athlete. He had seen the Athlete come out of the urinals with Mr Norton, with Mr Norton explaining that the Sample was short, and he would have to provide another Sample.

100. The Athlete was aggressively swearing and shouting, and he thought that there might have been a need to restrain the Athlete to prevent an assault. He saw the Athlete go back into the toilet and throw the Sample away. He then refused to sign the DCF.

101. In response to cross examination, he had not seen the Sample measured, he was aware that the Athlete had been required to provide a further Sample but could not recall the precise words used. He however felt that the Athlete had been so aggressive that there was nothing that anyone could have said to get through to him.

102. Answering the Tribunal, he indicated that he was a former prison officer and he felt the Athlete had

been trying to intimidate. When asked what his intention was, he said he could not speak as to that, but that the Athlete had been extremely aggressive and had no intention of listening to anyone.

103. Responding to further questions from Mr Meakin, he reiterated that the Athlete had not given anyone a chance to explain. However, he agreed that at the outset of the testing process an athlete should be informed of the process clearly and that this was "*part and parcel of the process*". There was a script DCOs could follow and should do every time, which included showing an athlete the Sample pot and the 90mL line. If that was not done, he did not think it would invalidate the process but that the DCO should then proceed with the partial Sample procedure.

Jack Dunning

104. Mr Dunning was the final UKAD witness and he confirmed the accuracy of a written statement he had provided on 10 September 2019.

105. This confirmed that the Athlete had been with his son, that he had lost his temper in the DCS but that he had been subject to considerable personal pressure due to family issues at the time he was tested.

106. Answering questions from Mr Meakin, he confirmed that that Athlete had repeatedly asked UKAD to accept his Sample, but that they did not want anything to do with it.

107. The Athlete had been concerned that it would take a long time to provide another Sample. The Athlete did not think he was being listened to or treated fairly.

108. In his opinion, the Athlete could have been treated differently. The Athlete was highly regarded in the community.

Evidence from the Athlete

109. The Athlete gave oral evidence before the Tribunal and confirmed the accuracy of his written statement dated 29 February 2020.

110. He apologised for his conduct which had let many people down. He was going through acute family problems at the time and had his 5-year-old son with him.

111. He had agreed to be tested and had given a Sample. However, he had not been told the volume of Sample that was required and so had not refused or failed to give a Sample.

112. He had then also offered to give another Sample if he could take his son home first. The procedure was not explained to him and no attempt at a compromise solution made. He felt intimidated by the number of DCOs present. He had only disposed of the Sample because the DCOs had refused to accept it.

113. In response to further questions from Mr Meakin, he again apologised for his behavior but was clear he had not threatened violence.

114. He was not given any rules about the Sample and not told to wear gloves. He was not told how much Sample was needed.

115. He had given the Sample to Mr Norton who handed it back to him telling him it was not enough. He had asked the DCOs over and over again if they were going to accept the Sample. He had been told he had to do a retest and understood this to mean provide a full 90mL. He was concerned that would take another two or three hours and he had his son with him. He had only found out during the evidence that he had only needed to give another 5mL. Had this been explained he would have probably stayed to finish but no one had ever told him.

116. He lived under a five 5-minute walk away from the ground as did his former partner.

117. In cross examination he confirmed that he had played rugby most of his life and fully supported the anti-doping regime.

118. Prior to being tested he was not aware of the Anti-Doping Rules stating he had received nothing from the WRU. He had however been notified by Mr Spencer and so knew that the process was governed by certain rules and that he had an obligation to comply.

119. He became aware that his Sample had not met the required volume when he was told that this was the position by Mr Norton as he was about to leave the DCS.

120. He agreed that he had been told he was required to provide another Sample but asked why he had not been told that all that was required was a further 5mL.

121. He was adamant that he had offered to take his son home and come back but no one had told him that this was possible.

122. The Athlete was referred to the record of an interview that he given to UKAD on 10 July 2019 and in

particular his answer to question 175 of that interview. He was also referred to a letter sent to him requiring him to attend that interview, which was not in evidence. When the Tribunal noted that this letter was potentially important to provide the correct context, noting that the interview appeared in large part to relate to another matter not before the Tribunal, Mr Renteurs advised that the letter could be made available. This was considered by the Tribunal, who determined that it would be unfair to the Athlete to admit new evidence at this very late stage, and after the close of UKADs case.

123. The Athlete did not in any event accept the suggestion that his answer to question 175 was inconsistent with his evidence given now, that he had offered to take his son home and come back.

124. He though accepted that, contrary to answer 91, he had not in fact told his ex-partner by phone that he had been selected for testing. He had not asked her to collect his son and had not taken any other steps to see if anyone could collect his son.

125. He accepted that he had reacted aggressively when told his Sample was short but had not been told all he needed to do was top it up by 5mL. He had thought that there was no way he could provide another 90mL when he had to get his son home.

126. He agreed that he had been focused on getting UKAD to accept his Sample and now knew that they could have done so, but the DCOs refused to accept it.

127. His main concern had been UKAD's refusal to accept the 85mL he had provided, and he had "*gone over the top*". He had asked them three times, maybe more to take the Sample and in the end when they refused he just disposed of it.

128. The Athlete said that he was at no time told that he could not throw the Sample away or that any DCO would throw it away. He had thrown it away because the DCOs had said they would not use it.

129. He conceded that it had not been reasonable to throw the Sample away but felt the whole night had not been reasonable.

130. He was unsure if Mr Dunning had told him not to throw the Sample away, but he might have done so.

131. It was put to him that Mr Norton would not have handed the Sample back to him, but he was *"100%"* sure that this had happened.

132. He again stated that his behavior had been bad but denied that he been so aggressive that he was simply not listening to anyone.

133. In re-examination he asked again why he had not been told that he needed to provide 90mL or that he simply needed to top the Sample up to comply with the process.

134. He had thrown the Sample away because he did not want it hanging around a facility used by many other teams and did not expect anyone to have to handle his urine.

Submissions

UKAD

135. The Tribunal had the benefit of being able to consider detailed and helpful written submissions from the parties, for which they were grateful.

136. Those submissions were further addressed at the hearing, and the Tribunal intends no discourtesy to either advocate in not recording these in full.

137. Mr Renteurs advised that UKAD considered that the charges were not in the alternative and that accordingly the Tribunal had to reach findings on both.

138. On the first charge, UKAD's primary position was that the Athlete's actions on the day of the test amounted to a refusal to submit to Sample Collection. In order to prove that charge, UKAD accepted that it must establish to the comfortable satisfaction of the Tribunal that:

a) The Athlete had been properly notified of the Testing;

b) That such notification was authorised under the ADR;

c) That the Athlete had refused to provide the Sample required; and

d) That the refusal was intentional.

139. Mr Renteurs referred to the evidence of the UKAD witnesses as set out above and submitted that it was clear that the Athlete had refused to provide a Sample as he had been required to do.

140. With respect to intention, he submitted the Athlete's actions were clearly intentional. He had plainly been made aware that the partial Sample provided was insufficient for testing purposes, and that he was required under the ADR to provide a further Sample of at least 90mL. There was no suggestion, that the Athlete was physically incapable of providing a Sample. He had chosen not to provide that

Sample, and that choice was a deliberate and intentional act on his part. In support of that submission, Mr Renteurs referred the Tribunal to the decision in *UKAD v Ryan Bailey*[2]

141. In the alternative, if the Tribunal was not comfortably satisfied that the Athlete's actions amounted to a refusal, at the very least his actions had amounted to a failure to submit to Sample Collection.

142. In order to establish that failure, UKAD had to prove:

a) That the Athlete had been properly notified of the Testing;

b) That such notification was authorised under the ADR

c) That he failed to provide the Sample requested; and

d) That the failure was either intentional or negligent.

143. UKAD again submitted that the evidence showed that the Athlete had clearly failed to provide a sufficient Sample, and that the failure was intentional if not, at the very least, negligent. The Athlete had plainly been made aware that he was required to provide a further Sample. He nevertheless chose to leave the DCS without providing such a Sample.

144. Mr Renteurs noted that both elements were subject to the defence of compelling justification. This was for the Athlete to prove on the balance of probabilities. In this respect the bar was high and Mr Renteurs relied on the decisions *Azevedo v FINA*[3] *and Brothers v FINA*[4] in support of that contention. In UKAD's submission the Athlete could not establish that any compelling justification had existed.

145. Turning to the second charge of tampering, Mr Renteurs referred to the definition of that term in the ADR:

> *Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing, misleading or engaging in any fraudulent conduct to alter results or prevent normal procedures from occurring.*

146. He also drew the Tribunal's attention to relevant provisions that were found in Articles 3 and 8.1 and Annexes D and F of the ISTI code.

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[2] SR/NADP/885/2017
[3] CAS 2005/A/925
[4] CAS 2016/A/4631

147. In UKAD's submission, an ADRV contrary to ADR Article 2.5 included any improper interference to prevent normal procedures from occurring. The normal procedures for Sample collection did not allow for or envisage the disposal of urine Samples (even partial Samples) as the Athlete had done. ISTI contained extensive provisions governing the collection, handling, processing and storage of Samples and partial Samples, which it had not been possible to follow because the Athlete had thrown away his Sample.

148. UKAD accepted that, in addition to establishing the fact of an improper interference with the Doping Control process, it also bore the burden of proving, to the comfortable satisfaction of the Tribunal, that the Athlete had intended to subvert the Doping Control process.

149. In UKAD's view, there was clear evidence that he had intended to do so:

a) As soon as he was told that his Sample was of insufficient volume, he became aggressive and intimidating. That behaviour was indicative of the Athlete being determined not to comply with the Doping Control process.

b) The Athlete's refusal to provide a further Sample was also indicative of a mindset whereby he was determined to interfere with the ordinary operation of the Doping Control process.

c) The Athlete was warned by Mr Dunning not to dispose of his Sample. UKAD submits that, in light of this warning, the Athlete must have been aware that the Doping Control process did not allow for the disposing of a Sample in the way that he did.

d) Nothing said by the DCP could have been properly interpreted as an indication that it had been permissible for the Athlete to dispose of the Sample in that way.

150. Submissions were also made as to the appropriate sanction to be imposed in the event that the ADRVs were established. In UKAD's submission the Athlete had acted intentionally, no finding that he had acted with no significant fault or negligence was warranted given the circumstances of the case and the Athlete should therefore be subject to a four year period of prohibition, which (in terms) could run concurrently in respect of both charges.

<u>The Athlete</u>

151. Mr Meakin opened his submissions by addressing the Athlete's behaviour, which he, and the Athlete conceded was "*wholly to be deprecated and was abusive and unacceptable*". However, the Athlete

had been an honest and straightforward witness even if his evidence could be characterised as being of “more truth than beauty”.

152. To the extent that UKAD submitted that the Athlete’s behaviour had been intended to intimidate the DPO, that suggestion was rejected. UKAD’s own evidence in the form of Mr Hood’s testimony did not support that assertion. On the totality of the evidence, whilst the Athlete’s conduct had been unacceptable, there had been no intention to destabilise the process by conduct that was intimidating or threatening.

153. On the charge contrary to 2.3, the Athlete’s primary submission was that UKAD could not prove on a comfortable balance that the Sample provided by the Athlete was insufficient. The Sample measurement process was transparently inaccurate and could not be relied upon with any degree of comfort under the ADR. As such, a vital element of the offence was not proved. Mr Renteurs confirmed his agreement with that proposition.

154. Without prejudice to that submission, the Athlete had not been given the appropriate advice on the procedure, most fundamentally the need to provide a minimum 90mL, and so the process was unfair and flawed. Further, UKAD had made a series of fundamental errors that were in breach of the Athlete’s rights and were procedurally and substantively unfair.

155. As to the advice that was not given, Mr Meakin questioned how an Athlete, who had not been told he had to give a minimum volume, could then be charged with refusing or failing to give a Sample, when he had in fact given one.

156. With reference to the procedural flaws, Mr Meakin’s submissions were summarised as follows:

i. If there was a “partial Sample” the Athlete had the right to provide a further “top up” Sample - under Annex F.

ii. This procedural requirement was not followed as the partial acceptance procedure was never initiated, let alone followed.

iii. That the Sample was rejected as a fact by UKAD was in clear breach of the proper procedure when it should have been made clear to the Athlete that what was required was a further top up and that the existing Sample would be accepted for sampling.

iv. There was no justification, irrespective of the above, for not sending the Sample for analysis.

There was sufficient on the split of the Sample for analysis purposes. The evidence from UKAD witnesses indicated that in other cases this had occurred. The Athlete had a right to have his Sample processed, particularly given the volume he had provided.

157. Mr Meakin drew the Tribunal's attention to the evidence from the UKAD witnesses, which in his view supported those submissions.

158. If contrary to his submission there had been a breach of Article 2.3 ADR, in his submission in all the circumstances there had been compelling justification for the Athlete to have acted as he did, and certainly compelling justification for any sanction that the Tribunal felt was required to be imposed being significantly reduced.

159. In turning to the tampering charge, Mr Meakin submitted that was a "makeweight" addition, which was wholly lacking in evidence and should be dismissed.

160. The Athlete had repeatedly asked for the Sample to be processed, but this was expressly refused.

161. That refusal was contrary to his rights under the ADR and its proper procedure.

162. The express refusal by UKAD had important consequences. The Sample did not form part of the process and there was therefore no factual basis to contend that the Athlete had "tampered with the Sample"; it could not be if it did not form part of the testing process.

163. In this respect, UKAD was in difficulties in that it had refused to accept and process the Sample yet had then asserted that in some way it should have been left in the DCS. There was no evidence that UKAD ever intended to use it and there was therefore no relevance to this action. In any event, the Athlete simply complied with the action of UKAD and it was a reasonable action to dispose of it because no DCO had told him not to do so.

164. Mr Meakin concluded his submissions by suggesting that the Tribunal should find in relation to the first charge:

I. UKAD could not prove the ADRV as it could not prove that the Sample was short at 85ml.

II. If (contrary to that submission) that aspect was proved, then there was procedural and substantive unfairness under the ADR as the proper procedure was not followed prior to the test to explain the information to which the Athlete was entitled, and this had been directly relevant to the cause of the dispute.

III. There had been procedural and substantive unfairness in that the Athlete was not permitted the right to take his son home under a chaperone and return to afford him a reasonable opportunity to prepare another Sample and provide it "within a reasonable period of opportunity".

IV. There had been further procedural and substantive unfairness as the partial Sample procedure was not followed. Annex F to the ISTI Rules establish that this was an on-going process and so it should have been fully explained to the Athlete.

V. There had been further procedural and substantive unfairness as the Athlete should have been advised that he could top up his Sample and that he had a reasonable time to do so (with a chaperone as per above).

VI. There had been further procedural and substantive unfairness in that the Sample was not accepted and sent for processing. There was no evidence that UKAD would not have processed it in any event, in fact the converse applies. Other samples had been analysed at lower levels.

VII. There had been further procedural and substantive unfairness in that the Sample was rejected. It should have been accepted on the terms set out above.

VIII. This conduct materially contributed to the breakdown of the procedure, but more importantly undermined the Athlete's right to a fair and reasonable testing procedure.

165. As noted, on the second charge the Athlete's position was that there was simply no basis to proceed with the charge and it should not have been pursued.

Decision on the ADRVs

166. The Tribunal noted that the burden was initially on UKAD to establish to its comfortable satisfaction that the Athlete had committed either of the alleged ADRVs.

167. Comfortable satisfaction is greater than a mere balance of probabilities, but less than proof beyond a reasonable doubt. Not least because of the gravity of the charges, the Tribunal very carefully

considered all the evidence and submissions before it.

168. The Tribunal notes at the outset that, as was accepted by the Athlete, his conduct had been wholly unacceptable. DCOs are mandated to perform an important task and are rightly entitled to expect that they will be treated with respect and able to perform their duties without being subject to abusive and/or aggressive behavior. The Tribunal was aware that a member of the WRU attended the hearing as an observer. The WRU may accordingly wish to determine if it is appropriate to consider, in a separate jurisdiction, whether the Athlete's conduct was such as to have brought the game, or the WRU, into disrepute.

169. In the Tribunal's view, however, the Athlete's conduct, as deplorable as it had been, did not detract from a number of fundamental issues, and flaws, in the testing process that he had been subject to.

170. In relation to the first charge a critical, if perhaps novel, issue arose in relation to whether UKAD could prove that the Athlete had not provided a Sample at the prescribed volume of 90mL. As Mr Renteurs fairly conceded, if that could not be proved, the charge had to fail.

171. The evidence on this point came solely from Mr Norton, and was significant:

"the bench was fairly level and that was why I crouched down to the level of the meniscus"

172. As such the position was, and the Tribunal found:

1) There was no evidence to show how level, or otherwise, the bench was, so as to rule out the possibility of an incorrect visual measurement. Given that the shortfall was only 5mL and so minimal, with Mr Norton also accepting that there was a margin of error, albeit only +/- 1mL, a high level of certainly was required.

2) There was no evidence to indicate whether any lighting issues could have impacted upon the accuracy Mr Norton's visual measurement.

3) Mr Norton's observation was not corroborated by any other DCO.

4) No independent photographic evidence had been taken.

173. The Tribunal makes it clear that there is absolutely no suggestion of Mr Norton's integrity in any way being called into question, but the failure of UKAD to obtain irrefutable evidence to show that the Athlete had failed to provide the minimum of 90mL was, in the Tribunal's finding, fatal to the charge brought against the Athlete under Article 2.3 ADR.

174. The Tribunal suspects that this failing arose in consequence of there being no procedure yet in place to verify that a Sample is under 90mL. This may very likely be because a similar scenario has not arisen before. However, and if so, when novel scenarios arise, they must be addressed by new procedures being put in place. If necessary, any benefit of doubt that results from a missing or flawed procedure must be resolved in favour of the charged athlete. The sanction contemplated by the ADR for a breach of Article 2.3 is severe, which reinforces the need for irrefutable evidence on the aspects of the charge that need to be proved.

175. In light of the failing to satisfactorily prove the Sample volume, the first charge was dismissed.

176. For completeness, the Tribunal would add that, even had there been incontrovertible evidence as to volume of the Sample, the Tribunal still would not have upheld this charge and in this respect it notes the following finding that may assist UKAD in further enhancing the testing process. This is addressed in three stages:

<u>The initial Sample</u>

1) The Athlete had submitted himself for testing. The only complaint made as to this was that he had refused to wash his hands or wear gloves. Whist the Athlete disputed this, the evidence of Mr Price, was that requirement was for the protection of the Athlete and so not linked to the integrity of the process.

2) The Athlete was not advised as to what was required of him to comply with the testing procedure. Most critically, he was not informed that he was required to provide a minimum of 90mL.

3) At the point therefore the Athlete submitted his Sample pot to Mr Norton to measure, there could have been no question that he had either refused or failed to provide a Sample.

<u>The request for a further Sample</u>

4) There were again significant flaws in the procedure at this stage.

5) The Athlete was not advised of the partial Sample process. Most critically he was not advised that he only needed to top up the initial Sample by providing another 5mL. In this regard the UKAD evidence was contradictory. Notwithstanding that the responsibility for providing the requisite advice lay with Mr Norton, he confirmed that he had not personally done so. To

address this failing, he sought to rely on words he had ascribed to Mr Hood in his written statement:

"*saying words to the effect that with that amount it wouldn't normally be long before was able to provide a second sample and achieve the required volume*".

This wording was in any event less than clear, in that it did not specifically advise the Athlete of his right just to have topped up the initial Sample. However, and significantly, Mr Hood in his evidence did not say that he had said this. Rather, he stated that he did no more than ask the Athlete if he would like him to explain the process. He had been unable to go any further because the Athlete had refused to listen.

6) Had the Athlete been accurately advised of the position, in the view of the Tribunal what ensued in terms of his regrettable reaction could very likely have been avoided.

7) The Athlete was not informed of the possibility that he could have left the DCS to take his son home and return to complete the test. Mr Spencer confirmed that, "*whilst not ideal*" it was an option. Again, had the Athlete been informed of this information, which UKAD did not dispute he had the right to be informed of, what had then ensued might well have been avoided.

Disposal of the Sample

8) The DCOs refused to accept the Athlete's Sample. Mr Norton and Mr Hood sought to finesse this in their evidence by claiming that they had refused to process it rather than refuse to accept it. However, in the Tribunal's finding, even that was a failure of process because they did not utilise, the partial Sample procedure as they should have done. In doing so they should have told the Athlete that they could retain the Sample and top it up – with the required 5mL- and that the test would have then been complete. Finding 5) above is also relevant on this point.

9) The Tribunal in any event accepted the Athlete's evidence that he believed that DCOs would not accept his Sample.

10) On UKAD's own evidence, no DCO had told the Athlete that he could not dispose of the Sample.

11) Extraordinarily, UKAD attempted to rely on indirect evidence purportedly from Mr Dunning. He was UKAD's witness. The point was not covered with him in the detailed written statement he

provided, and he was not asked to comment on the position whilst giving live evidence. In any event, it was wholly unsatisfactory for UKAD to try and establish liability for a serious allegation on the basis of second hand evidence from a non-UKAD source.

177. Absent having been provided with accurate information that the Athlete was entitled to receive, the Tribunal would not have felt comfortably satisfied that the Athlete had either refused or failed to submit to a test.

178. The Tribunal then addressed the second charge of Tampering. It did not agree entirely with Mr Meakin's submission that it was a "makeweight" charge. However, the Tribunal did have concerns in that UKAD appeared to have attempted to make the evidence fit the charge, when on a full analysis it did not support its assertions. It could nevertheless see some force in Mr Meakin's rhetorical question asking how, if UKAD were asserting that the Athlete had not given a Sample for the purpose of Article 2.3, there was a Sample that could be tampered with for the purposes of Article 2.5.

179. In any event with regard to UKAD's submissions on intentionality, the Tribunal rejected the case as pleaded. Taking the four grounds advanced by UKAD in support of this charge as set out at paragraph 148 above, the Tribunal found (adopting the lettering used):

a) The Tribunal rejected the argument that the Athlete was determined not to comply with the Doping Control process. The ground as advanced failed to have regard to the fact that the Athlete had submitted to being tested without issue. He had further provided a Sample that filled over half a pot (the gradation on the pot goes to 150mL) whilst not being not told that there was a minimum volume requirement.

b) The Tribunal similarly rejected the assertion that his behavior was indicative of a determination to interfere with the ordinary operation of the Doping Control process. As noted, the Athlete had not been given the information, which he had a right to receive, that fully and properly informed him of the process. Absent that information, he cannot reasonably be accused of trying to interfere with it.

c) As already noted above, leaving aside that the evidence was at best hearsay in any event, the Tribunal rejected the assertion that UKAD was able to rely on Mr Dunning to have notified the Athlete that he could not dispose of his Sample.

d) In the Tribunal's view the onus lay on UKAD to have made it clear that the Athlete could not dispose of his Sample. On its own evidence it had not done so. To the contrary, the Athlete

had believed that the DCOs would not have accepted his Sample in any event, and his disposal of it must therefore be seen in that context.

180. For the reasons given above, the second charge was also dismissed.

181. Mr Hood candidly described the mission as having been “shambolic”, and the Tribunal hopes that the finding made in this decision will enable UKAD to review and enhance the testing process so a DCO does not reach such a conclusion on missions.

Conclusion

182. Both charges having been dismissed, no adverse order was imposed upon the Athlete.

Appeal

183. In accordance with ADR 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.

Jeremy Summers (Chair)
Dr Tim Rogers
Blondel Thompson

12 August 2020