

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

Before:

*Robert Englehart QC (Chairman)
Dr Kiltrina Douglas
Professor Dorian Haskard*

B E T W E E N:

RUGBY FOOTBALL UNON

Anti-Doping Organisation

and

HENRY HADFIELD

Respondent

DECISION OF THE ANTI-DOPING TRIBUNAL

INTRODUCTION

1. We were convened as the Tribunal to determine a charge brought by the Rugby Football Union ("RFU") against Henry Hadfield for an Anti-Doping Rule Violation under World Rugby ("WR") Regulation 21.2.1. The RFU has adopted WR Regulation 21 as its own anti-doping regulations; WR Regulation 21 follows the WADA Code and incorporates the WADA Prohibited List. There is no dispute about that.
2. Mr Hadfield is an amateur Rugby Union player. He was charged in consequence of a urine sample which he provided on 17 April 2019 being found to contain higenamine and its metabolite coclaurine. Higenamine is a Prohibited Substance listed under category S3 of the WADA Prohibited List as a Beta-2 Agonist. It is prohibited at all times, both in and out of competition, and is a Specified Substance. By the letter of charge, which is dated 12 June 2019, Mr Hadfield was also provisionally suspended.
3. We held a short hearing to determine the charge on 8 October 2019. Mr Hadfield did not contest the finding of an Anti-Doping Rule Violation, and we were solely concerned with the question of sanction. Mr Hadfield gave evidence before us, and we also heard brief oral evidence from two other witnesses. By the end of the hearing the factual issues between the parties had largely been resolved so that the issue before us ultimately fell within a very narrow compass. The RFU was represented by Mr Steven Flynn of Counsel, and Mr Hadfield was represented by Mr Rupert Beloff of Counsel. We are grateful to both parties for their thorough and helpful written and oral arguments. We are particularly grateful to Mr Beloff for his skilful representation *pro bono* of Mr Hadfield.

THE FACTUAL BACKGROUND

4. Mr Hadfield lives in Penrith. He is a young rugby union player who has for the last two seasons played for Fylde RFC. He plays on the wing or in the centre, and has always thus far played as an amateur. Fylde RFC competes in National League 2 North. That is the fourth tier of rugby union in this country. Mr Hadfield told us that he has been playing rugby since the age of six, represented his county at age group levels and also represented the North of England at under-20 level. He is a keen rugby player but, as an amateur, he earns his living as a driver of heavy vehicles.

5. It was Mr Hadfield's evidence that since starting at college he has "played rugby at a level that has been subject to random drugs testing". Nevertheless, his knowledge about performance enhancing drugs was evidently minimal. He had an idea that recreational drugs, steroids and growth hormone drugs were banned, but otherwise he had no knowledge about forbidden drugs. He has never received any formal drugs education, and this was consistent with what Mr Watkins of the RFU told us: for the purposes of drugs education the RFU concentrates on the top tiers of English rugby. However, Mr Hadfield did appreciate that some substances were prohibited and indeed that he could well be tested for drugs. Indeed, on 13 February 2019 Mr Hadfield was in fact subject to testing with his urine sample on that occasion providing a negative result.
6. On 17 April 2019 Mr Hadfield was again asked to provide a urine sample at his home. It is notable that on the Doping Control Form he listed a number of medicaments and supplements which he had taken within the previous seven days. These included specifically "Black Magic BZRK". Unfortunately for Mr Hadfield, when his sample came to be analysed at the WADA accredited laboratory at King's College London, the sample was found to contain higenamine and its metabolite coclaurine. When Mr Hadfield was telephoned by Mr Watkins of the RFU with the information that the test had proved positive for higenamine, he told us that he had never heard of the drug.
7. It appears that higenamine had entered Mr Hadfield's system in the following way. Mr Hadfield has always worked hard at building up his physique. Apart from rugby training he has extensive workouts in the gym. He told us that he has been taking supplements since the age of thirteen, not for rugby specifically but to improve his physique, for he had been at one time, he told us, "a skinny lad".
8. The source of Mr Hadfield's supplements is a business called Key2 Sports & Nutrition. This business is run by a close friend of Mr Hadfield's, called JJ Key, and his father. Mr Key and Mr Hadfield were at school together, used to play rugby together and go out in the evenings for meals together. They know each other extremely well. Furthermore, their two families generally are good friends and even go on holiday together. Entirely understandably, Mr Hadfield has complete confidence and trust in his old friend.
9. Mr Hadfield is accustomed to taking pre-workout supplements before sessions in the gym. Having worked hard manually during the day, he feels in need of a "pick me up" –

something similar to, as he put it, Red Bull. Early this year he was recommended by Mr Key to take a supplement called Black Magic BZRK ("Black Magic") by way of a pre-workout which Mr Key said was very effective. Mr Key told us he had tried it out himself. However, he had no idea that it contained, as it in fact did, a banned substance. If he had known this, he would never have recommended it to his old friend.

10. Mr Hadfield regularly took Black Magic from early January 2019 until his April drugs test, although he did have a break from taking it in the period leading up to the time of his February 2019 drugs test. This break doubtless explains why that particular test was negative.
11. In fact, the label on Black Magic clearly indicates that it contains, along with other ingredients, higenamine. Mr Key had no idea that this was a Prohibited Substance. As for Mr Hadfield, he did not read the label but, if he had done so, the word would have meant nothing to him. He simply trusted his longstanding friend who ran a reputable business, and it would never have occurred to him that Mr Key might supply a banned drug.
12. As mentioned above, Mr Hadfield was formally charged by the RFU with the commission of an Anti-Doping Rule Violation by letter of 12 June 2019. Mr Hadfield responded by letter of 28 June 2019 enclosing a testimonial and a photograph of Black Magic packaging. He straightaway accepted that he had committed the violation and waived his right to have his B Sample tested. The letter went on to explain the circumstances in which he had unknowingly come to ingest higenamine and expressed great remorse and upset. He urged the RFU to accept that the violation was not intentional and asked for a reduction in sanction for his prompt admission. He offered full co-operation to the RFU.

THE CHARGE

13. Mr Hadfield is charged under WR Regulation 21.2.1. Under this Regulation the presence of a Prohibited Substance (or its metabolite) is an Anti-Doping Rule Violation regardless of knowledge on the part of a Player. The Regulation reads in material part:

The following constitute anti-doping rule violations:

21.2.1 Presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample

21.2.1.1 It is each Player's personal duty to ensure that no Prohibited Substance enters his or her body. Players are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Player's part be demonstrated in order to establish an anti-doping rule violation under Regulation 21.2.1 (Presence). [See Comment 1]

21.2.1.2 Sufficient proof of an anti-doping rule violation under Regulation 21.2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Player's A Sample where the Player waives analysis of the B Sample and the B Sample is not analysed

14. As already noted, Mr Hadfield did waive analysis of his B Sample, and the fact of an Anti-Doping Rule Violation is not in issue. The starting point for the applicable sanction is WR Regulation 21.10.2. In material part, this provides:

21.10.2 Ineligibility for Presence of a Prohibited Substance

.....

The period of Ineligibility for a violation of Regulations 21.2.1 (Presence) shall be as follows, subject to potential reduction or suspension pursuant to Regulations 21.10.4, 21.10.5 or 21.10.6:

21.10.2.1 The period of Ineligibility shall be four years where:

.....

21.10.2.1.2 The anti-doping rule violation involves a Specified Substance and World Rugby (or the Association, Union or Tournament Organiser handling the case as applicable) can establish that the anti-doping rule violation was intentional.

21.10.2.2 If Regulation 21.10.2.1 does not apply, the period of Ineligibility shall be two years.

Thus, for an intentional “presence” violation the period of Ineligibility would be four years. For such a violation, where intention cannot be established, the period of Ineligibility is two years. This may be subject to reduction in certain circumstances. However, for present purposes the only possible reduction below two years would arise if Mr Hadfield could demonstrate that he bore No Fault or Negligence or No Significant Fault or Negligence (as defined) for the Anti-Doping Rule Violation. We discuss these topics in more detail below.

CONTENTIONS OF THE RFU

15. In his skeleton argument, and at the outset of the hearing, Mr Flynn for the RFU left open an argument that this was an intentional Anti-Doping Rule Violation so that a four year period of Ineligibility should be imposed. However, at the conclusion of the evidence Mr Flynn took instructions and expressly conceded that this was not a case of an intentional Anti-Doping Rule Violation. In our view this was an entirely proper concession to have made. If the violation were intentional, Mr Hadfield’s declaration of his consumption of Black Magic on the Doping Control Form would have been surprising in the extreme. The reality is that there was here no evidence at all to suggest the intentional commission of an Anti-Doping Rule Violation.
16. In his closing submissions Mr Flynn concentrated upon the contentions advanced on behalf of Mr Hadfield that there was No Fault or Negligence or No Significant Fault or Negligence (as defined in WR Regulation 21).
17. Mr Flynn pointed out that Mr Hadfield was well aware that the consumption of banned substances was forbidden for a rugby player. He certainly had some knowledge of the anti-doping regime. He had recently undergone a drugs test in February 2019 and knew that he was subject to the testing procedure for drugs. Yet, he had taken no steps at all to check that what he was taking did not contain a Prohibited Substance.
18. A player is responsible for what goes into his body. However, Mr Hadfield took no precautions at all. He simply acted on the suggestion of a friend, Mr Key. And in fact he did not even ask Mr Key if Black Magic contained a Prohibited Substance. Mr Flynn drew our attention to the labelling of Black Magic which should have alerted anyone to the potential danger of consuming what is clearly a non-natural substance. Thus, Black Magic

claims to be “from the other side” and to be “supernatural”. These are not claims which suggest an ordinary natural product.

19. Mr Flynn noted that Mr Hadfield did not read the label of Black Magic which pointed clearly to higenamine as an ingredient. He did not ask his Club if it were safe to take Black Magic, nor did he check with anyone else at all. He had not even conducted an Internet search on the product.
20. Mr Hadfield is a person who is fully in control of his faculties. He is not a minor, nor does he suffer from any impairment. In Mr Flynn’s submission Mr Hadfield has to take responsibility for his actions. Mr Flynn drew our attention to two CAS decisions. In *Kutrovsky v ITF* (CAS 2012/A/2804) at [9.49] the Panel said:

The athlete’s fault is measured against the fundamental duty that he or she owes to do everything in his or her power to avoid ingesting any Prohibited Substance.

And in its Advisory Opinion in *FIFA & WADA* (CAS 2005/C/976 & 986) at [73]-[74] the Panel noted:

The WADC imposes on the athlete a *duty of the utmost caution* to avoid that a prohibited substance enters his or her body.

.....

It is this standard of utmost care against which the behaviour of an athlete is measured if an anti-doping violation has been identified

21. This was in Mr Flynn’s submission, a case at the top end of fault. He invited us to find that in this case a two year period of Ineligibility was inevitable. He acknowledged that this two year period should date back from the date of Mr Hadfield’s Provisional Suspension, i.e. 12 June 2019.

CONTENTIONS FOR MR HADFIELD

22. For Mr Hadfield Mr Beloff suggested - albeit somewhat tentatively – that we might find that there was No Fault or Negligence here. More realistically, he submitted that this was a case of No Significant Fault or Negligence. He invited us to bear in mind that Mr Hadfield

was a young amateur player who had never received any drugs training or education of any sort. Nor did he have any access to a club doctor since Fylde RFC had no doctor.

23. Even if Mr Hadfield had read the packaging of Black Magic and seen that it contained higenamine, he could not have been expected to understand what that was nor to realise that it was a Prohibited Substance. He had not purchased the supplement from some dubious source. He had acquired it from a lifelong and trusted friend with whom he and his family were very close. It was not realistic to suggest that Mr Hadfield should have doubted his friend whose business enjoyed a good reputation for supplying supplements to athletes in a variety of sports.
24. Mr Beloff reminded us that in *Sharapova v ITF* (CAS 2016/A/4643) the CAS Panel had recorded that the bar for the application of establishing No Significant Fault or Negligence must not be set so high that in practice the defence would be unachievable. Indeed, there are several decisions, both domestic and international, to this effect. Mr Beloff also reminded us of the *Cilic v ITF* case (CAS 2013/A/3327 & 3335) in which the CAS Panel had discussed the proper approach to an assessment of fault.
25. We were referred by Mr Beloff to a number of decisions concerning the drug higenamine where panels had imposed sanctions of less than two years' ineligibility. In *Drug Free Sport New Zealand v Kepaoa* (ST 10/17) the Sports Tribunal endorsed a suspension of 18 months which had been agreed between the parties; it should, however, be noted that there the player had made some, albeit inadequate, check on the supplement which contained higenamine. In *UWW v Asgarov* (UWW Anti-Doping Panel decision dated 18 April 2017) a 12 month suspension was imposed where the panel concluded that the wrestler could not reasonably have known that the supplement which he took contained higenamine. In *CCES v Borsa* (SDRCC DT-18-0302) the sole Arbitrator, having found that there was a significant degree of fault at [145], then rather curiously stated at [162]: "I reduce the sanction to the lowest end of the "significant" degree of fault, and impose a 16-month suspension". Finally, Mr Beloff also drew our attention to two instances where anti-doping organisations, rather than disciplinary tribunals, had imposed sanctions of rather less than two years' suspension for the ingestion of higenamine.
26. Finally, Mr Beloff urged us to find that any period of Ineligibility should commence with effect from the date of Sample collection, that is 17 April 2019 in the instant case. This

submission was founded on WR Regulation 21.10.11.2. This provides for the backdating of a period of Ineligibility to the date of Sample collection in cases of a “prompt admission” (subject to a minimum where applicable). In Mr Beloff’s submission there had evidently been a prompt admission in the present case in Mr Hadfield’s letter of 28 June 2019 in reply to the RFU’s letter of charge dated 12 June 2019.

DISCUSSION

27. It is not in dispute that there was here an Anti-Doping Rule Violation by reason of the presence of higenamine and its metabolite in Mr Hadfield’s urine Sample on 17 April 2019. Moreover, it is no longer in dispute that the source of the higenamine was Black Magic and that the Anti-Doping Rule Violation was not intentional. Accordingly, the applicable period of Ineligibility is one of two years unless Mr Hadfield can satisfy us that he bore No Fault or Negligence or No Significant Fault or Negligence.
28. Because they are defined terms it is appropriate to set out the WR Regulation meanings of Fault and No Significant Fault or Negligence. The definition of Fault is:

Fault: Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Player or other Person’s degree of Fault include, for example, the Player’s or other Person’s experience, whether the Player or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Player and the level of care and investigation exercised by the Player in relation to what should have been the perceived level of risk. In assessing the Player’s or other Person’s degree of Fault, the circumstances considered must be specific and relevant to explain the Player’s or other Person’s departure from the expected standard of behaviour

The respective definitions of No Fault or Negligence and No Significant Fault or Negligence are as follows:

No Fault or Negligence: The Player or other Person’s establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he

or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Regulation 21.2.1, the Player must also establish how the Prohibited Substance entered his or her system.

No Significant Fault or Negligence: The Player 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 Regulation 21.2.1, the Player must also establish how the Prohibited Substance entered his or her system.

29. It is evident that in assessing a person's fault regard must be had to the particular circumstances of a given individual. It is not some wholly objective standard which has to be applied in isolation. Of the considerations specifically identified within the definition of fault our conclusion is as follows.
30. First, Mr Hadfield is a young man and amateur player in the fourth tier of English rugby, and he has never received any drugs training or education at all. Nor did his club have any doctor from whom he could take advice. On the other hand, he did know that some drugs were banned. He also knew that he himself could be subject to drug testing, as had happened in February 2019. Some care as to what he ingested would plainly be appropriate.
31. Second, Mr Hadfield is not a minor, nor is he subject to any impairment. He is fully in control of his faculties. It is not possible to conclude that Mr Hadfield should not have been aware that there might be some risk in ingesting supplements. The danger for athletes in taking supplements has been well publicised. As the CAS Panel noted in the *FIFA & WADA* advisory opinion cited above at footnote 46:

In the first contaminated supplement-cases, there may have been a valid excuse of the athlete that he had no chance to know about the contamination. Today, however, the risk of contamination is widely known and the anti-doping organizations have issued explicit warnings to use any nutritional supplements without medical advice. An athlete

who is still continuing to take nutritional supplements on his or her own account is violating his or her duty of care. Thus, an athlete's attitude which complied with his or her duty of care in the past, may not suffice in the future.

This was stated in the context of supplement contamination. But the present is an *a fortiori* case where the ingredient of higenamine was actually given on the label.

32. We have sympathy with Mr Hadfield. He trusted his old friend and simply gave no thought at all to a possible risk associated with drugs. He has been totally straightforward about what happened and has shown considerable contrition since realising what was in Black Magic. If the sanction for the Anti-Doping Rule Violation in the present case were entirely at large, we would regard two years' Ineligibility for a young man like Mr Hadfield, who was naïve, as severe and would impose a lesser period. However, the sanction is not at large, and we are constrained by WR Regulation 21.
33. We have no discretion over sanction unless there was No Fault or Negligence or No Significant Fault or Negligence. We regard the contention that there was No Fault or Negligence at all as quite unrealistic when no precaution of any sort was taken by Mr Hadfield. The fact is that Mr Hadfield made no check at all on Black Magic. He did not even read the label or take any step at all to check whether Black Magic contained a Prohibited Substance. In our view, it is simply not tenable to say that making no check at all is a matter of no significance such that we could find No Significant Fault or Negligence. We are driven to conclude that there is no escaping a two year period of Ineligibility for Mr Hadfield.
34. In coming to this conclusion we have had regard to the several decisions concerning higenamine to which Mr Beloff referred us. His industry in unearthing these decisions is commendable. However, it seems to us that decisions in this area are necessarily highly fact specific. Whilst the decisions were certainly of interest, we did not think that any of them was decisive for the facts of the present case.
35. As for the starting point for the period of Ineligibility, we agree with Mr Beloff that we can and should direct that Ineligibility should commence with effect from 17 April 2019, the date when Mr Hadfield took the drug test. WR Regulation 21.10.11.2 provides:

Where the Player or other Person promptly (which, in all events, for a Player means before the Player competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by World Rugby (or the Association, Union or Tournament Organiser handling the case as applicable), 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 Regulation is applied, the Player or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Player 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 Regulation shall not apply where the period of Ineligibility has already been reduced under Regulation 21.10.6.3.

Mr Hadfield made a prompt admission shortly after receipt of the Charge and notice of Provisional Suspension. The proviso in the Regulation about service of at least half a period of Ineligibility has no application on the present facts.

CONCLUSION

36. We summarise our decision as follows:

- (1) As is common ground, Mr Hadfield did commit an Anti-Doping Rule Violation;
- (2) The Anti-Doping Rule Violation was not intentional;
- (3) Mr Hadfield has not established that there was No Fault or Negligence or No Significant Fault or Negligence;
- (4) The applicable period of Ineligibility for Mr Hadfield under WR Regulation 21 is two years;
- (5) The period of Ineligibility shall be applied with effect from 17 April 2019.

We conclude by drawing the parties' attention to the entitlement of either party to file a Notice of Appeal against this decision.

R. E. Englehart

Robert Englehart QC

For and on behalf of the Tribunal

25 October 2019

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