SR/249/2020

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

Before:

Robert Englehart QC (Chair)
Carole Billington-Wood
Professor Peter Sever

**BETWEEN:**

**UK ANTI-DOPING LIMITED ("UKAD")**
**Anti-Doping Organisation**

**and**

**CARL HONE**
**Respondent**

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**DECISION OF THE NATIONAL ANTI-DOPING PANEL**

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## INTRODUCTION

1. We were appointed as the Arbitral Tribunal to determine a charge brought by the Anti-Doping Organisation ("UKAD") against Mr Hone. He is a 33 year old carpenter by trade and an amateur Rugby Union player. He plays as a hooker for Llanhilleth RFC. This is an entirely amateur club where the players, including Mr Hone, participate solely for enjoyment of the game. The Club competes in a low division of the Rugby Union leagues organised under the auspices of the Welsh Rugby Union. There is no dispute that Mr Hone is subject to the anti-doping rules of the Welsh Rugby Union ("ADR") which has entrusted its anti-doping control to UK Anti-Doping

Limited ("UKAD"). Jurisdiction and the application of the ADR on the present facts are not in dispute between the parties.

2. We held a hearing remotely through video conferencing software on 19 April 2021 at which we received evidence and heard the submissions of the parties. UKAD was represented by Ailie McGowan, and Mr Hone was represented by Rupert Beloff of Counsel. We are most grateful to both representatives for their able and thorough presentation of the respective cases. We should like to record our particular gratitude to Mr Beloff for his *pro bono* representation of Mr Hone.

**THE CHARGE AND THE ISSUES**

3. By a Notice of Charge dated 12 October 2020 Mr Hone was charged by UKAD with the commission of an Anti-Doping Rule Violation in the following terms:

> *"UKAD therefore charges you with committing an ADRV contrary to ADR Article 2.1, in that a Prohibited Substance, namely boldenone and/or its metabolite 5β-Androst-1-en-17β-ol-3-one, were present in a urine Sample provided by you on 6 February 2020 numbered A1162172."*

Boldenone is a Prohibited Substance when administered exogenously and is listed under Section S1.1 of the 2020 WADA Prohibited List as an Anabolic Androgenic Steroid. It is a non-Specified Substance prohibited at all times.

4. Mr Hone does not dispute any of the above and that he committed, albeit on his case inadvertently, an Anti-Doping Rule Violation. The presence of a Prohibited Substance in a urine Sample does indeed constitute such a violation regardless of fault. We are only concerned with sanction. The principal issue before us was whether Mr Hone has established on the balance of probability that his Anti-Doping Rule Violation was not "intentional" as that term is defined in the ADR. By ADR Article 10.2 it is provided in material part:

> *"The period of Ineligibility for an Anti-Doping Rule Violation under Article 2.1 … shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:*

*10.2.1 The period of Ineligibility shall be four years where:*

*(a) The Anti-Doping Rule Violation does not involve a Specified Substance, unless … [Mr Hone] … can establish that the Anti-Doping Rule Violation was not intentional."*

The word "intentional" is a term of art for the purposes of the ADR. It does not simply mean deliberate. By ADR Article 10.2.3:

*"As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes or other Persons who cheat. The term, therefore, requires that … [Mr Hone] … 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. ……."*

5. If Mr Hone's Anti-Doping Rule Violation was not intentional, then the four year period of Ineligibility is reduced to two years but may be further reduced if he bore No Fault or Negligence or No Significant Fault or Negligence as defined by the ADR. In the former case, there would be no period of Ineligibility, and in the latter case there is a range within which we would have to determine the appropriate period.

**THE FACTUAL BACKGROUND**

6. On 6 February 2020 at around 8 p.m. UKAD officials attended at Llanhilleth RFC's ground where there was a training session underway. Mr Hone was randomly selected to provide a urine Sample and did so willingly. Apparently, UKAD had attended some two weeks beforehand but had been unable to carry out the testing. Accordingly, their presence did not come as a surprise to Mr Hone, and he was entirely co-operative in providing a Sample.

7. Mr Hone's Sample was subject to analysis at the WADA approved laboratory at King's College, London, and found to contain a very small concentration of the Boldenone metabolite mentioned above. Because Boldenone can sometimes be produced by the body endogenously, the Sample was then subject to further analysis by a WADA accredited

laboratory in Rome. This established that the Boldenone had come from an exogenous source. It was following these analyses that Mr Hone was charged with the Anti-Doping Rule Violation.

8. Mr Hone sought legal advice following the Notice of Charge. His response, through Mr Beloff, was to admit the Anti-Doping Rule Violation but to explain that the only possible source of the Boldenone was horse waste with which he must have come into contact when doing carpentry work at a barn adjacent to some stabling. UKAD declined the invitation to withdraw the Charge, and we were duly appointed as the Tribunal for the case.

**THE WITNESSES**

9. We only heard evidence from two live witnesses at the hearing. They were Mr Hone himself and Professor Cowan. We were due to have heard from another witness, Mr Richard Davies, the owner of the land where Mr Hone was working at the time he contends that he must have been in contact with horse waste. However, at a very late stage we were told that he had become "unavailable". This was particularly unfortunate since, although his written statement gave little detail, his evidence might well have been of considerable assistance in providing information which Mr Hone himself was unable to do. In the event, we agreed to admit his written statement in evidence but considered that it was to be given little weight in the absence of any cross-examination.

10. The witnesses, whose written statements we admitted, were as follows. For UKAD Mr Wojek, the UKAD Head of Science and Medicine, explained how Boldenone could be used illicitly in sport for its anabolic effects. It is available on the black market but has no licensed uses for humans. It could be useful for a Rugby player to build up physique or aid recovery from injury. But Mr Wojek could, of course, shed no light on the particular facts of the present case.

11. For Mr Hone, we had written statements from (1) Mr Taylor, the head coach of Llanhilleth RFC, (2) Mr Went, the Club secretary, and (3) as mentioned, Mr Davies. The evidence of Mr Taylor and Mr Went was favourable to Mr Hone as far as it went. They both thought that the taking of performance enhancing drugs would be quite out of character for Mr Hone, but of course neither could give any direct evidence about the material facts in his case. Mr Davies, on the other hand, might have been particularly helpful in providing information to fill a number of

unexplained gaps in the evidence to which we refer below. In the event, the substance of his written statement was only that Mr Hone had been working for him at a barn in Chippenham in January and February 2020 and that there had been horse waste in the adjoining stables where the previous tenants had kept horses until moving out on 6 January 2020.

12. The only witness for Mr Hone to give oral evidence was Mr Hone himself. He explained how he had been shocked to learn that he had tested positive for Boldenone. He could not understand how this had come about. Indeed, he had never heard of Boldenone, and so he started internet research from which he had learned that its main use was in the treatment of horses. With this in mind, he had come to the conclusion that the drug must have entered his system from contact with horse waste in the following circumstances.

13. He had gone to work at Mr Davies' barn in Chippenham in January 2020. This was next door to stables where Mr Davies' previous tenants had kept horses, and there was horse waste in the area where he parked his van. In fact, he had used the stables as a place to have a cup of coffee and eat a sandwich for lunch. Mr Hone told us that he had started work at the barn on a Monday towards the end of January with the tenants having moved out with their horses on the preceding Friday. This would have been fairly close to the date of Mr Hone's failed drug test. However, when it was pointed out to him that Mr Davies' written statement said that the tenants had moved out on 6 January 2020 and that this was in fact a Monday, Mr Hone became very much less sure over timing.

14. Mr Hone told us that there was horse waste and dirty hay in the area while he was working, and inadvertent contact with this waste must have been how Boldenone came into his system. There could be no other explanation as he had never taken any drug. He had never even taken any supplement apart from an occasion when he had taken a protein to aid recovery from injury.

15. Mr Hone was asked about the identity of the tenants who had kept horses at these stables but he said that he did not know who they were and had never tried to approach them to make inquiry about their horses and Boldenone. He had not ever asked Mr Davies for their phone number in order to try and make contact. He would not have known how to get hold of the tenants, and they had left on bad terms with Mr Davies. Nor had he ever tried to make inquiry of veterinary practitioners in the area to see if the tenants' horses had in fact been treated with Boldenone.

16. The other witness to give oral evidence was Professor Cowan who had been instructed by UKAD to advise whether the hypothesis advanced by Mr Hone was possible. He noted that there had been quite heavy rainfall in the Chippenham area in January 2020; this would be likely to have washed away horse waste, at least if the waste was not under cover. Nevertheless, Professor Cowan noted that the quantity of the Boldenone metabolite discovered in Mr Hone's system was very small indeed. Professor Cowan also remarked in evidence that Boldenone, although a steroid, was not a commonly misused drug by athletes, and since it left the body quite quickly it would have to be administered by injection to be of use as a performance enhancing drug.

17. In his long and distinguished career Professor Cowan had in fact infrequently come across the use of Boldenone in a sport context. Its main use was as a recovery agent from injury for horses. Professor Cowan himself had, however, never come across a case of the inadvertent administration of Boldenone, such as was said to have happened in this case. Nevertheless, on the totality of the information available to him Professor Cowan could not exclude the possibility of Mr Hone's theory being correct. The conclusion of his written report was as follows:

> *"22. It is my scientific opinion that, although it is possible that a small amount of boldenone had been inadvertently administered by the Player from equine waste, it is not possible to state the likelihood of this having occurred.*
>
> *23. Nevertheless, I consider that waste from one or more horses to whom boldenone had been administered could be a source of the boldenone in accordance with the Player's explanation, which I therefore consider to be plausible."*

18. This was the totality of the evidence on which we were asked to find that Mr Hone's ingestion of Boldenone had not been "intentional".

**SUBMISSIONS FOR UKAD**

19. The submissions of Ms McGowan for UKAD concentrated on Mr Hone's case that Boldenone must have entered his system through contamination with horse waste. This was perhaps a

theoretical possibility. Nevertheless, the evidence was very far from establishing that it was more likely than not that this is in fact how Mr Hone came to have a metabolite of Boldenone in his system on 6 February 2020.

20. UKAD could not, of course, prove how Mr Hone came to have this exogenously administered Prohibited Substance in his urine Sample. It was a matter for Mr Hone to establish on the balance of probability if he were to persuade us about his contamination with horse waste theory. In theory perhaps, the possibility of horse waste contamination could not be wholly excluded. But the evidence was very far from proving that this is in fact what happened in this instance. The likelihood of such contamination was lessened by the weather conditions noted by Professor Cowan and the length of time before the February 6 test since horses had been in the stables – January 6 according to Mr Davies. However, there was a complete lack of any evidence at all to show that there ever were any horses at the Chippenham site to which Boldenone had been administered. Mr Hone had not even attempted to adduce any such evidence.

21. Ms McGowan reminded us of the long line of authority to the effect that an athlete with a Prohibited Substance in his or her system who seeks to establish that it was not "intentional" must, at least normally, establish how the substance entered his or her system. Mere possibility is insufficient. The ADR do not in terms make this a requirement. However, unless a Tribunal is able to say how a Prohibited Substance came to be in an athlete's system, it is not in a position to judge whether or not administration of the Prohibited Substance was intentional within the ADR definition.

22. We were invited by Ms McGowan to follow the principles set out in the CAS consolidated appeals of *Guerrero v FIFA* and *WADA v FIFA* (CAS 2018/A/5546), (CAS 2018/A/5571) at [65]:

> *"(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; see CAS 2012/A/2759, paras. 11.31 and 11.32 ("It was not for UEFA– the Panel emphasise – to hypothesise, still less prove, their own version of events" as to how the prohibited substance got into the athlete's system); CAS 2014/A/3615, para. 52 ("The Panel rejects a proposed interpretation of the rules which would seek to impose the burden on the person charging to explain the source of the substance detected in the system of the person charged");*

*USADA v Meeker, AAA Panel decision dated 12 November 2013, para. 7.7 ("Respondent alone bears the burden of showing an explanation that is more likely than not for how the Prohibited Substances entered his system. If he fails to do so he has not met the requirement for relief under WADA Code 10.5.1 and 10.5.2. Claimant is not required to put forward its own speculative theory, and its failure to do so does not compel the acceptance of Respondent's theory").*

*(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. By way of example, the Panel in CAS OG 16/25 "found the sabotage(s) theory possible, but not probable and certainly not grounded in any real evidence" (para.7.27).*

*(iii) An athlete had to do so with evidence, not speculation; CAS 2014/A/3820: In order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide actual evidence as opposed to mere speculation" (para.80).*

*(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; in CAS 2010/A/2230, the Sole Arbitrator expressed an athlete's burden in the following terms: "To permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body" (para 11.12).*

*(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. For the hearing body in such a situation there are three choices, not just two (CAS 2010/A/2230, ditto)."*

23. In closing Ms McGowan reminded us that, although the ADR definition of intention does mention an intention to cheat, such an intention is not in fact an element of the definition itself. She then took us through further cases to support the proposition that something more than mere supposition by an athlete, coupled with a denial of any deliberate ingestion, is generally required for an athlete to establish a lack of intention for the purposes of the ADR. Specifically, we were referred to a number of passages in the NADP Appeal decisions of *UKAD v Buttifant* (SR/NADP/508/2016) and *UKAD v Ohuaregbe* (SR/NADP/300/2019). These both support the general CAS approach noted above.

24. Turning to Mr Hone's case that there had been No Fault or Negligence on his part, Ms McGowan referred us to the ADR definition of that expression. This makes it an express pre-condition for its application that the Athlete had to establish "how the Prohibited Substance entered his/her system". Mr Hone had failed to do this. Moreover, Ms McGowan submitted that Mr Hone had failed to take any precautionary steps at all so that he could not avail himself of any defence of No Fault or Negligence or No Significant Fault or Negligence.

**SUBMISSIONS FOR MR HONE**

25. On behalf of Mr Hone, Mr Beloff did not dissent from the general approach outlined by Ms McGowan. It would normally be incumbent on a player to establish how a Prohibited Substance entered his or her system in order to show a lack of "intention" to cheat. Nevertheless, the ADR definition does not make this an express requirement, and the authorities demonstrate that there may be exceptions to the general rule. This is evident from the seminal decision of *Buttifant* cited above.

26. In Mr Beloff's submission this was a special case, and there was nothing in the general approach to suggest that a Tribunal could not apply common sense. Mr Hone is an amateur player participating for the love of the sport in the lower echelons of the Welsh Rugby Union leagues. He did not even take supplements. The likelihood of Mr Hone injecting himself with a drug very rarely used as performance enhancing and generally used on horses is extremely remote. Common sense would suggest that deliberate drug misuse by Mr Hone was highly unlikely. Moreover, the very small quantity of Boldenone metabolite found in Mr Hone's system was entirely consistent with Mr Hone's case. And, of course, Professor Cowan, an expert of

great experience and reputation, was clear that the hypothesis advanced by Mr Hone was a possible one.

27. By way of illustration that there could be exceptional cases showing a lack of intention even where an athlete could not affirmatively prove the origin of a Prohibited Substance, Mr Beloff referred us to *Lawson v IAAF* (CAS 2019/A/6313). That was a case where an American athlete claimed that the source of the drug in question, Trenbolone, must have been a steak which he had eaten in a New York restaurant. Naturally, the steak in question could not be analysed, having been eaten. Nevertheless, Trenbolone is in fact sometimes used on American cattle. On appeal the CAS Tribunal concluded on the totality of the evidence that it was more likely than not that the presence of Trenbolone in the Athlete's system was due to a contaminated steak even though that could not be scientifically proved but was "reasonably plausible".

28. Given that Mr Hone had established that the source of the Boldenone was likely to have been horse waste, then it was Mr Beloff's submission that there was No Fault or Negligence on the part of Mr Hone or, at the very minimum, No Significant Fault or Negligence. As an amateur sportsman, Mr Hone had been wholly unaware of the drug Boldenone prior to the events in question. He could not reasonably be expected to have realised that his work at the Chippenham site might expose him to a risk of contamination by a Prohibited Substance.

**DISCUSSION**

29. There is, of course, no express requirement in the ADR that an athlete has to show how a Prohibited Substance entered his or her system before showing a lack of intention within ADR Article 10.2.3. This is in contrast to the case where an athlete is concerned to establish No Fault or Negligence. In that context the definition of the term expressly incorporates a requirement to establish how the Prohibited Substance entered the system. Nevertheless, there is undoubtedly a long and consistent line of authority, both domestic and international, to the effect that it would only be in a truly exceptional case that an athlete could establish a lack of intention without showing how a drug came to be in his or her body.

30. As for CAS jurisprudence, we gratefully adopt the summary from the *Guerrero* case, cited above, to which we were referred by Ms McGowan. Other authorities to which reference could

be made are *WADA v Chinese Taipei Olympic Committee* (CAS 2018/A/5784) especially at [60], *Abdelhak v IHF* (CAS 2018/A/5796) especially at [46], *WADA v CPA* (CAS 2017/A/4962) especially at [51-2] and *WADA v Ilescas* (CAS 2016/A/4834) especially at [73].

31. Turning to domestic cases, the position was explained in the appeal decision in *Buttifant*, cited above. It is not necessary to do more than note the Appeal Tribunal's conclusion at [28]:

> *"In summary, in a case to which Article 10.2.1.1 applies the burden is on the athlete to prove that the conduct which resulted in a violation was not intentional. Without evidence about the means of ingestion the tribunal has no evidence on which to judge whether the conduct of the athlete which resulted in the violation was intentional or not intentional …."*

32. The principle has been followed in a number of domestic authorities, including most recently the Appeal Decision in *Ohuaregbe*, cited above, to which we were referred by Ms McGowan. We might also refer to *Staples v RFU* (SR/NADP/1016/2017). There, the Appeal Tribunal said at [24]:

> *"The ADR do not specifically require that, in order to show that an anti-doping rule violation was not intentional, a Player has to prove how a substance entered his or her system. Nevertheless, there is a consistent line of jurisprudence to the effect that it is likely to be a rare case before a tribunal will be satisfied that the ingestion of a substance was not intentional if the tribunal cannot even know how the substance was ingested. This is affirmed in Buttifant, cited above, and is consistent with the CAS authorities: see, for example, the International Weightlifting Federation case, cited above, at 51-2 where the CAS tribunal said:*
>
> *51. The Athlete bears the burden of establishing that the violation was not intentional within the above meaning, and it naturally follows that the athlete must also establish how the substance entered her body …*
>
> *52. To establish the origin of the prohibited substance, CAS and other cases make clear that it is not sufficient for an athlete merely to protest their innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to*

*demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question."*

The Staples Appeal Tribunal further observed at [27]:

*"If a tribunal has nothing other than an athlete's own word and speculation as to how a prohibited substance came to be ingested, it is understandable that the evidence will be looked at with rigour. It would be all too easy for an athlete to say that he or she has never knowingly taken a Prohibited Substance, and it must have come from a contaminated product like a supplement. An Anti-Doping Organisation is rarely in a position to respond to such evidence. It is for this reason that tribunals tend to be rather sceptical in cases which depend solely on an athlete's word. There is a search for what has been called more "concrete" evidence than that."*

33. In light of the authorities Mr Beloff did not dissent from the general proposition. His position was that the present was an exceptional case of the kind left open in *Buttifant*. By the time Mr Hone first learned of the drug test failure, that is not until October 2020, actual scientific analysis of the hay and general waste at the stables adjacent to the Chippenham barn would have been impossible.

34. Boldenone does have equine uses although, as Professor Cowan noted, it is infrequently found as a performance enhancement drug in humans. The small quantity of the Boldenone metabolite discovered on Mr Hone's test, coupled with Professor Cowan's scientific conclusion that contamination from horse waste is a plausible scenario, are consistent with Mr Hone's hypothesis. We also accept that the temptation to take a Prohibited Substance could well be less in the case of a wholly amateur sportsman such as Mr Hone.

35. Despite the above, there is a gaping hole in the evidence. There is absolutely no evidence to suggest that any horse or horses at the Chippenham stabling was or were in fact being treated with Boldenone. In reality, the hypothesis put forward by Mr Hone is, as Ms McGowan pointed out, pure speculation. It may be possible but it is no more than that.

36. We accept that there may be exceptional cases where so-called "concrete" evidence of source may be lacking but lack of intention nevertheless found. However, the *Lawson* case, cited

above and to which Mr Beloff referred, seems to us to be quite different from the present. There, the CAS Tribunal noted at [70]:

> *"This appeal presents a rare set of facts whereby the Panel is tasked with examining this strict liability principle on balance against the Athlete's thorough, documented and diligent attempts to establish the source of the prohibited substance present in his sample."*

In the present instance Mr Hone certainly cannot be said to have made "thorough, documented and diligent attempts" to locate the source of the Boldenone. He has not made any attempt at all to contact the previous horse keeping tenants nor made any inquiries of veterinary sources in the Chippenham area. On the evidence, we are simply left with the bare possibility, no more, that horse waste could have been the source of the Boldenone. We also add to this lack of evidence (1) uncertainty over the length of time between the departure of the horses from the Chippenham stabling and Mr Hone's test and (2) the heavy rain in the area noted in Professor Cowan's evidence; neither of these is conclusive but they do raise queries.

37. On the extremely limited evidence before us, we do not think it open to us to treat this as an exceptional case. It falls squarely within the general principle. In the circumstances, the issue of No Fault or Negligence or No Significant Fault or Negligence does not arise. We are not satisfied on the balance of probability that the source of the Prohibited Substance in Mr Hone's system was in fact horse waste.

38. Finally, we would only wish to make it plain for Mr Hone that we are not by this Decision making a finding that he did actually take a performance enhancing drug. It is simply that we cannot be satisfied on the very limited evidence before us as to the source of the Boldenone in his system. It follows on the authorities that Mr Hone has not discharged the necessary burden of proof to show lack of intention for the purposes of the ADR.

**CONCLUSION**

39. In conclusion, for the reasons set out above, we find that:

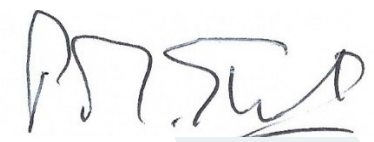
    (1) the admitted Anti-Doping Rule Violation is established; and

(2) the applicable period of Ineligibility is four years.

We consider that the period of Ineligibility should run from the date of Sample collection, that is 6 February 2020. Mr Hone promptly admitted the Anti-Doping Rule Violation when confronted with it. It is accordingly right that the period of Ineligibility should relate back to 6 February 2020 in accordance with ADR Article 10.11.2.

**RIGHT OF APPEAL**

40. In accordance with ADR Article 13.4, the parties may appeal against this decision to the NADP Appeal Tribunal. In accordance with Article 13.5 of the NADP Procedural Rules any party who wishes to appeal must lodge a Notice of Appeal with the NADP Secretariat within 21 days of receipt of this decision. The Appeal should be filed to Sport Resolutions, 1 Salisbury Square, London, EC4Y, 8AE and contact can be made via resolve@sportresolutions.co.uk.



Robert Englehart QC, Chairman

For and on behalf of the Panel

London, UK

06 May 2021