In the matter of a Regulatory Commission of The Football Association

Mr Nicholas Stewart QC (chairman), Mr Ifeanyi Odogwu and Mr Stuart Ripley

Between:

The Football Association

and

Dr Andrew Johnson

Reasons for Regulatory Commission decision made on 14 January 2020

Introduction: The charge and admission

1. Dr Andrew Johnson ("the Participant") is a qualified and experienced medical practitioner. Throughout the 2018-19 football season he was the part-time club doctor for Bury FC. The club was then playing in League Two of the English Football League. It has since been expelled from the Football League but that has no bearing on this case.

2. The Participant was charged by the Football Association by letter dated 17 October 2019 ("the Charge Letter") for misconduct under FA Rule E25 by a breach of Regulation 7(a) of the *FA Anti-Doping Regulations 2018-19* ("the ADR"): "Tampering or Attempted Tampering with any part of Doping Control". He has admitted the charge.

3. These are the reasons for this Regulatory Commission's decision, after a hearing at Wembley Stadium on Tuesday 14 January 2020, to suspend the Participant Dr Johnson from all football and football-related activity for four years. The Regulatory Commission is unanimous on all points in our decision and reasons.

4. Dr Johnson was present throughout the hearing, represented by his counsel Ms Mary O'Rourke QC and his solicitor Mr Nicholas Lewis of DWF Law LLP. The FA's case was presented by Mr Dario Giovannelli, FA Regulatory Advocate. Mr Robert Henderson, The FA Anti-Doping Manager, and Mr James Laing, UK Anti-Doping Legal Officer, were present as observers. The Regulatory Commission had full and helpful submissions from Mr Giovannelli and Ms O'Rourke but there was no oral evidence.

5. The particulars of the breach were that in April 2019 the Participant had provided fraudulent information to an Anti-Doping Organisation, namely the FA and/or UK Anti-Doping, in respect of an application for a Therapeutic Use Exemption ("TUE") dated 1 December 2018 on behalf of a player. That is a form of Tampering under Regulation 7 and is an Anti-Doping Rule Violation ("ADRV"). The Charge Letter incorporated an Explanatory Note with further particulars of the charge. The date of the breach means that it is the 2018-19 ADR which apply. There are some changes in the current 2019-20 ADR, although none would make any difference to this case anyway.

6. The crucial fact was that on 9 April 2019 the player sent UK Anti-Doping ("UKAD") an application for a retrospective TUE. The material sent in support of that application included:

- a signed letter from Dr Johnson dated 5 April 2019 which falsely stated that a TUE form had been filled in and posted on 1 December 2018; and

- a photocopy of a purported 1 December 2018 dated form with Dr Johnson's signature.

7. In fact, that purported 1 December 2018 form had been prepared and signed by Dr Johnson only in late March or early April 2019. He had deliberately backdated the form. That was done to cover up the fact that he had intended to submit an application on behalf of the player back in December 2018 but had forgotten. With no application having been submitted in 2018, the player's use of the medication in question had left him clearly exposed to a risk of an ADRV.

8. The deception was spotted almost immediately by UKAD, because the form used by the Participant in 2019 was a new version which had not been in use in December 2018.

9. None of this is in dispute and the Participant has never denied his deception since it was first spotted by UKAD. He admits his breach of Regulation 7 of the ADR, which states (as far as relevant):

> (a) Tampering or Attempted Tampering with any part of Doping Control by a Participant is prohibited. Tampering is conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include . . . providing fraudulent information to an Anti-Doping Organisation. .
>
> (b) The penalties set out in Regulation 52 apply to this violation.

10. The Regulatory Commission has reviewed all the detailed chronology and events and the more than 500 pages of documents but it is unnecessary to include more detail than we have done to explain our decision.

11. Regulation 52 sets out a mandatory 4 years' suspension for a breach of Regulation 7, with the only possibility of a reduction being under ADR Part Eight: "Reduction of penalties for exceptional or specific circumstances". In the present case, the only provision in Part Eight which either party suggests is relevant is Regulation 72: "Prompt Admission of an Anti-Doping Rule Violation after being Confronted with a

Violation". Regulation 72 provides that a Participant who is potentially subject to a four-year suspension for violation of Regulation 7:

> " . . may, by promptly admitting the asserted Anti-Doping Rule Violation after being confronted by an Anti-Doping Organisation, and also upon the approval and at the discretion of both WADA [World Anti-Doping Agency] and The [Football] Association, receive a reduction in the period of suspension down to a minimum of two years, depending on the seriousness of the violation and the Participant's degree of fault."

12. The Participant has relied on that provision to seek a reduction down to a minimum two years' suspension.

13. This Regulatory Commission has fully considered all the facts and circumstances of this case and has decided that there should be no reduction under Regulation 52. The result is a four years' suspension. We explain our reasons below.

The procedure under Regulation 72

14. Regulation 72 requires a favourable decision of three separate bodies before a Participant can receive any reduction from the four years' suspension set out in Regulation 52: (i) WADA; (ii) the FA; and (iii) the FA Regulatory Commission dealing with the case. It is clearly designed to implement Article 10.6.3 of the World Anti-Doping Code, which allows a reduction for Prompt Admission to be made only upon the approval and at the discretion of WADA and the "Anti-Doping Organisation with results management responsibility". Regulation 1 of the FA ADR expressly states that the ADR are intended to implement the WADA Code and should be interpreted in accordance with that purpose.

15. In this context it is even more important than usual to appreciate that an FA Regulatory Commission makes an independent judicial decision based on rigorous examination of the evidence and application of the FA's rules and regulations. A decision of a Regulatory Commission is *not* a decision of The Football Association.

16. While it is clear from Regulation 72 of the FA ADR that all three of those bodies must approve any reduction from a four years' suspension, the regulation does not prescribe the order in which those three bodies should consider and decide their

positions on the question. In the light of this Regulatory Commission's decision that there should be no reduction from a four years' suspension, the approval or disapproval of WADA and the FA would make no practical difference anyway. However, the sequence of decisions of those three bodies was raised at the hearing on 14 January 2020 and involved a question of principle for the Regulatory Commission.

17. The FA's case at the hearing was presented by Mr Dario Giovannelli, FA Regulatory Advocate. His written submissions a week in advance of the hearing expressly stated that the FA did not consider it appropriate to exercise its discretion under Regulation 72 in this case; and that UKAD had confirmed that it would not consider exercising its discretion in favour of a reduction on the facts of this case (the Regulatory Commission noting here that UKAD is not itself mentioned in Regulation 72). Mr Giovannelli asserted that in the absence of the FA's approval, Regulation 72 was not applicable. The way he put it at the hearing was that the Regulatory Commission had no jurisdiction to make any decision under Regulation 72.

18. The Regulatory Commission does not agree. It is obvious that a Regulatory Commission can make no *binding* decision to reduce a suspension under Regulation 72 without the approval of both WADA and the FA. However, it is the responsibility of a Regulatory Commission to consider all the evidence and submissions and express its independent view under Regulation 72. In doing so, the Regulatory Commission must have firmly in mind the anti-doping policies of WADA and the FA and, as far it has the information, should also take into account the way in which Regulation 72 the WADA Code Article 10.6.3 are applied generally by WADA and the FA in implementation of those policies. In many cases, as in the present case, the result will be no difference of view among the three bodies mentioned in Regulation 72. But a Regulatory Commission should make its own decision on the point, whether or not it has been informed of the WADA and FA views in advance.

19. At the 14 January 2020 hearing, the Regulatory Commission was shown an email sent very early that morning from WADA to Mr Giovannelli at the FA. The email pointed out that the FA was not itself "an Anti-Doping Organisation with results management responsibility" for the purposes of Article 10.6.3 of the WADA Code (the relevant organisation in England, as in the rest of the United Kingdom, being UKAD). The email also said that WADA presumed that the FA was acting under the

authority and supervision of UK Anti-Doping (although the Regulatory Commission does not know anything more about that point).

20. WADA's email noted that both UKAD and the FA had indicated that they did not consider it appropriate to exercise their discretion to apply a reduction to the period of ineligibility under Regulation 72. In those circumstances WADA did not consider it necessary to reach a decision whether it ought to approve a reduction, though it stated, for the avoidance of doubt, that WADA would not be inclined to exercise its discretion in favour of a reduction. It then set out some 25 lines of reasons for that view, which in practical terms amounted to submissions in support of the FA's case against Dr Johnson.

21. We do not criticise WADA or UKAD over any of this and the FA's case was presented by Mr Giovannelli in a conspicuously fair and helpful way, as was the Participant's case by Ms O'Rourke.

22. This Regulatory Commission is also not for one moment presuming to tell WADA, UKAD or the FA how to do their jobs when they are considering the exercise of discretion under Regulation 72. We are concerned with doing our job as a Regulatory Commission. That includes making a decision, based on the evidence and submissions before us, as to whether or not a reduction under Regulation 72 is fair. If we decide against any reduction from the basic four years, that is an end of the matter (subject always to the Participant's right of appeal to an FA Appeal Board). If, on the other hand, our decision is in favour of a reduction, it is then open to WADA and the FA to approve or not approve that reduction in their discretion; and to reconsider the matter even if they have expressed a firm view in advance of the Regulatory Commission's decision.

23. On that last point, we note that the WADA email on 14 January 2020 said "it is therefore not clear to WADA whether Dr Johnson has, in fact, fully admitted the anti-doping violation asserted against him". If it was not clear to WADA, it seems likely it was not clear to UKAD either. In mentioning that point at all, it appears that WADA considers it relevant to its Regulation 72 discretion. If the Regulatory Commission had decided a reduction was fair, where would that have left matters? In our view, the Participant could reasonably then have expected that if that relevant

point had become clearer as a result of the Regulatory Commission proceedings, WADA, UKAD and the FA should then have taken that into account for the purposes of Regulation 72. That would have required them to consider whether or not it justified a change of the position expressed unequivocally by the FA and provisionally by WADA.

24. Where all this leads is to our conclusion that when a Participant has asked for a reduction under Regulation 72, a Regulatory not only can but *must* make a decision on that point. What WADA and the FA then do with that decision is a matter for their discretion under Regulation 72 and the Regulatory Commission will have no further involvement.

25. We have considered an appeal decision of the Court of Arbitration for Sport concerning Article 10.6.3 of the WADA Code: CAS 2017/A/5282 *WADA v International Ice Hockey Federation (IHHF).* The CAS Panel held that the ice hockey player in question had committed an intentional ADRV so that the basic sanction was a four years' suspension. In that case the two bodies whose approval was required for a reduction under Article 10.6.3 were WADA and the IHHF. They were both parties to those CAS proceedings and made submissions to the CAS Panel. WADA submitted that the preconditions for the application of Article 10.6.3 had not been satisfied but that if the CAS Panel held that they had, a 10.6.3 reduction should be in the range of three to six months. The IHHF submitted that 10.6.3 was applicable and that a reduction of six to nine months was justified. The CAS Panel ordered a reduction of six months.

26. That CAS order was made in definitive terms, including no opportunity or requirement for further consideration by WADA or the IHHF. That decision was completely in line with the submissions from WADA and the IHHF on the appropriate level of the 10.6.3 reduction. In effect, the CAS Panel accepted and implemented the WADA and IHHF submission as the exercise by those bodies of their discretions under Article 10.6.3. However, the CAS Panel was also clearly exercising its own discretion. There is nothing in that WADA v IHHF decision which conflicts with what we have said above, particularly our conclusion in paragraph 23.

Should there be a Regulation 72 reduction of the 4 years' suspension?

27. This is the question on which the Regulatory Commission must express its own independent opinion.

28. First, the Regulatory Commission accepts that there was the prompt admission by the Participant which is essential to bring Regulation 72 into play at all. "Prompt Admission" in Regulation 72 is not a defined term so it has to be judged by common sense. The Charge Letter enclosed a Reply Form to be returned by 25 October 2019, admitting or denying the charge, and required the Participant to return all submissions, evidence and any other relevant material, including witness statements, by the same deadline.

29. That short deadline is standard in FA disciplinary cases but except in the simplest cases is frequently extended. The Participant's solicitors asked for extensions on 21 October and 8 November 2019. The Reply Form was returned on 19 November 2019, admitting the charge. The Regulatory Commission is satisfied that in a case of such obvious seriousness for Dr Johnson, those extension requests were reasonable and that his admission just over one month after being charged was prompt admission for the purposes of Regulation 72.

30. It is prompt admission when formally charged which is the precondition for applying Regulation 72. However, we do note that in his interview by FA investigators on 25 June 2019 the Participant had expressly admitted his dishonest preparation of the backdated form and its submission through the player some two months earlier. That was also expressly set out in his signed written statement dated that same day 25 June 2019. It followed letters from the FA dated 15 May 2019 notifying him and the player that the FA was conducting an investigation into potential tampering and inviting them both for interview.

31. It would have been obvious to the Participant from that FA letter on 15 May 2019 that he had been rumbled and that realistically he was bound to be charged by the FA for that serious and dishonest breach of the ADR. However, although it would have been futile for him to try to wriggle out of what he had done, the fact is that he did make a clean breast of it as soon as interviewed; and he could not have done more.

32. The CAS decision in *WADA v IHHF* (above), para. 90, refers to the need for the person charged with a doping offence to give a full and truthful description of the factual background of the offence. Those remarks were made in the different context of an ADRV, where such full disclosure would be potentially relevant to the crucial element of intent and therefore to sanction. However, any deliberate or even careless withholding of full and truthful disclosure is likely to be a strong point against a reduction under Regulation 72.

33. There was correspondence in December 2019 in which Dr Johnson's solicitors were trying to negotiate an amendment of a point in the FA's explanatory note concerning the drafting of a letter sent by the player to the FA in April 2019. The Participant's solicitors wrote on 18 December 2019 that "if the charge is amended, we can confirm, on behalf of Dr Johnson, that he maintains his admission to the charge". Despite that correspondence, it would be unrealistic to suppose that Dr Johnson was ever going to resile from his admission of the charge or from his explicit admission back on 25 June 2019 that it was he, and not the player or anyone else, who was responsible for the fraudulent submission of the backdated TUE form.

34. The Participant made a signed witness statement on 10 January 2019 correcting some errors in his earlier timings of various events and attributing those errors to confusion on his part and his poor record-keeping. At the hearing on 14 January 2019, there remained an unresolved issue between the FA and the Participant as to how and when exactly the items sent by the player to UKAD on 9 April 2019 had been prepared. There was also a conflict of evidence between the Participant and the player on the question of whether they had met on 22 March 2019, as the Participant claims but the player denies. Mr Giovannelli chose not to call the player to give oral evidence, The Participant did not give oral evidence either, following the Regulatory Commission's indication that we did not believe it would affect our decision in the case.

35. Mr Giovannelli invited the Regulatory Commission, if we were not minded to conclude on the written evidence alone in favour of the FA's position on those disputed points, not to make any findings. Ms O'Rourke did not press us to do so. We accept Mr Giovannelli's invitation. The position we take is that on the evidence before us, for the purposes of Regulation 72 we treat the Participant as having made a

sufficiently full and truthful description of all relevant events since the FA first notified its investigation on 15 May 2019. We treat any errors in the Participant's past accounts to The FA as inadvertent and insignificant.

36. On that footing, we now examine what does count in making our judgment under Regulation 72.

37. The perceptible purpose of Article 10.6.3 of the WADA Code, and therefore also Regulation 72, is to avoid the time and cost involved in a contested dispute and its procedural consequences: CAS 2016/A/4534 *Villanueva v Fédération Internationale de Football Association*, para. 49. The Participant could only admit what had been charged but there was little saving of time and cost in Dr Johnson's admission. Once the wrong TUE form had been spotted at UKAD, this would have been an easy charge to prove.

38. As the Participant has met the precondition for applying Regulation 72, expressly relevant factors are the seriousness of the violation and the Participant's degree of fault.

39. There is inevitably some overlap between seriousness and fault. Dealing first with fault, Ms O'Rourke naturally attempted to downplay this factor. However, we see a high degree of fault. This was a deliberately dishonest act by a professional man in a position of responsibility.

40. As to seriousness, some care is needed in seeing how that factor works under Regulation 72. Ms O'Rourke submitted that it could not be right that all offences received the same sanction/outcome. That led to her placing this offence at some distance on the spectrum of seriousness from the most extreme cases of tampering such as the Russian scheme at the 2014 Sochi Winter Olympics. We find that a flawed approach to Regulation 72 (and Article 10.6.3). The starting point is that unless Part Eight (including Regulation 72) comes into play, Regulation 52 imposes a single and deliberately tough penalty of four years' suspension for tampering, without allowing for any gradations according to relative seriousness. Prompt admission is not intended by Regulation 72 to open up a general gradation which as a matter of

clear policy is not allowed generally by the WADA Code and the FA ADR which implement the Code.

41. We nevertheless must and do consider the seriousness of the Participant's violation, as expressly required by Regulation 72. In our view, this was a serious violation, however much one can identify or describe more serious cases. We recognise that it was a single incident and was not part of any planned scheme to achieve any competitive advantage for the player. However, fraudulent information of this type is seriously undermining of the WADA anti-doping regime, which heavily relies upon the honesty and integrity of professionals such as Dr Johnson in positions of responsibility.

42. The Regulatory Commission has weighed the relatively slight practical time and cost saving by the Participant's admission of the charge against his degree of fault and the seriousness of the violation. Our firm decision is that there should be no reduction under Regulation 72 so there must be a four years' suspension as required by Regulations 7 and 52.

43. We have considered eleven points set out in Ms O'Rourke's written skeleton and prayed in aid of a reduction:

    (1) Dr Johnson's full co-operation with the authorities;

    (2) His prompt admissions of wrongdoing;

    (3) The fact the player had a genuine medical condition (not diagnosed by him such that he was not covering up any wrong diagnosis or error on his part);

    (4) His concern for the player and that due to his mistake he should not suffer;

    (5) The fact that as a doctor he will necessarily be dealt with and potentially sanctioned by his regulator (the GMC);

    (6) The fact that he self-reported to the GMC;

    (7) His resignation from his job at Bury FC.

    (8) His loss of his position at Manchester City FC;

    (9) The fact that a retroactive TUE could have been obtained if he had not panicked and lied and fraudulently submitted a document;

(10) The commission of the "offence" on the spur of the moment and without thought or advice;

(11) The damage to his reputation and associated publicity.

44. Our view of those points is:

- We have already covered points (1) and (2). They are relevant but are essentially the qualifying conditions for Regulation 72 and have little weight on the question of a reduction of the sanction.

- We are not impressed by point (3). The Participant was covering up his error in forgetting to arrange the TUE application in December 2018.

- As to point (4), we accept that the Participant was concerned to retrieve the position for the player as far as he could. But his dishonest actions were also an attempt to protect himself from the consequences of his own forgetful oversight in December 2018.

- Points (5), (7), (8) and (11) are the hard consequence of his actions. The fact that they are on top of the sanctions under the ADR do not justify a reduction under using Regulation 72 so as to weaken or undermine the purpose and application of the ADR and the WADA Code on which they are based.

- Point (6) has no weight. That is between him and the GMC. In any case, once his actions had come to light at UKAD and the FA, it must have been the only sensible course in his own interests.

- As to (9), if that is true we still cannot see how it is relevant.

- As to (10), it was not on the spur of the moment. What he did required thought and planning.

45. We informed the parties at the end of the hearing on 14 January 2020 that we were imposing a four years' suspension with no reduction under Regulation 72, starting on that day.

Costs

46. Dr Johnson asked for a personal hearing. That was his right. Nevertheless, this has all been made necessary by the Participant's own misconduct and it is fair that he should contribute £2,500 towards the costs incurred by this Regulatory Commission. We make that order under paragraph 54 of the *FA Disciplinary Regulations*.

47. We also direct forfeiture of his personal hearing fee.

Regulatory Commission order

48. The Regulatory Commission's order is:

(1) The Participant Dr Andrew Johnson is suspended pursuant to The Football Association *Anti-Doping Regulations* for 4 years from 14 January 2020.

(2) His personal hearing fee of £100 is forfeit to the Football Association.

(3) The Participant must pay £2,500 towards the costs of this Regulatory Commission on or before 13 February 2020, under paragraph 54 of *The FA Disciplinary Regulations 2019/2020*.

49. By Regulation 42(a) of the ADR, the effect of the suspension is that the Participant cannot during the period of suspension participate in any capacity in any Match or any other football-related activity or in any other activities under the jurisdiction of another World Anti-Doping Code signatory or member of a Code signatory, other than anti-doping education or rehabilitation programmes.

Right of appeal

50. The Participant has a right of appeal in accordance with Regulation 74 of the FA *Anti-Doping Regulations*.

Nicholas Stewart QC
Chairman

27 January 2020