SR/056/2022

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

Before:
Robert Englehart KC
Dr Neil Townshend
Professor Isla Mackenzie

BETWEEN

UK Anti-Doping Limited

Anti-Doping Organisation

and

Rowland Kaye

Respondent

DECISION OF THE NATIONAL ANTI-DOPING PANEL

PRELIMINARY

1. We were appointed the Arbitral Tribunal to determine a charge of breach of the Rugby Football League anti-doping rules brought against Rowland Kaye, a young semi-professional Rugby League player contracted to Hunslet RLFC. The Rugby Football League has delegated the conduct of its anti-doping programme to UK Anti-Doping Limited ("UKAD") and has adopted the UK Anti-Doping Rules ("ADR"). We held a remote hearing on Zoom with the consent of the parties for a full day on 14 December 2022. Before us UKAD's case was presented by

Mr Scott Smith, UKAD's Lawyer. Mr Kaye was represented by Mr Tim Meakin of Counsel. Also in attendance at the hearing were:

- Ms Stacey Cross – UKAD Deputy Director of Legal and Regulatory Affairs
- Mr Ciaran Cronin – UKAD Lawyer
- Ms Brodie Edmead – UKAD Paralegal
- Ms Alisha Ellis – NADP Secretariat
- Mr James Bromley-Derry – Sport Resolutions Observer

We are very grateful to Mr Meakin for representing Mr Kaye *pro bono* and forcefully advancing Mr Kaye's case.

THE CHARGE

2. Following a relatively recent amendment of the Charge, Mr Kaye faced a single charge under ADR Article 2.1. That Article of the ADR makes the mere presence of a Prohibited Substance or its Metabolite in a player's body an Anti-Doping Rule Violation regardless of any fault. Article 2.1 in material part provides:

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample, unless the Athlete establishes that the presence is consistent with a TUE granted in accordance with Article 4.

2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters their body. An Athlete is responsible for any Prohibited Substance or any of its Metabolites or Markers found to be present in their Sample. Accordingly, it is not necessary to demonstrate intent, Fault, negligence or knowing Use on the Athlete's part in order to establish an Article 2.1 Anti-Doping Rule Violation; nor is the Athlete's lack of intent, Fault, negligence or knowledge a valid defence to an assertion that an Article 2.1 Anti-Doping Rule Violation has been committed.

2.1.2 Proof of any of the following to the standard required by Article 8.4.1 is sufficient to establish an Article 2.1 Anti-Doping Rule Violation:

(a) An Adverse Analytical Finding of the presence of a Prohibited Substance or any of its Metabolites or Markers in the Athlete's A Sample, where the Athlete waives analysis of the B Sample and so the B Sample is not analysed.

(b) An Adverse Analytical Finding of the presence of a Prohibited Substance or any of its Metabolites or Markers found in the Athlete's A Sample, where analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample.

………

3. A further previous charge against Mr Kaye of using a Prohibited Substance was withdrawn on the making of the amendment. The sole Charge faced by Mr Kaye following amendment was as follows:

> An ADRV pursuant to ADR Article 2.1, in that a Prohibited Substance, namely *18-nor-17β-hydroxymethyl-17α-methyl-5α-androst-13-en-3-one*, a long-term Metabolite of oxymetholone and/or methasterone, was present in a urine Sample provided by you on 5 January 2022 numbered A1164806.

4. Two matters are to be noted. First, the Charge contains a typographical error in the precise name of the long-term metabolite in question ("the Metabolite"). It should read: 18-nor-17β-hydroxymethyl-17α-methyl-2α-methyl-5α-androst-13-en-3-one. However, nothing turns on that. Secondly, the letter to Mr Kaye which contains the Charge after amendment explains that either oxymetholone or methasterone could be a parent substance of the Metabolite; it is not scientifically possible to specify which of the two was in fact the relevant parent

substance in Mr Kaye's case. However, again nothing turns on that since both oxymetholone and methasterone are anabolic steroids and are Prohibited Substances under the same section of the WADA Prohibited List.

5. Before us, Mr Kaye accepted that he had committed an Anti-Doping Violation under ADR Article 2.1 in that a metabolite of a Prohibited Substances was found in his system; he would have contested Use of a Prohibited Substance but, given the amendment, that was no longer part of the Charge. On the remaining part of the Charge, the sole issue now before us was one of sanction. In that regard, at the hearing most of the time was devoted to the question of how the Prohibited Substance, whether methasterone or oxymetholone, which had generated the Metabolite had entered Mr Kaye's system.

THE FACTUAL BACKGROUND

6. Mr Kaye is a young man now aged 23. He is a qualified teacher and clearly passionate about rugby. In October last year he was contracted as a semi-professional to Hunslet RLFC, a club in Leeds which competes in Betfred League One. Before that he had been under contract as a professional to Carcassonne in France. He is a talented young Rugby player who had previously played in Wales and indeed represented Wales in various junior teams.

7. In December 2021 Mr Kaye was suffering from a leg injury which was preventing him from playing matches. However, he was continuing to train at Hunslet RLFC. On 5 January 2022 a UKAD Doping Control Officer attended the Hunslet RLFC ground in order to carry out testing. Mr Kaye was selected to take a urine test. He completed the Doping Control Form and provided a urine Sample. It is notable that on the form Mr Kaye only mentioned three medicines and one supplement that he had taken in the previous week: (1) Piriteze, an antihistamine (2) ABE Workout, a supplement (3) Paracetamol and (4)

Ibuprofen. The testing process was entirely uneventful. The Sample, divided into A and B samples, was then transmitted to the World Anti-Doping Agency ("WADA") approved laboratory on 7 January 2022.

8. The laboratory test report for the A Sample was provided to UKAD on 1 March 2022. It revealed that it contained a small quantity of the Metabolite. The laboratory's documentation pack was independently reviewed, and Mr Kaye was informed of the positive test by letter of 4 March 2022. He exercised his right to have the B Sample analysed. That analysis also disclosed a small quantity of the Metabolite.

9. It is against that background that Mr Kaye accepted the Presence of a Prohibited Substance in his A Sample, as subsequently confirmed by his B Sample. There was no dispute about the Anti-Doping Rule Violation itself, although there was a vigorous dispute about the appropriate sanction for Mr Kaye. For completeness, we should record that the two possible parent substances of the Metabolite are both listed as anabolic androgenic steroids on the WADA Prohibited List. They are non-Specified Products, prohibited at all times both In and Out-of-Competition.

EVIDENCE ADDUCED BY UKAD

10. Before us UKAD called no live witnesses and relied solely on documentary evidence. Given Mr Kaye's acceptance of the Charge as amended it is not necessary to describe the evidence relevant to the fact of the Anti-Doping Rule Violation. However, we should note the written evidence put forward by UKAD which could have some relevance to issues ventilated before us. In considering this evidence we exercised some caution since it was not the subject of cross-examination.

11. Professor David Cowan provided an expert report of some relevance to Mr Kaye's case that the source of the Metabolite in his system must have been a legitimate but contaminated supplement. Professor Cowan pointed out that the concentrations of the Metabolite in this case, 4 ng/ml in the A Sample and 3 ng/ml in the B Sample, were above the minimum sensitivity level for the testing mechanism, that is 2.5 ng/ml. He also pointed out that he had seen no evidence of regular use of a prohibited anabolic androgenic steroid from Mr Kaye's test results. In his view, there were three possible scientific explanations for the presence of the Metabolite stemming from oxymethalone or methasterone in Mr Kaye's system: (1) repeated ingestion of a contaminated supplement but with the last occasion at least a week prior to the test (2) administration of the parent substance most likely at least two weeks prior to the test and (3) administration of a small dose a little more than a week before the test. The latter was in Professor Cowan's view unlikely given that neither the parent substance nor its short-term metabolite had been revealed by the test.

12. UKAD also relied on a witness statement from Mr Nick Wojeck, Head of Science and Medicine at UKAD. In brief, it was Mr Wojeck's evidence that oxymetholone and methasterone are sometimes illicitly taken by athletes to improve physique or to aid recovery from injury. He could not, of course, give any evidence about Mr Kaye's particular case, and Mr Meakin for Mr Kaye objected to our looking at his evidence at all. This objection, which we rejected, was on the basis that his evidence could only have relevance to the now abandoned Use charge.

13. Finally, UKAD referred to a letter from Professor Kim Wolff, the Head of the laboratory where Mr Kaye's Sample was analysed. This letter explained the reasons for the 38 business day period before the results of Mr Kaye's test were released on 1 March 2022. Testing inevitably takes time but in Mr Kaye's case the time taken was exacerbated by a Christmas backlog, Covid among

laboratory staff, university maintenance procedures and technical problems with the test.

EVIDENCE FOR MR KAYE

14. Mr Kaye himself was the sole witness called by Mr Meakin. In addition, he relied upon written statements from four character witnesses, Mr Alan Kilshaw the Hunslet RLFC Head Coach, Ms Ellie France the club head physiotherapist, Mr Simon Jones who had been a sponsor of Mr Kaye at a Welsh club and Mr Jarrad Varnagas the welfare officer at that latter club. All of them spoke of their high regard for Mr Kaye and expressed the opinion that he was not someone who would take drugs.

15. Mr Kaye gave evidence over quite a lengthy time but, we can summarise the main points of his evidence as follows. He is an honest person and passionate about rugby. He was aware of some substances being banned for sportsmen and he had had talks with UKAD on the subject, although these talks were in fact just chats with UKAD personnel attending for drug tests. Whilst he did take a number of different supplements, he would never take illicit drugs, especially having seen their effect on a player at a previous club who had been taking banned substances. Mr Kaye was careful to use the 100% Me app and the Informed Sport website to check supplements he used. His physique had scarcely changed over the period when he had been at Hunslet; that would be unlikely if he were taking steroids. Furthermore, he suffered from a kidney problem and a heart condition which would be incompatible with the taking of steroids.

16. Mr Kaye was particularly concerned about the two month period between his test and being notified that it was positive; he did not know how long analysis might take, but in the only other case about which he knew the player had been

charged within a month of his test. But for the delay he could have had the containers of the supplements he had been taking analysed, but in the two months between test and notification he had disposed of all the containers.

17. Supplements which Mr Kaye had been taking in the period before the test were as follows:

    (1) ABE All Black Everything which had been bought for him on Amazon by his brother's girlfriend, and he had also himself purchased at a shop.

    (2) Prosupps-hyde Nightmare bought at a shop in Swansea.

    (3) Creatine Myprotein powder bought from the Myprotein website.

    (4) PAS protein powder bought from the PAS website.

    (5) Applied Nutrition critical whey protein bought at a shop.

    (6) Cod liver oil tablets and Magnesium tablets purchased through Holland and Barrett.

    He had still retained the Creatine Myprotein when he was notified of the test result, although he had since then disposed of it when moving house. He had thought that this was likely to have been the contaminated supplement, although this opinion was based on no more than the fact that he had retained it. Mr Kaye had not had this supplement analysed to see if it was contaminated because that would have been too expensive. Apart from this supplement, he had disposed of all the other containers after finishing the contents.

18. Mr Kaye also showed us attempts he had made in September 2022 to seek evidence from the manufacturers of supplements but without success. One manufacturer had been anxious to assist. Nevertheless, Mr Kaye had not pursued any investigation, even though this was one case where a receipt for

the supplement's purchase was still available so that the manufacturer might possibly have been able to identify the relevant batch.

19. As noted, Mr Kaye had not disclosed the various supplements, apart from one, on the Doping Control Form. His only explanation for this was that he had felt under great pressure at the time of the test.

SUBMISSIONS FOR UKAD

20. Mr Smith for UKAD submitted that this was a case where a four year period of Ineligibility was required under ADR Article 10.2.1. Mr Kaye could not claim that his Anti-Doping Rule Violation was not intentional because he had been unable to prove how the Prohibited Substance had entered his body. Essentially, there was nothing to show lack of intention other than Mr Kaye's own protestations of innocence.

21. Mr Smith referred us to the commentary to Article 10.2.1 in the World Anti-Doping Code. This states:

> While it is theoretically possible for an Athlete or other Person to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one's system, it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance.

We were invited to take note of the approach in the CAS decision in *Guerrero v FIFA* (CAS 2018/A/5546) especially at [65]. We were also referred by Mr Smith (as well as Mr Meakin) to the CAS decision in *Villanueva v FINA* (CAS 2016/A/4534) at [37] where the Panel observed:

> […] Furthermore, the Panel can envisage the theoretical possibility that it might be persuaded by an athlete's simple assertion of his innocence of intent when considering not only his demeanour, but also his character and history (it is recorded if apocryphally, that the young George Washington admitted chopping down a cherry tree because he could not tell a lie. *Mutatis mutandis* the Panel could find the same fidelity to the truth in the case of an athlete denying a charge of cheating). That said, such a situation would inevitably be extremely rare. Even on the persuasive analysis of Rigozzi, Haas *et al*., proof of source would be *"an important, even critical"* first step in any exculpation of intent. Where an athlete cannot prove source it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him.

22. Mr Smith drew our attention to the one CAS decision which did not follow the consistent line of other CAS decisions about the requirement to prove a source, that is *Jack v Swimming Australia* (CAS A1/2020). We were invited not to follow the approach in that case; Mr Smith also noted that Ms Jack had made much greater efforts to try and trace the source in her case than Mr Kaye had in this case and how the Sole Arbitrator had been extraordinarily impressed by Ms Jack as a witness.

23. If, contrary to Mr Smith's submission, we were to find that Mr Kaye had proved the source of the Metabolite in his system as a contaminated supplement, the period of Ineligibility would be two years. However, there could be no room for any further reduction on the basis of No Fault or Negligence or No Significant Fault or Negligence (as defined in the ADR). Under the ADR there is a strict personal responsibility to ensure that no Prohibited Substance enters an Athlete's body. This requires the "utmost caution" and leaving "no reasonable stone unturned". Mr Kaye took no precautions at all over what he ingested. He simply assumed that what he purchased at various shops or over the Internet would be alright. His fleeting references to the 100% Me app and the Informed Sport website were vague generalisations and not conclusive for the actual

supplements which Mr Kaye was consuming. He consulted nobody at the club and took no medical advice about what he was taking. He followed no planned regime and maintained no record of what supplements he was taking and when he was taking them. In Mr Smith's submission Mr Kaye had simply taken a chance.

SUBMISSIONS FOR MR KAYE

24. In his forceful submissions for Mr Kaye it was Mr Meakin's case that the source of the Prohibited Substance giving rise to the Metabolite had been demonstrated. On the balance of probabilities the source was a contaminated supplement, and Mr Meakin pointed us to a research article which showed how contamination in supplements did occur.

25. Mr Kaye had never taken, and would never take, any banned drug. He is rigorous in taking care over what he ingests and very much supports the eradication of drugs in sport. The only possible source was therefore one of the supplements which he was taking. The small quantity of the Metabolite found, i.e. 4 ng/ml, was consistent with this explanation.

26. We were particularly asked to take into account the delay in this case between testing and notification to Mr Kaye. Some two months was unacceptable and was culpable delay. Mr Kaye had been greatly prejudiced by the delay in that, by the time he learned of the failed test, all his supplements, apart from one, had been consumed and the containers disposed of. In the result, Mr Kaye had been prevented from having the supplements analysed. This was very unfair.

27. Mr Meakin relied heavily on the CAS decision of *Jack*, cited above. In his submission this recent decision showed a welcome flexibility of approach. We

should not follow the long line of domestic decisions to the effect that it would be extremely rare for a Tribunal to find an Anti-Doping Rule Violation not intentional when the source of the Prohibited Substance had not been established.

28. Mr Meakin urged us to bear in mind the following features of this case in holding that the Anti-Doping Rule Violation was not intentional: (1) Mr Kaye's clear evidence (2) the character evidence (3) Mr Kaye's consumption of supplements (4) the small trace of the Metabolite found (5) the absence of any material change in Mr Kaye's physique (6) his medical reasons for not taking steroids (7) the evidence that steroid contamination can occur (8) Mr Kaye's attempts to locate a source (9) the prejudice from the delay in notifying him of the failed test (10) the fact that as a teacher and professional man Mr Kaye would have a lot to lose by consuming illicit drugs and (11) the absence of any assistance from UKAD over establishing the source of the Metabolite.

29. Mr Meakin urged us to find that this was a case of No Fault or Negligence or, at least, No Significant Fault or Negligence. Mr Kaye was mindful of the dangers of illicit drugs and did refer to both the 100% Me app and the Informed Sport website. He only consumed supplements which he had personally acquired or knew the source. He had done all he could to prevent a Prohibited Substance from entering his system, and it was quite unreal to expect an athlete to keep written records of items like batch numbers and receipts.

DISCUSSION

30. Article 10.2 of the ADR provides:

> The period of Ineligibility for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6 that is the Athlete's or other Person's first anti-doping offence shall be as

follows, subject to potential elimination, reduction or suspension pursuant to Article 10.5, 10.6 or 10.7:

10.2.1 Save where Article 10.2.4(a) applies, the period of Ineligibility shall be four (4) years where:

10.2.1(a) The Anti-Doping Rule Violation does not involve a Specified Substance or a Specified Method, unless the Athlete or other Person can establish that the Anti-Doping Rule Violation was not intentional.

…….

Thus, the ADR plainly requires a four year period of Ineligibility in Mr Kaye's case unless he can prove (on the balance of probabilities) that his ingestion of the steroid generating the Metabolite was not "intentional". As used in Article 10.2, the term "intentional" is a term of art; it does not simply mean deliberate. Article 10.2.3 provides:

As used in Article 10.2, the term "intentional" is meant to identify those Athletes or other Persons who engage in conduct which they know constitutes an Anti-Doping Rule Violation or they know that there is a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk.

………

31. There is a long line of domestic authority to the effect that (1) it will only be in the rarest of cases that a Tribunal will be able to hold that ingestion of a Prohibited Substance was not intentional unless an Athlete can show how it entered his system and (2) speculation coupled with an Athlete's protestations

of innocence, rather than hard factual evidence, will not satisfy the Athlete's onus of proof.

32. In the seminal decision of *UKAD v Buttifant* (SR/NADP/508/2016) the Appeal Tribunal said at [27] - [28]:

> […] There must be an objective evidential basis for any explanation for the violation which is put forward. We reject the argument put by the Respondent that the athlete's contention that he does not know how the prohibited substance entered his body is consistent with an intention not to cheat and that the ultimate issue is the credibility of the athlete. The logic of the argument would be that where the only evidence is that of the athlete who, with apparent credibility, asserts that he was not responsible for the ingestion then on the balance of probability the athlete has proved that he did not act intentionally. Article 10.2.3 requires an assessment of evidence about the conduct which resulted or might have resulted in the violation. A bare denial of knowing ingestion will not be sufficient to establish a lack of intention.
>
> In summary, in a case to which Article 10.2.1 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 …….

33. In *Staples v RFU* (SR/NADP/1016/2017) 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.

Reference for the principle may also be made to the Appeal Tribunal decisions in *UKAD v Ohuaregbe* (SR/NADP/300/2019) and *RFU v Wells* (SR/NADP/96/2018) especially at paragraphs 26-7.

34. Aside from the *Jack* decision, cited above, the weight of the CAS authorities is consistent with the approach taken in this country. Reference may be made to *Guerrero v FIFA* (CAS 2018/A/5546) especially at [65] for the Panel's summary of the applicable principles. Other relevant authorities 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]. The position was succinctly summarised in the paragraphs from the *CPA* case, cited above:

> 51. To establish the origin of the prohibited substance, it is nowhere near enough for an athlete to protest innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which he or she was taking at the relevant time.
>
> 52. Rather, an athlete must adduce actual evidence to demonstrate that a particular product ingested by him or her contained the substance in question, as a preliminary to seeking to prove that it was unintentional, or without fault or negligence.

35. Mr Meakin invited us to follow the approach in *Jack*, cited above. However, we do not feel able to discard the wealth of both domestic and CAS jurisprudence. And we should say that we do have some reservations about the *Jack* case with its heavy reliance on the demeanour of a witness. Whilst the demeanour of a witness is doubtless a factor in assessing credibility, it is unsafe to place too much reliance on demeanour; that has been shown to be an unreliable tool.

36. In light of the above, we have examined the evidence in the present case with care, but it seems to us that there is almost nothing to establish source of the Metabolite other than Mr Kaye's protestations of innocence. Blaming some unknown supplement seems to us to be mere speculation. Indeed, the scientific evidence provided by Professor Cowan tends against the theory put forward by Mr Kaye. He claimed to have been taking the supplements on a regular basis up to the time of the test. However, as Professor Cowan pointed out, the test revealed neither the parent product nor indeed a short-term metabolite of the

parent product. The parent product must have been ingested quite some time before. We now address some of Mr Meakin's points other than those based on Mr Kaye's evidence.

37. In our view, the fact that the quantity of the Metabolite discovered on the test was small does not point to contamination as the source. The amount was above the sensitivity threshold for assessment. The smallness of the amount is in fact consistent with the inevitable lessening of any metabolite in the human body over time and would be consistent with the parent substance having been ingested some weeks earlier.

38. In our view there was some delay and a regrettable amount of time between test and results notification. We do not agree with Mr Smith's submission that there was no delay. We noted what Professor Wolff said about the reasons for the delay but, if the delay had caused prejudice, we do not think that culpability would matter. We considered whether the delay might make the present an exceptional case where it would be just not to require proof of source of the Prohibited Substance. Nevertheless, we did not feel able to do so. We are of the view that the delay did not in fact cause prejudice to Mr Kaye. It seems to us that on Mr Kaye's evidence he would be likely in any event to have consumed the relevant supplements and disposed of the containers by the normal time taken for an analysis. Second, we doubt very much whether Mr Kaye would in fact have had all the supplements which he was taking analysed. We note that he did not even have the one supplement which he had retained analysed. We sympathise with the reason he gave for this, that is the expense. But the expense of multiple analyses would, of course, have been considerably more. And it is to be noted that Mr Kaye did not even supply to Applied Nutrition, the makers of ABE All Black Everything, a copy of the receipt for which they asked when offering assistance to Mr Kaye.

39. Finally, we should say that we did not attach importance to the evidence of Mr Kaye’s physique not having substantially changed during his time at Hunslet RLFC. The evidence of Professor Cowan makes it clear that there was no long term use of steroids here. We also attached little importance to Mr Kaye having renal problems; the medical evidence about this postdates the positive result. Similarly, without medical evidence we were not able to read much into the heart scans produced by Mr Kaye.

40. In light of the above, we were unable to be satisfied as to the source of the Metabolite found in Mr Kaye’s system. In saying this, we wish to make it clear that we are not making any positive finding that Mr Kaye is a cheat. It is just that, without knowing the source of the Prohibited Substance, we cannot be satisfied that any period of Ineligibility should be reduced from four to two years in accordance with ADR Article 10.2.1.

41. Given that Mr Kaye has not identified the source of the Metabolite, we can deal briefly with the other points raised by Mr Meakin for a reduction in sanction. He relies on the sections of the ADR which provide for the elimination or reduction of sanction where there is No Fault or Negligence (Article 10.5) or No Significant Fault or Negligence (Article 10.6). In both cases, however, it is a pre-condition for application of the Articles that the Athlete has shown how the Prohibited Substance came to be in his or her body. Reference is made to the definitions in Appendix 1 of the ADR as follows:

> **No Fault or Negligence:** The Athlete or other person establishing that they did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that they had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Protected Person or Recreational Athlete, for any

violation of Article 2.1 **[as here]**, the Athlete must also establish how the Prohibited Substance entered the Athlete's system.

No Significant Fault or Negligence: The Athlete or other Person's establishing that any 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 relation to the Anti-Doping Rule Violation. Except in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1 **[as here]**, the Athlete must also establish how the Prohibited Substance entered the Athlete's system.

[Emphasis added]

42. Given our above conclusion, these sections of the ADR cannot be invoked by Mr Kaye. Nevertheless, we should say that we are far from satisfied that the high standards required for a reduction in sanction were met by Mr Kaye. We acknowledge, of course, that Mr Kaye would not have known that some supplement was contaminated by a Prohibited Substance, assuming such be the case. Nevertheless, given that (1) the standard for invoking Article 10.5 or 10.6 is notoriously high and (2) the potential problems associated with taking supplements are both widely known and indeed were appreciated by Mr Kaye himself, we are far from persuaded that a reduction in what would on this hypothesis be a two year sanction could be justified. Mr Kaye did make rather imprecise statements about chats with UKAD personnel, as well as the 100% Me app and Informed Sport website. However, he neither consulted the club nor took any medical advice about his taking of supplements generally or the particular supplements in question. His lack of care over the ingestion of supplements was perhaps reflected in the fact of his taking a supplement bought by a third party, his brother's girlfriend, on Amazon and his sharing a tub of one supplement with a teammate.

CONCLUSION

43. For the above reasons, our conclusion may be summarised as follows:

    (1) There was an admitted Anti-Doping Rule Violation.

    (2) We are not satisfied that Mr Kaye has proved how the Prohibited Substance in question entered his system.

    (3) Given this finding, there is no room for elimination or reduction in sanction by reason of No Fault or Negligence or No Significant Fault or Negligence.

    (4) The sanction must accordingly under the ADR be a period of Ineligibility of four years.

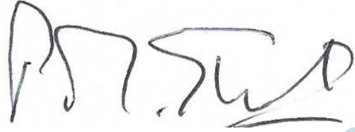
    (5) The Ineligibility will run from 4 March 2022, that is the date of Mr Kaye's provisional suspension and end at 23:59 on 3 March 2026.

    (6) There was no application for costs.

44. Our findings have meant that we have had no option under the ADR but to impose a four year period of Ineligibility. We have no discretion under the ADR. We would, however, wish to say that we do regard four years' Ineligibility as an extremely harsh sanction for someone like Mr Kaye, a young man who was on any showing not a regular user of steroids.

45. Finally, we remind the parties that in accordance with Article 13.5 of the NADP Procedural Rules any party who wishes to appeal this Decision must lodge a Notice of Appeal with the NADP Secretariat within 21 days of receipt of the Decision. Pursuant to Article 13.4.2(b), the Appeal should be filed to the

National Anti-Doping Panel, located at Sport Resolutions, 1 Paternoster Lane, London, EC4M7BQ (resolve@sportresolutions.co.uk).



Robert Englehart KC,

Chairman for the Tribunal

4 January 2023

London