

NATIONAL ANTI DOPING PANEL

Charles Flint QC

Carole Billington-Wood

Lorraine Johnson

RUGBY FOOTBALL LEAGUE

and

GEORGE FLANAGAN

Date of hearing: 13 May 2009

Date of Decision: 18 May 2009

FINAL DECISION

1. The tribunal has been appointed by the President of the National Anti-Doping Panel under Article 8.1 of the Rugby Football League Anti-Doping Rules ("the Rules") to hear and determine a charge brought against George Flanagan ("the player") of a doping offence contrary to Article D3.2.1 of the Rules that a metabolite (benzoylecgonine) of a Prohibited Substance (cocaine) had been found to be present in a urine specimen taken from the player on 15 March 2009 at a match between Batley Bulldogs against Featherstone Rovers.
2. The player is aged 22 and plays on a semi-professional basis for Batley Bulldogs. He is bound by the Rules which under Article 2.1 make it an offence for a Prohibited Substance or its metabolite to be found in a player's sample.

3. The Rules incorporate the Prohibited List which includes at S6 (a) cocaine as a Prohibited Substance which is a non-specified stimulant, that is a substance which is not a "Specified Substance" as defined by Article 3.3.1.
4. The Player admits the commission of the doping offence. His evidence is that he took cocaine at a party on the evening of Friday 13 March 2009 without any intent to enhance his sporting performance at the match which took place on Sunday 15 March 2009. He seeks to mitigate the sanction to be imposed by invoking Article 10.4 which, in a case involving a Specified Substance, permits the period of ineligibility to be reduced in certain circumstances. In the alternative it is argued that it would be disproportionate and an infringement of his human rights for the tribunal to impose a period of ineligibility of 2 years, which is the applicable period of disqualification required by Article 10.2 in the case of a first violation.

Procedural History

5. A sample was taken from the player in competition on 15 March 2009. Following analysis of the A sample the player was notified by letter dated 2 April 2009 of the adverse analytical finding of benzoylecgonine, a metabolite of cocaine. He was charged with a violation of Article D 3.2.1 of the Rules and a provisional suspension was imposed. He did not elect to attend the B sample analysis which took place, in the presence of an independent witness on 9 April 2009. By letter dated 15 April 2009 the player was informed of the result of the B sample analysis which confirmed the presence of benzoylecgonine.
6. By letter dated 22 April 2009 from his solicitor the player admitted the charge. He requested a hearing under Article 8 in order to seek to mitigate the sanction to be

- imposed. He submitted that benzoylecgonine should be regarded as a Specified Substance so that the period of ineligibility ought to be reduced, alternatively it would be an infringement of his human rights for him to be excluded from the sport where the drug taken was not performance enhancing.
7. The tribunal was appointed by the President of the NADP on 27 April 2009. Directions were given on 5 May 2009 for the filing of written submissions by each party. In addition the directions provided that if the player wished to show how the substance entered his body, in order to meet the requirements of Article 10.4, then he should serve a witness statement. Written submissions and a statement from the player were served.
 8. A hearing was held on 13 May 2009, at which the RFL was represented by Blake Solly and Dean Hardman. The player, accompanied by his father, was represented by Kevin Nicholas of Nicholas and Partners. In the course of the hearing the player produced a number of character references.

The Doping Offence

9. The offence arises under Article D3 2.1 (referred to elsewhere in the Rules and below as Article 2.1) which provides that a doping offence shall be constituted by:

The 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 Therapeutic Use Exemption granted in accordance with Article 4.
10. As recorded above the player admitted the violation. That admission was confirmed in written submissions on his behalf which accepted that benzoylecgonine is a metabolite of cocaine, that cocaine is a Prohibited

Substance, and that the player did not hold a relevant Therapeutic Use Exemption (TUE). Those admissions were confirmed at the hearing.

11. The doping offence is thus established. The issues which the tribunal has to decide concern the sanctions that should apply.

The facts

12. The player is aged 22 and was a professional player with Bradford Bulls from 2002 until 2008. In 2009 he moved to Batley Bulldogs where he plays on a semi-professional basis. He has full time employment outside the sport. He has no previous record of anti-doping violations.
13. His explanation of the circumstances in which he came to test positive is set out in his written statement. He says that he attended a birthday party on the evening of Friday 13 March 2009. He had some drinks and in a group he was offered some cocaine which he took. He says this was under the influence of drink and peer pressure and was done without thinking about his rugby career. He knows that under the rules of the sport he is not allowed to take drugs. He takes full responsibility for his own decision, accepts that it was a mistake and acknowledges that he has let down his family and the sport.

Ineligibility

14. Under Article 10.2 the sanction for a first violation of Article 2.1 is a period of ineligibility from competition of 2 years, subject to any reduction under Article 10.4.
15. Article 10.4 provides:

10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specified Circumstances

10.4.1 Where the Participant can establish how a Specified Substance entered his/her body or came into his/her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing

substance, and it is the Participant's first violation, the period of Ineligibility established in Article 10.2 shall be replaced with, at a minimum, a reprimand and no period of Ineligibility, and at a maximum a period of Ineligibility of two (2) years.

10.4.2 To qualify for any elimination or reduction under this Article 10.4, the Participant must produce corroborating evidence in addition to his/her word that establishes, to the comfortable satisfaction of the hearing panel, the absence of an intent to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance. The Participant's degree of fault shall be criterion considered in assessing any reduction of the period of Ineligibility.

16. On the points argued for the player the issues which arise are:
- (i) whether benzoylecgonine is a Specified Substance to which Article 10.4 applies;
 - (ii) if Article 10.4 applies, whether the conditions for a reduction in the period of ineligibility have been satisfied;
 - (iii) if Article 10.4 does not apply, whether the tribunal has any power to disapply or reduce the mandatory period of disqualification required by Article 10.2 on the grounds that such a sanction would be disproportionate or an infringement of the human rights of the player.
17. It is argued for the player that benzoylecgonine is not listed in the Prohibited List as a non-specified stimulant. It is accepted that cocaine is not a Specified Substance but argued that that is not the substance found in the sample. It is asserted that "the player has not tested positive for cocaine and therefore he has tested positive for a "specified substance"". .
18. In this case the violation under Article 2.1 consists of the presence of a metabolite (benzoylecgonine) of a Prohibited Substance (cocaine) in the sample. The rules draw a clear distinction between a Prohibited Substance and its metabolites so that, for example, Article 2.1.1 sets out the fundamental principle that it is the athlete's duty to ensure that no Prohibited Substance enters his body, whereas he is responsible for "any Prohibited Substance or any of its Metabolites or Markers" found to be present in his sample.

19. Under Article 10.4 it is for the athlete to show how a Specified Substance entered his body. It was not the metabolite that entered the body, but the Prohibited Substance (cocaine). The reference in the article to the issue of how the substance entered the body shows that the focus is not on what is found in the sample but what was ingested or inhaled by the athlete. It is for the athlete to show that the substance taken was a Specified Substance.

20. The substance ingested or inhaled was cocaine which is listed under S6 (a) of the Prohibited List as a non-specified stimulant and so cannot be a Specified Substance. The metabolite found was derived from cocaine which is a non-specified stimulant. There is no basis under the Rules and the Prohibited List for contending that the metabolite should be treated differently from the Prohibited Substance from which it is derived. Neither cocaine nor benzoylecgonine fall within the definition of Specified Substance contained in Article 3.3.1.

21. This is not simply a matter of literal interpretation of the Rules. The clear intent of the Prohibited List is that a stimulant, such as cocaine which may well have a performance enhancing application in certain circumstances, shall not be regarded as a Specified Substance. On the player's argument if cocaine had been found in his possession Article 10.4 could not have been invoked, yet it is said that a different result should follow if a metabolite of cocaine is found in his body. There could be no logical basis for such a distinction. We do not accept the assertion, which is not supported by any scientific or medical evidence, that the detection of a metabolite of cocaine indicates that the substance was not recently ingested or administered, so that it is less likely to have been performance enhancing. In this case it is admitted that cocaine was taken within about 36 hours of the match, so that the point is in any event unrealistic.

22. The logic of the argument would also apply, in the opposite way, to those stimulants which are identified at S6 (b) as Specified Stimulants. If the argument were correct if a metabolite derived from a Specified Stimulant were detected then the athlete would not be entitled to invoke Article 10.4. That argument would contradict the clear purpose of the relevant provisions of the Rules and the Prohibited List.

23. For those reasons we conclude that the Player may not invoke Article 10.4 because the relevant substance which entered his body, cocaine, is not a Specified Substance. It is therefore not necessary to consider whether the other conditions in that article would have been satisfied so as to give the tribunal power to reduce the period of ineligibility.

24. The second point argued for the player is that to apply a period of ineligibility of 2 years for a first violation would be disproportionate and an infringement of the player's human rights. That point has been put very generally and without reference to any specific decisions. The RFL has referred us to the decisions of the Court of Arbitration for Sport in *Edwards v USADA & IAAF* (2004) and *Hipperdinger v ATP* (2005), and we have also had regard to *Squizzato v FINA* (2005) and *Puerta v ITF* (2006). It is clear that under the Rules, consistent with the WADA Code, there is no power in the tribunal to disapply or mitigate the mandatory sanction of 2 years' ineligibility imposed for a first violation, otherwise than under the provisions of Articles 10.4 (Specified Substances) or 10.5 (Exceptional Circumstances). Those provisions are clearly intended to ensure that in appropriate cases, where it is established that the substance was not intended to be performance enhancing or the athlete was not at fault, there is discretion given to the anti-doping tribunal as to the period for which the athlete is to be declared ineligible. So the scheme under the WADA Code 2009 does allow for justified exceptions to the necessary principle of strict liability with fixed penalties. If the athlete cannot produce the evidence to bring himself within

the two relevant exceptions, under Articles 10.4 or 10.5, then he has no grounds to challenge the imposition of a fixed period of ineligibility.

25. The express premise of this argument is that the player did not take the substance with the intention of enhancing his sporting performance. The Rules, at Article 10.4, allow a player to seek a reduction of the period of ineligibility on that ground, but only in respect of Specified Substances and only if he can satisfy the evidential conditions of Article 10.4. If the player cannot satisfy those conditions then there is nothing unfair or disproportionate in imposing the fixed period of ineligibility required by Article 10.2.
26. It also needs to be pointed out that S6 stimulants, such as cocaine, are only prohibited in competition, in contrast to anabolic agents and the other substances under categories S1 to S5 which are generally prohibited. So the prohibition on cocaine is limited to competition, where it has the potential in certain circumstances to have a performance enhancing effect and thus affects the principle of fair competition between athletes.
27. The intention of the internationally agreed WADA Code is to strike a fair balance between the need for fixed sanctions, in the interests of fairness between athletes and in order to deter doping, and the need for sanctions to reflect the circumstances of the particular case. The Code pursues a legitimate aim and the restrictions are those which are necessary to ensure doping-free sport. The sanction in this case is proportionate to the doping offence and does not infringe any fundamental rights of the player.
28. We therefore decide that for the doping violation proved in this case the sanction to be applied under Article 10.2 must be a period of 2 years.

29. Under Article 10.9 the period of ineligibility must commence on the date of this decision, subject to Article 10.9.3 which states that the player is entitled to credit for the period of provisional suspension which he has respected. He was subject to provisional suspension under the letter dated 2 April 2009, but he did not receive the letter until 6 April, having played in a match on 5 April. Accordingly the period of ineligibility will run from 6 April 2009. Reinstatement will be subject to the provisions of Article 10.11.

30. The player produced a number of references which spoke as to his good character and contribution to the sport. For the reasons set out above we are unable to take those references into account to reduce the mandatory sanction required by Article 10.2. But in any event it needs to be emphasised that cocaine is a class A drug, its possession is a criminal offence and the rules are quite clear. Any player bound by anti-doping rules who takes cocaine is knowingly taking the risk of detection which will result in him being banned from the sport for 2 years on a first violation.

Decision

31. For the reasons given above, the tribunal makes the following decision:
- (i) A doping offence contrary to Article 2.1 has been established;
 - (ii) Under Article 10.2 the period of ineligibility to be imposed is 2 years;
 - (iii) Under Article 10.9 the period of ineligibility shall commence on 6 April 2009.

Right of Appeal

32. The athlete has a right of appeal against this decision, as a national level athlete, under Article 13.4 to the National Anti-Doping Panel. Under Article 13.7 any appeal must be filed within 21 days of the receipt of this decision.

Charles Flint QC

Carole Billington - Wood

Lorraine Johnson

A handwritten signature in black ink that reads "Charles Flint." The signature is written in a cursive style and is underlined with a single horizontal line.

signed on behalf of the tribunal

18 May 2009