

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF RUGBY FOOTBALL UNION REGULATION 20 AND WORLD RUGBY REGULATION 21

Before:

William Norris QC
Professor Isla Mackenzie
Colin Murdock

BETWEEN:

Rugby Football Union

Anti-Doping Organisation

and

Kurt Brown

Respondent

DECISION OF THE TRIBUNAL

Introduction & Summary

1. Kurt Brown, who was born on 15 December 1990 and who lives in Coleford, Gloucestershire, has played rugby since the age of six and at the material time played for Lydney RFC. He did so as an amateur and what he calls his “*day job*” was as a scaffolder.

2. In January 2019, he suffered an injury to his shoulder. This happened, according to a medical note of 19 January 2019, at page 51 of the Hearing Bundle¹, in the “*first tackle of the game*”. A later note from Mr Farooq, Associate Specialist in Trauma & Orthopaedics [52], offered a diagnosis of a “*Grade II / III AC joint subluxation*”. The pain at that stage was said to be “*settling down*”.
3. The events of that spring / summer / early autumn are in dispute but Mr Brown’s case is that he believed, on medical advice, that he had no prospect of playing again and, having continuing pain in his shoulder, took the advice of a friend in the gym as to how he might reduce his symptoms. That friend apparently advised Mr Brown to inject himself with Deca-Durabolin, a regime which began in May 2019 and ended, on his account, at the beginning of September that same year.
4. Contrary to what he says was his expectation (given the medical opinion he claims to have received), Mr Brown was able to and did in fact return to competitive rugby that autumn. It is in issue as to whether his first game was on 5 October or on 3 November 2019. Later in this decision we shall explain that we attach no particular significance to the difference.
5. The drug known as Deca-Durabolin is in fact a brand name used by a pharmaceutical company. Its more technical name is Nandrolone. As is explained by the report from the Drug Control Centre at King’s College London [35]:

“Nandrolone or 19-norandrosterone is a synthetic derivative of testosterone, the main naturally produced, anabolic androgenic hormone in males.”
6. Following an In-Competition test (a urine sample) which Mr Brown provided on 1 February 2020, after a match between Lydney RFC and Sidmouth RFC, analysis established an Adverse Analytical Finding (“AAF”) for “*S1.1 Anabolic Androgenic Steroid, namely Nandrolone, 19-norandrosterone and 19-noretiocholanolone [1-2] a Non Specified Substance on the WADA Prohibited List 2020.*”
7. It is that finding which resulted in the charge Mr Brown now faces.

¹ All references in square brackets are to the Parties’ Main Hearing Bundle.

The Hearing on 14 September 2020

8. In accordance with Directions made previously by the Chair, we heard this case remotely on 14 September 2020.
9. Mr Brown was represented by Mr Richard McLean of Counsel, acting *pro bono*. We are – and, no doubt Mr Brown is also – very grateful to Mr McLean for his services and for putting the case clearly, skilfully and with moderation.
10. We are equally grateful to Ms Laura Gould of Counsel who did likewise in presenting the case for the RFU.
11. We heard oral evidence from Mr Brown himself and from Mr Stephen Watkins, RFU’s Anti-Doping and Illicit Drugs Programme Manager.

Relevant Regulations

12. At all material times, Mr Brown was registered as a player with the National Governing Body, the Rugby Football Union (“RFU”). As a player, and pursuant to RFU Regulation 20.6, Mr Brown was bound by Regulation 20 of the RFU Regulations and by World Rugby Regulation (“WRR”) 21.

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

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

Notification & Response

13. As a result of the AAF, Mr Brown was notified by letter dated 13 March 2020 [17-18] that he would be charged with an Anti-Doping Rule Violation under WR Regulation 21.2.1 and that he was provisionally suspended and would remain so until the final determination of this case.
14. In an undated letter [20-21] in response, Mr Brown provided a detailed explanation of what he said were the circumstances in which he returned such a finding. He accepted the test results. Nevertheless, he asserted that the Anti-Doping Rule Violation was not intentional and that he had acted without Significant Fault or Negligence. We quote:

“I took the substance Deca-Durabolin. I detail the reasons for this below. In summary, I took this drug to aid my recovery from serious injury so that I was able to work again and earn money necessary to support myself. At the time of suffering the injury I had retired from rugby, having been told by my doctor I would not play again. I stopped taking the drug on medical examination two months before I began playing rugby again having been given the all-clear to resume playing. My resuming playing rugby was a surprise, and at the time of taking the substance I did not envisage playing or participating in the sport again.”
15. In that same letter, Mr Brown said that, following his surgery for the shoulder injury on 29 January 2019, he was told by “*medical professionals*” that it was “*unlikely [he] would play rugby again*”. He said that he was then off work for three months, which would take him to April / May 2019. He added that the injury had had a “*detrimental effect*” on his mental health and that he was under “*severe financial pressure*”.
16. He went on to say that it was against that background that he began taking Deca-Durabolin in May 2019 “*solely for the purpose of regaining fitness to return to work and earning [his] salary*”. He claimed that he stopped taking the substance in September 2019 because a doctor had told him his shoulder rehabilitation had been going well and “*there was a chance, on further review, [that he might] be able to resume rugby*”. He said that he only resumed rugby in November 2019 after the doctor had reviewed his rehabilitation.
17. As a comment, one might infer that, if he stopped taking the substance at least in part because of the good news that he might be able to resume rugby, it would tend to suggest

he realised that injecting himself with Deca-Durabolin was something he should not be doing.

The Respondent's Use of Deca-Durabolin

18. This case can serve as a stark reminder to all amateur and professional athletes of the dangers associated with taking (and in this case injecting) medication other than on prescription and / or without taking absolute care to ensure that the consumption of the particular supplement or the administration of the particular medicine does not fall foul of the strict regulations that are in place to ensure that sport is clean.
19. Mr Brown took no proper professional advice on medication. He was “*doing his own*” physio and rehab on his shoulder and, as we have already said, claims he met a friend in the gym who recommended that he might improve his recovery by taking human growth hormones. Astonishingly, Mr Brown says, at paragraph 24 of his Witness Statement [46], that he rejected that advice not because it was inherently dangerous or otherwise inappropriate, but because it was “*far too expensive*”. Instead, he accepted the recommendation that he should inject Deca-Durabolin.
20. He told us that he did “*some research*”, but claimed that his research was only as to the positive benefits and did not flag up any indication that the drug might be prohibited for those engaged in competitive sport and/or have any detrimental consequences. We say straight away that we do not believe this for one moment. If, as Mr Brown claims, he researched by using Google then it is overwhelmingly clear that he would have seen – or at the very least ought to have seen – that this was a drug strictly prohibited for athletes and that it should only have been administered (if at all) under strict medical supervision.
21. Far from doing that, and relying only on his friend’s advice and guidance in a YouTube clip, Mr Brown injected himself into the buttock which, he says at paragraph 28 of his Witness Statement [47], he did “*twice a week starting at 200ml [and] gradually brought the dose up to 600ml over a month and a half*”. He says he took his last injection of 600ml in September and that he felt that the process of treatment had been beneficial.

Other Surrounding Facts: Discussion of and Decision on Factual Matters

22. There is a singular lack of corroboration of Mr Brown's case as to the medical advice he received at the material times. In particular, his medical records and the reports that he has annexed to his Witness Statement and drawn to our attention do not confirm either that he was told that he would never / be unlikely to play again in the first few months following his operation, nor do they confirm his assertion that he was told in the autumn that he would, after all, be able to do so.
23. In fact, the material he has produced in relation to those medical records, and as regards the continuing impact of his injury upon his earnings, is positively unhelpful to the case he presents which is that he felt he had to start taking these substances in May 2019 because of continuing symptoms in his shoulder. A note that we do have, dated 11 May 2019 [62], when he consulted an emergency practitioner because of a recent injury to his ankle, actually records that he was then working (and had been until his ankle injury) and that he was using elbow crutches.
24. We accept that this may be an incomplete record and that the fact he was using elbow crutches would not necessarily be inconsistent with continuing problems in his right shoulder. However, it is hardly supportive of his case that his shoulder was causing him such difficulties at about the same time and was affecting his work so that he decided to embark on the course of self-injection to which we have already referred. The wage slips he has produced likewise do nothing to support his case to that effect.
25. The next problem Mr Brown has is the absence of any corroboration of his assertion that he had formed a firm intention, based on medical advice, never to play rugby again.
26. He certainly failed to notify his club to that effect. On the contrary, he continued to be registered as a player with them and the club, whether with his knowledge or without, continued to include him as a player in various postings. Moreover, some apparently contradictory evidence was introduced by Mr Brown himself in the form of a letter from the Club Chairman, Duncan Sleeman [72].
27. Since Mr Sleeman was also a friend (as Mr Brown told us), as well as a Sports Injury Therapist, and was involved to some extent in his rehabilitation programme, one would

have expected Mr Sleeman's written statement, at a bare minimum, to have provided some confirmation of Mr Brown's key assertion to the effect that, when he was injecting himself between May and September 2019, that was a period when he believed he would never return to rugby again.

28. Mr Sleeman's statement does no such thing. On the contrary, it gives a confusing picture which apparently refers to two shoulder injuries, one at the end of the 2018/19 season (which, logically, would be the one relevant here) and what he refers to as a "*later injury to the same shoulder which Mr Brown apparently sustained in January of the 2019/2020 season*".
29. Whatever the explanation for that account, the fact remains that Mr Sleeman says nothing at all about Mr Brown having decided to give up and then return to rugby, nor does he mention Mr Brown having asked him about the injections of Deca-Durabolin, notwithstanding the fact that Mr Sleeman was a Sports Injury Therapist, was helping with rehabilitation and was the Club Chairman. Indeed, as a comment, if it is true that Mr Brown mentioned nothing of that to Mr Sleeman, then the clear inference is that it was because Mr Brown knew that he had something to hide.
30. The next issue is as to when Mr Brown resumed training and playing. Mr Brown's own Witness Statement, at paragraph 31 [48] was that:

"I returned back to playing rugby in November 2019, some time after I stopped taking Deca-Durabolin. I started off by gradually attending two rugby training sessions where I participated in strength and conditioning sessions where I was able to perform a variation of stretches and core work to help my mobility. As time went on, I then began to feel more confident and was able to participate in more hands on sessions such as team play / structure play (going through the team moves such as line out moves, scrums). I then went onto joining in with contact sessions, such as hitting tackle bags and pads until I finally had the confidence to perform full contact training sessions where practice games were held. From this, I then participated in my first game of rugby where I returned to my usual position of number 8."

31. If one construes that paragraph literally, the clear implication is that Mr Brown only "*started off*" his return in November 2019, but it is possible to read it as consistent with what he

told us which was that he started on his training a month or so before he returned to playing. The question, then, is when in fact he first returned to playing.

32. On any view, he had returned to playing at least by 3 November 2019. We know that because the RFU's only witness, Stephen Watkins, did some research which not only confirmed that the player had never been deregistered during the period he was taking Deca-Durabolin but also showed that he was recorded as one of the club players on its Twitter feed and as a sponsored player on the club website.
33. Furthermore, Mr Watkins noted that the club's Twitter feed listed Mr Brown as having started at Number 7 in a competitive fixture on 5 October 2019, and he also obtained a screenshot apparently showing Mr Brown playing with a "*heavily strapped arm*" and also produced a match report which mentioned Mr Brown by name several times.
34. Mr Brown's explanation is that this was a case of mistaken identity. There were two Browns who played for Lydney – Kurt Brown, the Respondent in the present case, and his brother Harry, and Mr Brown said that it was Harry who was playing at Number 7 on the day in question, whereas Mr (Kurt) Brown's position was Number 6 or Number 8. Mr Brown suggested that the Twitter posting and the match report were simply wrong. He did not, however, take what might seem the obvious step of asking his brother to assist the Panel either by giving oral evidence or even by some form or letter or statement.
35. We invited the parties to see if this matter could be investigated further, perhaps by the provision of team sheets from the club if they are not still held within the RFU. The day following the hearing (that is, on 15 September 2020), a copy of the match card was found and sent to the Panel. It showed Kurt Brown at Number 7. On that basis, it may well be the case that Kurt Brown was indeed playing as early as 5 October and, on balance, given the state of the evidence, we would find that he probably was.
36. However, we do not need to reach any conclusion on that point as it seems to us that whether or not Mr (Kurt) Brown was playing on 5 October 2019, rather than having his first game (as he admits) on 3 November 2019, is ultimately immaterial to the decision that we have to reach.

37. In a nutshell, that is because Mr Brown had begun playing at a time when he had only recently stopped taking a banned substance (on his account, September 2019) and in circumstances where he had been taking that substance without having de-registered as a player and when, as we find as a fact, he had always intended to – or at least had hoped he might one day – return to playing and could not possibly have had any reasonable basis for thinking that he was a clean competitor when he did so.

The Relevant Anti-Doping Provisions and Our Conclusions on Breach of the Regulations

38. It is common ground that Mr Brown has provided an AAF in respect of an S1.1 Anabolic Androgenic Steroid, which is a “*Non-Specified Substance*” on the WADA Prohibited List 2020.

39. WR Regulation 21.10.2 states that:

“21.10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method

The period of Ineligibility for a violation of Regulations 21.2.1 (Presence), 21.2.2 (Use or Attempted Use) or 21.2.6 (Possession) shall be as follows, subject to potential reduction or suspension pursuant to Regulations 21.10.4, 21.10.5 or 21.10.6:

21.10.2.1 The period of Ineligibility shall be four years where:

21.10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Player or other Person can establish that the anti-doping rule violation was not intentional.

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

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

40. The next question is whether Mr Brown acted intentionally within the wording of WR Regulation 21.10.2.3. That states:

“As used in Regulations 21.10.2 and 21.10.3, the term ‘intentional’ is meant to identify those Players who cheat. The term therefore requires that the Player or other Person engaged in conduct which he or she 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. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Player can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Player can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.”

41. In the circumstances we have described above, the Panel unanimously concludes that Mr Brown has not established that his Anti-Doping Rule Violation was unintentional. On the contrary: we find that it was intentional.

42. The next question is whether Mr Brown is, as is submitted on his behalf, entitled to a reduction on the basis that he has acted without Significant Fault or Negligence under WR Regulation 21.10.4 and 21.10.5. These state as follows:

“21.10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence

If a Player or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.”

43. No Fault or Negligence is defined as follows:

“The Player or other Person’s establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Regulation 21.2.1, the Player must also establish how the Prohibited Substance entered his or her system.”

44. A number of authorities were drawn to our attention and they appear in the Parties' Agreed Bundle of Authorities and are referred to in their Opening Submissions. Perhaps the previous case which comes closest to the present is that of RFU v Ashfield (SR/NADP/804/2017) which also refers to and relies on the decision of UKAD v Buttifant (SR/NADP/508/2016).
45. For reasons which are obvious to anybody who compares the facts of the present case with those in Ashfield, this is a significantly more serious case. Whilst we consider questions of negligence and Fault recognising that, as explained by Sharapova v ITF (CAS 2016/A/4643), the bar therefore must not be set too high and that "*an athlete cannot reasonably be expected to follow all such steps [of investigation] in each and every circumstance*", the present Respondent would fail to get over a bar set at the lowest imaginable height.
46. That is our conclusion because, as we have already explained, Mr Brown relied on the advice of a friend from the gym who had no medical qualifications or experience. He failed to consult his club about that course of treatment or even to mention it to his friend and Club Chairman, Mr Sleeman. He failed to seek any medical advice and he failed to make even the most elementary investigations by way of the internet before injecting himself personally, guided only by his friend and a clip on YouTube. This case, therefore, has significant differences from almost all the others cited to us, including UKAD v Normandale (SR/NADP/86/2019).
47. In short summary, we conclude that Mr Brown acted intentionally and that, in doing so, he was seriously at Fault in following a deliberate course of conduct which, taken at its lowest, placed him at serious risk of the very thing that happened, namely, that he would fail a doping test.

Was Mr Brown a "Player" as defined by WRR 21?

48. It was argued on Mr Brown's behalf that at the time he consumed the relevant substance he was not a "*Player*" as defined by WRR 21.2.1.1, which provides that it is every Player's personal duty to ensure that no Prohibited Substance enters his or her body and the

Appendix thereto defines a “*Player*” as “*any person who competes in sport at the international level (as defined by World Rugby) or the national level (as defined by each National Anti-Doping Organisation)*”.

49. On that basis, and given that (on his case) he was not competing at the time that he consumed the substance and had no prospect of doing so, it is said that he was therefore not a Player as defined by the Regulations.
50. We firmly reject that submission. He certainly was a “*Player*” when competing between (at least) November 2019 and the date on which he gave his positive test on 1 February 2020. He was also a person who “*competed in sport*”, not least because, even when he was consuming the relevant substance, he was still a registered Player and had taken no steps to ensure his deregistration, even if we had accepted (as we do not) that he had then formed a firm intention never to play the game again.
51. Further, our attention was drawn to, and we adopt, WR Regulation 14.8 which specifically provides that a Player may request deregistration in accordance with the RFU Deregistration Process. He did not do that, formally or even informally and we take a similar view of his situation to that of the Panel in a case concerning the parallel provision in relation to Welsh Rugby (Article 4.1.1) in *UKAD v Colclough* (SR/0000120105), where the Player claimed he had made an effective retirement for the purposes of the ADR (see paragraph 41 of that decision).

Prompt Admission?

52. WR Regulation 21.10.6.3 provides as follows:

A Player or other Person potentially subject to a four-year sanction under Regulation 21.10.2.1 or 21.10.3.1 (for evading or refusing Sample Collection or Tampering with Sample Collection), by promptly admitting the asserted anti-doping rule violation after being confronted by World Rugby (or the Association, Union or Tournament Organiser handling the case as applicable), and also upon the approval and at the discretion of both WADA and World Rugby (or the Association, Union or Tournament Organiser handling the case as applicable), may receive a reduction in the period of Ineligibility down to a minimum of two

years, depending on the seriousness of the violation and the Player or other Person's degree of Fault.

53. No such approval has been gained here and, even had such been forthcoming (which would have been astonishing), we would not have regarded this case as one where any reduction would be appropriate given our conclusions on the seriousness of the violation and Mr Brown's high degree of Fault.

54. WR Regulation 21.10.11.2 provides as follows:

"Where the Player or other Person promptly (which, in all events, for a Player means before the Player competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by World Rugby (or the Association, Union or Tournament Organiser handling the case as applicable), the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Regulation is applied, the Player or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Player or other Person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed. This Regulation shall not apply where the period of Ineligibility has already been reduced under Regulation 21.10.6.3."

55. We accept that Mr Brown admitted the Anti-Doping Rule Violation in his Response to Charge on 27 March 2020. However, we do not consider that this entitles him to succeed in his submission that we should backdate any period of suspension to the date of Sample collection. We say that because his admission was, at best, qualified and because we have firmly rejected the various excuses he has offered in respect of what was, we consider, a serious violation of the spirit and letter of the Anti-Doping Rules. The fact that he may have had little or no anti-doping education – something that is regrettable for obvious reasons – cannot begin to excuse him from embarking on a course of conduct which any reasonable person would have known was wholly wrong and which we find as a fact he knew was indeed wrong. Further, the accounts that he has given have been incomplete and contain various inconsistencies, and we comment further that, if anything had turned on his credibility as a witness, we would have found that he was not credible.

Sanction

56. In all those circumstances, Mr Brown must serve a period of four years' suspension, such ban to commence on 13 March 2020, the date of his Provisional Suspension.
57. In accordance with World Rugby Regulation 21.13, the relevant parties may appeal this decision by lodging an appeal within the applicable timelines.



William Norris QC (Chair)

For and on behalf of the Tribunal

London

28 September 2020

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