

**IN THE MATTER OF RUGBY FOOTBALL UNION DISCIPLINARY PROCEEDINGS
CONCERNING WORLD RUGBY REGULATION 21.2.5**

Before:

Mr Matthew Lohn (Sole Arbitrator)

BETWEEN:

THE RUGBY FOOTBALL UNION

Anti-Doping Organisation

-and-

JACK MCINTOSH

Respondent

DECISION

Factual background

1. Jack McIntosh was registered as a player for Vale of Lune RUFC by the RFU on 28 November 2014.
2. On 15 May 2015, Mr McIntosh was target tested by UKAD at his home address. UKAD tested Mr McIntosh because it had been informed that he had recently registered at the Vale of Lune RUFC and it was aware that he had been convicted of the criminal offence of supplying steroids in 2012.
3. Mr McIntosh provided a urine sample to UKAD's Doping Control Officer (the "DCO") on 15 May 2015. Mr McIntosh consented to the urine test when the DCO visited him on 15 May 2015. The DCO did not record Mr McIntosh making any comment that he had retired from the sport of rugby.
4. On 16 May 2015, Mr McIntosh emailed UKAD seeking to withdraw his consent to the sample being analysed for prohibited substances, stating:

"I was visited last night by Steve Harris [sic] to take part in a urine test. At the time I agreed but subsequently decided that having retired from the sport of rugby I hear by [sic] withdraw my consent to the test. Please return or destroy my sample."
5. Subsequently, Mr McIntosh left a voicemail with UKAD and sent a private message to the DCO, Steve Harris, via LinkedIn to the same effect.
6. On 22 May 2015, UKAD responded to Mr McIntosh via email stating that although he wished to withdraw his consent, as a player registered with the RFU he was bound by the Anti-Doping Rules, which include submitting to the sample collection process once notified at any time. The RFU subsequently wrote to Mr McIntosh on 5 June 2015 notifying him that UKAD had determined there was a case to answer and formally charging him with an offence under World Rugby Regulation ("WRR") 21.2.1.
7. Mr McIntosh was provisionally suspended with immediate effect. Mr McIntosh responded to the RFU stating he wished to contest the charge against him.

Hearing

8. A hearing into the alleged breach of WRR 21.2.1 was held on 11 January 2016 at the Holiday Inn in Preston and was attended by Mr McIntosh and his father and, for the RFU, counsel, the RFU's Discipline Case Manager and the RFU's Anti-Doping and Illicit Drugs Programme Manager. The Anti-Doping Panel was assisted by Mr Brian Scott as Judicial Secretary to the Panel.
9. The parties were given an oral decision on that evening. This was supplemented by written reasons dated 9 February which were provided to the parties on 12 February 2016. The Anti-Doping Panel concluded that Mr McIntosh:
 - (a) was subject to the RFU's jurisdiction in respect of the sample collected on 22 May 2015;
 - (b) was guilty of a violation of WRR 21.2.1;
 - (c) would be subject to a period of ineligibility of four years commencing on 5 June 2015; and,
 - (d) would be governed by WRR 21.10.12 during his period of ineligibility.

Grounds of Appeal

10. Mr McIntosh appealed the decision to find him in breach of WRR 21.2.1.
11. An RFU Anti-Doping Post-Hearing Review Panel was convened to review the challenge against the original finding. It comprised Matthew Lohn (Chair), Nick De Marco and Siobhan Abrahams. It convened on 21 April 2016. Mr McIntosh did not attend and was not represented. The RFU made submissions following which the hearing was adjourned and directions issued which sought additional information from the parties in respect of privacy and data protection issues.
12. The matter was scheduled for a further hearing before the Post-Hearing Review Panel on 16 March 2017. On 13 March 2017 the Panel was provided with additional documentation which contained, amongst other new material,

correspondence between the RFU and Mr McIntosh relating to a further charge for the purposes of WRR 21.2.5.

WRR 21.2.5

13. On 16 January 2017 Mr McIntosh was charged by the RFU with an Anti-Doping Rule Violation under WRR 21.2.5, in the alternative to the previous charge under WRR 21.2.1. The facts relied upon were identical to those which underpinned the charge in respect of WRR 21.2.1.
14. The new charge under WRR 21.2.5 was brought as a result of a notification of a Case to Answer by UKAD, following consultation between UKAD and WADA as to the appropriate consequences under the WADA Code (and therefore the World Rugby Regulations) when an athlete communicates the withdrawal of his consent to the testing of a Sample provided by him but before testing has taken place.
15. UKAD and WADA's position was that Mr McIntosh's conduct subverted (or attempted to subvert) the Doping Control process and fell within the definition of 'tampering', namely, obstructing or preventing normal procedures from occurring.

National Anti-Doping Panel

16. The RFU Post-Hearing Review Panel acknowledged that it had no jurisdiction to consider the further charge in the light of the amendment of the RFU Anti-Doping Regulations by the RFU during the adjournment period. The amendments, which came into force on 1 August 2016, provided that the RFU must instruct the National Anti-Doping Panel ("NADP") to appoint an independent Panel to hear any Anti-Doping charges (see RFU Regulation 20.12.4).
17. Nevertheless the Post-Hearing Review Panel remained seized of Mr McIntosh's challenge against the finding of the RFU Anti-Doping Panel made in respect of WRR 21.2.1.

18. Submissions were received from the RFU that since the Chair of the RFU Post-Hearing Review Panel was also a member of the NADP, he should be appointed to determine the new charge under WRR 21.2.5.
19. The NADP subsequently appointed Matthew Lohn (the Chair of the RFU Post-Hearing Review Panel) for the purposes of WRR 21.7.10 as a Single Legal Member to determine the tampering charge under WRR 21.2.5.

Admissions

20. The additional documentation provided to the Post-Hearing Review Panel on 13 March 2017 detailed a proposal that had the support of both the RFU and Mr McIntosh (who for the purposes of the resumed hearing had received the benefit of pro-bono legal advice from Matthew Phillips QC) as to how the case should progress.
21. The proposal set out an agreement that Mr McIntosh had breached WRR 21.2.5 and moreover he should receive a four year ban in respect of his breach of WRR 21.2.5.
22. Mr McIntosh's position was that the use of the term "tampering" or "alleged tampering", without additional qualification, did not accurately or fairly reflect the nature of his conduct. He requested that the decision recording his breach of WRR 21.2.5 set out that he "subverted or sought to subvert the Doping Control process by withdrawing consent to the processing of his Doping Control related data", rather than using the title of that provision. The RFU indicated its agreement to this position.
23. The correspondence also noted the further agreement between the parties that, in circumstances where a four year ban were imposed on the basis of a breach of WRR 21.2.5, the RFU would accept that McIntosh's appeal against the ban previously imposed in connection with an alleged breach of WRR 21.2.1 ought to be allowed. The Post-Hearing Review Panel did in fact allow the appeal against WRR 21.2.1.

Decision

24. The Chair, in his capacity as the Single Legal Member appointed by the NADP, confirmed to the parties his acceptance of the proposed agreement. He determined that Mr McIntosh had breached WRR 21.2.5 in that he had subverted the Doping Control process by withdrawing his consent to the processing of his Doping Control related data, namely the urine sample he had provided to the Doping Control Officer.
25. The Chair further determined that Mr McIntosh will be subject to a period of ineligibility of four years commencing on 5 June 2015 and concluding (but inclusive of) on 4 June 2019. This period reflects the date upon which Mr McIntosh's original suspension commenced. During the period of ineligibility, Mr McIntosh will be governed by WRR 21.10.12.
26. There is a right of appeal against this decision as provided for in RFU Regulation 20.13 and 20.14.

MATTHEW LOHN
13 APRIL 2017



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