IN THE LEAGUES ANTI-DOPING TRIBUNAL

REASONS FOR DECISION IN THE MATTER OF: JAKE LAW (player)

Hearing: Tuesday 14 May 2013
Rugby League Central, Driver Ave, Moore Park

Date of reasons: 23 May 2013

Tribunal: Lachlan Gyles SC (Chair), Dr Jeff Steinweg and Mr Sean Garlick

A. INTRODUCTION

1. This matter concerned an alleged anti doping violation by Mr Law (the Player) and came before the Tribunal on the evening on 14 May 2013. The basis of the alleged violation was the attempted use by the Player of a prohibited substance, being Clenbuterol.

2. Mr Marshall SC appeared as Counsel Assisting and, despite having the right to legal representation, the Player chose to represent himself, although he was very capably assisted and supported at the hearing by his partner Ms Perry.

3. These are the written reasons which supplement the decision given orally on the evening of the Hearing, whereby the standard sanction of two years was imposed on the Player.

4. In short, and as set out more fully below, the Player did not dispute that he arranged to import the offending product into Australia, and did not take issue that would have used the product once in his possession. His defence was that he did not know that Clenbuterol was on the Prohibited List, and thereby did not know that he would be in breach of the Anti-Doping Policy in importing or using the product. Had he known that it was, he says, he would not have purchased the product. He also says that at no time did he intend to gain any benefit or advantage from the substance in terms of his performance as a Rugby League player.

5. Despite the fact that the Tribunal found the Player to be an impressive and truthful witness, and accepts that he did not know that the product was on the Prohibited List when it was purchased or that he intended to gain an advantage in his performance as a player, where knowledge is not a necessary element of the charge, and where the basic elements of the charge have effectively been conceded, it sees that it has no real choice but to find that the violation has been made out.

6. In that circumstance it follows that the standard sanction must be imposed and the Tribunal, however sympathetic to the position of the Player, has no power to reduce that period. Had it had such discretion, there would certainly have been good reasons such as the explanation of the Player and his partner as to why the product was purchased, his subsequent frankness and co-operation, he not being a full time player and his otherwise good record and character which would all have weighed heavily towards that discretion being exercised in his favour.

B. THE HEARING

7. Mr Marshall tendered a bundle of documents at the hearing. They included transcripts of two interviews between ASADA investigators and the Player on 15 June 2011 and 5 November 2011 respectively, and a Statement of the Player dated 22 October 2012. The Tribunal had been provided with these documents before the hearing and had the opportunity to read them.

8. At the hearing additional oral evidence was given by the Player and Ms Perry, and the Player was cross-examined by Mr Marshall SC, although not extensively.

9. Written Submissions were provided by Mr Marshall which were very useful, and supplemented orally. Both the Player and Ms Perry addressed the Tribunal in a way which illustrated a good understanding of the issues, and both came across as impressive young people.

C. FACTS AND REASONS

10. The Player played in the Country Rugby League (**CRL**) and was a registered member of the Cessnock Rugby League Football Club. While he had played SG Ball for the Newcastle Knights while under eighteen, after 2008 he started working as an electrician in the mines and his training was limited by that and he only played reserve grade for Cessnock thereafter. By doing so however, he was bound to the Leagues Anti-Doping Policy 2010 and also 2011 (the **ADP**) as adopted by the CRL. Mr Marshall submits that there is no relevant difference and for that reason reference is only made to the 2011 ADP and we accept that. Although noting a lack of player education by the Club as to the Policy and its operation, the Player did not dispute that he was bound by it.

11. On 28 January 2011, the Australian Customs and Border Protection Service (**Customs**) seized a package addressed to the Player at [redacted] containing one (1) bottle branded "Liquid Clen" containing Clenbuterol.

12. The substance was destroyed by Customs prior to notification by Customs to ASADA of the seizure. The Player was after that interviewed on two occasions by

ASADA.[1] On 18 December 2012 the Player was provisionally suspended and is not playing Rugby League at present.

13. The findings we make concerning the circumstances which precipitated the seizure are as follows:-

(a) the Player wanted to buy a fat burner for himself and his partner to lose weight for the summer;

(b) he twice went onto the internet looking for products for this purpose;

(c) on the second attempt he decided to purchase the product 'Liquid Clen' and did so using his debit card;

(d) he was attracted to the product because he thought it was good value and worth trying out, and ordered a relatively small quantity for that purpose;

(e) he admitted to the ASADA investigators that he knew at the time that he was ordering Clenbuterol;

(f) he did not take issue that he would have used the product if and when it was received;

(g) he did not know that Clenbuterol was on the Prohibited list and did not know that its use or attempted use would be in breach of the Anti Doping Policy;

(h) he understood that he was not permitted to take steroids, and did not want to do so, so he searched the internet to seek confirm that Clenbuterol was not a steroid, and the results indicated that it was not;

(i) he did not intend by purchasing or using the product to gain an advantage or enhance or benefit his performance as a Rugby League player.

14. Against that background, on 10 October 2012 the CRL issued a "Notice of alleged ADRV" to the player. That notice was in accordance with ADP rule 108.

15. The notice alleges that the player has committed an anti-doping rule violation by breaching ADP rule 37 (WADC 2.2). That rule relates to Attempted Use of a Prohibited Substance.

16. Mr Marshall submits, and we accept, that Clenbuterol was a *Prohibited Substance* under the WADA 2011 List. The Player did not submit otherwise. Accordingly, if

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[1] On 15 June 2011, ASADA Investigators Mark Nicholls and Thomas McQuillen interviewed Mr Law; also present in this interview was Ms Tennille Perry, Mr Law's girlfriend. On 5 November 2011 ASADA investigator Victor Burgos and Director of Legal Services and Results Management, Darren Mullaly re-interviewed Mr Law in the absence of Ms Perry.

the substance had arrived and been consumed the player, he would have been guilty of Use. Mr Marshall submits, and we accept, that it would not matter in that circumstance if the player did not know that Clenbuterol was on the Prohibited List, because under the ADP, which adopts the WADA Code, that Use carries a strict liability. See ADP 38 (WADC 2.2.1) which provides:

> *WADC 2.2.1: It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.*

17. In the present case, the Prohibited Substance did not enter the Players body because it never came into his possession. That is why the alleged breach is one of *attempted use* rather than *use*.

18. This brings into focus ADP 39 (WADC 2.2.2) which provides:

> *The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was used or attempted to be used for an anti-doping rule violation to be committed.*

19. The question then is whether under the ADP the act of purchasing the Prohibited Substance of itself constitutes *attempted use*. One can see a real issue arising under the criminal law in this respect as it would be said that one must go to the next step of actually attempting to use the substance, and thereby satisfying the actus reas element of the relevant crime, before being found guilty of attempting to commit the crime. Purchasing a gun for the purpose of killing someone is an example. However the definition of *Attempt* under the ADP can be distinguished from the criminal law, and is more favourable for the prosecution, because it brings in the concept of the taking of a *substantial step* in the relevant course of conduct in committing the violation as follows:

> ***Attempt** means purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an Anti Doping Rule Violation. Provided, however, there shall be no Anti Doping Rule Violation based solely on an Attempt to commit a violation if the Person renounces the Attempt prior to it being discovered by a third party not involved in the Attempt.*

20. The case against Mr Law is that he did *attempt to use* Liquid Clen, which contained Clenbuterol. Mr Marshall submits that by ordering Liquid Clen on the internet, paying for it and having it arrive in the country, he had taken a substantial step in a course of conduct planned to culminate in the commission of an ADRV by the consumption of the Liquid Clen. We note that he at no time renounced his intention to do so.

21. Mr Marshall in support of his contention referred to two earlier anti-doping cases which he submitted supported the findings of attempted use. The first is *ASADA v Andrew Wyper* CAS A4/2007, a decision of Malcolm Holmes QC sitting as a CAS

arbitrator dated 21 August 2008. In that case, the cyclist Wyper had ordered products in the same way as the player in this case which had not arrived, hence no actual use. Despite that Mr Holmes QC comfortably found that the ordering and paying for the relevant substance was a substantial step in the course of conduct planned to culminate in the taking of that substance within the meaning of a Policy relevantly in the same terms as the ADP. In doing so he distinguished the definition of attempt in the ADP, which he noted was based on the WADA Code which is replicated in Anti Doping Policies worldwide, from the term as used in the criminal law sense.

22. The second case is *IRB v Luke Troy* CAS 2008/S/1668, which was a decision of a CAS appeal panel of 2 June 2009 comprising Malcolm Holmes QC, Alan Sullivan QC and David Williams QC (of New Zealand). In that case, the rugby union player, Troy, had ordered substances off the internet. He was also found to have committed the ADRV of Attempted Use (overruling the Rugby Union Tribunal), the Panel finding that the ordering, payment and consequent intention to use the substance did constitute a substantial step in the relevant course of conduct so as to be attempted use for the purpose of the ADP.

23. Mr Marshall gave notice of no anti-doping authorities the other way, and submitted that this tribunal should apply the approach in *Wyper* and *Troy* in this case. Although we are not bound by these decisions, they are of assistance in considering whether the requirement of *attempted use* has been made out on these facts, and provide support for the finding that it has been. It would be our preference to follow that reasoning as a matter of comity and consistency where possible.

24. Whilst we recognise that they were stronger cases than the present in terms of culpability with the offenders knowing that the substances were on the prohibited list and with far greater quantities involved, it nevertheless seems to us that as a matter of basic common sense if one is seeking to identify a course of conduct which is intended to culminate in an ADP rule violation, namely the taking of the prohibited substance, and where knowledge of the breach is not a necessary element, then the acquisition of the product would be a critical and important step in that process. It is also at least prima facie evidence of an intention to use that product. We therefore accept Mr Marshall's submission, both independently of the above authorities and in line with them, that the elements of the ADRV of *Attempted Use* by the Player have been made out by the purchase and ordering of the prohibited substance despite the fact that the Player did not know that it's use was prohibited and despite the fact that the substance never came into his possession.

D. SANCTION

25. ADP rule 152 (WADC 10.2) provides for the standard two (2) years Ineligibility. Mr Marshall submits that we have no discretion to reduce that penalty even where the Player is able to put the forward the most compelling grounds for leniency. On the wording of the ADP we accept that and therefore the standard period of ineligibility shall apply. For the record however it should not be assumed from our unwillingness to reduce the sanction that we are not very sympathetic to the position of the Player where he did not appreciate that use of the substance which was ordered was prohibited and where he did not intend to use it to benefit his performance as a player; but our hands are tied and the sanction applies by force of the ADP.

26. The player was provisionally suspended on 18 December 2012 hence the period of illegibility should commence on that date and expire on 19 December 2014.

27. The circumstances of the case should provide a timely reminder to all players falling with the operation of the ADP to exercise significant caution when purchasing any substance or supplement, particularly over the internet, and not to do so without taking all appropriate steps to confirm through their Club or through the relevant authorities that the substance is not, or does not contain, a prohibited substance. If in any doubt the substance should not be purchased, because as these reasons illustrate the ordering or purchase of the product is taken to be a substantial step in the course of conduct leading to the taking of the substance, and therefore of itself can be a breach of the ADP. The case also illustrates the necessity for Clubs to be vigilant in providing anti-doping education to all players who are subject to the ADP, and who may have their careers substantially impacted by a violation of it. Ignorance is no defence, and as can be seen from the present case, there can be little or no scope for leniency in individual cases, whatever the merits.

LACHLAN GYLES SC

CHAIRMAN LEAGUES ANTI-DOPING TRIBUNAL