

**IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF
THE WELSH RUGBY UNION**

Before:

David Casement KC (Chair)

Professor Kitrina Douglas

Professor Isla Mackenzie

BETWEEN:

UK ANTI-DOPING LIMITED

Anti-Doping Organisation

and

BEVAN JAY

Respondent

DECISION OF THE NATIONAL ANTI-DOPING PANEL

Background and Procedure

1. Bevan Jay (“the Respondent”) is a rugby union player registered with the Welsh Rugby Union (“WRU”) and aged 22 at the time of this hearing. The WRU is the National Governing Body for the sport of rugby union in Wales. The WRU has adopted the UK Anti-

Doping Rules, currently the 2021 UK Anti-Doping Rules, as its Anti-Doping Rules (the “ADR”).

2. On 11 July 2023 the Respondent provided a urine Sample in an Out-of-Competition test, following a training session at Ebbw Vale Rugby Football Club. On 16 August 2023, the respondent was informed by UK Anti-Doping (“UKAD”) that the respondent’s A Sample had tested positive for ostarine at an estimated concentration of 53 ng/mL. Ostarine (also known as “enobosarm” or “MK-2866”) is listed under section S1.2 of the 2023 WADA Prohibited List as an Anabolic Agent. Ostarine is a non-Specified Substance that is prohibited at all times. The notice of 16 August 2023 also informed the Respondent that with immediate effect he was provisionally suspended from participation in all Competitions, Events or other activities that are organised, convened, authorised, or recognised by the WRU.
3. The Respondent provided a written response, dated 27 August 2023, in which he did not dispute the Adverse Analytical Finding but set out certain factual matters and mitigating circumstances. In particular, the respondent referred to having taken a product called “Alpha GPC” which he purchased from a friend at the gym and “AGF-1” from “PAS Nutrition” prior to providing the Sample. UKAD enquired of the Respondent whether he had retained any of those products and if he could provide those, as well as photographs, to UKAD. The Respondent informed UKAD on 7 September 2023 that he had not retained the products and could not provide the photographs requested.
4. On 25 September 2023, UKAD issued a letter charging the Respondent with breaches of the anti-doping rules namely Article 2.1 (presence of a Prohibited Substance) and Article 2.2 (Use or Attempted Use by an Athlete of a Prohibited Substance).
5. On 3 October 2023, the Respondent provided a written response to the charge letter stating that he did not challenge the validity of the test results. He contended that the supplements he identified in his letter of 27 August 2023, as taken prior to the Sample, did not list ostarine as an ingredient however, he asserted that he did not take any other supplements. He further contended for other matters by way of mitigation and in particular that he has never knowingly taken any Prohibited Substance to enhance his performance, nor has he ever intentionally sought to cheat.

6. The Chair was appointed on 19 December 2023 and directions were given on 8 January 2024. Pursuant to those directions this case was listed before the National Anti-Doping Panel (“NADP”) for final hearing on 27 June 2024. There is no dispute as to the jurisdiction of the NADP.
7. Professor Kitrina Douglas and Professor Isla Mackenzie were appointed on 12 January 2024.
8. The hearing itself was conducted in a hybrid format and the parties were represented as follows:

UKAD

Ailie McGowan, UKAD Counsel

Tom Middleton, UKAD Head of Case Management, Observer

Yusuf Panah, Observer

Simon Hitchcox, Observer

Nick Wojek, Witness

Professor David Cowan, Expert Witness

The Respondent

Bevan Jay, the Respondent

Yasin Patel, Counsel

Thomas Lear, Witness

Warren Davies, Witness

WRU

Leah Thomas, WRU Discipline and Anti-Doping Manager, Observer

NADP Secretariat

Eleanor Stocker, Case Manager

Alisha Ellis, Case Manager

9. The Tribunal wishes to record its thanks to both counsel for their excellent written and oral submissions and in particular to Mr Yasin Patel who, in the best traditions of the Bar, agreed to act in this matter on a pro-bono basis.

Legal Framework

10. ADR Article 2.1 and Article 2.2 provides that the following constitute Anti-Doping Rule Violations (“ADRVs”):

“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.”

“2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method, unless the Athlete establishes that the Use or Attempted Use is consistent with a TUE granted in accordance with Article 4.”

11. In respect of the period of Ineligibility 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:

(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.

(b) *The Anti-Doping Rule Violation involves a Specified Substance or a Specified Method and UKAD can establish that the Anti-Doping Rule Violation was intentional.*

10.2.2 *If Article 10.2.1 does not apply, then (subject to Article 10.2.4(a)) the period of Ineligibility shall be two (2) years.”*

12. As to the meaning of “intentional” Article 10.2.3 of the ADR 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 they manifestly disregard that risk.”

13. There was no real dispute between the parties in respect of the legal principles to be applied in determining whether the ADRVs were intentional. The application of those principles to the facts of the present case was, however, very much in dispute. It is well understood that save in wholly exceptional and rare cases, in order to prove that an ADRV was not “intentional” for the purposes of Article 10.2.1(a), an Athlete must also establish how the Prohibited Substance entered their system. The reason for this is that, without identifying the means of ingestion, any consideration of the conduct in question would be likely to be speculation. The case law shows that the hurdle to establishing that the conduct was not intentional, in the absence of proof of how the Prohibited Substance was ingested, is formidable including: Villanueva v FINA CAS 2016/A/4534, Ademi v UEFA 2016/A/4676, WADA v Jack CAS 2020/A/7579, UKAD v Bowes NADP Tribunal decision 5 August 2021 and NADP Appeal Tribunal decision 14 April 2022. UKAD v Khan NADP Tribunal Decision dated 21 February 2023 was a recent case demonstrating how persuasive the evidence needs to be in order to satisfy the Athlete’s burden of proof, in the absence of being able to demonstrate how the Prohibited Substance was ingested. If mere assertions, protestations of innocence and speculations were sufficient to discharge the burden of proof, the evidential and factual analysis provided in cases such as *Khan* would not have been necessary.

14. Article 10.6.2 of the ADR deals with the potential reduction in the period of Ineligibility based upon No Significant Fault or Negligence:

“In an individual case where Article 10.6.1 is not applicable, if an Athlete or other Person establishes that they bear No Significant Fault or Negligence for the Anti-Doping Rule Violation asserted against them, then (subject to further reduction or elimination as provided in Article 10.7) the otherwise applicable period of Ineligibility may be reduced based on the Athlete's or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period may be no less than eight (8) years.”

15. In respect of No Significant Fault or Negligence the ADR provides:

“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, the Athlete must also establish how the Prohibited Substance entered the Athlete's system.”

Issues

16. The Respondent did not ask for his B Sample to be tested and admits the charges. The only issue for determination is the period of Ineligibility. The starting point is a period of four years.
17. It follows from the above-mentioned ADR, and was common ground between the parties, that because ostarine is a non-Specified Substance the burden of proof rests upon the Respondent to prove, on the balance of probabilities, that the ADRVs were not intentional. If the Respondent is able to discharge that burden of proof the period of Ineligibility is reduced to two years.
18. The submissions of the parties raise several issues before the Tribunal namely whether:
- 18.1 the ADRVs were intentional;
 - 18.2 there was No Significant Fault or Negligence on the part of the Respondent;
 - 18.3 a four year period of Ineligibility is disproportionate.

The Evidence

19. The Tribunal was provided with the written statements of the Respondent as well those of Sam Brown, Warren Davies and Thomas Lear. The latter two also joined the hearing remotely to give oral evidence and to answer questions. UKAD took the opportunity to cross-examine the Respondent and those witnesses that attended remotely. UKAD also adduced the expert report of Professor David Cowan and the witness statement of Nick Wojek, Head of Science and Medicine at UKAD.
20. The Respondent was candid in that he readily admitted he did not know how he came to ingest ostarine. He was in the final stages of his university degree course in Sports and Exercise Science. He gave evidence that he had used three supplements in the period before the Sample was provided on 11 July 2023. The three supplements were TWP Nutrition L.I.T Fat Burner, PAS AGF-1 and Warrior Alpha GPC. The Fat Burner was said to have been acquired by the Respondent from a friend at the gym who did not charge him for the already opened tub which had about 130 capsules left. The same friend at the gym also allegedly supplied the Warrior Alpha GPC although the Respondent paid cash for that. The identity of the friend was not provided to the Tribunal, and they did not provide evidence: the Respondent explained that the friend did not wish to be involved in the proceedings. The AGF supplement was acquired separately by the Respondent online. None of the three products alleged to have been taken by the Respondent report ostarine as one of their ingredients.
21. The focus at the hearing was on the TWP Nutrition L.I.T Fat Burner product due to the theoretical possibility of cross contamination from some other products made by the same manufacturer and which other products do contain ostarine. This was noted by Mr Wojek in his report at paragraph 12. The PAS AGF-1 product was certified by Informed Sport and, as Mr Wojek noted, was highly unlikely to be the source of the ostarine. Warrior Alpha GPC was not certified by Informed Sport and therefore could not be totally eliminated as a source of the Adverse Analytical Finding. Therefore, he concluded the most likely source of the Adverse Analytical Finding was the TWP Nutrition L.I.T Fat Burner.
22. The supplements taken by the Respondent were not declared on the Doping Control form that he completed and signed when he provided the Sample. He identified creatine,

ibuprofen, protein, paracetamol and energy gel but not the three supplements now identified as the potential source of the ostarine. The first time TWP Nutrition L.I.T Fat Burner was disclosed to UKAD was in a response to specific questions UKAD raised in March 2024. It was not mentioned in the Respondent's letter of 27 August 2023 nor his response of 3 October 2023 to the charge letter.

23. The explanation of the Respondent as to why he did not disclose any supplements on the Doping Control form was that he thought it only applied to products he had taken that day. The Doping Control form is however very clear. It required disclosure of, among other things, any supplement that was consumed in the previous 7 days. The explanation as to why the Fat Burner was not disclosed by the Respondent in his response letters of August 2023 or October 2023 is that he did not consider it was the source of the ostarine, as it was last consumed six days before the Sample was provided. However, in his evidence to the Tribunal, Mr Lear said he remembered being told by the Respondent that he provided a Sample a day or two afterwards and he recalled the Respondent was still taking the Fat Burner at that time. The delayed emergence of the Fat Burner source theory was clearly unhelpful to the Respondent's attempt to discharge the burden of proof that rested upon him to prove this is one of those wholly exceptional and rare cases. Other than the Respondent's assertion there was no persuasive evidence of that product's acquisition and consumption. The inability to identify and call the supplier of the product was also unhelpful. The decision to act on the advice of an unidentified friend from the gym as opposed to asking for advice from club medics and coaches required a convincing explanation but this was not provided. This is particularly so given the evidence of Warren Davies who had coached the Respondent some years earlier and gave evidence that the Respondent would have received some anti-doping education during his career and been aware to some extent of the rules as to what can be consumed.
24. In his response letter of 27 August 2023, the Respondent said "*Negligently, because I was out of season, and I was yet to sign for a new club, I regretfully admit that anti-doping regulations slipped my mind, and I didn't even consider the fact I may have been violating them.*" This suggests that at some point in the past the Respondent was mindful of the anti-doping rules but that they then slipped his mind around the time he provided the Sample.

25. Professor Cowan noted the Laboratory gave an approximate estimate of the concentration of ostarine found by them to be 53 ng/mL. Given the margin for error, he informed the Tribunal that the precise reading was likely to fall between 40 to 65 ng/mL. He also noted that the Respondent had said in a written answer to UKAD's questions that he last took the Fat Burner supplement 6 days before he was tested. He opined that given the excretion rate of ostarine, this would not account for the quantity of ostarine found in the Sample and therefore the Fat Burner should be discounted as the source. Likewise, the AGF-1 was certified by Informed Sport and should also be discounted. In respect of Alpha GPC which the Respondent said had been taken up to the day before the test, Professor Cowan considered that contaminated doses of this product could not account for the quantities of ostarine found in the Sample unless there was contamination of a much larger amount of ostarine than has typically been found in contaminated products.

Analysis

26. The burden of proof rests upon the Respondent to prove on the balance of probabilities that the ADRVs were not intentional in that the Respondent did not engage in conduct which he knew constituted an ADRV or, he knew that there was a significant risk that the conduct might constitute or result in an ADRV and he manifestly disregarded that risk.
27. The Respondent frankly admits he does not know how ostarine entered his body. It will be a rare case in which any Athlete can discharge the burden of proof of showing the ADRV was not intentional if they cannot provide evidence as to the means of ingestion:

“(28) In summary, in a case to which article 10.2.1.1 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. There is no express requirement for an athlete to prove the means of ingestion but there is an evidential burden to explain how the violation occurred. If the athlete puts forward a credible explanation, then the tribunal will focus on that conduct and determine on the balance of probabilities whether the athlete has proved the cause of the violation and that he did not act intentionally.”

(29) There may be wholly exceptional cases in which the precise cause of the violation is not established but there is objective evidence which allows the tribunal to conclude that, however it occurred, the violation was neither committed knowingly nor in manifest disregard of the risk of violation. In such a case the conduct under examination is all the conduct which might have caused or permitted the violation to occur. These rare cases must be judged on the facts when they arise.”

UKAD v Buttifant (7 March 2016) NADP Appeal Panel.

28. In the present case, the precise cause of the violation has not been established. That is common ground. The Tribunal has therefore looked to the other evidence placed before it to consider if there is objective evidence which allows the Tribunal to conclude that, however the violation occurred, it was neither committed knowingly nor in manifest disregard of the risk of violation.
29. In the present case, the Respondent has not been able to discharge the burden of proof placed upon him to show the violations were not intentional. The starting point is the science. The uncontested evidence of Mr Wojek is that ostarine can be beneficial in enhancing performance in Rugby Union in that it can increase skeletal muscle mass, enhance lean muscle mass and enhance recovery between training sessions. It was also common ground that none of the products identified by the Respondent listed ostarine as one of their ingredients. According to Professor Cowan’s evidence, which we accept, the pattern of usage explained by the Respondent meant it was unlikely the supplements identified (if contaminated) were the source of the ostarine. Further, the quantity of ostarine found in the Sample was much higher than has been previously found in contaminated supplements.
30. Science apart, the credibility of the tentative theory put forward that the source of ostarine was likely to be the supplements identified and the Fat Burner, in particular, did not withstand scrutiny. The fact that none of the three supplements were disclosed on the Doping Control form makes it more difficult for the Respondent to discharge the burden of proof in circumstances where the form was clear and specific that such should have been disclosed. The lack of a good explanation offered by the Respondent for this failure and the subsequent failure to inform UKAD of the consumption of TWP Nutrition L.I.T Fat

Burner until answering a question in March 2024, some eight months later, is also detrimental to credibility. The failure to disclose the Fat Burner supplement required particular explanation when another witness gave evidence that he recalled the Respondent using the Fat Burner even after he had heard of the Respondent's test. The Respondent's overall explanation amounted to no more than speculation about how ostarine came to be in his system.

31. As the Respondent was unable to establish the means by which ostarine came to be in his system, he is unable to establish the threshold requirement for No Significant Fault or Negligence.
32. Alternatively, it was submitted on behalf of the Respondent that a four year period of Ineligibility would be disproportionate to the ADRV and relied upon *Puerta v ITF CAS 2006/A/1025* and in particular the well-known passage at paragraph 11.7.18 regarding *"the problem with any 'one size fits all' solution."* Any appeal to the principle of proportionality must take into account that the World Anti-Doping Code has developed and refined since *Puerta*. Even in *Puerta* the CAS tribunal found that *"the WADC works admirably in all but the very rare case."* The submission in this case is really a general submission that four years is too long on the facts of this case. This submission is not one that the Tribunal can accept. It is for World Anti-Doping Agency to determine the starting point in respect of periods of Ineligibility and the criteria for reducing that period. There is nothing in the facts of the present case that suggests that a starting point or a final outcome of four years Ineligibility is disproportionate. This is particularly so where the Prohibited Substance is one that may enhance performance in the sport in question.

Conclusion

33. The Tribunal finds as follows:
 - 33.1 The Respondent committed an ADRV pursuant to ADR Article 2.1, in that on 11 July 2023, a Prohibited Substance, namely ostarine, was present in his Sample;
 - 33.2 The Respondent committed an ADRV pursuant to ADR Article 2.2, in that on or before 11 July 2023 he used a Prohibited Substance, namely ostarine;

- 33.3 The Respondent has not discharged the burden on him under ADR Article 10.2.1(a) to establish that the ADRVs were not “intentional”, within the meaning of ADR Article 10.2.3;
- 33.4 The Respondent has failed to establish that he acted with No Significant Fault or Negligence under ADR Article 10.6.2;
- 33.5 The Respondent is hereby subject to a period of Ineligibility of four (4) years under ADR Article 10.2.1, such period to run from 16 August 2023, being the date when the Respondent was provisionally suspended in accordance with ADR Article 10.13.2, until 23:59 on 15 August 2027.

Right of Appeal

34. In accordance with Article 13.5 of the NADP Procedural Rules any party who wishes to appeal must lodge a Notice of Appeal with the NADP Secretariat within 21 days of receipt of this decision.
35. Pursuant to ADR Article 13.4.2(b), the Appeal should be filed to the National Anti-Doping Panel, located at Sport Resolutions, 1 Paternoster Lane, London, EC4M 7BQ (resolve@sportresolutions.com).



David Casement KC
Chair, on behalf of the Panel
London, UK
18 July 2024

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