

DISCIPLINARY HEARING

Before

THE INDEPENDENT ANTI-DOPING DISCIPLINARY PANEL

Between

JAMAICA ANTI-DOPING COMMISSION **Complainant**

And

ANDRE RUSSELL **Respondent**

Mr. Lackston Robinson - Counsel for the Complainant
Mr. Patrick Foster, QC, Mr. Donovan Walker & - Attorneys-at-law for the Respondent
Mr. Mark Paul Cowan

Hearing Dates	-	July 20, 2016	-	Courtleigh Hotel, New Kingston
	-	September 19, 28, 2016	-	Jamaica Conference Centre, Kingston
	-	October 6, 7, 11, 2016	-	Jamaica Conference Centre, Kingston
	-	November 17, 2016	-	Jamaica Conference Centre, Kingston

1. **The Anti-Doping in Sport Act 2014** Section 14 (1) requires establishment of an Independent Anti-Doping Act identifies the functions of the Panel which includes inter alia:
 - a. Receive, examine and hear evidence relating to Anti-Doping Rule Violation;
 - b) Conduct disciplinary hearings relating to Anti-Doping Rule Violations;
 - c) Determine whether an Anti-Doping Rule Violation referred to it by the Commission (The Jamaica Anti-Doping Commission established by Section 5, **The Anti-Doping in Sport Act, 2014**) has occurred.

2. In the instant case the Complainant alleges that Mr. Andre Russell an athlete _____ in the Jamaica Anti-Doping Commission, Registered Testing Pool (commonly referred to as RTP) is required to provide the Commission with his Whereabouts Information. The information provided enables the Commission to plan and conduct tests pursuant to Anti-Doping rule.

Article 2.4 **Anti-Doping Rule 2015** stipulates that an Anti-Doping Rule Violation occurs when:

*Any combination of three missed tests and/or Filing Failures, as defined in the **International Standard for Testing and Investigation** within a twelve-month period by an Athlete in a Registered Testing Pool.*

3. The burden of proving that an Anti-Doping Violation has been committed is that of the Commission. The requisite standard of proof as per Article 3.1 is, *“to the comfortable satisfaction of the Independent Anti-Doping Disciplinary Panel, bearing in mind the seriousness of the allegation made”*. The provisions of the herein mentioned Act states further that the standard of proof in all cases is greater than a balance of probability but less than proof beyond reasonable doubt (the criminal standard).

COMPLAINANT'S CASE – FIRST FILING FAILURE

4. The Jamaica Anti-Doping Commission (hereinafter referred to as JADCO) asserts that the First Filing Failure was recorded against the respondent on the 27th March 2015. This filing according to the complainant, was for the period 1st January 2015 to 31st March 2015.
5. The chronology of activities leading to the Filing Failure the complainant posits include a letter from the Executive Director of JADCO, Mr. Carey Brown dated February 11, 2015 notifying the respondent that whereabouts information was not submitted for the aforementioned quarter (1st January 2015 to 31st March 2015). The letter Exhibit 2 at page thirty (30) of Complainant's Bundle of documents.
6. The missive captioned "Formal notice pursuant to the **Anti-Doping Rules (the ADR) of the Jamaica Anti-Doping Commission Notice of apparent Filing Failure:** required the Respondent to submit the Whereabouts Filing for the Quarter no later than February 18, 2015. The complainants letter required the respondent to respond within fourteen (14) days of the February 11, 2015 letter by providing the information which it asserts had been due by December 31, 2014.
7. The complainant as per the February 11, 2015 letter from Mr. Brown required the respondent to provide an explanation for why the Whereabouts Filing was not done and whether the failure so to do was not a result of any negligence on the part of the respondent. Alternatively the respondent may provide information supporting his assertion that the Whereabouts Filing was made.
8. The respondent in examination in chief stated that he has not been the beneficiary of "face to face" information by JADCO regarding whereabouts information save and except an occasion at Sabina Park with members of the Jamaica cricket team. Mr.

Russell also told the Panel that he has received no information or invitation from JADCO for any seminars, workshop or symposium in relation to anti-doping issues and in particular the use of the Adams System.

9. "Adams" is an acronym for the Anti-Doping Administration and Management System. This is a web-based database management tool for data entry including information for Whereabouts Filing.
10. A witness on behalf of the Respondent Miss Judith Lue an Outside Travel Agent testified on Tuesday, October 11, 2016, that she assisted the Respondent by contacting JADCO and with the assistance of Mr. Tajae Smith updated Mr. Russell's Whereabouts Information for the January to March Quarter 2015. JADCO's letter of February 27, 2015 under the signature of Miss Nadia Vassell, Technical Services Director, confirmed the update of the Whereabouts Information on February 17, 2015.
11. The Decision by JADCO to record a Filing Failure was revealed in letter from Mr. Carey Brown dated 11th March 2015 to the Respondent. The basis being, according to JADCO "We have not received any comments regarding your apparent Filing Failure and the deadline has passed". The email from Miss Nadia Vassell on Thursday, March 12, 2015, expressed with greater clarity what was required of the Respondent. The later letter stated "You updated your whereabouts information, but you did not give any written explanation as to why you did not submit your Whereabouts by the December 31st 2014 deadline for the current quarter."
12. Confirmation of the Filing Failure was contained in letter of 27th March 2015 duly signed by the JADCO Executive Director. The Panel noted that Exhibit 11, JADCO's Filing Failure Submission Report recommended as follows "Carry in athlete for educational session."

13. The evidence heard by the Panel does not confirm such session being held. The usefulness of such session seems obvious given the Respondent's email of March 11, 2015 to Miss Vassell stating inter alia "I don't understand what is going on".
14. An opportunity to request a review of the decision to record a Filing Failure, was not taken up by the Respondent within the seven (7) day window provided to do so.
15. Additionally, the Complainant relied on the Whereabouts Filing to illustrate that Mr. Russell did not attend the educational session notwithstanding he being in Jamaica between March 17 and April 3, 2015. (see Whereabouts Detail Report, p52 Case Bundle).
16. The Respondent suggested that JADCO being in possession of information indicating Russell's presence in Jamaica could have taken steps to call him in, consistent with the spirit of the **International Standard for Testing and Investigations**.
17. The **2015 Jamaica Anti-Doping Rules** emphasis the need for Education of stakeholders at ARTICLE 19 (p102).

Article 19.1 JADCO shall plan, implement, evaluate and monitor Information **education** (emphasis supplied) and prevention programmes for doping-free sport and shall support active participation by athletes and athlete support personnel in such programmes.

Article 19.2(a) Requires that the JADCO programmes provide Athletes and other Persons with updated and accurate information on Anti-Doping Rule Violations while

Article 19.2 (e) Targets Athletes and Athlete Support Personnel's rights and responsibilities.

COMPLAINANT'S CASE – SECOND FILING FAILURE

18. The complainant alleges that the respondent did not file the whereabouts information for the quarter commencing July 1, 2015. The complainant asserted that the requisite whereabouts information for the said July to September quarter was to be submitted by the 30th day of June 2015.

19. The Complainant via Exhibit Number 20, (p86 of Complainant's Bundle) a letter from JADCO's Executive Director, Mr. Carey Brown, and captioned Re: Notice of an apparent filing failure, asserted an apparent filing failure and invited the respondent to reply to the notice "within ten days".

20. The Respondent was asked to indicate in his response whether he accepts committing a filing failure or in the event he believes he has not committed such failure, to explain" in as much as details as possible" the basis of such belief.

21. Paragraph 5 of the aforementioned July 6 2015 letter, requested the Respondent to submit a whereabouts filing for the "current quarter" including information pursuant to the fulfilment of ISTI Article 1.3, for each remaining day in the quarter. This latter data was to be submitted within seven (7) days of the receipt of the July 6, 2015 letter, "i.e" by 13 July 2015", the writer states following JADCO's Executive Director's July 6, 2015 letter, an exchange of correspondence between Tajee Smith, Nadia Vassell, Ayana Coper (Senior Player Liaison Officer for the West Indies Cricket Board), Andre Russell and Will Quin culminated with Nadia Vassell's, email of July 20, 2015, (Exhibit 31, p113 of Complainant's Bundle) extending the response date to Friday, July 24, 2015.

22. The Complainant's evidence to the Panel that as at 31st August 2015 the Whereabouts Information for the Respondent for the period 1st July 2015 to September 30 2015 was not submitted to JADCO.

23. On September 8, 2015, a second Filing Failure was recorded against the Respondent (Exhibit 39, p.134 Complainant's Bundle). The letter under the hand of Mr. Carey Brown, Executive Director of JADCO in confirming the recording of the Filing Failure requested Mr Russell to visit the JADCO Office on South Odeon Avenue, Kingston 10 and informed the Respondent that a JADCO representative would contact him "within the next couple of days to arrange a session." Mr. Dale Newby and Mr. Tajee Smith were conducting Whereabouts Session, Complainant stated. No evidence was provided to suggest that such contact was made.
24. Mr. Russell in his evidence made mention of attending the JADCO office to update his Whereabouts Information. In his October 7, 2016, viva voce evidence the Respondent acknowledged receiving assistance from JADCO personnel, "Renaldo" and "Tajee" and on one occasion "Mr. Newby".
25. The Respondent complied with the requirements for the April - June 2015 Quarter with the assistance of Miss Judith Lue, (previously referred to at page 4). The Respondent told the Panel that the Information was provided while he was in India.
26. Mr. Russell in support of his case gave sworn evidence that he sought Mr. Quin's assistance in July 2015, because his cricketing schedule was hectic requiring him to travel from (in his words) "country to country, tournaments after tournaments". As a consequence, according to the Respondent, he relied on his agent (Mr. Quin) to "take over and deal with JADCO on a matter he did not fully understand". Mr. Quin, the evidence would suggest, did not fulfil "the Whereabouts Filing" expectation of Mr. Russell. Mr. Russell told the Panel that Mr. Quin had suggested that he the Respondent should focus on his cricket. Exhibit 28 (p58 of Bundle) letter from Nadia Vassell dated September 8, 2015, informed the Respondent that the assignment of a delegate does not remove from the Respondent the responsibility to ensure the update of his Whereabouts Information and to have same submitted to JADCO for the respective Quarters.

27. The Respondent in his sworn testimony that neither the West Indies Cricket nor the Players Association nor the "Cricket Association" conducted workshops or training sessions dealing with anti-doping and the use of the ADAMS System. Mr. Russell in examination in chief alluded to having done "a number of tests in different countries"; however, he mounted no vigorous defence to the complainant's case of a second Filing Failure.

28. The Respondent has essentially conceded the validity of the first and Second Filing Failures.

COMPLAINANT'S CASE - THIRD FILING FAILURE

29. The Quarter giving rise to the Second Filing Failure, that is, the July 1, 2015 to September 30, 2015 provides the foundation for the Third Filing Failure, on the Complainant's Case.
30. Exhibit 41 (p.137 of Case Bundle) entered into evidence by the Complainant is a missive from the JADCO Executive Director, providing to the Respondent, Notice of an apparent Filing Failure, in essence the initiation of the process.
31. The Respondent was given ten (10) days to respond to the September 9, 2015 letter and to submit the Whereabouts Filing by September 17, 2015.
32. The letter concluded by stating the consequences of a Filing Failure being recorded against an athlete.
33. The Complainant acknowledged that the Whereabouts Information for the requisite Quarter was submitted by the Respondent on September 9, 2015, however the explanation for the failure to file the Whereabouts Information was not forthcoming.
34. The chronology of correspondence reveals that the next letter was dated September 21, 2015 under the hand of the JADCO Executive Director. In the letter captioned "Apparent Filing Failure", the Complainant conveyed the non-receipt of a response by JADCO of to its September 9, 2015 letter.
35. Exhibit 50, (letter dated October 2, 2015) addressed to Mr. Andre Russell from the JADCO Executive Director, confirmed a Filing Failure being recorded against the Respondent for the July to September 2015 Quarter.

36. The Respondent by document tendered into evidence as Exhibit 52, acknowledged receipt of the October 2, 2015 letter.
37. JADCO dispatched to the Respondent, "Notification of Anti-Doping rule Violation: the medium being letter dated October 12, 2015 signed by Mr. Carey Brown.
38. The Respondent confirmed receipt of this letter while he was in Australia.
39. The Respondent queried whether he was given proper and adequate notice in accordance with ISTI 1.3.6(c) with respect to this Third Filing Failure on July 2015. The Complainant challenged this aspect of the Respondent's closing submission arguing that this is a new issue being raised by the Respondent which was not a part of its pleadings.
40. The Panel will nonetheless examine Rule 1.3.6(c) of the International Standard Testing and Investigations 2015. To do otherwise would be imprudent.

ISTI 1.3.6. C. (in the case of second or third Filing Failure in the same quarter) that he/she was given notice of in accordance with Article 1.5.2(d), of the previous Filing Failure, and (if that Filing Failure revealed deficiencies in the Whereabouts Filing that would lend to further Filing Failures if not rectified) was advised in the notice that in order to avoid a further Filing Failure he/she must file the required Whereabouts Filing (or update) by the deadline specified in the notice (which must be no less than 24 hours after receipt of the notice and no later than the end of the month in which the notice is received) and yet failed to rectify that Filing Failure by the deadline specified in the notice; and.

41. The comment appended to 1.3.6© is useful:

The requirement is to give the Athlete notice of the First Filing Failure in the quarter and an opportunity to avoid a subsequent one, before a subsequent Filing Failure may be pursued against him/her that quarter. But that is all that is required. In particular, it is not necessary to complete the results management process with respect to the first Filing Failure before pursuing a second Filing Failure against the Athlete.

42. The Complainant grounds its case in the JADCO Anti-Doping Rules specifically Article 2.4 which states:

Whereabouts Failures

Any combination of three Missed Tests and/or Filing Failures, as defined in the **International Standard for Testing and Investigations** within a twelve -month period by an Athlete in a Registered Testing Pool.

43. The Complainant further submits to the Independent Anti-Doping Disciplinary Panel that three Filing Failures were committed thus violating Article 2.4 of **JADCO 2015 Anti-Doping Rules**.

44. JADCO also sought the application of sanctions pursuant to Article 10.2.2 of the **JADCO Anti-Doping Rules 2015**.

45. The aforementioned provisions stipulate as below:

10.3.2 For Violations of Article 2.4 the period of *Ineligibility* shall be two years, subject to reduction to a minimum of one year, depending on the Athlete's degree of Fault. The flexibility between two years and one year of ineligibility in this Article

is not available to Athletes where a pattern of last minute whereabouts changes or other conduct raises a serious suspicion that the Athlete was trying to avoid being available for Testing.

46. The Panel notes that the Limitation on application of the discretion to reduce the two-year sanction did not form part of the Complainant's case. In other words, no evidence was provided to suggest a "pattern of last-minute whereabouts changes or other conduct (that) raises in serious suspicion that the athlete was trying to avoid being available for testing".

47. In fact, evidence given in the matter which was not challenged placed on record the Respondent undergoing several anti-doping tests in several countries. The Panel agrees that there was "clearly some intervention and willingness to do something to have the situation rectified", though unsuccessfully to the critical moment.

48. Annex 1.5.2 (d) of the ISTI Rules was the subject of counter arguments by the Complainant and the Respondent. The Annex states inter alia;

1.5.2 (d) if the results management authority concludes that all of the required requirements have been met, it shall notify the athlete within 14 days of the date of the apparent Whereabouts Failure. The Notice shall include sufficient details of the apparent Whereabouts Failure to enable the athlete to respond meaningfully and shall give the athlete a reasonable deadline to respond, advising whether he/she admits the Whereabouts Failure and if not, then why not. The Notice should also advise the athlete that three Whereabouts Failure in any 12 month period is a Code Article 2.4 anti-doping rule violation and should note whether he/she has any

other Whereabouts Failures recorded against him or her in the previous 12 months. In the case of a further Filing Failure he/she must file the missing Whereabouts Information by the deadline specified in the notice (which must be no less than 24 hours after receipt of the notice and no later than the end of the month in which the notice is received).

49. It is the view of the Panel that Exhibit 41, dated 9th September 2015 answers the issue as to whether there is compliance by the Complainant of ISTI 1.5.2 (d)
50. The case of **Union Cycliste Internationale (UCI) v Alex Rasmussen & the National Olympic Committee and Sports Confederation of Denmark** (Dansk Idrætsforbund) heard by the Court of Arbitration for Sport (CAS) was vigorously debated.
51. The CAS overturned the decision of the Anti-Doping Board (Dopingnaevn) of the National Olympic Committee and Sports Confederation of Denmark, which had adjudicated on WADA's International Standard for Testing Article 11.6.3.(b) (the equivalent of our 1.5.2 (d) of the ISTI Rules), and the Union Cycliste Internationale (UCI) ADR Article 105.
52. In setting aside the previous decision, the Court of Arbitration for Sport imposed an 18 month suspension on Mr. Rasmussen. The time limitation CAS ruled seeks to prevent a fourth violation being recorded against the athlete but does not prevent the recording of a missed test. On the basis of same, the Complainant to the Panel's comfortable satisfaction would have properly complied with Annex 1.5.2 (a) of the ISTI Rules in recording a Third Filing Failure.

SANCTION

53. Consequent on the findings of the Panel, we are required to turn our minds to the provisions regarding sanction.

Code Article 10.10 Sanctions on Individuals of The International Standard Testing and Investigations (p12) is hereby revisited.

54. The Panel believes in the instant case the Respondent athlete as per the evidence heard, has not displayed a pattern of last minute Whereabouts Changes or other conduct which raise a serious suspicion that the athlete was trying to avoid being available for testing. Accordingly, the Respondent is eligible for the reduction that the Code makes available.

55. The Complainant submits that any sanction imposed should commence on the date, the Panel announces its decision in the matter.

56. The Anti-Doping Rules 2015, specifically Articles 10.11, 10.11.1, 10.11.2 and 10.11.3 were cited by the Complainant as providing instances where the sanction may commence at a date earlier than the decision date. The Complainant however argue that the circumstances specified would not apply in the instant case.

57. Several authorities were cited by both Counsel for the Respondent and Counsel for the Complainant.

58. The Panel found a number of these cases useful as it exercises its functions. These cases will be identified, notwithstanding the fact that most if not all the cases cited will be acknowledged.

59. The case of Davis v USADA was of some value with regard to the question of sanction. (AAA No 77190 00587 13 JENF United States Anti-Doping Agency (“USADA”) and Walter Davis (“Respondent”).
60. Walter Davis a 34 year old Track and Field Athlete conceded to the Arbitrator that he failed to file three (3) Whereabouts Information within an eighteen month period. Mr. Davis, however, attributed the failure to his retirement from Track and Field athletics. The evidence from USADA and USA Track and Field revealed that neither entity received notification of Mr. Davis’ retirement. A one year sanction was applied to Mr. Davis.
61. The World Anti-Doping Code seeks to foster uniformity of sanctions globally through a harmonized framework which is applicable to all sports. This stance as extracted from **Arbitration CAS 2009/A/2012 Doping Authority Netherlands v N.**
62. The Complainant invited the Panel to determine the degree of Fault of the Respondent. However, the CAS Anti-Doping Netherlands v N states that the applicability of such principle of proportionality is permitted though restricted by the World Anti-Doping Code. Proportionality is compatible with human rights and general legal principles.
63. The case of W./International Equestrian Federation (FEI) the Court of Arbitration for Sport confirmed the previous decision save and except reducing an eight month sanction to six months. Proportionality was also addressed in that case.
64. Like the instant case the United Anti-Doping Agency and Luis Arias examined allegations of Whereabouts Filing Failure. Luis Arias a boxer claimed he had unsuccessfully attempted to log on to USADA Website and tried to contact USADA in order to file his Whereabouts Information prior to the stipulated deadline.

65. The Respondent in this matter as earlier acknowledged stated that he encountered difficulties in accessing the ADAMS System and sought help to do so.
66. The Panel finds noteworthy the facts that in the Arias case an online educational program prior to the completion of the first Whereabouts Filing was utilized by (Mr. Arias) the Respondent. This process seems useful for the athlete, furthermore the sporting bodies to which the athlete is affiliated should take an interest in assisting the completion of these administrative processes in the interest of sport.
67. Arias attributed indecision in filing as the result of academic pursuits and career choice decisions. In other words, the athlete's conduct may provide rebuttal to the negligence presumption a scenario not evident in the instant case. Luis Arias was handed a sanction of one year ineligibility.
68. Arbitration CAS 99/A/246 W./International Federation FEI) cited earlier stated the above principle this way "the athlete must have the possibility to rebut charges by providing exculpatory evidence". It was further held that the severity of the penalty imposed must be proportionate to the seriousness of the infringement.
69. In the matter of **Robert Lea v United States Anti-Doping Agency (USADA)** the issue of sanction was the central ground of appeal. The relief sought was appurtenant to this main issue.
70. The Court of Arbitration for Sport, CAS, upheld the earlier decision of the American Arbitration Association Panel to commence sanctions at the date of the athlete's acceptance of a provisional sanction. The effective date in Lea falls prior to both the Panel's Interim Award and to a later Modified Interim Operative Award. The facts of the **Robert Lea** case are incongruous with the Russell case.
71. Drug Free Sport New Zealand (DFSNZ) filed an appeal to the decision of the Sports Tribunal to dismiss a charge of an Anti-Doping Rule Violation against Kris Gemmel a

member of Triathlon New Zealand. DFSNZ sought to establish that Gemmell accumulated three Whereabouts Failure within an eighteen month period.

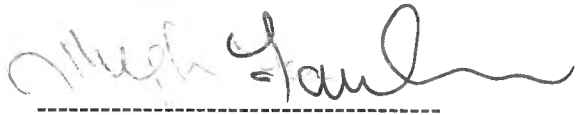
72. In Gemmell's case, the Whereabouts Filing Failure was complemented by two missed tests. In reversing the earlier decision of the Sports Tribunal, the Court of Arbitration Sport re-stated principles enunciated earlier regarding the commencement date for sanctions. Gemmell was sanctioned ineligible to compete for a period of fifteen months commencing on the date of the decision of the Sports Tribunal. The case also pronounced on costs and Publication of the Award specifically with regard to confidentiality if so agreed.

73. Other cases cited during the hearing included CAS 2013/A/332 Marin Cilic v International Tennis Federation, CAS 2013/A/3335 International Tennis Federation v Marin Cilic, CAS 2005/A/847 Hans Knauss v FIS.

78. The Panel also finds to the comfortable satisfaction standard bearing in mind the seriousness of the allegation made that the three Filing Failures took place within a twelve (12) month period as required by Rule 2.4 of the **JADCO 2015 Anti-Doping Rules**. The Panel also re-iterates the fact that an anti-doping rule violation arises where three Filing Failures satisfy the twelve (12) month condition.

79. The Respondent is hereby sanctioned for a one-year period of ineligibility commencing January 31, 2017 and ending at midnight on January 30, 2018.

Date: January 31, 2017

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Hugh Faulkner, Chairman

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Dr. Marjorie Vassell, Member

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Dixeth Palmer, Member