

DISCIPLINARY HEARING

Before

THE JAMAICA ANTI-DOPING DISCIPLINARY PANEL

Between

JAMAICA ANTI-DOPING COMMISSION Complainant

And

ODEAN BROWN Respondent

JADP2015/1

Mr. Lackston Robinson for the Complainant and Mr. Patrick Foster, QC, and Mrs. Stephanie Forte for the Respondent.

The evidence from the Complainant disclosed that:

1. Mr. Odean Brown, the Respondent who is a cricketer was on the Jamaica Anti-Doping Commission's Registered Testing Pool (RTP).
2. Athletes in that Pool are subject to both in-competition and out-of-competition testing.
3. An athlete in the RTP is required to provide the Jamaica Anti-Doping Commission (JADCO) with accurate information on his or her location at all times.
4. The athlete is also required to make himself available for testing on the dates, at the times and at the locations specified by him in his Whereabouts information.
5. Mr. Carey Brown, the Executive Director of JADCO on 22nd May, 2014, wrote to the Respondent notifying him of his inclusion in JADCO's Registered Testing Pool.
6. The letter also provided information concerning the relevant rules, the nature of his responsibility, how he should file the Whereabouts information and the sanction for non-compliance.

7. The Respondent on the 6th June, 2014 provided JADCO with his whereabouts information for the period 1st July, 2014 to 31st July, 2014.
8. He indicated that at 6 a.m. on the 22nd July, 2014, he would be at his home at 21 Flinch Crescent, Waltham Park, Kingston.
9. On 22nd July, 2014, Mrs. Lorraine Drysdale, a JADCO Doping Control Officer, went to the Respondent's home at 21 Flinch Crescent, Waltham Park, Kingston at 6:45 a.m. but the Respondent was not at home.
10. Consequently, on 30th July, 2014, Mr. Carey Brown, the Executive Director of JADCO wrote to the Respondent notifying him of his failure to make himself available for testing on 22nd July, 2014 and requested him to provide JADCO with an explanation within fourteen (14) days.
11. The Respondent did not provide a response to the said letter.
12. Mr. Carey Brown on the 21st August, 2014 wrote to the Respondent pointing out that no response was received from him as to his unavailability and advised him that a decision was taken to record a Missed Test against him in accordance with Clause 11.6.3 (D) of the International Standard for Testing.
13. The Respondent was also advised of his right to request a review of the decision and was invited to make an application in seven (7) days if he wished to exercise his right.
14. The Respondent did not reply to the letter of 21st August, 2014 from Mr. Carey Brown.
15. On the 20th September, 2014, a Missed Test was recorded against the Respondent and he was so advised in a letter of the same date.
16. On 3rd September, 2014, the Respondent provided Whereabouts information to JADCO for period 1st October, 2014 to 31st October, 2014 indicating that at 6 a.m. on 29th October, 2014, he would be at Lot 69 Whitewing, The Aviary, Old Harbour, St. Catherine.
17. On 29th October, 2014, Mrs. Carol Cheese, a Doping Control Officer of JADCO went to 69 Whitewing, The Aviary, Old Harbour at 6:54 a.m. to conduct testing, but the Respondent was not there.

18. Mr. Carey Brown, the Executive Director of JADCO, on the 11th November, 2014, wrote to the Respondent, notifying him that he had failed to make himself available for testing on 29th October, 2014, and directed the Respondent to provide JADCO with an explanation of his unavailability within fourteen (14) days.
19. The Respondent replied in an undated letter which was received by JADCO on 18th November, 2014.
20. The undated letter (Ex 21) stated:

"I just want to apologise for my miss test, due to I wasn't home. I left early for training that morning (6:30 am) I was trying to beat the traffic into Kingston. My wife had called me the same time and told me that they came, so I called the office the same time."
21. Mr. Carey Brown on 2nd December, 2014 wrote the Respondent advising him that due consideration was given to his explanation but the reasons were inadequate and so a decision had been taken to record a Missed Test against him in accordance with Clause 11.6.3 (D) of the International Standard for Testing.
22. The Respondent was also advised of his right to request a review of the decision and invited to make an application within seven (7) days if he wished to exercise his right.
23. The Respondent did not reply to Mr. Carey Brown's letter of 2nd December, 2014.
24. A Missed Test was recorded against the Respondent on 12th December, 2014 and he was so advised in a letter of the same date.
25. The Respondent is required to provide JADCO with information on his Whereabouts on a quarterly basis and such information must be submitted to JADCO before the commencement of each quarter.
26. On the 11th February, 2015 Mr. Carey Brown wrote to the Respondent notifying him of his failure to submit his Whereabouts information for the quarter 1st January, 2015 to 31st March, 2015.
27. That information was due on 31st December, 2014, and the Respondent was given fourteen (14) days to provide JADCO with an explanation for his failure to file his Whereabouts information and he was mandated to update his Whereabouts information by 18th February, 2015.

28. On 1st March, 2015, the Respondent wrote to JADCO explaining his failure to file his Whereabouts information stating that it was due to someone hacking into his email and that he did not have access to it for more than two months. (See Ex 30).
29. On 13th March, 2015 Mr. Carey Brown replied to the Respondent requesting further information by 20th March, 2015.
30. On 24th March, 2015, the time for providing the further information was extended to the 27th March, 2015.
31. On 27th March, 2015, the Respondent provided JADCO with the additional information.
32. On 15th April, 2015, Mr. Carey Brown wrote to the Respondent advising him that his explanation was given due consideration and that a decision was taken to record a Filing Failure against him, and the reasons therefor.
33. The Respondent was advised of his right to request a review of the decision and he was invited to make an application within seven (7) days if he wished to exercise his right.
34. The Respondent wrote to JADCO on 27th April, 2015 requesting a review of the decision.
35. The review was carried out and on 8th June, 2015 a Filing Failure was recorded against the Respondent and he was so advised on 8th June, 2015.
36. The Respondent in his evidence before the Independent Anti-Doping Disciplinary Panel was that:
37. The Respondent resides at Lot 35 Mockingbird Drive, The Aviary, Old Harbour, St. Catherine.
38. He previously resided at 21 Flinch Crescent, Waltham Park, Kingston and later moved to Lot 69, Whitewing, The Aviary, Old Harbour, St. Catherine.
39. The Respondent has been a full-time cricketer since 2004 and cricket is his only occupation and only source of income.

40. He was advised that he was in the Registered Testing Pool for athletes and that he could be tested in-season and out-of-season and that he should provide information of his Whereabouts to JADCO
41. The home address provided before 22nd May, 2014 by the Respondent to JADCO was 21 Flinch Crescent.
42. The Respondent was advised by JADCO of the various information and procedures relevant to filing and testing. (See Statement of Respondent Odean Brown Ex 54).
43. As far as the Missed Test for 22nd July, 2014 is concerned, the Respondent could not understand why the Doping Officer had gone to 21 Flinch Crescent when he lived at 69 Whitewing Crescent, The Aviary, Old Harbour, St. Catherine. (See paragraph 27 of Ex 54).
44. The Respondent said that the reason for the alleged Missed Test on July 22, 2014 was due to the mix-up with his mailing address and overnight accommodation address.
45. He said that this happened because of a misunderstanding that it was sufficient for him to update his mailing address, and that it was not his intention to evade anything.
46. The Respondent in his statement said that in relation to the alleged Missed Test of October 29, 2014, he left his house at Lot 69, Whitewing, the Aviary, Old Harbour, at some time after 6:30 a.m. to attend training for the National Team, which was scheduled by the National Coach, Mr. Junior Bennett, at Sabina Park, Kingston which was to start at 8 a.m.
47. He said he left at that time because he wanted to be on time for training on October 29, 2014.
48. The Respondent explained that he was trying to be early for training as he did not want the Coach, Mr. Junior Bennett or trainer, Mr. David Bernard Snr., to have a negative impression of his punctuality when it came for team selection.
49. On the morning of 29th October, 2014, he said that after he left home he drove on the highway to head into Kingston.
50. The Respondent said that close to 7 a.m. his wife called him and told him that there were persons who said they were from JADCO at the house and they asked her if he was there.

51. He said his wife told the JADCO Officers that he had left the house a few minutes before, and that he was on his way to training for the Nation Team at Sabina Park.
52. The Respondent said that his wife told him that the JADCO Officers left after she informed them that he had informed her that he had gone to training at Sabina Park.
53. He said that after he got off the phone with his wife, he called the JADCO Office to inform them of what had happened but no one answered.
54. The Respondent said that late that day when he was at Kensington (which was changed from Sabina Park in his statement (paragraph 50) he met one of the JADCO Officers and having introduced himself, asked her if she had gone to his house at Lot 69, Whitewing, the Aviary, Old Harbour, that morning looking for him.
55. The Respondent said he explained to the Officer that he was not at home because he was called to training which began at 8 a.m., and asked if he could be tested there.
56. He said the JADCO Officer refused and told him that he was not at home when they arrived there that morning and that the test should have been done there.
57. The Respondent said he later received a letter from JADCO dated November 11, 2014 asking for an explanation for the Missed Test of October 29, 2014.
58. He said he wrote a letter to JADCO apologising for not being at home on October 29, 2014 and explaining that he had left early for training to beat the traffic into Kingston and his effort to contact the JADCO office after his wife informed him of the JADCO Officers' visit to his house.
59. The Respondent said he received another letter from JADCO dated December 2, 2014 stating that JADCO was going to record a Missed Test against him and that he could request an administrative review of the decision.
60. He said he did not request a review because he did not understand what this meant or the process that would be involved.
61. The Respondent said that in his mind JADCO had already made its decision to record a Missed Test against him and since he had already explained the circumstances of October 29, 2014 to the JADCO Officers and had written to JADCO there was nothing further that he could do.

62. The Respondent said that in respect of his failure to file his whereabouts information for the period February 1, 2015 to March 31, 2015 on time, was due, in part, to his losing access to his email for about two (2) months from December 2014 to January 2015.
63. The loss of access, he said, was because the password had been changed by someone else.
64. He said he was assisted by a friend who was good with technology to go through the steps to regain access to his account which involved contacting Yahoo and going through a verification process, and this allowed him to reset his password and gain access to his account in mid-January 2015.
65. The Respondent said he explained the issues of his email account to Ms. Nadia Vassell on March 27, 2015.
66. He said he received a letter from JADCO dated April 15, 2015 stating that JADCO intended to record a Filing Failure against him and that he had the right to an administrative review.
67. The Respondent said that he emailed Ms. Marsha Williams of JADCO on April 23, 2015 to explain that it was difficult for him to update all his whereabouts for that period as they the cricketers often do not have precise details on where they would be staying when they travel overseas.
68. He said he explained this to Ms. Williams because in the months of February to March 2015, the team travelled to play matches in Kingstown (St. Vincent), Providence (Guyana), and Basseterre (St. Kitts) in the WICB Professional Cricket League Regional 4 Day Tournament 2014/15.
69. The Respondent said that it was a very busy time for him and that most of the time members of the team do not know which hotel they would be staying at until they arrive at each location.
70. He said he emailed Ms. Vassell on April 27, 2015 requesting an administrative review.
71. The Respondent said that in hind sight, he felt that he should have tried harder to update his whereabouts information for January to March 2015.
72. He said that he apologises sincerely for that oversight on his part, and that he is committed to be diligent in filing his whereabouts information in the future and never do that again.
73. Miss Annette Wellington gave evidence in support of the Respondent.

74. In her statement (Exhibit 56) she said that she allowed the Respondent to board with her at 21 Finch Crescent, Waltham Park, Kingston 11.
75. She said he lived there until about April 2013 when he moved out and relocated to Old Harbour.
76. Miss Wellington said on July 22, 2014 at about 6:45 a.m. she was in her yard when some persons approached her and asked if Odean Brown was in the house.
77. She said she told one of the women in the group that the Respondent was not at the house and that she did not know where he was at that time. The persons she said then left.
78. Miss Wellington said about two days later she called the Respondent and told him that some persons came to her house on July 22, 2014 asking for him, and that she told him the details of the conversation she had with those persons on that day.
79. At the hearing Miss Wellington denied that she told any of the persons who came to her house that she was the Respondent's mother and that he had gone on tour overseas.
80. Mr. Junior Bennett, the Respondent's coach also gave evidence on behalf of the Respondent.
81. He said that as coach, he was responsible for scheduling training days and time for the Jamaica Senior cricket team, and that the days set for team training depend on the competition schedule for the team.
82. In his statement (Exhibit 57) Mr. Bennett said that punctuality of players is a matter that is taken seriously by him and the other administrators of the National Team.
83. He said that on October 29, 2014 training was scheduled to take place on that morning at Kensington Cricket Club, Preston Road, Rollington Town, Kingston 2 and that the Respondent was present at the scheduled training.
84. Mr. Bennett said he recalled officers from the Jamaica Anti-Doping Commission (JADCO) arriving at Kensington Cricket oval on October 29, 2014 to carry out testing of players.
85. He said he did not speak with them on that day but that he is familiar with them as they visit their training and match venues from time to time.

86. The Respondent challenged the Doping Control Officers in cross-examination as to whether they had complied with the World Anti-Doping Code International Standard Testing and Investigations (ISTI) guidelines.
87. Mrs. Lorraine Drysdale, Doping Control Officer (DCO) in her evidence said that the JADCO Rules did not require the DCO to telephone the athlete before the window for the testing on July 22, 2014 had closed. (See Transcript, September 18, 2015 pages 22-23).
88. Mrs. Carol Cheese, DCO, was also challenged by Mr. Foster QC as to whether it was not reasonable to contact the Respondent when she visited his home and his wife informed her that he had gone to cricket practice. (See Transcript September 2015, page 48).
89. Mr. Foster, QC, in his final submissions stated that the Doping Control Officers did not follow the ISTI Guidelines as they did not contact the Respondent.
90. Mr. Lackston Robinson, for the Complainant, submitted that the Doping Control Officers were not required by the ISTI Guidelines to contact the athlete when he was not located at home as the guidelines which were then in force did not require them to contact him.
91. The Panel finds that the Doping Control Officers were not required to contact the Respondent when he was not located at home.
92. The Panel considered the two missed tests separately and found that the evidence supported a breach in each instance.
93. The Panel considered the Filing failure and found that the evidence supported the breach.
94. The Respondent did not act in a responsible manner when he was informed by JADCO's Executive Director of the missed test and filing failure.
95. The Panel finds that his explanations were unsatisfactory.
96. The handing in to JADCO of a "blank" piece of paper and his promise to return, and his failure to return to the office were unfortunate.

97. Ms. Vassell called the Respondent on the phone on 10th September, 2014, one week later, and sent him an email on the 16th September, 2014 and he did not respond, so a missed test was then recorded against him.
98. The Panel does not accept the explanation of the Respondent as to how the "wrong" address got on the ADAMS database.
99. The Panel finds that the Respondent was familiar with the filing of Whereabouts information as he had so filed before.

SANCTION

100. JADCO, the Complainant has satisfied the Panel to its comfortable satisfaction, so the Panel must apply the appropriate sanction.
101. Article 10.3.2 of JADCO Rules provide that "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 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.
102. The Panel has not found any evidence to suggest that the Respondent demonstrated a pattern of whereabouts changes or other conduct to raise any serious suspicion that he was trying to avoid being available for testing.
103. Mr. Foster, QC suggested that the sanction that should be applied must be based on the principle of proportionality which he contended "means that the severity of the penalty must be in proportion to the seriousness of the infringement."
104. He cited several cases to support his submissions.
105. The cases cited including United States Anti-Doping Agency (USADA) v Walter Davis (American Arbitration Association, Arbitration No. 77190 00587 BNEF, Final Award dated April 15, 2014) and USADA v Walter Davis at [3.13].
106. The athlete was charged with a whereabouts failure for failing to file his whereabouts information on three occasions within a 12-month period.
107. The athlete in his defence said he was still upset for not making the Olympic team and Was considering retirement therefore he did not complete the form. He was looking for a job and was no longer in a full-time training schedule so filling out a whereabouts form slipped his mind.

108. He was still contemplating what to do when the information was due and that his July 2013 filing failure was because he was busy with work and just did not have the time to fill it out in a timely manner.
109. It is to be noted that USADA recommended a one year period of ineligibility and the hearing Panel agreed, and imposed the sanction accordingly.
110. Mr. Foster, QC also referred to USADA v Lenroy Thompson, American Arbitration Association, Arbitration No. 77 190 E000 4212 JENF, Final Award dated May 2, 2012 where the athlete was charged with a whereabouts failure for one filing failure and two missed tests.
111. The Panel in that case took into consideration that the athlete gave no justification for failing to file his whereabouts information for the third quarter of June, 2011 by the June 30, 2011 deadline.
112. It is also considered that the athlete's failure to update his whereabouts information was uncontested.
113. The Panel also considered the fact that after the first missed test, the athlete failed to update his whereabouts filing to advise USADA of the change of address from Lexana, Kansas to Dallas, Texas resulting in the second missed test.
114. The Panel considered that the athlete negligently failed on three occasions to comply with the filing requirements.
115. The Panel imposed a one year period of ineligibility.
116. Mr. Foster QC submitted that the negligence of the athlete in USADA v Lenroy Thompson far surpassed that of the Respondent as Thompson made no attempt to update his whereabouts information and provided no excuse for his failure.
117. In addition Mr. Foster QC submitted that on the days of the missed tests Thompson was not even in the same State of the Doping Control Officer, and so could not have returned to the location stated in the whereabouts filing.
118. The finding of the Panel that the DCOs were not required to contact the Respondent to enable his return, would not support Mr. Foster's submission.
119. Mr. Foster, QC brought the case of USADA V Mark Jelks American Arbitration Association, Arbitration No. AAA 77190 0007412, Final Award date May 23, 2012 to the attention of the Panel.
120. In that case the athlete received a sanction period of ineligibility for two filing failures and one missed test.
121. The Panel found that Jelks did not dispute USADA's determination that he committed whereabouts failure and presented no evidence in defence of the charge.

122. The Panel said that Jelks did not contest the sanction imposed by USADA from August 2010 to February 2012 – a period of 18 months – although he was provided with notice of an opportunity to challenge the sanction.
123. The Arbitrator said that Jelks chose to ignore his rights.
124. Mr. Foster QC submitted that Jelks took no active steps to explain the reasons for his whereabouts failure or appeal the sanction imposed in a timely manner.
125. He said that in those circumstances the Panel was entitled to draw an “unfavourable inference” due to the athlete’s failure to respond.
126. Mr. Foster QC submitted that the Respondent in the instant case had been very forthcoming and proactive in explaining the circumstances relating to the matters raised by JADCO which he said is a sharp contrast to the conduct of Jelks.
127. The Panel does not agree that the response and behaviour of the Respondent in relation to the correspondence from the Executive Director of JADCO was satisfactory.
128. The Respondent ignored some of the correspondence and provided unsatisfactory letters and correspondence.
129. In *Drug Free Sport New Zealand v Kris Gemmell*, CAS 2014/A/2 the athlete had two (2) missed tests and one filing failure.
130. The Panel imposed a sanction of 15 months ineligibility.
131. The following circumstances were considered:
- (a) Gemmell offered no reasons to explain his filing failure
 - (b) The Panel viewed a filing failure as a “minor offence” and “an offence at the lower end of the scale”
 - (c) The athlete was in the basement of the house and was not aware that a Doping Control Officer had come to test him.
 - (d) The Doping Control Officer made no attempt to contact the athlete
 - (e) On the day of the second missed test, the athlete failed to update his Whereabouts filing because he received news that his father had been admitted to hospital, and he was called away by his employer to go to work to deal with a situation that had arisen
 - (f) That the athlete was upset and under pressure.
132. The Panel held that this explanation provided “Some partial excuse” for the missed test.

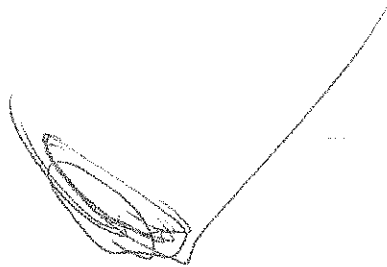
133. Mr. Foster QC cited the case of Australian Sports Anti-Doping Authority v Jerrod Bannister, Court of Arbitration for Sport, Ref A1/2013 Final Award dated July 22, 2013 where the athlete admitted that two of his three missed tests were "inexcusable" and offered no explanation for them.
134. The Panel imposed a sanction of 1 year and 8 months.
135. Mr. Foster also provided a list with statistics of cases and the sanctions imposed.
136. The Panel finds that the list is not of much help as the sanctions are based on subjective circumstances peculiar to each case.
137. The Panel is mindful that Article 10.3.2 is the applicable Article and therefore should determine the athlete's degree of fault.
138. The Panel, in assessing the athlete's degree of fault adopts the approach of the Court of Arbitration for Sport under Article 10.5.2.
139. Mr. Lackston Robinson for the Complainant submitted that the case of Doping Authority Netherlands v N, CAS 2009/A/2012 sets out the approach.
140. He submitted that the sole arbitrator had to consider the provisions of Article 41 ISR Doping Regulations which are similar to Article 10.5.2 of the CODE.
141. Mr. Robinson submitted that the sole arbitrator accepted the opinion of other CAS panels that:

"The sanctioning body has to determine the reasons which prevented the athlete in a particular situation from complying with his or her duty of care. For this purpose the sanctioning body has to evaluate the specific and individual circumstances ..."
142. The Panel accepts the approach and adopts it as relevant.
143. Based on the actions of the Respondent mentioned earlier the Panel finds that the degree of fault would put the Respondent above the one year minimum period of ineligibility.
144. Having assessed and considered the Respondent's violations and his responses thereto, the Panel finds that the appropriate sanction should be a period of fifteen (15) months ineligibility.

145. The Panel takes into account the submissions as to the commencement of the sanction, the fact that the Respondent was not suspended, and that there was a delay in handing down the decision.
146. in those circumstances, the Panel considers it fair and just to commence the period of ineligibility from 24th November, 2015.

By THE JAMAICA ANTI-DOPING DISCIPLINARY PANEL

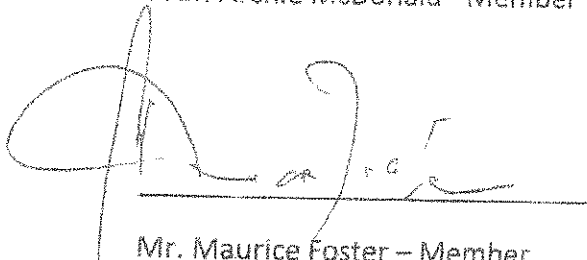
Dated the 10th day of May, 2016



Prof. Kent S. Pantry CD, QC – Chairman



Prof. Archie McDonald – Member



Mr. Maurice Foster – Member