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WHISTLEBLOWING IN SPORT – PART 2: INVESTIGATIONS AND DISCIPLINARY PROCEEDINGS

By [Sir Anthony Hooper \(/item/sir-anthony-hooper\)](/item/sir-anthony-hooper) [Andrew Smith \(/item/andrew-smith-2\)](/item/andrew-smith-2) published on 15 December 2014



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In part two of this two part series, Sir Anthony Hooper & Andrew Smith review the “*Substantial Assistance*” provisions in the 2015 WADA Code and explain how other industries approach the investigations and disciplinary proceedings involving information provided by whistleblowers.

To conclude the authors outline some pragmatic solutions that will assist governing bodies of sport to main-

tain public confidence in their sport.

With regard to the objective of encouraging a greater number of whistleblowers to come forward, one potential option is to operate a form of ‘amnesty’ or reduced sanction regime for those individuals who do step forward and report serious wrongdoing, even if they themselves have been personally involved in that wrongdoing. In January 2013 the International Cycling Union (UCI) suggested that the World Anti-Doping Agency (WADA) should introduce a limited amnesty across all sports, stating that:

"If WADA is serious about uncovering the full extent to which modern science and the limited methods of detection available to sporting bodies and anti-doping authorities (including itself) have prevented doping, it should establish a truth and reconciliation commission..."¹

This suggestion was strongly criticised by (amongst others) Sir Dave Brailsford, the Principal of Team Sky, who is reported to have said (<http://www.telegraph.co.uk/sport/othersports/cycling/9828392/Team-Skys-Dave-Brailsford-angered-by-UCI-plan-to-offer-amnesty-to-doping-whistle-blowers.html>):

"There is this idea that if everyone tells the truth it will make it all better. No it won't. Telling the truth doesn't make it better. It's about acting on the information that you find and doing something tangible with that information to make sure it doesn't happen in the future. This idea of everyone telling the truth and it all goes into a pot, is it going to change anything? If it is about trying to identify all the individuals who were involved only to say, 'OK you're off the hook', then what have you learned?"²

WADA'S APPROACH TO WHISTLEBLOWERS

In terms of WADA's current approach, a particularly important provision is Article 10.6 (Elimination, Reduction or Suspension of Period of *Ineligibility* or other *Consequences* for Reasons other than *Fault*) of the 2015 World Anti-Doping Code (<https://www.wada-ama.org/en/resources/the-code/2015-world-anti-doping-code>), which comes into force on 1 January 2015.³ In brief summary, this rule provides that:

- a. A sportsperson who comes forward to admit a doping violation (in circumstances where no Anti-Doping Organisation was aware that an anti-doping rule violation might have been committed) may be 'rewarded' with a reduced ban, with WADA having the final say on any such reduction (see comment to Article 10.6.2);
- b. Anti-Doping Organisations may agree reduced bans in return for the provision of "substantial assistance" by sportspersons – put simply, information that leads to other doping violations being uncovered; and
- c. In exceptional circumstances, WADA has the power to agree to eliminate a ban in its entirety and offer complete confidentiality in return for the wrongdoer's "substantial assistance" (Article 10.6.1.2).

Although there has been some criticism of this reform – with the charge that wrongdoers will be unjustly 'let off the hook' if they 'get in early' to report misdemeanours (including their own) – it must surely be a sensible system which: (a) provides *some* incentive for such reporting; (b) allows disciplinary bodies to take into account, as a significant mitigating factor, an individual's willingness to step forward and report both themselves and others who they suspect of wrongdoing – whether they be teammates, colleagues or others; and (c) allows a case by case assessment to be made of what (if any) 'benefit' it may be proportionate and appropriate to bestow upon individual whistleblowers.

INCENTIVISING WHISTLEBLOWERS

The incentives / potential benefits to whistleblowers which are envisaged by the WADA Code are sporting, rather than financial in nature (albeit they may of course have financial consequences for the individual athletes – who will be able to resume their career earlier than would otherwise be the case). The prospect of providing financial rewards to whistleblowers is an even more controversial topic. It has been reported (<http://www.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2014/04/17/whistleblowing-could-become->

[more-rewarding.aspx](#)) that a US scheme of offering ‘bounty payments’ for whistleblowing in the financial services sector (pursuant to which anonymous whistleblowers can claim a reward of between 10 – 30 per cent of any sanction successfully applied to those found guilty of breaches) has been operating successfully⁴. Indeed, in September 2014, it was [reported \(http://www.complianceweek.com/blogs/enforcement-action-the-filing-cabinet/sec-awards-largest-ever-whistleblower-bounty-30-million#.VlrEQmep6zk\)](http://www.complianceweek.com/blogs/enforcement-action-the-filing-cabinet/sec-awards-largest-ever-whistleblower-bounty-30-million#.VlrEQmep6zk) that the US Securities and Exchange Commission had awarded a record \$30 million to an informant whose information had led to a major enforcement action.⁵ For its part, the European Commission has proposed the setting of common rules across the EU, where incentives are provided to whistleblowers for reporting information about market abuse.⁶ Interestingly, in a [report \(http://www.fca.org.uk/your-fca/documents/financial-incentives-for-whistleblowers\)](http://www.fca.org.uk/your-fca/documents/financial-incentives-for-whistleblowers) published in July 2014, the UK Financial Conduct Authority and Prudential Regulation Authority stated that “*The research showed that introducing financial incentives for whistleblowers would be unlikely to increase the number or quality of the disclosures we receive from them.*”⁷ In addition, the Whistleblowing Commission Report did not recommend the introduction of financial rewards for whistleblowers in the UK.

Returning the issue of sportspersons’ reluctance to ‘turn in’ their teammates, an interesting recent piece of research by Leeds Metropolitan University⁸ identified significant differences between the attitudes of a sample of rugby league players on the one hand, and track and field athletes on the other. In essence, the former group of players indicated a much greater degree of hesitation / reluctance towards reporting wrongdoing than the latter, owing to the moral quandary of reporting a teammate (as opposed to an individual competitor). One of the authors of the report, Dr Lisa Whitaker, has [emphasised \(http://www2011-1b.leeds-met.ac.uk/news/attitudes-to-whistleblowing-drugcheats-differ-across-sports16122013.htm?type=student\)](http://www2011-1b.leeds-met.ac.uk/news/attitudes-to-whistleblowing-drugcheats-differ-across-sports16122013.htm?type=student) the importance of “*increasing awareness of reporting lines and adopting a community responsibility approach to anti-doping where every individual is encouraged to play a role in preventing negative behaviours*”, in order to increase the likelihood of wrongdoing being reported.⁹

INVESTIGATIONS AND DISCIPLINARY PROCEEDINGS

Much of the discussion above has centred on the ‘first step’ in the whistleblowing process – namely, encouraging and facilitating the reporting of concerns. The next stage of the process is deciding what to do with the information that has been provided, including in relation to investigatory and/or disciplinary proceedings. Clearly, once individuals have taken the decision to step forward and raise a concern (or set of concerns), it is vitally important that any information gathered from them is properly investigated and acted upon by the relevant clubs, governing bodies and/or enforcement agencies. In that regard, one potential reform is the development of an independent ‘sports integrity unit’, although there presently seems to be a lack of political and/or sporting will to fund the set-up and operation of such a body.

If having conducted an investigation into a whistleblower’s concerns there is a conclusion that the alleged wrongdoer(s) does in fact have a case to answer, a decision must be taken as to how information provided by a whistleblower may be used / deployed in disciplinary or other formal proceedings. It is not unusual for whistleblowers to be concerned about the prospect of giving evidence in person at a contested hearing, at which they may be subjected to detailed questioning and cross-examination (in the presence of the alleged wrongdoer(s)); and/or the potential consequences of giving such evidence, including the reaction of their teammates or colleagues (past and present). One option, which has previously been considered by CAS, is the possibility of giving evidence anonymously. In the [FK Pobeda case \(http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.tas-cas.org%2F2F2Ffiles%2Fdocument%2F4129%2F5048%2F0%2FAWARD20192020Pobeda20INTERNET.pdf&ei=8LiK-VNzGL4X1UO2ngKgB&usq=AFqjCNHHueDxbODjAbapRV53FOQQO2xyJQ&sig2=COqCLSASjCc7WCS-S5NEmA\)](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCEQFjAA&url=http%3A%2F%2Fwww.tas-cas.org%2F2F2Ffiles%2Fdocument%2F4129%2F5048%2F0%2FAWARD20192020Pobeda20INTERNET.pdf&ei=8LiK-VNzGL4X1UO2ngKgB&usq=AFqjCNHHueDxbODjAbapRV53FOQQO2xyJQ&sig2=COqCLSASjCc7WCS-S5NEmA)¹⁰, in order to balance the competing interests of the parties and comply with the requirements of natural justice, the Panel concluded that it was legitimate and appropriate for a number of witnesses to provide witness statements on an anonymous basis, and to be subjected to cross-examination over the tele-

phone, rather than in person at the hearing. However, it should be noted that the witnesses in that case had been “*personally exposed to threats, insults, pressure and intimidation*”, which was clearly a significant factor in the Panel’s reasoning.

DEALING WITH FAILURE TO REPORT CASES

In addition to seeking to encourage whistleblowing through the provision of education, information, protection and/or inducements, on the flip side of the coin it is important to ensure that there is in place a proper system for imposing (where appropriate) proportionate sporting and/or other sanctions in relation to a *failure to report*, without proper justification, wrongdoing or suspected wrongdoing. An extreme example of a failure to report wrongdoing resulting in a severe sporting sanction is *Oriekhov v UEFA* (http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCMQFjAA&url=http%3A%2F%2Fwww.tas-cas.org%2F2F2wfiles%2Fdocument%2F4522%2F5048%2F0%2FAward%25202172%2520FINAL%2520internet%252018.01.2011.pdf&ei=uRp3VPyWLOy67ga_mIHACg&usq=AFQjCNGBLktnO3Kwxf0POjty-tZvU5EP0SA&sig2=bu8T_IguHm1LgvdKqzTjA&bvm=bv.80642063.d.ZGU)¹¹, where the Court of Arbitration for Sport concluded that a senior and highly experienced referee’s failure to report the fact that he had been the subject of unlawful approaches from individuals seeking to manipulate the outcome of a UEFA Europa League fixture, in which he had been appointed to officiate, was sufficiently serious to justify a lifetime ban from any football related activities. CAS held (at para. 80 of its judgment):

“It is therefore essential...for sporting regulators to demonstrate zero-tolerance against all kinds of corruption and to impose sanctions sufficient to serve as an effective deterrent to people who might otherwise be tempted through greed or fear to consider involvement in such criminal activities. Match officials are an obvious target for those who wish to make illicit profit through gambling on match results (or indeed on the occurrence of incidents within matches). They must be reinforced in their resistance to such criminal approaches.”

Whilst the “*zero tolerance*” approach articulated by CAS in this case is entirely understandable, it is important to recognise the particular aggravating factors which were present in this case, and which rendered the referee’s failure to report so egregious that it was deemed to justify the sanction of a lifetime ban from any football-related activities.

As outlined above, it is important that sporting regulatory systems do provide some form of incentive (or ‘carrot’) for the reporting of wrongdoing. Whilst the ‘stick approach’ may be appropriate in certain circumstances (and operate as a more general deterrent to turning a blind eye to wrongdoing), in the authors’ view it should not be the default setting for dealing with an individual who – although perhaps late in the day – does drum up the courage to step forward and report wrongdoing (for the overall good of his or her sport). Such an approach is only likely to encourage individuals who have previously kept quiet about wrongdoing or suspected wrongdoing – perhaps for fear of reprisal from their club, colleagues and/or associates – to remain quiet.

CONCLUSION

The creation and maintenance of a culture and regulatory system which encourages whistleblowing is essential to the promotion of sporting integrity. Whilst there are some signs of progress, much more can and should be done to improve the situation. As Lord Justice Leveson concluded in his report¹² into the role of the press and police in the phone-hacking scandal: “*My overall assessment is that a series of pragmatic solutions need to be devised to maximise the chance that genuine whistle-blowers will use confidential avenues in which they may have faith ...*”¹³ This analysis is equally apposite in the sporting context, even if permanent anonymity and/or immunity from sanction may not always be a possible or appropriate outcome.

[References \(http://www.lawinsport.com/articles/item/whistleblowing-in-sport-part-2-investigations-and-disciplinary-proceedings#references\)](http://www.lawinsport.com/articles/item/whistleblowing-in-sport-part-2-investigations-and-disciplinary-proceedings#references)

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