

## **The world at your doorstep. The ethical legitimacy of drug testing in sport: the relevance of organisational justice as a countervailing model, and the wider lessons?<sup>1</sup>**

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### **Introduction**

The growth in drug testing and the issues surrounding it have elevated the activity into a key consideration when examining modern working and employment relationships (Shahandeh and Caborn 2003; TUC 2003). This is especially true in the context of sport where glaring publicity has attached itself to the testing phenomena in the wake of sporting authorities' goals of maintaining the integrity of their respective sports (Adams 2009). This high profile appears to apply not only to drugs as a mode of performance enhancement, but also to the recreational use of drugs where laws are transgressed, and the reputation of sports personalities as role models breached.

However testing also raises questions in respect of human rights and the encroachment of what might be regarded as the sportsman or woman's 'private space'. It also raises questions of work-life balance. In addition there are more general concerns concerning the reliability of testing, in respect of the chain of custody question, the validity of the tests themselves, and the overall impact of these matters on the livelihood and reputation of sports people in the context of highly pressurised work environments.

The first part of this paper seeks to build on a previous more general study undertaken by the author, who sought to identify *the concerns of employees towards drug testing*, and where appropriate review the policy positions taken by trade unions and representative organisations. In addition it will consider examples from the literature in order to place the issues in sport within a wider context of employment and performance relationships. The above will form the basis for the second part of the paper, which is to examine the content and application of the *World Anti Doping Agency's regulations on drug testing*, including the requirement that sports people be available for testing (WADA 2009). It will consider to what extent this protocol is unique in seeking to globalise and universalise a regulatory framework, and give some preliminary considerations to the strengths and weaknesses of such an approach. This approach appears to be an example of 'think global, act local' where the latter allows very little by way of discretion on the ground in how the regulations operate in practice across both sporting and geographical boundaries. This provides the basis for the title of this paper, with regard to the metaphorical role of place. This part of the paper will examine to what extent a universal ethical underpinning provides both a theoretical and practical legitimisation to the Agency's regulatory regime as it operates, and is applied in different

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countries and different sport contexts. The third part of the paper will draw on preliminary evidence from representative bodies of employees and people in sports, which questions the universal or 'one size fits all' approach. This section will consider not only the *principles raised by testing regimes, but also the evidence, which supports a counter view*. We will seek to relate these to the wider debate on drug testing, and consider to what extent there is a commonality between workers in sports and workers elsewhere. Finally the paper will determine the relevance of the Organisational Justice model (Lowry 2009) as an ethical means of examining the operation of drugs testing regimes from the perspective of employees in sports, and consider to what extent the application of the OJ model refutes claims made for the ethical legitimacy of the World Anti-Doping Code

### **Employee attitudes towards drug testing**

This part of the paper seeks to identify the concerns of employees towards drug testing, and where appropriate review the policy positions taken by trade unions and representative organisations (Holland 2003). In addition it will review other evidence from the literature in order to place the issues in sport within a wider context of employment and performance relationships.

A survey undertaken by the author of 88 trade unions identified a number of issues of specific concerns and requirements, but underlying these was a concern that tests were an 'unnecessary encroachment on a worker's life style, intrusive, and a further instrument of management control' (Fenley 1999:3).

These concerns were that:

- There should be no automatic right to test without the employee's express consent in an employment context;
- There should be a specific work nexus justifying testing;
- Tests should be carried out in a proper and dignified manner explanations should be given at the time explaining the grounds for the test and what is involved, and having proper regard to gender factors;
- There should be a legitimate basis for testing where such tests interfere with the private lives of individuals;
- Tests should be carried out on the basis of objective criteria, and in a technically correct way, providing safeguards on the verification of tests;
- They should be part of a supportive framework, and a 'harm reduction rather than a zero tolerance approach'. This means having regard to the provision of treatment, advice, and assuring employment security;
- Finally there should be full consultation with employees on the content of policies, of which testing forms a part, and these should have due regard to poor job design, high workloads, and the existence of workplace stress i.e. they should be contextualised.

The study recognised the need for employee organisations to be pro active in a key area of personnel development, the need to properly service and represent members in 'test' situations, but also have regard to a wider public interest.

Work by Khoshaba (2007) examined the issue of drug testing in Australian sports, with particular reference to football codes. Underpinning Khoshaba's work was a concern with the transgression of boundaries between work and non-work, and the encroachment by testing authorities of both physical and temporal space. This, she felt, reflected a culture of control, surveillance, and punishment, rather than an environment a 'drug free sport'. She identified a number of areas of concern to sports workers. These included:

- The physical invasion of privacy, and the manner in which tests were carried out;
- A failure to provide advance notice of the hours of testing;
- The hours of testing and tests been carried out in 'dawn raids' and at times unacceptable to players (which were regarded as contravening Article 12 of the UN's Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights;
- The right to have a witness present at the test;
- Questioning the legitimacy of the inclusion of recreational drugs, for example cannabis and cocaine on the expanding list of prohibited substances;
- The strains on sports workers having to carefully monitor all they eat and consume, including restaurant meals;
- A perceived ignorance on the part of the authorities of the nature of professional sport, and the need for authorities to create a framework based on co-operation and consultation with sports workers organisations.

### **WADA Code on Drug Testing**

The second part of the paper will consider the relevance and application of workers' concerns in the context of the development of the 2003 WADA Code on Drug Testing. The Code was revised in 2008 and became operative in 2009 (WADA 2009). The Code aims at promoting health, fairness, and equality, the universal harmonisation of core anti-doping elements (p.11) and refers to celebration of the, 'human spirit, body and mind,' characterised by eleven values. The Code also advocates that the consequences for athletes (used in the generic sense) not in conformity with the rules should be globalised and harmonised, and not subject to national requirements and legal standards applicable to criminal proceedings or legal matters. The code is extensive and consists of 25 Articles covering 123 pages, in addition to a nine page appendix covering definitions.

Among issues that might be potentially contentious is the *strict liability rule*, which places personal responsibility on the athlete to prevent prohibited substances from entering his or her body. It is not necessary that intent, fault, negligence or knowing by the athlete be demonstrated (Code 2.1), but Article 10.5 allows for avoiding or reducing sanctions if the athlete can show they were not at fault or significant fault.

The second area of contention is the failure to comply with the 'Whereabouts' rule, and/or missed tests (Code 2.4) which is also linked to the 'Testing Pool' requirements (5.1) and (14.3). Sports men and women selected for national testing pools will need to provide a 60 minute slot, 365 days a year where a Doping Control Officer can make contact with them to collect a test, with no prior notice. The DCOs can arrive unannounced at a time and place nominated by the athlete and collect a sample the DCO does not have to give prior notice. In

addition athletes have to give details of their regular place of residence, details of their competitions, and their regular activities, for example training sessions.

The third possible area of contention refers to the *list of substances* or methods that can be placed on the Prohibited List (Code 4.3), these include those that are performance enhancing (para 4.3.1.1), those that represent a potential health risk to the athlete (para 4.3.1.2), or those which violates the spirit of sport described in the introduction to the Code (4.3.1.3). Notes to the article state that two of the three criteria have to be met, or for example red meat or smoking (presumably tobacco) would have to be included in the list. Interestingly inclusions on the list cannot be challenged.

The fourth possible area of contention relates to *the sanctions that are applied for violations* of the Code (paras 10.1 to 10.12). Whilst there does seem to be some room for flexibility, which appear to be in line with a complex tariff system set out in the Code, the concept of proportionality appears to be rejected. The notes to para 10.2 on harmonisation recognise that uniform penalties can have a disproportionate impact on those athletes with shorter careers, but argues instead for equity between sports and the prevention of certain sports been lenient. In general terms the WADA question and answer document accompanying the Code talks of firmness and fairness.

A fifth possible problem area relates to the responsibility to *provide updated and accurate information to athletes* (Code 18.2). This refers to a list of eight issues including substances and methods on the Prohibited List, consequences, and control procedures. But obviously sports people would need to sure that the communication systems that are in place are satisfactory.

A further consideration is that although WADA make reference to the *role of stakeholders* in the process of constructing and applying the Code, Part Three of the Code on Rights and Responsibilities makes no reference to representative organisations of athletes or sports workers.

The final issue relates to the WADA International Standard on the Protection of *Privacy and Personnel Information* which seems to satisfy itself that privacy requirements are met with regard to the storing of data and the ADAMS system. The latter is the Web-based database management tool for data entry, storage, sharing, and reporting. However privacy in the context of how collection is organised in the first place appears to be neglected.

### **Objections of players to the Code**

The next part of the paper deals with how sports players perceive the Code, what they find acceptable, and what they find questionable. These qualified observations are based on preliminary and informal discussions with representatives of sports organisations, as a prelude to more detailed interviews, and the conducting of a survey which is planned for later in 2009.

There is acceptance and agreement with WADA's primary goal and by implication, the ethical underpinning of the Code, the achievement of drug free sports, and the need for drug testing policies are recognised. However a number of problems were identified, these included:

- The need for greater differentiation in the treatment of recreational drugs and performance enhancing drugs;

- A need for greater responsibility in rehabilitating those players with problems in respect of recreational drug, including support systems;
- A greater need for proportionality in respect of penalties where, in effect, a two year ban, which includes training, could mean the termination of a player's career;
- A belief that the 'whereabouts' rules is grossly disproportionate,
- A belief that Article 8 of the European Convention on Human Rights, the right to respect for privacy and family life, is contravened, based on the view that sports 'employees' enjoy the same rights as all other employees;
- The view that the requirement to be on call one hour per day 365 days per year contravenes the European Working Time Directive;
- Concern that WADA is not properly engaged with players associations and therefore there is no democratic accountability.

### **Sports and other workers**

There is evidence to support the contention that the concerns of sports players' representative organisations are compatible with those of other representative bodies of workers. This is particularly true with regard to the ability to influence the content of drug testing, the need for support systems as well as punitive sanctions, the right to consent, and a need for dignity in the way that testing is carried out. However the indications are that sports men and women are greatly disadvantaged when compared to other types of workers.

### **Legitimising the Code**

It is not readily apparent to the author which of the theoretical underpinnings that might underpin business ethics may be applicable to the WADA Code (Budd and Scoville 2005). This could reflect the author's own lack of understanding, or provide support for Lafer's argument that: "HR ethics ... has produced a large volume of vague, convoluted theories that have little grounding in reality" (Lafer 2005:291). WADA is an organisation whose business is ethics, and whose stated goals are rooted in the sporting ideal of fairness. It is, however, questionable how substantial and justified the wider rhetoric used by WADA is in sustaining its remit and its attempts to achieve global and universal goals. Lafer also argues that to make workplace ethics "more realistic and compelling, scholars must speak less to managers and more to workers, and they must be willing to 0ounsel resistance as well as co-operation" (Lafer 2005 in Budd and Scoville:295)

### **Counter ethics of sporting organisations**

This returns us to the issue as to whether it is proper to achieve ethical ends (doping free sports) by means that are perceived as unethical in themselves as far as sports players, and their representative bodies are concerned. In this regard the concept of organisational justice is arguably of some considerable value.

Organisational justice addresses perceptions about fairness in organisations (Cropanzano and Greenberg 1997). Although it may focus on any aspect of the working relationships, its relevance to discipline, in the context of drug testing, is readily apparent. Its first concern is with *distributive justice*, and the outcomes resulting from decisions about resources and allocations (Homans 1961; Leventhal 1976). Here we may concern ourselves with those



situations where the penalties ascribed under the WADA Code may have a disproportionate impact on players.

The second aspect deals with perceptions about the procedures used to arrive at organisational decisions referred to as *procedural justice* (Thibaut and Walker 1975; Leventhal 1980). Also of relevance are the procedures used for drug testing, for example the whereabouts rules, and how they are perceived by players, which might also include the attitudes of players' representative organisations in respect of their inability to influence the content of procedures.

The third dimension is *interactional justice*. Interactional justice is concerned with how decisions are implemented (Bies and Moag 1986). It consists of *Informational justice* and *interpersonal justice*. Informational justice is concerned with explanations offered for organisational decisions, and relates to justifications put forward by organisation's officials for the decisions they have made. At one end of this informational continuum would be a fair explanation of the basis for a decision, with justifications offered that are arrived at via logically reasoned arguments. At the other end of the continuum there would be either no explanation or one that was perceived by employees as arbitrary or capricious. *Interpersonal justice* relates to the perceptions about the treatment received during the decision making process. The relevance here may be to do with how drug testing is carried out, and its perceived impact on privacy and dignity.

### **Counter ethics and power**

The importance of the Organisational Justice model is that it provides a construct encouraging us to pay due consideration to the perceptions of players as to what is acceptable and what is not. This might go some way to avoiding the situation where the underlying ethical imperatives of a doping free sports are accepted, but where the Code itself will meet resistance in respect of a number of key elements, because of objections from those to whom it applies. In the context of sports this is further complicated because professional players may well come under the jurisdiction of a multiplicity of jurisdictional bodies, including WADA, but they may also be employees of organisations, for example a world famous football club, whose sporting brands are businesses quite often on a global scale. And, therefore, as Lafer (2005) argues alongside ethics one must also consider power. WADA in its Code makes copious references to the political and economic power it believes that it has in relation to national and international sporting bodies, the IOC, and national governments through the UNESCO Convention on this subject. However there is no evidence of attention having been paid to the potential power of sports people acting collectively on specific issues whether it is withdrawal from the sport entirely or industrial or legal action in specific contexts.

### **Conclusion: Is the WADA Code an example of Business Ethics?**

This paper concludes with one final question: Is the WADA Code an example of business ethics? On face value the answer appears to be 'no', because as WADA is not a commercial organisation. However, it seeks to operate on a global scale; it seeks monopolisation of a key activity, and the propagation of universal values. This involves the acquisition and provision of resources, the operation of global information systems, the exercising of political influence, and perhaps most importantly the control of those who engage in human endeavour, whether we choose to call them athletes, players, employees or workers. It is therefore an ethical

code deserving of ethical scrutiny by those who it most affects. These are the people, some of whom receive the World at their doorstep, and whose voice deserves to be heard.

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