BEFORE THE SPORTS DISPUTES TRIBUNAL
OF NEW ZEALAND

SDT/7/04

Anti-doping rule violation proceedings

BETWEEN	**CYCLING NEW ZEALAND FEDERATION INCORPORATED**
	Applicant
A N D	**STEPHEN COLLINS**
	Defendant

Tribunal:	Kit Toogood QC (presiding member) Tim Castle Farah Palmer Carol Quirk
Representatives:	Mr Wayne Hudson for Cycling New Zealand Mr Stephen Collins in person
Decision:	17 August 2004

DECISION OF TRIBUNAL

Introduction

[1] This unfortunate case provides a number of important reminders and lessons for athletes and national sports organisations in relation to the duties and responsibilities imposed by the anti-doping regime under the New Zealand Sports Drug Agency Act 1994 ("the Act"). The Board of the New Zealand Sports Drug Agency ("the NZSDA" or "the Agency") determined that defendant, Stephen Collins, did not have reasonable cause to fail to provide a urine sample for analysis under the Act. The matter has been referred to the Tribunal for the imposition of a penalty. Although Mr Collins has made an attempt, well out of time, to argue that he had reasonable cause for his failure, the Tribunal's function is limited by statute to determining the appropriate sanction to be imposed for the breach of the anti-doping rules. In that respect, the penalty is largely mandatory.

Background

[2] On 6 July 2004, the Tribunal received from the Cycling New Zealand Federation Incorporated ("Cycling NZ") an application against Stephen Collins under Rule 11.2 of the Tribunal's Rules. This is the rule which provides for the commencement of Anti-Doping Violation Proceedings before the Tribunal. Attached to the application was a Notice from the New Zealand Sports Drug Agency ("the Agency") dated 11 June 2004 stating that the Board of the Agency had determined that, on 23 May 2004, the defendant did not have reasonable cause to fail to provide a sample which he was required to provide under the NZSDA Act and its regulations.

[3] The application by Cycling NZ, made under its Anti-Doping Policy, requested the Tribunal to "consider this offence and . . . [apply] an appropriate sanctioning in line with precedents set from similar, historical cases."

[4] Mr Collins was given copies of the application and associated papers. On 12 July 2004, he filed with the Tribunal a notice of defence indicating that he wished to defend the application. Mr Collins subsequently filed a statement of defence in which he denied the anti-doping violation alleged, but acknowledged that the Tribunal had jurisdiction to deal with the matter.

[5] Cycling NZ filed a statement in reply to the statement of defence. Both parties confirmed that they did not wish to appear before the Tribunal in person and the Tribunal elected under rule 11.8.1 to determine the proceedings by reference only to the papers filed.

The essential facts

[6] Stephen Collins was an elite road cyclist. Now almost 21 years old, he has been a competitive cyclist since 1998. He has an impressive record which includes representing New Zealand overseas in the Under-19 Junior Men's Road Squad in 2001 and selection for New Zealand teams competing both in New Zealand and overseas in 2003. He represented New Zealand at the 2003 Oceania Games.

[7] Mr Collins was a member of the New Zealand Cycling Federation Inc and a rider who was registered with the New Zealand Sports Drug Agency as eligible for out of competition testing.

[8] Earlier this year, Mr Collins took up what was intended to be a seven month contract with an amateur elite cycling team in Switzerland. Joining this team was intended to be a further step in his progression to competing professionally and to being selected to represent New Zealand in the senior elite road race at the 2006 Commonwealth Games.

[9] Only a few weeks into his contract, Mr Collins decided that the harsh life of a semi-professional rider on the international circuit was not for him. By 22 April 2004, Mr Collins

had returned home to New Zealand disillusioned with his sport. On about 27 April 2004, he informed Cycling NZ by email that he was back in the country and no longer competing. He requested a refund of part of his international insurance premium.

[10] Mr Collins said in his statement of defence that he intended this to be notice to Cycling NZ of his retirement, and that he understood Cycling NZ would, in turn, inform the Agency, who would remove his name from the out of competition register. Mr Collins's view of what should have occurred is consistent with a statement contained in a competitor's details form, signed by him on 15 November 2002, which reads:

> I understand that only Cycling New Zealand can authorise the NZSDA to remove my name from the Drug Testing Register. Should I retire from competition I will contact Cycling New Zealand as soon as possible.

[11] By the form which he signed, Mr Collins demonstrated his acceptance of the anti-doping programme governed by the provisions of the New Zealand Sports Drug Agency Act 1998 and the Anti-Doping Policy of Cycling NZ.

[12] It is common ground that Cycling NZ had not, by 23 May 2004, passed on to the Agency notice of Mr Collins's retirement. On 23 May 2004, at about 4.00 pm, NZSDA drug control officials called on Mr Collins at his parents' home in Hamilton. They notified Mr Collins, orally and on the appropriate form, that he was required to provide a urine sample, under section 10 of the Act, for analysis to determine the presence or otherwise of prohibited drugs or doping methods. The written notice informed Mr Collins that if he deliberately failed to provide a sufficient sample within a reasonable time, his name may be entered in the Sports Drug Register [as a person who had been guilty of a doping infraction] and that he may be disciplined by his sporting organisation. In his statement of defence, Mr Collins said:

> On talking to the representatives from the NZSDA about the matter, they admitted not having any experience on refusal of a test and that the repercussion could be a two year ban from competing in <u>any</u> sport at National or International level as imposed by Cycling New Zealand in the past.

[13] The Tribunal is satisfied that Stephen Collins was aware of his obligation under the Act to provide a sample as requested and of the likely consequences of his refusing to do so. We accept that he may not have been aware of the process by which any penalty would be imposed (namely, by having the matter referred to the Tribunal for decision). Nevertheless, he had been warned of the likely outcome of his refusal.

[14] The Tribunal accepts, however, that at the time he was called upon to provide the sample, Mr Collins was depressed and disillusioned about the sport of cycling. He said in his statement of defence:

> Having the NZSDA turning up on a Sunday afternoon asking for a sample just "rubbed salt into a very big wound" for me.

> I felt very disappointed in the fact that I was on the testing list and obviously regarded as having a high potential but was not given the opportunity to go to the training camp in France with the National road cycling team.
>
> To go through with the drug test seemed a total waste of resources (people's time and cost) to me since I was no longer involved in competing in cycling full stop [sic].

[15] It appears that Mr Collins' father, who was present when the sample was requested, supported his son's position. It was explained in Stephen Collins's statement of defence that his father

> . . . expressed strongly that he saw no need for Stephen to do a drug test as he had finished with the sport full stop and it was a waste of time . . . (he) did not know the implications of not giving a sample and thought one needs to comply only to be able to carry on competing.

As we have noted in paragraph 12, however, the drug testing officials warned Stephen Collins of the possible implications of an unreasonable refusal.

[16] Under section 13 of the Act, the Agency was obliged to provide Mr Collins with a notice giving him an opportunity to tell the agency of the grounds of his failure to provide a sample. Although we have not been shown a copy of any such notice, Mr Collins has not suggested that he did not receive it. There is no evidence that he made any representations to the Agency.

[17] On 11 June 2004, the NZSDA gave notice that the Board of the Agency had determined under s 14 of the Act that Mr Collins did not have reasonable cause to fail to provide a sample on 23 May 2004. Accordingly, Mr Collins' name was entered in the Sports Drug Testing Register as a person who had committed a doping infraction.

[18] A competitor who has received such a notice is entitled to appeal to the District Court against the Board's determination on the grounds that he had reasonable cause to fail to provide a sample as requested: sections 20 and 21 of the Act. Mr Collins did not appeal against the determination. Importantly for this case, section 14(a) of the Act provides that, subject to the rights of appeal, a determination by the Board under section 14 "shall be final and conclusive".

The obligations of Cycling New Zealand

[19] We have not been told of any express requirement for Cycling NZ to authorise the removal of a rider's name from the out of competition register, but it may be assumed that the Federation would take that step once a rider resigned his membership. The rider's undertaking on the competitor details form to notify Cycling NZ "as soon as possible" should he retire from competition suggests that the Federation should then act promptly to notify the Agency. We cannot say that it ought to have done so, or done so more promptly, in this case

because it is not clear from the material provided to us that Mr Collins indicated that he was no longer competing at all, or that his request for a refund of his international insurance premium amounted to notification of his resignation under Cycling NZ's constitution – the Federation did not treat it as such.

[20] The express obligations of Cycling NZ, in relation to this case, are set out in its Anti-Doping Policy. Clause 3.2 of the Policy provides that where Cycling NZ receives a report of a positive result (which includes a refusal by a rider to undertake a test or provide a sample) it must implement the procedure described in the Policy.

[21] Clause 5.1 of the Policy provides that Cycling NZ "must, within two working days of receiving a report from a Testing Agency … that a Doping Offence has been committed, send by registered mail to the Member's last known address a copy of the report."

[22] Clause 5.2 provides:

> Within 10 working days after the Federation has sent to the Member the report referred to in Clause 5.1 the Federation must refer the report to the Tribunal and request the Tribunal to determine the matter in accordance with the Rules of the Tribunal."

[23] It is common ground that Cycling New Zealand did not comply with its obligations under clause 5.1 in a timely fashion, in that it was not until 1 July 2004 that it forwarded to Mr Collins the notification dated 11 June 2004 of the NZSDA Board's determination that he had committed a doping infraction by failing to provide a sample. The report was, however, referred to the Tribunal within the time limit provided in clause 5.2 by being sent to the Tribunal at the same time as the notification to Mr Collins.

[24] An apparent procedural defect, however, is not necessarily fatal to the validity of the disciplinary action. Clause 3.4 of the Policy provides, importantly, as follows:

> The formalities, procedures and deadlines set out in this Policy are intended to ensure the proper conduct of drug tests and the hearings. However, a procedural error that does not affect the result of the test or the hearing will not invalidate it.

The matters at issue before the Tribunal

[25] The Tribunal's exclusive jurisdiction to impose the penalty in this case, which the parties do not dispute, arises by virtue of sections 5 and 6 of Cycling NZ's Anti-Doping Policy, and under section 11 of the Tribunal's Rules. We note, in passing, that Cycling NZ has not yet adopted the new World Anti-Doping Code so that our consideration of this case is governed by the wording of the sport's current Policy which was ratified in August 2003.

[26] Mr Collins filed a notice of defence in which he indicated that he wished to defend the application. Within the time provided by the Rules, he also filed a statement of defence

setting out the grounds upon which he responded to the application. He explained that the reasons for his failure to provide a sample were:

[a] his retirement from competitive cycling upon his return to New Zealand on 22 April 2004;

[b] his notice to Cycling NZ, sent on approximately 27 April 2004, that he was no longer competing;

[c] his anticipation that Cycling NZ would request the Agency to remove him from the Sports Drug Testing Register; and

[d] his disillusionment with his sport and his frustration at the lack of support which he had considered he was entitled to receive from Cycling NZ.

[27] Mr Collins also complained that, although he had been told by the drug testing officials of the possible repercussion of a two year ban from competing in any sport, he was not warned of the role of the Sports Tribunal in relation to doping offences. He also considered that the statement in the notification form that he "may be disciplined" by his sporting organisation was ambiguous. Mr Collins said that he did not believe that he was covered by the Anti-Doping Policy because he had not been training or competing since 22 April 2004. He also complained about the failure of Cycling NZ to comply with the two day time limit in Clause 5.1 of the Anti-Doping Policy.

[28] In summary, Mr Collins said that his case was "out of the ordinary because … (he) was upset, angry and mis-informed about the possible consequences of … (his) decision (not to provide a sample)".

[29] In its statement in reply to Mr Collins' statement of defence, Cycling NZ did not dispute the facts described by Mr Collins. It said that, although part of Mr Collins's international insurance premium was repaid in June 2004, such repayment did not constitute a revocation of his licence and said that Mr Collins was still a current member of Cycling NZ. The constitution of Cycling NZ permits a member to resign by notice to the Federation, but there is no evidence Mr Collins actually resigned his membership before he was asked to supply the sample and his membership would appear to continue until the end of the licence year on 31 December.

[30] In any event, the Policy provides that Mr Collins remained a member of Cycling NZ as long as he was recorded on the NZSDA's out of competition register, even if he was no longer a financial member.

[31] Cycling NZ said that it could not comment on Mr Collins's feelings but accepted "that he may well have been angry, disappointed and frustrated as a result of his early retirement from competitive international cycling".

[32] Under clause 4.3(b) of the Anti-Doping Policy, Cycling NZ was obliged to notify its members that riders must not use prohibited substances and must provide samples for testing for doping offences when requested, both in and outside competition. It also undertook to make the Policy available to members: clause 1.2(c). Cycling NZ said that it could not be certain that a copy of the Anti-Doping Policy had been forwarded to Mr Collins. It pointed out, however, that the Anti-Doping Policy had been made available for some time on the official *cyclingnz.org.nz* website and that the "Competitor Details" form signed by the defendant referred to the Anti-Doping Policy and Cycling NZ's anti-doping programme.

[33] Cycling NZ recorded that Mr Collins was still treated as a financial member. It acknowledged that it had not forwarded the Agency's notice of the determination of a drug infraction within the time limit specified, but referred the Tribunal to clause 3.4 which is quoted in paragraph [24] above.

[34] In conclusion, Cycling NZ stated:

> CNZ accepts that the Defendant may have been upset and angry when he refused to provide a sample to NZSDA. CNZ also recognises that, had the Defendant been made aware of the consequences of his refusal and, had he not been so upset at the time of NZSDA's visit, he might have been more co-operative and might have provided a sample. CNZ is not aware of any circumstances that would lead to the belief that the Defendant had previously taken prohibited substances or committed a doping infraction. CNZ has no desire to see the Defendant unduly punished for his refusal to supply a sample to NZSDA and would be sympathetic to the view that that [sic] there may be reasonable cause for his failure to provide a sample.

The decision of the Tribunal

[35] It is now too late for Mr Collins to submit that he had reasonable cause to refuse to supply a sample; the Tribunal has no power to overturn the Board's determination. In circumstances where there has been no successful appeal to the District Court against a determination of the Board of the Agency that a doping infraction has been committed, a determination by the Board is "final and conclusive": s14(5) of the Act. Furthermore, and consistently with the statutory position, rule 11.9.2 of the Tribunal's Rules provides that:

> The Tribunal shall accept as a proven fact … a determination by the New Zealand Sports Drug Agency under section 14 of the New Zealand Sports Drug Agency Act.

[36] This means that allegations or suggestions that Cycling NZ failed to fully inform Mr Collins of his obligations under the Anti-Doping Policy and failed to comply with time-limits, and submissions relating to Mr Collin's state of mind at the time of the request for the provision of a sample and his reasons for failing to comply with a request, cannot be relied upon before the Tribunal in an effort to overturn the determination of the Agency, render it invalid, or negate its effect. While we have considerable sympathy for Mr Collins, the Tribunal is bound to accept the determination as a proven fact and its jurisdiction is limited to

the imposition of an appropriate penalty which complies with Cycling NZ's Anti-Doping Policy.

[37] Section 13 of the Act requires the Agency to notify a competitor who appears to have failed to provide a sample of an opportunity to advise the Agency of the grounds on which the competitor had reasonable cause for failing to comply with the request. Mr Collins has not suggested that he did not receive such notice. Further, he could have challenged the Board's determination under section 14 of the Act by appealing to the District Court under section 20 of the Act. He was notified of that right of appeal when he received notice of the determination.

[38] It should not be overlooked, therefore, that before this case was brought to the Tribunal for the fixing of the appropriate penalty, Mr Collins had prior opportunities to challenge, and if successful, to avoid a finding that his refusal to provide the sample was unreasonable.

[39] We have considered whether Cycling NZ's failure to provide Mr Collins with timely notice of the determination of the Board of the NZSDA has deprived him of an effective right of appeal or challenge to the Board's determination. Section 21 of the NZSDA Act provides that an appeal under s 20 shall be brought by the filing of a notice of appeal by the competitor or his or her representative in the District Court "within 5 working days after service of notification of the determination concerned . . . ." Thus, the failure of Cycling NZ to send Mr Collins a copy of the Board's determination within two working days of receiving the report from the Agency, as required by clause 5.1 of the Policy, did not prejudicially affect Mr Collins' right of appeal under the Act. Cycling NZ's failure to comply with the time limit, therefore, could have had no bearing on any hearing into this matter and clause 3.4 applies accordingly.

[40] The matters relied upon by Mr Collins may be relevant, however, in mitigation of penalty, to the extent that the Tribunal has any discretion in that regard.

Applicable penalties

[41] The penalties to be applied by the Tribunal in respect of an anti-doping violation which has been brought before it are provided for in Rule 11.10, as follows:

> If the Tribunal determines that a [sic] Anti-Doping Rule Violation has been committed, the Tribunal shall impose such penalty or penalties as is consistent with the applicable rules or policies of the National Sports Organisation or, in the absence of such rules or policies, as is consistent with the Olympic Movement Anti-Doping Code or the World Anti-Doping Code, which ever applies.

[42] Cycling NZ's Anti-Doping Policy provides the following in clauses 6.1 and 6.2:

> 6.1 A Member declared or considered to have committed a Doping Offence:

(a) will, unless otherwise determined by the Tribunal, be required to repay to the Federation all funding and grants received from the Federation since the commission of the Doping Offence; and

(b) will have all awards, placings and records obtained or granted by or under the auspices of the Federation from the date of the commission of the Doping Offence withdrawn; and

(c) will, for the applicable period referred to in clause 6.2 or clause 6.3, be:

(i) ineligible for membership of, or selection by the Federation in, any New Zealand representative team,

(ii) banned from competing in any events and competitions conducted by or under the auspices of the Federation,

(iii) ineligible to receive, directly or indirectly, funding or assistance from the Federation, and

(iv) ineligible to hold any position with the Federation; and

(d) may be required to pay the fine referred to in clause 6.2 or clause 6.3.

6.2 The applicable periods and fines for clauses 6.1(c) and 6.1(d) are (subject to clause 6.3) as follows:

1st offence: disqualification and suspension for two years, plus a fine of up to NZ$4,000;

2nd offence: suspension for life.

[43] It has not been suggested that Mr Collins has received any funding or grants since the commission of the doping infraction on 23 May 2004, nor that he has obtained or been granted any awards, placings or records since that date. Accordingly, clauses 6.1(a) and (b) do not apply.

[44] Reading paragraphs 6.1(c) and (d) and clause 6.2 together, the Tribunal considers that the disqualification and suspension period of two years, provided for a first offence in clause 6.2, is mandatory. If it had been intended that the Policy would provide the Tribunal with a discretion to impose a penalty for a shorter period, the reference to a period of two years could have been prefaced by the phrase “up to” which appears subsequently in relation to the amount of any fine.

[45] However, the Tribunal considers that a proper interpretation of clauses 6.1(d) and 6.2 provides the Tribunal with a discretion to determine whether any fine should be imposed at all and, if so, of what amount up to a maximum of NZ$4,000.

Considerations as to penalty

[46] As we have said, the Tribunal is not unsympathetic towards Mr Collins. We accept that, at the time he was requested to provide a sample on 23 May 2004, he had become disillusioned with cycling and, at that time at least, had resolved not to compete in that sport in the future. He had apparently signalled these views to the administrators of his sport. If they had acted in a more timely way, he may never have been required to provide a urine sample for testing.

[47] We also acknowledge Cycling NZ's submission that there was no evidence that Mr Collins had previously taken prohibited substances or committed a doping infraction; in fact, it appears from comments made by Mr Collins in his statement of defence that he had previously provided a sample for testing and that a negative result had been obtained.

[48] Nevertheless, any unreasonable refusal by an athlete who is required by the provisions of the Act and by the rules of his or her sport to provide a sample for testing under the Act must be treated seriously. The Act and Cycling NZ's Anti-Doping Policy make no distinction, either as to liability or to penalty, between a doping infraction based on a positive test or an unreasonable refusal to supply a sample. If it were otherwise, drug cheats would have an incentive to avoid the penalties imposed for a positive test by refusing to provide samples. It is regrettably unavoidable, therefore, that Mr Collins must receive a period of disqualification and suspension for the same period as would have applied if he had supplied a sample which returned a positive test, namely, two years.

[49] Clause 6.7 of Cycling NZ's Anti-Doping Policy is ambiguous in relation to the commencement date of any disqualification or suspension. It reads: "Any suspension will take effect from the day after the date of the Relevant Authority's decision." The term "Relevant Authority" is not defined in the Policy. It may be intended to refer to the NZSDA, but the Agency is included in the definition of "Testing Agency" in section 2. On the other hand, it may be intended to refer to the Tribunal as the body imposing the period of ineligibility.

[50] There are arguments and policy considerations in favour of either approach – see, for example, the comment to Article 10.8 of the WADA Code. There being nothing in the other provisions of the Policy to assist with the interpretation, the Tribunal considers that the ambiguity should be resolved in a manner which favours the athlete. The period of disqualification and suspension will be deemed to have commenced on the date of the notice of the Board's determination under s 14 of the Act, namely, 11 June 2004.

[51] Mr Collins expressed a wish to be able to compete in sports other than cycling. The terms of the mandatory disqualification and suspension under the Anti-Doping Policy are specific and bear a relationship to the activities of Cycling NZ. Mr Collins should take advice on what sporting activities fall outside the terms of the formal orders set out below.

[52] Taking into account all of the matters raised as being relevant to mitigation, if not defence, the Tribunal considers that this is not an appropriate case for the imposition of a fine. We record that the Tribunal waived the payment of a filing fee by Cycling NZ in respect of this application; in those circumstances, no order requiring Mr Collins to pay any costs to Cycling NZ is appropriate.

Formal orders

[53] On 11 June 2004, the New Zealand Sports Drug Agency gave notice that the Board of the Agency had determined under s 14 of the Act that Stephen Collins of 37 Willis Road, Hamilton, RD10 did not have reasonable cause to fail to provide a sample on 23 May 2004. Accordingly, Mr Collins's name was entered in the Sports Drug Testing Register as a person who had committed a doping infraction.

[54] In consequence of that determination, Stephen Collins of 37 Willis Road, Hamilton, RD10 is hereby declared, for the mandatory period of two years commencing on 11 June 2004, to be:

[a] ineligible for membership of, or selection by the Cycling New Zealand Federation Incorporated in, any New Zealand representative team;

[b] banned from competing in any events and competitions conducted by or under the auspices of the Cycling New Zealand Federation Incorporated;

[c] ineligible to receive, directly or indirectly, funding or assistance from the Cycling New Zealand Federation Incorporated; and

[d] ineligible to hold any position with the Cycling New Zealand Federation Incorporated.

Observations

[55] In view of the circumstances of this case, we consider it may be helpful to make some observations which might encourage National Sports Organisations and athletes who are covered by the Anti-Doping Rules to look closely at, and adhere to, their respective responsibilities under the anti-doping rules. This will be particularly important when the new World Anti-Doping Code is adopted by sports in New Zealand.

[56] It is hoped this case will serve to remind national sports organisations that it should be a primary function to ensure that all athletes subject to the anti-doping rules are fully informed of their obligations, and their rights, under the New Zealand Sports Drug Agency Act, the regulations, and the anti-doping policy of their sport. This obligation should include the provision from time to time of up to date information on changes to the Prohibited List and any changes to policies and procedures.

[57] Timeliness is essential to the proper application of the anti-doping rules. This decision highlights the fact that it is a primary duty of national sports organisations to comply promptly and strictly with their obligations under the Act, the regulations, and the anti-doping policy of their sport.

[58] Athletes and their coaches will need to accept personal responsibility for keeping themselves fully informed of their obligations, and their rights, under the Act, the regulations, and the anti-doping policy of their sport.

[59] The anti-doping rules provide adequate opportunities for athletes to challenge doping procedures and findings, where appropriate. To be effective, it is important that such rights are exercised promptly, as it will generally be too late to attempt to make such a challenge when the case comes to the Tribunal for the imposition of a penalty.

[60] Many, if not most, of the New Zealand athletes who are subject to the anti-doping rules are young and have limited financial resources. Given the serious consequences for an athlete of being found guilty of a doping violation, the major sports agencies and national sports organisations are encouraged to consider establishing and maintaining a free and prompt advisory service for athletes (which should include access to free or inexpensive legal advice) when doping issues arise.

C H Toogood QC

Deputy Chairperson, for and on behalf of the Tribunal