

**BEFORE THE SPORTS DISPUTES TRIBUNAL
OF NEW ZEALAND**

STD 10/05

Anti-Doping Violation Application

BETWEEN

NZ FEDERATION OF BODY BUILDERS INC.

Applicant

AND

BARBORA JURCANOVA

Respondent

Date of Hearing: Tuesday, 6 December 2005

Venue: Hawkes Bay Club, Napier

Representation: T R Nicholls for Respondent

**REASONS FOR DECISION OF TRIBUNAL
Dated 20 December 2005**

Tribunal Members Participating: Hon Barry Paterson, QC (Chairman),
Kit Toogood QC
Dr Farah Palmer

Registrar: Brent Ellis

INTRODUCTION

1. The New Zealand Federation of Body Builders Incorporated (the Federation) received from the New Zealand Sports Drug Agency (the Agency) a notice of determination pursuant to Sections 16B and 18(1) of the New Zealand Sports Drug Agency Act 1994 (the Act). In accordance with the mandatory requirements of the Federation's anti-doping policy, it referred the matter to this Tribunal for a hearing.
2. The determination dated 5 July 2005 stated that Ms Jurcanova had committed a doping infraction, evidenced by the sample provided by her at the Auckland Body Building Championships on 21 May 2005 by testing positive for Clenbuterol – an anabolic agent under S1 of the 2005 Prohibited List International Standard. The Prohibited List was issued by the World Anti-Doping Agency (WADA) pursuant to its World Anti-Doping Code (the Code).
3. Ms Jurcanova did not challenge the determination in accordance with the provisions of the Act but sought to have any period of ineligibility reduced under the provisions of Article 10.5.2 of the Code. Mr Nicholls on Ms Jurcanova's behalf acknowledged that he had received an opportunity to present all evidence and make all necessary submissions on behalf of Ms Jurcanova.
4. At the conclusion of the hearing on 6 December, the Tribunal gave a brief oral decision without detailed reasons which it agreed to provide as soon as possible. The Decision was that Ms Jurcanova had not discharged the burden of proof to establish grounds for a reduction in the period of ineligibility in accordance with Article 10.5.2. Therefore, a period of two years ineligibility was imposed upon her. However, because of the circumstances, the period of ineligibility is to commence as from 22 May 2005. The Tribunal now gives its reasons for the decision.

THE FEDERATION'S POSITION

5. Because of Ms Jurcanova's inability to come to Auckland for a hearing, the venue was changed at relatively late notice to Napier. The Federation, which would normally have been represented by its President, Mr Stewart, was unable to arrange for representation.
6. Mr Stewart did provide a memorandum for the hearing. The Federation submitted in that memorandum that an anti-doping violation had been committed by the athlete and asked the Tribunal to hold accordingly. The memorandum noted that the athlete

appeared to raise grounds for the elimination or reduction of the mandatory two year sanction under either Article 10.5.1 or Article 10.5.2. The Federation was content to abide the decision of the Tribunal in relation to the question of whether Ms Jurcanova could establish a case within the Code to eliminate or reduce the mandatory sanction. In fact, Ms Jurcanova did not seek to eliminate the sanction but to have it reduced under Article 10.5.2

RESPONDENT'S POSITION

7. Ms Jurcanova was born and raised in the Czech Republic. She came to New Zealand in 1999 and since forming a relationship with a New Zealander, has decided to settle here. English is not her maiden tongue and it was submitted that she has difficulties with New Zealand language. This may be so in respect of the written language but the Tribunal notes that she spoke the language quite well at the hearing and did not appear to have any great difficulty in understanding the questions put to her.
8. Ms Jurcanova has a keen interest in sport and since coming to this country, has developed an interest in body building. She became a competitor and had competed in one novice event in New Plymouth a few months before competing in the Auckland Championships in May 2005. At Auckland she won the Novice Tall section in the Figure section.
9. On 28 June 2005, after receiving a letter from the Agency saying she had tested positive for Clenbuterol, Ms Jurcanova sent a letter witnessed by a Deputy Registrar of the District Court at Hastings, to both the Federation and the Agency. She stated that she was really shocked and very surprised at the result and could not believe what had happened. The explanation which she gave was:

“In November 2004 I travel to Czech Republic and I spend over six weeks with my family. Not long after I arrive there I find hard to breathe and end up sick with very sore throat and flu. I get some medication for this (Acilpirin, Disprin, Panadol, Spiropent, Cough Drops). Suppose, come from middle hot summer to freezing (minus 15 deg. C). European winter wasn't good idea. It was not nice.

After holiday I come back to H.Bay and slowly get back to training. And in March 2005 I decide to do one more body building competition before NZ Nationals. Close to comp. I wasn't feel well. I felt cold and every now and then I had trouble with cough and breathing. Also couldn't sleep properly. I used the same medication what I had left over from home (Czech Republic). With combination of many Strepsils, Lemsips, and Disprins.

I do not know. This is the only thing that I can think of.”

10. While in the Czech Republic, Ms Jurcanova did not see a doctor for several reasons, including that there was not a doctor in her parent's town. She took medicines from her mother's medicine cabinet and one of those was Spiropent (to assist with breathing and clearing the airways). The medicine she took relieved her condition. At that time, her evidence was that she had no intention of competing in any further body building competitions. Her priority was to return to New Zealand to find employment. She brought some of these medicines back to New Zealand with her. They were not in a container but were in bubbles in a plastic sheet.
11. Ms Jurcanova decided to compete at the Auckland Championships as a forerunner to the New Zealand Championships. Three or four days before the event, she developed similar symptoms to those which she had suffered in the Czech Republic in November 2004. The Tribunal accepts from the evidence given at the hearing that she did suffer these symptoms just before the Championships. As a result, she reverted to the medicines which she had brought back from the Czech Republic to try and assist her to feel better and to allow her to compete in the event. For financial reasons, she did not visit a doctor. She is of the view that the Spiropent which she took some three to four days before the event, was the cause of the positive test.
12. Clenbuterol works the same way as Ephedrine. It is used in the treatment of asthma. The evidence before the Tribunal suggests that, unlike Ephedrine, which is out of the body in a few hours, Clenbuterol lasts for days. Spiropent is a trade name for Clenbuterol.
13. The Tribunal is of the view that it is likely that Spiropent taken by Ms Jurcanova was the cause of the Clenbuterol in her system which led to the positive test.

ARTICLE 10.5.2 OF THE CODE

14. The mandatory sanction for a first offence where Clenbuterol is the substance is two years' ineligibility. This period can be reduced if the provisions of Article 10.5.2 of the Code apply. The relevant portion of that Article states:

"If an Athlete establishes in an individual case involving such violations that he or she bears *No Significant Fault or Negligence*, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable... The Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced."

15. The Code imposes strict liability on an Athlete. It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. It is not necessary that intent, fault, negligence or knowing use on the Athlete's part be demonstrated in order to establish an anti-doping violation (Article 2.1). Strict liability can and does lead to apparently harsh results. The CAS Panel in *Raducan v International Olympic Committee* 2000/011 of 28 September 2000 considered the case of a 16-year old gymnast who had tested positive for pseudoephedrine after winning the individual all-around gymnastics gold medal at the Sydney Olympics. The pseudoephedrine had been in the over-the-counter cold and flu medication, Nurofen, which had been prescribed for Raducan by her team doctor. The Panel noted:

"The Panel is aware of the impact its decision will have on a fine, young, elite athlete. It finds, in balancing the interests of Ms Raducan with the commitment of the Olympic Movement to drug-free sport, the Anti-Doping Code must be enforced without compromise."

Raducan was stripped of her gold medal.

16. The Notes to the Code are an aid to interpretation. The Note to Article 10.5 includes:

"Article 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases."

SUBMISSIONS ON ARTICLE 10.5.2

17. Mr Nicholls in careful submissions submitted that there was no significant fault or negligence on Ms Jurcanova's part. She took the Spiropent in order to help her breathing, both when she was in the Czech Republic and when she returned to New Zealand. He submitted that it was her inaction rather than her action that is significant, that inaction being not taking the steps necessary to ensure that she had not taken banned substances. She was an Athlete who was a relative novice when it came to body building. Her first language is Czechoslovakian and not English. Any negligence was therefore at the lower end of the scale and not significant. She did not take the Spiropent for the purposes of benefiting her performance. She did not know she was taking a Prohibited Substance until she received notice of the drug test.

CONSIDERATION

18. The Tribunal does not find that Ms Jurcanova took the Clenbuterol for performance enhancing purposes. It accepts that she was an athlete who wished to live a healthy life and generally she made a favourable impression on the Tribunal. The Tribunal

accepts that in the circumstances a finding that there was significant fault is a harsh one. Nevertheless, the Tribunal is of the view that it must make that finding.

19. Ms Jurcanova was not an experienced competitive bodybuilder; she was not a member of a team; and there was no evidence before the Tribunal to indicate that she had received the instruction and training on anti-doping issues which an elite athlete would receive.
20. In these circumstances, the Tribunal has considered whether there should be a different test for the novice athlete as against that applied for the elite sportsperson. It has determined that the test is the same although the circumstances of a novice may at times allow an athlete to establish exceptional circumstances. In this case, notwithstanding the Tribunal's sympathy for Ms Jurcanova, the facts do not, in its view, establish these exceptional circumstances. Although Ms Jurcanova may not have received any information about drugs from either the Federation or the Agency before she competed in the Championships she was, in the Tribunal's view, in general terms aware of the need to avoid drugs. She admitted that she is aware of the need for sport to be drug free. She took medication a few days before the Championship without in any way checking on what she was taking and the likely effect on her. Under Article 2.1 of the Code, it was her obligation to ensure that no prohibited substance entered her system.
21. Ms Jurcanova took no steps to ensure that the Spiropent was not a prohibited substance. Her inaction amounted to significant fault.
22. In the circumstances, the two year period of ineligibility will apply.

COMMENCEMENT OF PERIOD

23. The Tribunal does have a discretion under Article 10.8 to backdate commencement of the two year period. Ms Jurcanova intended to compete in the New Zealand Championships in October but because of this matter, decided not to do so. This allowed the matter to proceed in an appropriate timeframe. In the circumstances, particularly her own decision not to compete in the interim, the Tribunal is of the view that Article 10.8 can be applied and that the two year period of ineligibility should commence from 22 May 2005.

FORMAL DECISION

24. The formal Decisions of the Tribunal were:

- (a) Ms Jurcanova is ineligible for a period of two years from 22 May 2005. Article 10.9 of the Code will apply during the two year period.
- (b) In accordance with the anti-doping policy of the Federation, Ms Jurcanova is disqualified from the event in which she competed in the Auckland Championships on 21 May 2005.
- (c) The suppression order previously made in this case is vacated.



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Hon Barry Paterson QC
Chairman

20 December 2005