BEFORE THE SPORTS TRIBUNAL OF NEW ZEALAND

ST 08/07

Anti Doping Rule violation proceedings

BETWEEN	**NEW ZEALAND FEDERATION OF BODY BUILDING INC**
	Applicant
A N D	**ANN HOLT**
	Defendant
TRIBUNAL	Tim Castle (Presiding Member) Adrienne Greenwood Carol Quirk
Hearing:	10 September 2007 at Wellington
In Attendance:	Mark Stewart on behalf of New Zealand Federation of Body Builders Inc Ann Holt; with support from Chris Waite
Registrar:	Brent Ellis

DECISION OF TRIBUNAL
Dated: 28 September 2007

Introduction

1. The New Zealand Federation of Body Builders Inc ("NZFBB") made an application to this Tribunal on 9 July 2007 for the exercise of the Tribunal's decision in Anti-Doping Rule Violation Proceedings in respect of the defendant, Ann Holt. The application followed the determination by the Board of Drug Free Sport New Zealand ("DFS") that on 21 April 2007 the defendant returned a urine sample which tested positive for benzylpiperazine (BZP), which is banned by the World Anti-Doping Code 2007 Prohibited List International Standard under s.6 – Stimulants. DFS recognise this substance as being banned according to its "schedule" maintained pursuant to s.6(1)(a)

of the New Zealand Sports Drug Agency Act 1994. Sample collection and analysis procedures were carried out as required by the Sports Drug (Urine Testing) Regulations 1994. The DFS Notice of Determination and Entry in the Sports Drug Register that a competitor has committed a doping infraction was issued and made in accordance with ss.16B and 18(1), New Zealand Sports Drug Agency Act 1994.

2. The occasion of the sampling was the Wellington Body Building Championships at Victoria University of Wellington on 21 April 2007. The defendant competed in those championships and was selected to submit a urine sample for testing.

3. Ms Holt had a right of appeal against the Agency's determination under s.20 of the New Zealand Sports Drug Agency Act 1994. She did not appeal.

4. The defendant was advised that the Tribunal could supply her with names of lawyers who had indicated they would be willing to assist parties before the Tribunal on a free or low cost basis. The defendant made no request that the list of those lawyers be provided to her and she elected to not secure legal representation for this case.

5. The applicant was notified of the DFS determination in June 2007. That being the case, the Tribunal's determination necessarily proceeds under the old Rules of the Sports Disputes Tribunal which were revoked and replaced with new rules with effect from 1 July 2007. The defendant was informed accordingly.

6. The NZFBB's anti-doping policy of 1 September 2004 applies to all athletes within the jurisdiction of the NZFBB or its member organisations. Athletes are required to submit to test initiated by the New Zealand Sports Drug Agency/DFS. Where the NZFBB alleges an athlete to have committed an anti-doping rule violation it is required to refer the matter to this Tribunal for hearing. The procedures that are to follow are those set out in clause 12 of the applicant's September 2004 Anti-Doping Policy. Every person who commits an anti-doping rule violation is liable for sanction in accordance with Article 10 of the WADA Code.

7. The Tribunal is required to accept as a proven fact a positive test result determined by DFS in accordance with the Act. Burdens and standards of proof and the methods of establishing facts and presumptions are as set out in Article 3 of the WADA Code incorporated into the applicant's Anti-Doping Policy of September 2004 by clause 12.5 thereof.

The case for the defendant athlete

8. In her notice of defence dated 19 July 2007, Ms Holt admitted the anti-doping rule violation as stated in the application and advised that she did not wish to participate in the hearing. She acknowledged that the Tribunal had jurisdiction to impose a penalty on her without holding the hearing and that she would be notified of any such penalty in due course.

9. In addition to that formal notice of defence, the defendant wrote to the Tribunal. In her letter dated 19 July 2007 she recorded as follows:

> *"Please find attached my Notice of Defence and my admission that I have committed a violation in respect to the rules governing the competition in question in that I unintentionally used a product containing a banned substance.*
>
> *Having tested positive I see little point in contesting the allegation, but in terms of determining what disciplinary actions are taken place please consider the following:-*
>
> 1. *I purchased a product in December 2006 called Slimfast by NFS, from a local Health Store. It was recommended to me by the store to assist in reducing mental fatigue and to help elevate mood, energy and overall well being. It certainly was not purchased for the intention of enhancing sport performance.*
>
> 2. *I accept it is the responsibility of each athlete to be aware of the list of banned substances. However, it is equally the responsibility of the Sporting Organisation to take all reasonable steps to ensure that the current prohibited list is available to its members and participants.*
>
>   *Prior to the event, I had not seen any list or been informed of any list by the NZFBB.*
>
> 3. *Since the allegation has been reported, I was informed the NZFBB Website provides such a list, but having had a friend view this website (as I have no experience with computers) no list was readily accessible or identifiable. It maybe therefore beneficial that some level of comment is fed back to the NZFBB in view of making athletes more aware of the Risks of*

using any Supplements and perhaps providing a list of Supplements that contain banned substances rather than the substance itself.

4. *I am a relative Novice to the Sport and this unfortunate event has already caused me much distress and embarrassment and this is prior to any formal disciplinary action taking place.*

   All I ask is that in reviewing this violation you consider the product taken and the circumstances surrounding its use. In terms of abuse it was unintentional and minor in respect to the sport and any potential benefit that may have been gained from its use.

   I accept that you may need to impose some level of disciplinary action, but ask that this be minimal."

10. Because of the importance of this matter, the Presiding Member of the Tribunal directed the Registrar to communicate further with the defendant, specifically for the purposes of inviting the defendant to reconsider her position that she would not participate in any hearing undertaken by the Tribunal for the purposes of considering a penalty in this case. In the result, the defendant did participate in a preliminary hearing by telephone in the morning of 10 September 2007. She was ably assisted by her partner, Mr Chris Waite, who also participated in that teleconference. The scheduling of the pre-hearing telephone conference was somewhat delayed because of unavailability of one or more members of the Tribunal and also the unavailability for certain periods of both the defendant and her partner.

11. The Tribunal was assisted by further written communication from Mr Waite who noted that the issue for Ann Holt was that:

- *"She was not aware Slimfast contained a banned substance.*
- *She was not aware that Slimfast could be deemed as performance enhancing.*
- *The product had provided no real assistance or benefit to the defendant in coming second (out of two) in the Wellington championships in 2006.*
- *That the applicant is 'very slack' in providing all necessary information to its athletes.*
- *That this was a bad mistake; Ann had inadvertently and accidentally taken something which had led to the situation.*

- *That the violation must be a minor one and that the defendant hoped that the sanction imposed would reflect all surrounding circumstances."*

12. At the preliminary pre-hearing teleconference of 10 September 2007, all parties agreed that there need be only one hearing into this matter and that that preliminary pre-hearing teleconference could properly serve as the hearing.

13. At the hearing, the defendant supplemented orally what she had set out in her earlier letter and what her partner had set out in his earlier electronic mail communication. The defendant told the Tribunal that she had purchased the product "Slimfast" from a "Health 2000" store in capsule form and that she was very surprised that the product, which recorded on the bottle that it included BZP, was readily available in a store which sold health products to the public. The defendant said that the bottle did have "R18" marked on it. She told us that she was shocked that something she could buy "over the counter" as readily available in a health shop would be sold notwithstanding it was a product which contained a banned substance. Although she knew that BZP was in the product, she did not know BZP was a banned substance. She said there was nothing to alert her to the fact that anything in the product was a banned substance. The defendant was very clear in her submissions to the Tribunal: that her breach was an unintentional breach with no intention to enhance her performance. Ms Holt's desire to reinforce this point to the Tribunal was, ultimately, the reason she decided to participate in the teleconference hearing.

14. In answer to questions from members of the Tribunal and generally in final submissions made by her and her partner, the defendant said that although she had taken the Slimfast product to elevate her mood and mental alertness as well as energy, she had not taken it on the day of the competition. Her purpose of taking the product was simply to help her get over what had become a traditional sleepy or "dozy" spell (as she described it) of an afternoon. She anticipated that the product would enable her to stay more alert and more awake. The competition was on a Saturday and she used the product for the last time prior to the competition a day earlier, on the Friday.

15. The defendant confirmed that she had signed all the necessary documentation agreeing to submit to drug testing but had not anticipated that this would affect her in any way.

16. Although not as an excuse for her doping infraction, and whilst not suggesting any fault on the part of NZFBB, the defendant also contended that she felt the controlling body of her sport could do much more to identify for athletes the full list of banned substances, including the "catch all" for stimulants. Mr Waite for the defendant suggested that there should be more hard copy information available in gymnasiums and elsewhere where body builders are either training or competing so that there is much greater information from the sport about what is banned and what is not and what can happen if a positive test should occur. It was contended that NZFBB does not do enough to notify athletes of full information, particularly in relation to stimulants which may be found in supplements and that the sport must carefully consider what additional steps it could take to communicate more fully with athletes. For our part, we can see the value in hard copy information available for athletes in the places Mr Waite suggested. In addition, we recommend NZFBB consider providing written information on banned substances on competitive occasions, including references to appropriate website information.

BZP

17. In *NZFBB v. Ligaliga* (STD 11/05, 8 December 2005), the Tribunal previously considered a case involving a positive test by an athlete for BZP. In that decision, the Tribunal observed:

> *"Benzylpiperazine is widely and under certain circumstances legally available in New Zealand. It is frequently described as a "party pill". Under a 2005 amendment to the Misuse of Drugs Act 1975 BZP has been made a "restricted substance" which means it can only be legally sold or supplied to persons 18 years of age and over."*

It has not been contended either by the applicant in this case or generally by DFS that BZP is a substance typically used as a performance-enhancing drug. Reference to this fact was made also in the Tribunal's decision in *NZFBB Inc v. Ligaliga* when the Tribunal considered the case of another athlete of the applicant federation who had tested positive for the presence of

BZP following a sample provided by him at the Auckland Body Building Championships on 21 May 2005. It is not completely clear to the Tribunal whether that decision was widely circulated by the applicant through the sport. The Tribunal is, however, of the view that both this decision and the earlier *Ligaliga* decision should be widely distributed throughout the sport by NZFBB in view of the seriousness of the consequences for any athlete testing positive for this drug.

18. As was noted in *Ligaliga*, BZP is a prohibited substance because the definition of "stimulants" in s.6 of the prohibited list contains a list of stimulants and concludes with the words: *"... and other substances with a similar chemical structure or similar biological effect(s) ..."*.

19. Given the product label in this case included the "R18" restriction upon sale, the Tribunal proceeds on the basis that the amending legislation anticipated by the Tribunal in the *Ligaliga* decision was duly passed into law. The availability in New Zealand of BZP, even to people over the age of 18 years, seems destined now to change again. On 22 August this year The Misuse of Drugs (Classification of BZP) Amendment Bill was introduced to Parliament. It will make the manufacture, supply, sale, export and import of BZP-based products illegal. It is antiticipated that the amendment will be in force by Christmas 2007.

NZFBB position

20. Mr Stewart for the applicant noted for the Tribunal that at all times material to this case, the NZFBB website identified a link to DFS on which there is available, of course, more than sufficient information about the Prohibited List of banned substances. The NZFBB is doing, Mr Stewart told us, all it can do to increase awareness amongst its athletes and provide full website links or references to information for their edification. Mr Stewart did accept, as Mr Waite also told the Tribunal, that the NZFBB website is currently under reconstruction, meaning that more recently Mr Waite's search for links to sites with information on banned substances was in vain. The NZFBB website was, however, not suffering any such impediment at the time of the offence in this case so Mr Stewart told us.

21. In addition, Mr Stewart referred to the *Ligaliga* case as a case involving a very high profile athlete (which seems correct) who had been banned for two years and whose case was the subject of comprehensive radio, newspaper and television media coverage with specific reference to his positive test for BZP.

22. Mr Stewart emphasised, and the Tribunal considers correctly, that in the end under the WADA Anti-Doping Policy applied internationally it is the athlete's responsibility for what is in his or her system and that the fact that the Slimfast product identified the presence of BZP would have alerted any careful and thoughtful athlete to potential problems with the presence of such a stimulant in any product, albeit one sold over the counter.

Discussion

23. The Tribunal has considerable sympathy with the defendant in this case. She purchased a product over the counter. She did so not for the purposes of enhancing her performance in sport – the Tribunal completely accepts this assertion. The Tribunal notes that the defendant is a novice athlete who had competed at the Wellington Championships and the National Championships in 2006 but had only been competing for less than a year at the time of the provision of the urine sample for testing. She has not competed since receipt of the notice of determination from DFS.

24. In the light of the submissions and circumstances put before the Tribunal by the defendant and her partner, the Tribunal has considered whether there is room in this case for the application of provisions of the WADA Code which allow for a reduction in what would otherwise be a two year period of ineligibility upon a positive test for a stimulant as is the position in this case. In that regard, the WADA Code provides as follows:

> *"10.5.1* ***No fault or negligence***
>
> *If the athlete establishes in an individual case involving an anti-doping rule violation … that he or she bears no fault or negligence for the violation, the otherwise applicable period of ineligibility shall be eliminated. When a prohibited substance … is detected in an athlete's specimen in violation of Article 2.1 … the athlete must establish how the prohibited substance entered his or her system in order to have the period of ineligibility eliminated.*

10.5.2 ***No significant fault or negligence***

> *This article 10.5.2 applies only to anti-doping rule violations involving Article 2.1. ... 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."*

25. There is also an obligation on the athlete under clause 10.5.2 to *"establish how the prohibited substance entered his or her system in order to have the period of ineligibility reduced".*

26. As the Tribunal said in *Ligaliga*:

> *"The fundamental ground for these defences was that the strict liability test imposed by the Code imposes a particularly onerous obligation on the athlete. In order for such a regime to function effectively, where the onus falls on the athlete to prove no fault/no significant fault, the process leading up to a 'determination' needs to be beyond reproach. In other words the grounds upon which the respondent sought to challenge the determination were those upon which the defences were based. ...*
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> *Article 24.2 of the WADA Code states that the comments annotating various provisions of the Code are included to assist in the understanding and interpretation of the Code. The comments in Article 10.5 state that the article 'is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases'."*

27. Other passages in the *Ligaliga* decision of relevance in this case are :

> *"19. Article 24.2 of the Code states that the comments annotating various provisions of the Code are included to assist in the understanding and interpretation of the Code. The comments in Article 10.5 state that the Article 'is meant to have an impact only on cases where the circumstances are truly exceptional and not in the vast majority of cases'. Other relevant portions of the commentary state:*
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> - *to illustrate the operation of Article 10.5, an example where No Fault or Negligence would result in the total elimination of the sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances:*
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> *(a) a positive test resulting from a mis-labelled or contaminated vitamin or nutritional supplement (Athletes*

are responsible for what they ingest)... and have been warned against the possibility of supplement contamination;

(b) the administration of a prohibited substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for the choice of medical personnel and for advising medical personnel that they cannot be given any prohibited substance); and

(c) sabotage of the Athlete's food or drink by a spouse, coach or other person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink);

However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence (for example, reduction may well be appropriate in illustration (a) if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements).

20. *Article 2.1 of the Code provides that the presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily specimen constitutes an anti-doping rule violation. It states that it 'is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily specimens. Accordingly, 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 under Article 2.1'. The Code is a strict liability code, as has been demonstrated in many subsequent CAS cases.*

21. *Edwards v IAAF and USA Track and Field (CAS OG 04/003, 17 August 2004) was a case where CAS accepted that Nikethamide, a stimulant, entered the Athlete's body through a glucose tablet. Edwards had conducted herself with honesty, integrity and character and she had not sought to gain any improper advantage or to 'cheat' in any way. However, the Athlete was negligent in not ascertaining that no Prohibited Substance was present within the tablets as would have been clear to any person reviewing the tablets that there was more than one ingredient in the tablets. CAS noted the obligation and duty of the Athlete to ensure that no Prohibited Substance entered his/her body tissues or fluid. It was noted that the case provided an example of the harshness of the operation of the IAAF rule (similar to the present Code provision) relating to*

the imposition of the mandatory two-year sanction. It regretted the circumstances of the case did not make the threshold for the sort of rare and 'fairly exceptional' facts necessary for a reduction of the minimum sanction applicable for a doping offence.

22. *Another CAS cases which is relevant to this case was Hipperdinger v ATP Tour (CAS 2004/A/690, 24 March 2005) where CAS stated:*

> *'Under the applicable anti-doping regulations, it is not the duty of the respondent to warn athletes against the use of certain substances. While it is certainly desirable that the respondent and any IF should make every effort to educate athletes about doping, it is principally the sole duty of the individual athlete to ensure that no prohibited substances enter his body.' "*

28. In the Tribunal's view, the circumstance which is impossible to disregard in this case is the fact that at the time of the purchase of the product by the defendant, the presence of BZP in the product purchased was clearly visible and known by the defendant. She took the product, in her words, to:

> *"... help elevate mood, energy and overall wellbeing."*

29. Elevation and stimulation of energy the day before the competition is, the Tribunal considers, a practice laden with risk if the athlete does not make very sure that what is identified in the product purchased and being used is not a banned substance and will not provide an appreciable risk of a positive test if the athlete is required to provide a sample for testing. BZP is widely known as a stimulant in New Zealand society. The athlete purchased the product in December 2006 and her management of the use of it included taking it the day before the championships in Wellington. Whilst the Tribunal accepts that she did not take the drug for the purposes of enhancing her performance, there is a very fine line between no intention to enhance performance but an intention to elevate energy levels the day before a competition.

30. The Tribunal has concluded that the lack of caution and care exercised by the defendant in making use of a product in which BZP was declared an ingredient represents a degree of carelessness which means she cannot rely on the "no significant fault or negligence" provisions of the WADA Code for

of ineligibility of two years. The Tribunal hereby declares that the defendant is ineligible to participate in her sport of body building, or indeed participate in any way in any sport governed by the World Anti-Doping Agency (WADA), for a period of two years.

31. In coming to this decision, the Tribunal has not overlooked anything that has been put forward on behalf of the athlete by her and Mr Waite. Having heard the submissions the Tribunal is of the view that the date from which the period of ineligibility should commence is the date on which she last competed which was 21 April 2007. The period of two years' ineligibility will commence from that date.

DATED at Wellington this 28th day of September 2007.

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T J Castle
Presiding Member
New Zealand Sports Tribunal