

**BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND**

ST 13/08

BETWEEN DRUG FREE SPORT NEW ZEALAND
Applicant

AND RODNEY NEWMAN
Respondent

**DECISION OF TRIBUNAL
Dated the 5th day of November 2008**

Hearing Date: 23 October 2008

Tribunal: Alan Galbraith QC (Deputy Chairperson)
Carol Quirk
Ron Cheatley

Registrar: Brent Ellis

Counsel: Paul David for Applicant
Michael Smyth for Respondent

Other participants: Rodney Newman, Respondent
Graeme Steel and Jayne Kernohan, Drug Free Sport
Steve Lousich, New Zealand Powerlifting Federation

INTRODUCTION

1. This reference from Drug Free Sport New Zealand (DFS) arose from an admitted breach of Rule 3.1 of the Sports Anti-Doping Rules 2007 (the Rules). Mr Newman returned a positive test to Boldenone and Testosterone, two prohibited substances, present in a sample taken on 21 June 2008 at the North Island Powerlifting Championships at Tauranga.
2. DFS was legally represented at a telephone hearing on 24 October 2008 by Paul David, barrister, and Mr Newman by Michael Smyth, barrister. DFS was also represented at the telephone hearing by Graeme Steel and Jayne Kernohan and the New Zealand Powerlifting Federation by its President, Stephen Lousich.
3. Both Mr Smyth and Mr David filed written submissions. Mr Newman submitted a signed statement and a character reference.

ISSUE

4. Mr Newman, through his counsel Mr Smyth, admitted the violation and acknowledged his disqualification from the North Island Powerlifting Championships. He also accepted that the classification of the prohibited substances would result in a period of ineligibility of two years.
5. The issue which engaged the Tribunal was the submission on behalf of Mr Newman that the period of ineligibility should commence from 21 June 2008 rather than the presumptive date of the hearing decision provided for by Rule 14.8.1. In the course of the hearing Mr Smyth accepted that the earliest date which it would be appropriate for the Tribunal to consider as the commencement date would be 22 July 2008, which was the date of notice of the positive test. It was only

following that notification that Mr Newman voluntarily withdrew from participation in further competition, which came to be acknowledged at the hearing as the principal, if not only, basis for the Tribunal accepting a date earlier than that of the date of decision.

RULES

6. Rule 14.8 makes provision for the commencement of the ineligibility period:

14.8.1 The period of *Ineligibility* shall start on the date of the hearing decision providing for *Ineligibility* or, if the hearing is waived, on the date *Ineligibility* is accepted or otherwise imposed.

14.8.2 Any period of *Provisional Suspension* (whether imposed or voluntarily accepted) shall be credited against the total period of ineligibility to be served.

14.8.3 Where required by fairness, such as delays in the hearing process or other aspects of *Doping Control* not attributable to the *Athlete*, the *Sports Tribunal* may start the period of *Ineligibility* at an earlier date commencing as early as the date of *Sample* collection.

7. The definition section of the Rules provides in the definition of "Consequences":

"(c) *Provisional Suspension* means the *Athlete* or other *Person* is barred temporarily from participating in any *Competition* prior to the final decision at a hearing conducted under Rule 12.5."

8. The process by which a Provisional Suspension is imposed requires a national sporting organisation (NSO) to apply to the Tribunal for such an order. However, in some instances, an NSO will not make such a formal application where an athlete voluntarily withdraws from competitive participation.

DISCUSSION

9. As Mr David pointed out, on a literal interpretation of Rule 14.8.2 and the definition provision there is no procedure for the voluntary acceptance of a Provisional Suspension. It is arguable therefore, as he submitted, that there is no basis for the ineligibility period to run from earlier than the date of the hearing decision if an NSO elects not to make a formal application for Provisional Suspension.
10. Both Mr Smyth and Mr David drew the Tribunal's attention to the proposed WADA Code 2009 which is to come into effect in January 2009 and which will provide for a greater flexibility in respect to sanctions and commencement dates. It is proposed that the Sports Anti-Doping Rules will be amended to reflect those changes in the 2009 Code. However, those new Rules will not alter the fundamental principle that the athlete is responsible for the consequences of his/her actions. Mr David drew attention to provisions and explanatory notes in the WADA Code 2009 that he submitted supported the interpretation that the commencement of an ineligibility period before the hearing date was not available in the case of an athlete who has merely voluntarily decided to withdraw from competition.
11. However, the Tribunal in a number of decisions has accepted that there may be factual circumstances where the voluntary withdrawal from further competition is akin to a voluntarily accepted Provisional Suspension and may justify an ineligibility period commencing from an earlier date than the date of the decision hearing. See *New Zealand*

Federation of Body Builders v Ann Holt (ST 08/07, decision 28 September 2007), *New Zealand Federation of Body Builders v Daryll Tomuli* (SDT 02/06, decision 28 April 2006), *New Zealand Federation of Body Builders v Barbora Jurcanova* (SDT 10/05, decision 20 December 2005), and *New Zealand Federation of Body Builders v Tony Ligaliga* (SDT 11/05, decision 16 December 2005).

12. Our view is that the interpretation which has previously been applied by the Tribunal in the cases referred to above, which it is accepted were directed to Article 10.8 of the current WADA Code 2003 rather than the 2007 Rules, continues to be appropriate in applying Rule 14.8. That approach, in our view, gives due effect to the intention behind the explicit recognition in Rule 14.8.2 of the so-called “voluntarily accepted” period of the Provisional Suspension.
13. However, the Tribunal emphasizes that the voluntary withdrawal from competition does not per se require the Tribunal to backdate the operative date of ineligibility. Whether or not it is appropriate to do so will depend upon the particular circumstances. It will generally be appropriate to do so when there has been communication between the athlete and the NSO, explicit acceptance by the athlete which is communicated to the NSO that the athlete will no longer be competing, and acceptance by the NSO that in those circumstances an application for Provisional Suspension is not necessary.
14. The Tribunal was assisted in reaching a conclusion in the present case by evidence from Mr Lousich. Mr Lousich advised that he and Mr Newman had a telephone conversation after the initial notice of a positive test had been received. In that conversation he advised, and Mr Newman accepted, that Mr Newman should withdraw from future competition. It could properly be inferred from Mr Lousich’s evidence that in those circumstances the NSO determined that it was

unnecessary for it to apply for an order of Provisional Suspension. Obviously in the circumstance of many of the smaller NSOs there is an administrative and cost advantage if that formal course can be avoided. The Tribunal's appreciation of the evidence is that this was one of those situations where Mr Newman's explicit acceptance that he would not continue to compete obviated the necessity for a formal application.

15. We were also assisted by Mr David's acceptance, reinforced by Mr Steel's reference to the spirit of the code and of sport, that DFS did not wish to see Mr Newman treated differently from the Tribunal's previous practice.
16. In those circumstances, and on the basis of Mr Lousich's evidence, the Tribunal has determined that it is appropriate that the two year period of ineligibility, as defined in Rule 14.9, shall commence from 22 July 2008. It is also a consequence of Mr Newman's admission of breach that he is disqualified from the North Island Powerlifting Championships and must return any awards which he received as a consequence of his performance at those championships.
17. We note for completeness that a submission was made by Mr Smyth that there had been some delay in the hearing process that would justify the Tribunal exercising its discretion under Rule 14.8.3. Inevitably there is a period of time between an initial "A" sample testing positive and a hearing decision, particularly where an athlete exercises his/her rights to analysis of the "B" sample. However, in our view that inevitable delay is not such as to give rise to the discretion under Rule 14.8.3.

CAUTION

18. The circumstances under which Mr Newman came to return his positive test should be a warning to all athletes. It appears from Mr Newman's statement that for many years he had been engaged in strength building exercises, generally under guidance, and had quite reasonably taken appropriate supplements, also under guidance.
19. However, frustration at a decline in performance level led Mr Newman to engage in what he described as the taking of a "cocktail" of supplements which he identified for himself. While the Tribunal is prepared to accept that Mr Newman attempted through reference to the labelling of such supplements and advertising material that no prohibited substances were involved, this approach was, as Mr Newman now recognises, almost certain to end as it has. Athletes cannot assume that the labelling of supplements, particularly so-called natural supplements, necessarily fully discloses their content and should always seek informed advice before taking supplements that might broadly be described as "out of the ordinary".
20. The Tribunal repeats what has been said in many of its decisions that the primary and ultimate responsibility rests on the athlete.

Dated 5 November 2008



Alan Galbraith QC, Deputy Chairperson

For the Sports Tribunal:

Carol Quirk
Ron Cheatley