

BETWEEN SOFTBALL NEW ZEALAND

Applicant

AND CINDY POTAE

Respondent

DECISION OF THE TRIBUNAL

Dated 27 February 2008

Date of Hearing: 19 February 2008

Appearances: Dale Eagar for Applicant
Peter Hobbs counsel for Respondent
Respondent in Person

Tribunal Members Participating: Barry Paterson QC, Chairman
Ron Cheatley
Adrienne Greenwood

Registrar: Brent Ellis

INTRODUCTION

1. The Respondent (Ms Potae) was a member of the New Zealand Women's Softball Team (the White Sox) at the 2006 International Softball Federation World Championships held in Beijing. A urine sample collected during doping tests on 30 August 2006 tested positive for morphine. The Respondent (Softball NZ) accordingly brought an anti-doping rule violation proceeding before the Tribunal.

PROCEDURE

2. The Tribunal understands that there was a delay in bringing the matter to it because of dealings between Softball NZ and the International Softball Federation (ISF). There was some doubt as to whether the matter was to be resolved by the ISF or in accordance with the rules of Softball NZ. On 12 February 2007, the ISF Secretary General advised the CEO of Softball NZ that the matter was within the jurisdiction of Softball NZ and it should proceed with the anti-doping rule violation proceeding.
3. For some reason which was unexplained, the application was not filed with the Tribunal until 20 April 2007. It should in fact have been filed several months earlier and was one of the main reasons for the delay in bringing this matter to a conclusion. The consequences of the delay could have had serious implications on the results of teams Ms Potae played for in the interim. In accordance with the then rules of the Tribunal, the proceeding was served on Ms Potae in late April 2007.
4. On 4 May 2007, Ms Potae filed a notice of defence with the Tribunal advising that she wished to defend the application and would be filing a statement of defence. The statement of defence was not filed promptly or in accordance with the rules.
5. The Tribunal convened a telephone conference for 8 June 2007 to progress the matter. During that conference, Ms Potae advised that she accepted the result of the urine test as the B sample had confirmed the A sample result. She had made some enquiries as to whether a

medication she took for an injury could have caused the adverse result but it appeared that the medication, if true to label, could not have caused the result. She also indicated that she had taken Voltaren (Naxopren Sodium) while in the USA a few weeks previous to the test because of toothache. Ms Potae was given further time to make further enquiries and the conference was adjourned until 20 June 2007.

6. At the telephone conference on 20 June 2007, Ms Potae advised that medication to ease the pain for a broken thumb given to her in Indonesia on her way to Beijing had been tested by the Institute of Environmental Science and Research (ESR) and that it could not have been the source of the morphine. It was determined that the matter would need to go to a hearing as Ms Potae wished to raise the no fault or negligence defence.
7. Ms Potae filed her statement of defence on 4 July 2007. In it she advised that she had no option but to accept the evidence of the stated violation because of the positive tests. She had been involved for over a decade in international softball and advised she was fully aware of the requirements of carefully managing medication especially at an event such as the World Championships. She stated that to her knowledge she had not taken any medication or substance that would lead to such a reading. She stated that she had never knowingly taken any substance that would lead to a positive result in a drugs test in or out of competition.
8. Ms Potae was in fact supported by the CEO of Softball NZ who was obviously perplexed at the test results in view of Ms Potae's commitment to the sport and the conditions established within the World Anti-Doping Agency (WADA) Code. He stated that she *"as a knowledgeable and experienced athlete ... has been fully aware for a number of years of the requirements surrounding medication ... and has sought advice and guidance when necessary from medical or management staff. At the particular event where the test in question was taken, Cindy took medication for an injury only after seeking confirmation from the medical practitioner and the team manager of its*

suitability". He noted that in a determination not to cause any potential issues for the White Sox, she had made herself unavailable for that team when it played in Taiwan at an Olympic qualifying tournament.

9. A further telephone conference was held on 6 July 2007. At Ms Potae's request the hearing was adjourned to enable her to make further enquiries as to the effect of medication she had taken, both for toothache in the United States and her injured thumb while in Indonesia on the way to Beijing. She was also urged by the Tribunal to take independent legal advice.
10. There was then a considerable delay while various medicines were checked by ESR.
11. A further telephone conference was held on 18 December 2007. Ms Potae participated in the conference but was also represented by Mr P Hobbs. Mr Hobbs advised that he wished to present evidence from a Dr Richardson employed by ESR and a team mate of Cindy, in support of her no fault or no negligence defence. He advised that Ms Potae would not challenge the test result but wished to proceed with that defence.
12. Mr Hobbs advised the Tribunal of the nature of the evidence from Dr Richardson. In view of the nature of the evidence, the Tribunal determined to take its own independent advice. As a result of enquiries initially made through Drug Free Sport, the Tribunal sought the views of Dr John Lewis, Head of the Toxicology Unit, Macquarie Hospital Campus, New South Wales.
13. A hearing was convened in Wellington for 19 February 2008. The Chairman of the Tribunal attended in person and the other two members of the Tribunal participated by telephone conference.

EVIDENCE AT THE HEARING

14. Ms Potae gave evidence herself and called evidence from Dr Ralph Richardson of ESR and a team mate at Beijing, Maleme Williams.
15. It is appropriate to refer to Dr Richardson's evidence first. He is employed by ESR at Porirua, has a PhD in Chemistry and worked for 10 years running the Toxicology Laboratory at Auckland Hospital. His work focused on the qualitative and quantitative analysis of drugs and poisons in biological fluids for patients undergoing therapy or in an overdosed or poisoned state. His present role with ESR involves the testing of formulations on the New Zealand market and analysis of samples for drug content from clinical and pre-clinical studies.
16. Dr Richardson had considered the reports from the China Doping Control Centre, Beijing. His evidence included:

"My review of these reports indicate that morphine and codeine were present in the A samples and the morphine levels were above the WADA threshold of greater than 1 microgram per millilitre of urine (1.20). The B sample was assayed for morphine only, returning a result of 1.42 micrograms per millilitre of urine. The report for the A sample included a quantitative result for codeine of 0.11 microgram per millilitre of urine.

These results suggested the ingestion of codeine some time before the sample was taken. Codeine is metabolized mainly in the liver where it undergoes O-demethylation to form morphine, N-demethylation to form norcodeine, and partial conjugation to form glucuronides and sulphates of both the unchanged drug and its metabolites. The results obtained by the Chinese laboratory are consistent with literature reports of levels after codeine ingestion 2 - 3 days before sampling. The actual levels in urine are dependant on the quantity of fluid intake but the ratio of morphine to codeine to the time after ingestion."

17. Dr Richardson also made the following points:
 - Morphine is a controlled substance and accordingly records are kept by pharmacists and suppliers and any discrepancies in stock explained at audits that are regularly carried out. For this reason he thought it very unlikely that the morphine detected in Ms Potae's urine was due to the ingestion of such products.

- He had tested Tramal (the medication given to Ms Potae in Indonesia) and Naproxen Sodium, which Ms Potae had taken in the United States. They were both true to label and no codeine was detected in either.
 - He had been informed that Ms Potae had taken one dose of a Nurofen Plus formulation. These tablets contain ibuprofen 200mg and codeine phosphate 12.8mg. He thought that that formulation could account for the presence of codeine and subsequently morphine in the urine test.
18. Dr Richardson gave evidence at the hearing by conference call and answered questions from Tribunal members. Because of the report from Dr Lewis, he was asked whether there was any recent literature on the topic. He said that his view was formed on literature which was published since 2000. He also said that the amount of morphine indicated that it had been ingested only a few days before the test because codeine was still present.
19. Ms Williams had been Ms Potae's room mate in Beijing from 21 to 30 August 2006. Her evidence was that during that time Ms Potae had a severe toothache and asked Ms Williams whether she had any pain relief tablets. Ms Williams did have some Nurofen Plus pills purchased over the counter in New Zealand before departing. She said she gave Cindy an open packet that only had two tablets left in it. She said that Ms Potae consumed the tablets that she had given her. Ms Williams said she had previously checked the ingredients of Nurofen and was satisfied that they did not contain any prohibited substances.
20. Mr Potae's evidence throughout has been consistent. She has consistently expressed mystification as to how morphine came to be in her system. In her evidence she referred to the relief taken for toothache in the United States of America several weeks before and to the medication in Indonesia. She confirmed that while in China she continued to suffer with toothache. In her written statement she said:

"While I cannot for certain recall taking the Nurofen Plus at the tournament I have no reason to think that what Maleme has stated is not correct as I was suffering severe toothache and had previously taken a painkiller to help with the toothache."

21. Ms Potae confirmed that she was fully aware of the requirements to carefully manage any medication especially during a World Championship. She was adamant she had not knowingly taken any substance or medication which could lead to morphine being present in her sample and averred that she had never knowingly or deliberately taken morphine. The only explanation she could offer was that she had taken the Nurofen Plus tablets for toothache.
22. Ms Potae was questioned by members of the Tribunal. She once again confirmed that she could not herself remember having taken the Nurofen Plus tablets. She also reiterated her statement that she had not knowingly or deliberately taken morphine or any substance which could have contained morphine.
23. In drug violation matters, it is not unusual for an athlete to state that he or she had not knowingly taken any substance containing the prohibited drug. It is necessary for the Tribunal to approach such evidence carefully, and in some cases with a degree of cynicism. In this case, the Chairman of the Tribunal was present while Ms Potae gave her evidence. He found her to be a credible and truthful witness and saw no reason to disbelieve what she said.

THE TRIBUNAL'S OWN ENQUIRIES

24. As noted above, the Tribunal obtained a statement from Dr Lewis. The substantive part of that statement read:

"Thank you for the opportunity to provide an opinion on above matter. I agree with the comments submitted by Dr Ralph Richardson of ESR that urine containing morphine at a concentration of approximately 1200ug/L could have arisen through consumption of a codeine based medication such as Nurofen Plus. Different people metabolise codeine to morphine to a greater or lesser degree. In some instances, there is mainly codeine with very little morphine, and in others, it is the reverse. This tends to occur after a single rather than a repeated dose of codeine. Evidence of the variability in codeine metabolism was

published in the Journal of Chromatography, 267 (1983) pp 117-124. The authors noted a wide range of codeine: morphine ratios following the administration of a table of codeine to volunteers. In some cases, only morphine was detected.

In my opinion, on the balance of probabilities, the source of morphine in the athlete's urine was the Nurofen Plus."

25. The article referred to in Dr Lewis's statement was published in 1983. Dr Richardson confirmed when this point was put to him that recent literature is still consistent with that article. The article referred to controlled studies on 15 volunteers that consumed codeine tablets. The study showed that consumption of codeine tablets "*leads to the urinary excretion of both codeine and morphine and, in some instances, to morphine only*".

SOFTBALL NZ's ANTI DOPING POLICY

26. Softball NZ's anti-doping policy at the relevant times adopted the provisions of the WADA Code. It provided for this Tribunal to consider anti-doping violation applications. Mr Hobbs accepted on behalf of Ms Potae that the WADA Code applies.
27. Morphine is a prohibited substance under the WADA Code. Codeine is not.
28. Unless the provisions of Article 10.5 of the WADA Code apply, this Tribunal is required to impose a period of ineligibility on Ms Potae of 2 years. Article 10.5.1 of the WADA Code states, in part:

"10.5.1 *No Fault or Negligence*

If the *Athlete* establishes in an individual case involving an anti-doping rule violation under Article 2.1 (presence of *Prohibited Substance* or its *Metabolites* or *Markers*) ... 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* or its *Markers* or *Metabolites* is detected in an Athlete's Specimen in violation of Article 2.1 (presence of *Prohibited Substance*), the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* eliminated. "

MS POTAE'S CASE

29. Mr Hobbs for Ms Potae accepted that if the Tribunal were to find no fault or negligence, he would need to establish:
- (a) How the morphine entered Ms Potae's system; and
 - (b) That Ms Potae bore no fault or negligence for the entry of the morphine into her system.
30. Mr Hobbs submitted that it was more likely than not that the morphine entered Ms Potae's system through the Nurofen Plus tablets given to her by Ms Williams. There was no evidence to suggest anything to the contrary and the fact that Ms Potae cannot recall having taken the tablets gives a ring of truth to the explanation. He also submitted that the difficulty in obtaining morphine, as noted by Dr Richardson, also suggested that it was unlikely it could have been voluntarily taken by Ms Potae.
31. In respect of the "no fault" submission, he noted that codeine and Nurofen Plus were not on the prohibited list and therefore there could not be any fault on Ms Potae for not knowing that Nurofen Plus would lead to a positive morphine test.
32. Mr Hobbs alternatively relied on the "no significant fault" provision in the WADA Code.

SOFTBALL NZ'S POSITION

33. Softball NZ throughout has been supportive of Ms Potae and did not seek to make any submissions contrary to those made by Mr Hobbs. In an earlier statement Mr Eagar had expressed Softball NZ's wish to provide tangible support to Ms Potae and had referred to her awareness and practice relating to medication.

DISCUSSION

34. Under Article 10.5.1 of the WADA Code, the onus is on Ms Potae to establish on the balance of probabilities both how the morphine got into her system and that it got there through no fault of hers. An unusual factor in this case is that Ms Potae relies upon the morphine getting into her system through taking Nurofen Plus tablets which she does not recall having taken. This issue has caused the Tribunal some anxiety. There are factors which support Ms Potae's case, namely:
- (a) Ms Williams' evidence.
 - (b) Ms Potae's history of taking care and seeking advice before taking medication. Not only did she give evidence on this point but this was confirmed by Softball NZ.
 - (c) The difficulty in obtaining morphine as noted by Dr Richardson. The Tribunal notes that it is unlikely that Ms Potae would have had access to morphine because of the controlled nature of morphine.
 - (d) The finding that Ms Potae is a credible and honest witness and her evidence that she did not take any other medications which could have led to the morphine being in her system. The other medications she took were checked by ESR and found not to be the source.
35. In these circumstances, the Tribunal, notwithstanding Ms Potae's lack of recollection, accepts that it is more likely than not that the source of the morphine was the Nurofen Plus tablets. The evidence of Dr Richardson and Dr Lewis satisfies the Tribunal that, on the balance of probabilities, the Nurofen Plus tablets were the cause of the morphine.
36. A Nurofen Plus packet states that "*each tablet contains Ibuprofen 200mg & Codeine Phosphate 12.8mg*". Neither of those substances is on the prohibited list. WADA has established a monitoring program in relation to substances which are not on the Prohibited List but which WADA wishes to monitor in order to detect patterns of misuse in sport.

As discussed above, one of the metabolites of codeine is morphine which can create difficulties for testing for morphine use alone. For this reason, WADA monitors the morphine/codeine urine ratio as part of its monitoring program to detect patterns of codeine and morphine misuse in sport.

37. While the morphine/codeine ratio is on the monitoring program list, codeine is not on the prohibited list and therefore codeine is not a prohibited substance. In the circumstances the Tribunal accepts, again on the balance of probabilities, that there was no fault on Ms Potae in taking the tablets. An athlete cannot be held to be at fault or to be negligent if he or she takes a recognised remedy, the contents of which are not on the prohibited list and which an athlete could not be expected to know, may lead in the case of some athletes to morphine being in the athlete's system.
38. The Tribunal therefore determines that there was no fault or negligence on the part of Ms Potae and accordingly, under Article 10.5.1 of the WADA Code, no period of ineligibility can be imposed. In the circumstances it is not necessary to consider Ms Potae's alternative defence of no significant fault or negligence.

CAUTION

39. Ms Potae voluntarily withdrew from international softball competition once she was advised of the positive tests. She however continued to play domestic softball. For reasons given, it has taken some time for this matter to be finally determined. Softball NZ's attention is drawn to Article 10.7 of the WADA Code. If Ms Potae had not established the no significant fault or negligence test, all subsequent results for the teams in which she played, may have been set aside. A national sporting organisation should be aware of this provision and be aware that by allowing an athlete to continue to play in the circumstances, it may be putting at risk subsequent results of other competitors. Anti-drug violation matters should be brought to a hearing as soon as possible.

DECISION

40. For the reasons given, no period of ineligibility is imposed on Ms Potae.

Dated 27 February 2008



Hon B J Paterson QC
Chairman