

BETWEEN DRUG FREE SPORT NEW ZEALAND

Applicant

A N D ADAM STEWART

Respondent

AND BIKE NZ INCORPORATED

Interested Party

**DECISION ON APPLICATION OF RULE 14.8
OF THE SPORTS ANTI-DOPING RULES (2010)**

Dated 16 February 2011

Counsel: Paul David for Drug Free Sport
Ben Walker for Adam Stewart
Maria Clarke for Bike NZ Incorporated

Panel: Barry Paterson QC, Chairman
Adrienne Greenwood
Chantal Brunner

Present: Graeme Steel (Drug Free Sport)
Mark Elliott (Bike NZ)

Registrar: Brent Ellis

1. On 8 September 2010, this Tribunal issued a decision imposing a period of two years ineligibility on Adam Stewart, commencing from 7 September 2010. That decision arose from a hearing on 7 September 2010 which had originally been scheduled to hear an application for provisional suspension.
2. Because of the urgency in which the matter was determined, it was not possible at that stage to consider Drug Free Sport's application to disqualify Adam's competition results in accordance with the provisions of rule 14.8 of the Sports Anti-Doping Rules (2010) ("the rules").
3. An issue arose as to the extent of this Tribunal's jurisdiction in considering the application of rule 14.8. The Tribunal issued a ruling on the extent of its jurisdiction on 18 November 2010.
4. Adam Stewart admitted two violations of the rules, namely:
 - (a) The Athlete attempted to use prohibited substances between 31 March 2009 and 19 May 2010 by ordering, purchasing and arranging for the delivery of prohibited substances to a PO Box 69-164 Lincoln, namely Eprex Epoetin alfa 4000iu/0.4ml (prohibited under S2 Prohibited List), Pregnyl Chorionic Gonadotropin 5000IU (prohibited under S2 Prohibited List) and Pregnyl Solvent (required for the administration of Chorionic Gonadotropin).
 - (b) The Athlete was in possession of human chorionic gonadotropin (hCG) (a prohibited substance), in or about 24 June 2009.

On the basis of Adam's admissions, Adam was found to have infringed under two rules. Firstly, he had attempted to use a prohibited substance (rule 3.2), and secondly, he had been in possession of prohibited substances (rule 3.6).

5. A telephone conference hearing to determine the application of rule 14.8 of the rules was held on 9 February 2011.

Rule 14.8

6. Rule 14.8 of the rules reads:

Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation

In addition to the automatic *Disqualification* of the results in the *Competition* which produced the positive *Sample* under Rule 14.1.2 or 14.1 (Automatic *Disqualification* of Individual Results), all other competitive results obtained from the date a positive *Sample* was collected (whether *In-Competition* or *Out-of-Competition*), or other *Anti-Doping Rule Violation* occurred, through the commencement of any *Provisional Suspension* or *Ineligibility* period, shall, unless fairness requires otherwise, be *Disqualified* with all of the resulting *Consequences* including forfeiture of any medals, points and prizes.

14.8.1 As a condition of remaining eligibility after being found to have committed an *Anti-Doping Rule Violation*, the *Athlete* must first repay all prize money forfeited under this Rule.

14.8.2 Allocation of Forfeited Prize Money

Unless the rules of the International Federation provide that forfeited prize money shall be reallocated to other *Athletes*, it shall be allocated first to reimburse the collection expenses of the *Anti-Doping Organisation* that performed the necessary steps to collect the prize money back, then to reimburse the expenses of the *Anti-Doping Organisation* that conducted results management in the case, with the balance, if any, allocated in accordance with the International Federation's rules.

7. Rule 14.8 mirrors Article 10.8 of the WADA Code which Signatories to the Code are required to adopt in identical terms.

8. As noted in the jurisdictional decision of 6 December 2010, the factual situation has its difficulties because Adam Stewart sometimes competed as a team member. The Tribunal said in that decision at para 15:

There appears to be a concern in Bike NZ's submission that applying rule 14.8 may affect team results. This, in the Tribunal's view, is not the case. The Tribunal, under rule 14.2, applies a period of *Ineligibility* against the *Athlete*. The powers under rule 14.8 when construed in context and against the definition of *Consequences* refer to the results of the *Athlete* who has committed the *Violation*. The Rule does not refer to team results. Rule 14.12 does refer to team results but that rule does not apply where only one member of the team commits a *Violation*.

9. There may be a grey area where Adam's individual results in a team sprint may be a component in team results. In the Tribunal's view, this is not a matter to concern the Tribunal at this stage. It is for Bike NZ Incorporated (Bike NZ) and Union Cycliste Internationale (UCI) to determine the consequences on particular results of any decision made under rule 14.8.
10. Rule 14.8 requires the mandatory *Disqualification* of certain results "unless fairness requires otherwise". Mr Walker, on behalf of Adam Stewart, has suggested this is a case when fairness does require otherwise. The Tribunal accepts the submission of Mr David on behalf of Drug Free Sport, supported by Ms Clarke on behalf of Bike NZ, that the application of the "fairness exception" is the exception. The Rule itself recognises that *Disqualification* itself may be severe as it provides for forfeiture of medals, points and prize monies. In the Tribunal's view, there needs to be exceptional circumstances before the exception applies.

Adam Stewart's Submissions

11. Mr Walker for Adam Stewart submitted that fairness did require the exception to be applied because:
 - (a) The banned substance was purchased over the internet. Adam did not ingest the substance and it was not, in fact, used for performance enhancement. Because the substance was not actually used for performance enhancement, the offence is at the lower end of the scale.
 - (b) The consequences on Mr Stewart are severe, cycling having been his life. The sanction prevented him from competing at the recent Commonwealth Games and because the suspension will expire shortly before the next Olympic Games, it will prevent him from being able to be considered for membership of the New Zealand Olympic team. The two years' ineligibility period has effectively terminated his cycling career.

- (c) Because the violation did not assist Adam Stewart's performance during the disqualification period, fairness requires that the results from 31 March 2009 should remain.

Submissions by Drug Free Sport and Bike NZ

- 12. Mr David and Ms Clarke made similar submissions. There is a presumption in rule 14.8 that the results should be disqualified and the facts of this case do not rebut that presumption. In respect of the three matters referred to in the previous paragraph, the other parties' position is:
 - (a) They do not accept that the Tribunal can make a finding that the hCG which was in Adam's possession in or about 24 June 2009 was not ingested by him. The previous acknowledgment was in respect of the importation in May 2010 as that prohibited substance was not, in fact, received by Adam. There is no credible evidence before the Tribunal on which it can make the finding suggested.
 - (b) The rule itself recognises the severity of the disqualification. This is a normal consequence.
 - (c) In the circumstances, the Tribunal can not take into account that the violation did not assist Adam's performance during the disqualification period for the reasons set out in subparagraph (a) above.
- 13. It was also submitted that the disqualification provision under rule 14.8 clearly applies to anti-doping rule violations other than those obtained on a positive test. The rule applies in cases of anti-doping rule violations when the athlete may not have taken the substance.

Discussion

- 14. The Tribunal accepts that there is a presumption that rule 14.8 is to apply and exceptional circumstances are required to rebut that presumption. In the Tribunal's view, exceptional circumstances have not been established in this case.

15. The Tribunal does not know whether or not the hCG was ingested. It has no evidence on this point. Even if it did have evidence and accepted that it was not ingested, it does not, in the Tribunal's view, follow that non-digestion leads to the application of the "fairness" exception.
16. Rule 14.8 is clearly designed to have harsh consequences. The fact that the consequences in themselves are severe is contemplated by the rule and can not therefore in itself be the basis of the application of the exception.
17. It is also noted that the facts of this case do not support the fairness exception even if it were to be applied more generously than the Tribunal believes it is to be applied. Although the violation is treated as one violation under the rules, the fact that there were two separate acts of ordering prohibited drugs over several months indicates that this was not a casual spur of the moment decision.
18. For the above reasons, the consequences will apply from 31 March 2009.

Decision

19. There is an order under rule 14.8 of the rules that the results of Adam Stewart from 31 March 2009 to the date of the application of the period of ineligibility are disqualified. The consequences set out in rule 14.8 will therefore apply. It is for Bike NZ and UCI to determine the application of this order to those results which may have a "team" element in them.

Dated 16 February 2011



.....
B J Paterson QC
Chairman