BEFORE THE NEW ZEALAND RUGBY UNION ANTI-DOPING TRIBUNAL

BETWEEN	**NEW ZEALAND RUGBY UNION INCORPORATED**
	Applicant
AND	**WADE PEREIRA**
	Respondent

DECISION OF TRIBUNAL

29 SEPTEMBER 2011

Hearing	31 August 2011 at Wellington
Tribunal Members	Terry Sissons (Chair) Ian Murphy Inoke Afeaki
In Attendance by telephone	Wade Pereira – Player Mrs Pereira – Player's mother Harry Edward – Counsel for Player Graeme Steel – Drug Free Sport NZ Paul David – Counsel for Drug Free Sport NZ
Registrar	Stuart Doig

A. INTRODUCTION

1. On 27 July 2011 Drug Free Sport New Zealand (**DFS**) commenced proceedings under the New Zealand Rugby Union (**NZRU**) Anti-doping Regulations alleging that on 20 June 2011 Wade Perira[1] (the **Player**) refused or failed to submit to sample collection, or otherwise evaded sample collection, in breach of Rule 3.3 of the New Zealand Sports Anti-Doping Rules (**SADR**).

2. Mr Pereira is a club rugby player who was called into the Bay of Plenty Rugby Union pre-season squad prior to the ITM Cup. As such he is subject to the NZRU's anti-doping regulations, and to drug testing undertaken by DFS.

3. Following a hearing held on 28 July 2011, the Tribunal made an order provisionally suspending the Player from that date.

4. The Player admitted the violation and indicated that he wished to present evidence and make submissions on the sanction to be imposed.

B. SANCTIONS

5. Rule 14.3.1 of SADR provides that the period of ineligibility for violations of rule 3.3 shall be two years unless the conditions provided in Rule 14.5 or 14.6[2] are met.

6. Rule 14.5.1 provides:

> *"If the athlete establishes in an individual case that he or she bears no fault or negligence, the otherwise applicable period of ineligibility shall be eliminated."*

7. Rule 14.5.2 provides:

> *"If an athlete or other person establishes in an individual case involving such violations that he or she bears no significant fault or negligence then the otherwise applicable 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."*

8. The commentary to the Rule says that:

> *"Rules 14.5.1 and 14.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases. For the purposes of assessing the athlete's or other person's fault under Rules 14.5.1 and 14.5.2 the evidence considered must be specific and relevant to*

---

[1] It became clear during the course of the proceedings that the respondent's name is spelled "Pereira". No issue has been taken with the fact that the respondent is correctly the subject of the allegations.

[2] No submissions were made to the effect that there were any aggravating circumstances in this case, and the Tribunal is satisfied Rule 14.6 has no applicability.

explain the athlete's or other person's departure from the expected standard of behaviour."

C. EVIDENCE

9. At the hearing which took place on 31 August 2011 the only issue was whether the Player had established that he bore no fault or negligence or no significant fault or negligence.

10. Evidence relating to the events of 20 June 2011 was not disputed, and was set out in the statements of DFS employees Craig Kirkwood (Doping Control Officer) and Craig Torr (Chaperone). In summary:

    a. DFS attended a Bay of Plenty squad indoor training session, and selected four players for drug testing, one of whom was the Player;
    b. Questions were raised about testing the Player because he was a club level player. Discussions took place between Paul Feeney, the coach and Craig Kirkwood, which clarified the position;
    c. While this issue was being discussed Mr Torr introduced himself and began the notification process with two players, including the Player;
    d. During the notification process, which informed the Player that he had been selected for random drug testing, the Player turned and started to walk away and said that his partner was waiting for him outside in her car and he had to tell her that he had to be drug tested;
    e. Mr Torr followed the Player to the doorway, and from there observed the Player walk to a vehicle parked 20 to 30 metres away. He did not accompany the Player to the car because it was raining;
    f. Mr Torr saw the Player get into the passenger side of the vehicle, which then started up and drove off.

11. In his written statement the Player said that:

    a. There were two reasons why he did not undergo the drug test. First, as he does not have a current drivers licence, his partner drove him from Rotorua, where they live, to training at Mt Maunganui;
    b. On the day in question their son was in day care and had to be uplifted by 7pm. The return journey from Mt Maunganui to Rotorua is approximately one hour, and DFS's evidence was that the testing process was commenced shortly after 6pm.
    c. On informing his partner that he had to have a drugs test, they decided that the collection of their son was of greater importance, because there was no one at home to pick him up.
    d. The second reason was that, as a club player, he was not aware of his obligation to undergo drug testing and did not know of the implications of refusal;
    e. He did not hear the discussions between Paul Feeney and Craig Kirkwood.

D. SUBMISSIONS

12. For the Player, Mr Edward submitted that the Player had never been required to undergo a drug test in his playing career. At no stage

was he advised by the Bay of Plenty Rugby Union management or coaching staff of his obligations under SADR or the consequences of a proven breach of the Rules. He further submitted that any confirmation that he was required to undergo the drug test was never communicated to the Player by either Paul Feeney or Craig Kirkwood, and accordingly he elected to return to Rotorua to collect his son and not undergo the drug test.

13. He submitted that the Bay of Plenty Rugby Union must carry a share of the blame in the Player's case for failing to appraise him fully on his obligations as a member of the Bay of Plenty Rugby Union squad and accordingly has not discharged its employment obligations towards a potential employee. He submitted that the Player had no knowledge of the mandatory obligation to provide a sample for drug testing and that SADR should not be construed as providing for absolute or strict liability offences. Rather they should be interpreted as requiring the prosecuting agency to establish that the Respondent had the requisite intention of avoiding compliance with the Rules, particularly in the context of an employment relationship between the bearing in mind the implications that a breach of the Rules would have on a person's ability to create a career in rugby and receive remuneration for playing rugby. The Player is a first offender and has not tried to deny the current violation and must receive credit for his acceptance of responsibility.

14. Mr Edward also submitted that the Player provided a sample when requested on a subsequent occasion and that the clear result when that sample was tested showed that the Player did not have prohibited substances in his system.

15. In conclusion, he submitted that Mr Pereira had acted out of naivety and a lack of understanding of the seriousness of the breach of SADR. It was further submitted that there would appear also to be a serious inconsistency within the Rules in terms of sanctions that a person who fails to undergo a test receives a greater penalty than a person who fails a test and is proven to have an illegal drug in his sample, as was the case in *DFS v Wineti* ST 14/08 19 December 2008[3].

16. Mr David, for DFS, submitted that:

    a. The nature of the violation means that only SADR 14.5.2 is possibly applicable. He emphasised the exceptional nature of the defence under SADR 14.5.2 and submitted that there have been very few cases since the advent of the Code in 2003 where there have been successful pleas of no significant fault or negligence in the context of refusals. He submitted that two of the cases can properly be regarded as doubtful, but all emphasise that the circumstances must be wholly exceptional before any plea for a reduction under SADR 14.5.2 can be considered in the case of a violation under SADR 3.3.
    b. In this case Mr Pereira made a conscious choice to refuse to submit to doping control for personal reasons. Whether the undisputed facts are seen as refusal after notification or evading sample collection, Mr Pereira deliberately chose not to do what he was asked to do. He submitted that the plea is not

[3] The Tribunal notes that Mr Wineti received 2 months ineligibility in relation to cannabis, but also received a concurrent period of ineligibility of 2 years in relation to other prohibited substances.

available on the facts where the Player, knowing he had been asked to submit to drug testing, made a decision to refuse for personal reasons.

c. The Player's fault is clearly high, and submitting to a test some days later is completely irrelevant to the plea under SADR 14.5.2 as are matters of general mitigation.
d. The violation under SADR 3.3 is serious. The submission that the presence of a substance in an athlete's system may, in certain circumstances, lead to a lesser penalty than a refusal and that this is, in some way, an anomaly misunderstands the fundamental importance of refusal to the anti-doping regime.
e. The Tribunal can only look at the athlete's fault in connection with the violation. By his conduct the Player cut short the process of notification;
f. In conclusion, Mr David submitted that the Player should be subject to a period of ineligibility of two years.

E. POST HEARING REQUEST FOR FURTHER EVIDENCE AND SUBMISSIONS

17. Shortly after the hearing the Tribunal asked for further evidence as to the steps DFS took to ensure that the player was advised of the possible consequences of a failure to comply as required by Rule 5.4.1(e)iii of the International Standard for Testing (IST) established by WADA. The Tribunal also sought submissions as to whether any failure to observe the WADA testing requirements occurred and the potential relevance of such failure to the question of fault.

18. In a statement received from Graeme Steele, DFS's Chief Executive he said that:

a. the requirements under IST Rule 5.4 provide a series of steps which representatives of an anti-doping organisation work through with an athlete. DFS recognises that the process can be seen as intrusive or at least inconvenient by some athletes and it seeks to adopt an approach which is accommodating rather than officious when dealing with all athletes. DFS personnel are encouraged to work through the requirements for notification in a manner which fits with the circumstances and demeanour of the athlete.

b. It is not uncommon for an athlete to ask for a delay in the process after initial notification (or at a later stage) so that they can complete a training session, locate a representative or receive necessary medical treatment. Equally, it is not uncommon to seek to inform other parties who may be waiting for the athlete. The approach of DFS is to be as accommodating as possible when such requests are made.

c. It is not necessary for a chaperone to follow an athlete very closely in such circumstances. Chaperones are expected to keep a respectable distance, especially where an athlete has asked for a private conversation to take place. Their job is to keep the athlete in sight.

d. In this case, the Player was clearly informed of the requirement that he undergo sample collection by a person

authorised to carry out the process by DFS. This request was never withdrawn or altered. When the athlete walked away saying that he intended to go to his car to inform his partner, he expressly acknowledged that he was required to do the test. At that stage he gave no indication he intended to leave or wished to leave but rather acknowledged that he was going to be tested. The Player walked off before further steps in the notification process could be taken.

e. The chaperone's job was to keep the athlete in sight, which he did. The rain prompted the chaperone to remain in the shelter of the building. While, with the benefit of hindsight, the chaperone might have remained closer, observation from 20 to 30 metres is acceptable.

f. The formal process of notification under the IST could not be completed due to the discussions with the rugby official concerning the obligation to carry out the test and the Player's decision that he needed to inform his partner that he was required for testing.

19. Where, as here, the Player had acknowledged his obligation to be tested it was, in Mr Steele's view, acceptable for the DFS personnel to keep him under observation and wait for him to return to complete the requirements for formal notification. There was no reason to think the Player would not return and be tested. Had he come back the formal process ending with the signing of the appropriate form would have been completed (as it was for the three other players tested that evening). The Player's decision to get into the car and leave unexpectedly with his partner without warning prevented the process from being completed.

20. Mr David submitted that while the steps in the notification process under IST could not be carried out after the initial notification, it is not correct to refer to these matters as failures by DFS where the Player, having been informed of his obligation, acknowledges it but decides to leave without further statement or enquiry. A person who evades a test in this way will avoid the full formal process of notification which would have been carried out. It is illogical to allow the consequences of the conduct of making off and evading the test to provide a basis for a plea of no significant fault.

21. Even if the facts established some failure on the part of DFS, Mr David submitted that the Player clearly bears significant fault in acting as he did and cannot establish no significant fault as required under SADR 14.5.2.

22. For the Player, Mr Edward submitted that the IST Rules were not strictly complied with by DFS. While the Player did not provide a sample as directed, given the non-compliance by DFS with the sampling procedures, the Respondent meets the criteria to allow the Tribunal to either eliminate the applicable period of eligibility or to reduce it substantially.

F. CONSIDERATION

23. The Tribunal has some sympathy for the Player who had no experience of drug testing and was clearly torn between his need to

return home to collect his son and his obligation to undergo drug testing.

24. Although Mr Edwards submitted that there was no evidence that the Player knew he was obliged to undergo testing, the Player's statement records that he told his partner that *"I had to have a drugs test"*. Mr Torr's statement, which was not disputed, records that the Player told him that, *"he had to tell [his partner] that he had to be drug tested"*. The Tribunal is therefore satisfied that Mr Pereira knew he was obliged to undergo the test and chose not to.

25. The Tribunal does not accept Mr Edward's submission that DFS had to prove that the Player intended to avoid compliance with the Rules. It was sufficient for DFS to show that the Player intended to evade sample collection.

26. The Player may have made his decision in ignorance of the sanction that he was exposing himself to, but that does not alter that fact that he made a deliberate decision to evade the test. In the present circumstances it is not possible to find that the player bore no fault or negligence. The only question therefore is whether he bore no significant fault or negligence.

27. In that context we have considered whether DFS's performance of its obligations under the IST caused or contributed to the violation. In the case of Lindsey Scherf[4] the Court of Arbitration for Sport found that the athlete's fault was not significant where her error of judgment in refusing to submit to a drug test was a *"direct result of errors made by agencies that should have provided better service to the athlete"*. In that case the athlete took a banned substance as treatment for asthma and had previously obtained a Therapeutic Use Exemption (**TUE**). Before entering the Gold Coast marathon she applied for a TUE from the International Association of Athletics Federations (**IAAF**). The IAAF failed to process an application promptly, caused by delays in forwarding the application from the United States Anti-Doping Agency (**USADA**); the USADA incorrectly advised her of the need for an IAAF TUE; and the organiser of the Gold Coast marathon failed to inform the athlete that drug testing would be conducted, after previously telling her that testing was unlikely.

28. In the present case DFS did not ensure that the Player was advised of the possible consequences of a failure to comply with the requirement to undergo testing.

29. It is possible that the Player would not have committed the violation if he had been advised of the likely consequences, however no evidence was provided to enable us to make a positive finding to that effect. Furthermore the Player's own conduct played a significant part in this non-compliance with the IST. We accept Mr Steele's statement that the full notification procedure would have been followed if the player had returned to undergo testing instead of leaving. The DFS representatives had no reason to believe that he was not going to return once he had told his partner that he had to undergo drug testing.

---

[4] *WADA v USADA & Scherf* CAS 2007/A/1416

30. In effect Mr Pereira's own conduct prevented DFS from ensuring that he was advised of the possible consequences of a failure to comply with the requirement to undergo testing.

31. While the strict non-compliance with the IST requirements may have contributed to the violation, it does not excuse the player's evasion or mean that he bore no significant fault or negligence. This was not a case of the Player being misled by DFS. It is not on all fours with the *Scherf* case.

32. It is irrelevant that a subsequent test result contained no evidence of the presence of a banned substance. This is not a case like *Tawera*[5] where the subsequent negative sample was collected within a few minutes of an initial failure or refusal, caused by *"a momentary lapse of judgement"*. In that case the Tribunal was certain that the result of the first failed sample would also have been negative, whereas in cases like the present it is not possible to say with any certainty what the result of the analysis of the evaded sample would have been. In *Tawera*, that certainty enabled the Tribunal to hold that the intentional failure to provide a sample assumed less significance, resulting in a finding of no significant fault or negligence.

33. It is also irrelevant that in other cases the presence of cannabis in a sample may lead to a lesser period of ineligibility.

34. Rule 3.3 underpins the testing regime. Refusing, failing and evading sample collection are generally considered to be as serious as the provision of a positive result; otherwise drug cheats would have an incentive to refuse to participate in the testing process. There is no evidence in this case that the Player is a drug cheat, and it was not suggested that he is, but that does not reduce the seriousness of the violation.

35. The Tribunal finally considered whether the combination of the Player's inexperience and lack of knowledge; DFS's failure, for whatever reason, to ensure that the Player was made aware of the consequences of refusal; and the Player's family needs, was so exceptional as to justify a finding of no significant fault or negligence.

36. With some regret the Tribunal members are unable to make that finding for the following reasons:

    a. the Player's family needs, while genuine, were unrelated to the test itself and therefore irrelevant to this issue;
    b. the Player did not take any steps to find out what his obligations were even though he knew his coach was having discussions with Mr Kirkwood about this issue; and
    c. the Player decided to leave, knowing that he had to submit to testing.

37. Despite this result, the Tribunal still has some concerns about the process followed by DFS staff. The IST does provide for athletes to be permitted to temporarily leave a testing area after notification has occurred. It is regrettable that they did not require the Player to stay until he was fully informed of the consequences of refusal or evasion,

---

[5] *New Zealand Rugby League Inc v Barry Tawera* SDT/12/04 6 May 2005

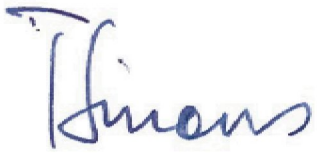
or provided him with this information as he walked to his car, particularly when they were aware they were dealing with a club player. Closer supervision alone, rather than from 20 or 30 metres, may have reinforced the importance of compliance and resulted in a different outcome.

G. DECISION

38. The Player having admitted the violation and having failed to establish that he bore no significant fault or negligence, the Tribunal finds a violation of SADR 3.3 to be proven, and imposes a period of ineligibility of two years commencing on 28 July 2011.

39. The parties are reminded of their rights of appeal to the NZRU Post Hearing Review Body and to the Court of Arbitration for Sport.

Dated 29 September 2011



.....
Terry Sissons
Chairman