BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 01/15**

BETWEEN **KRIS GEMMELL**

Applicant

AND **DRUG FREE SPORT NEW ZEALAND**

Respondent

AND **TRIATHLON NEW ZEALAND**

Interested Party

DECISION OF SPORTS TRIBUNAL
DATED 26 January 2015

Hearing: 19 January 2015 in Auckland

Tribunal: Sir Bruce Robertson (Chair)
Alan Galbraith QC
Dr James Farmer QC

Present: Kris Gemmell, Athlete
Ian Hunt, counsel for Mr Gemmell
Paul David QC, counsel for Drug Free Sport New Zealand
Graeme Steel, Drug Free Sport New Zealand
Jude Ellis, Drug Free Sport New Zealand

Registrar: Brent Ellis

1. This is an application by Mr Gemmell requesting the Tribunal to consider a reduction in the period of ineligibility imposed in respect of an anti-doping rule violation under Rule 3.4 of the Sports Anti-Doping Rules 2013 (New Zealand).

2. The brief background is that by a Court of Arbitration for Sport ("CAS") decision dated 1 December 2014, reversing a Tribunal decision of 12 February 2014, a period of ineligibility of 15 months commencing on 12 February 2014 was imposed for breach of the whereabouts obligations under Rule 3.4. The violation was held by CAS to have arisen through three failures within an 18 month period then provided by Rule 3.4.

3. On 1 January 2015 the Sports Anti-Doping Rules 2015 came into effect. Rule 2.4 of the 2015 Rules applies to whereabouts failures and reduced the 18 month period which had applied under the previous Rule 3.4 to a 12 month period, i.e. to breach the 2015 Rule 2.4, and commit a whereabouts anti-doping violation, there has to be a combination of three missed tests and/or filing failures *within a 12 month period*. While Mr Gemmell's failures for which he had been sanctioned occurred within an 18 month period, they fell outside a 12 month period and accordingly, as from 1 January 2015, would not have constituted an anti-doping violation.

4. Mr Gemmell applied to Drug Free Sport New Zealand ("DFSNZ") to consider a reduction in the period of ineligibility "in light of" the changed 2015 Rules and this application was referred by DFSNZ to this Tribunal.

5. The application is considered under Rule 18.2.1 of the 2015 Rules which provides:

> 18.2.1 Application to Decisions Rendered Prior to the 2015 Rules
>
> With respect to cases where a final decision finding an *Anti-Doping Rule Violation* has been rendered prior to the Effective Date, but the *Athlete* or other *Person* is still serving the period of *Ineligibility* as of the Effective Date, the *Athlete* or other *Person* may apply to *DFSNZ* for the *Anti-Doping Rule Violation* to consider a reduction in the period of *Ineligibility* in light of the 2015 *Rules*. Such application must be made before the period of *Ineligibility* has expired. The application will be referred by *DFSNZ* to the *Sports Tribunal*. The decision on the application by the Sports Tribunal rendered may be appealed pursuant to Rule 13.2. The 2015 *Rules* shall have no application to any *Anti-Doping Rule Violation* case where a final decision finding an *Anti-Doping Rule Violation* has been rendered and the period of *Ineligibility* has expired.

6. Written submissions were filed by Mr Hunt as counsel for Mr Gemmell and by Mr David QC as counsel for Drug Free Sport. Triathlon New Zealand indicated that it would abide the decision of the Tribunal but noted Mr Gemmell's positive contribution to that sport.

7. Because of the nature of the issues raised in the submissions, including the novelty of the application, a hearing was held on Monday 19 January 2015.

The Issues

8. Although the submissions covered a variety of matters and circumstances we made clear that only two issues arose in respect to the application:

   (a) Whether the Tribunal had jurisdiction to determine the application;

   (b) If the Tribunal did have jurisdiction whether any reduction should be granted.

9. The essence of the issue raised by DFSNZ in respect to jurisdiction was whether Rule 18.2.1 should be interpreted narrowly to only apply where the new Rules reduced the previous period of sanction applicable to the violation but not where the new Rules were so altered that the facts constituting the earlier violation would no longer be a violation.

10. This possible interpretation was said to be supported by the terms of Rule 18.2 and the reference in that Rule to the principle of "lex mitior" which it was submitted applies only to changes in sanction and not changes in the substance of a violation.

11. DFSNZ's written submissions included advice that DFSNZ had consulted with WADA and been told that there were no relevant memoranda or background papers of assistance and further stated:

> *36. WADA has, however, read the submissions in draft and considers that the narrower approach to the Rule is more appropriate (and it reserves all its rights including its rights of appeal) as this Article was drafted to cover the situations where the same violation is sanctioned in a different fashion under the new Code (as for example in the case of contaminated products, see Article 10.5.1.2).*

12. The Tribunal notes that the CAS decision contained some comment on the scope of lex mitior and the application of Rule 22.1.2 of the 2013 Rules (which is the equivalent of Rule 18.2 of the 2015 Rules). There was also passing reference in

this context to Article 23.5 of the 2015 WADA Code (which appears to be the Code equivalent of Rule 18.2.1). However, the issue now to be determined by the Tribunal was not directly in issue before CAS and accordingly the Tribunal has not attempted to reconcile obiter comments in that decision. We considered various comments in paragraphs 112-115 of the CAS Decision and sought submissions from counsel as to whether and how they might assist on the current application. Ultimately, however, we did not think those paragraphs did assist and we have based our decision on the wording of the relevant rule (i.e. Rule 18.2.1) and its obvious remedial purpose as expounded in this Decision.

Discussion in relation to Jurisdiction

13. The substance of Rule 18.2.1 has appeared in successive re-writes of the Rules, obviously with amendment to capture the date of the applicable re-write. The critical phrase for the purpose of the jurisdictional issue is "in light of the 2015 Rules".

14. Synonyms to the phrase "in light of" are "considering, because of, taking into account, bearing in mind, in view of, taking into consideration and with knowledge of".

15. Neither the phrase itself or the synonyms suggest any limitation or qualification to what it is of the "2015 Rules" which is to be taken into account. There is no reference to lex mitior in Rule 18.2.1 and there is no inter-relationship between Rule 18.2, which does refer to lex mitior, and Rule 18.2.1. Rule 18.2 deals with a limited scope of the retroactive applications of procedural rules which is a quite different issue from that dealt with by Rule 18.2.1.

16. Accordingly the Tribunal can discern nothing in the text or context of Rule 18.2.1 that limits the plain meaning of the phrase "in light of" to exclude the Tribunal's jurisdiction to consider all changes included in the 2015 Rules. This is not the application of a broader interpretation to the phrase "in light of" as was suggested by the DFSNZ submission and the incorporated WADA proposition. This is simply an application of the plain meaning of the phrase. The interpretation suggested by DFSNZ and WADA would require a reading in of words of limitation without any textual or, as the Tribunal understands, any contextual justification.

17. In that latter respect we note that the position in paragraph 36 of the DFSNZ submission which apparently represents an intra-WADA view does not in fact support the proposition it asserts. It is there said that the Article was drafted to

cover situations where the same violation was sanctioned in a different fashion and Article 10.5.1.2 is given by way of example. However, Article 10.5.1.2, and its equivalent provision Rule 10.5.1.2 of the 2015 Sports Anti-Doping Rules, are substantively different from their immediate predecessors - Article 10.5.2 of the 2009 WADA Code and Rule 14.5.2 of the 2014 Sports Anti-Doping Rules. Accordingly to compare the difference in sanction a Tribunal would have to consider the fact that the new Article and Rule 10.5.1.2 relate to "contaminated products" which is a new categorisation expressly created in the 2015 WADA Code and 2015 Rules and was unknown in Article 10.5.2 of the 2009 Code or Rule 14.5.2 of the 2014 Rules (or the 2013 Rules under which Mr Gemmell committed a violation).

18. In short, a Tribunal has to be able to consider the substance of any change in the new Rules in order to accurately identify whether there is any change in sanction and to what it applies. Accordingly, in the Tribunal's view, there is nothing in the example referred to by WADA that justifies the limitation which is suggested, indeed to the contrary, the example illustrates the point that it is necessary to consider and understand the full substance of any change.

19. For these reasons the Tribunal sees no justification for reading down the plain meaning of Rule 18.2.1 and in particular the determinative phrase "in light of". The Tribunal therefore has jurisdiction to consider Mr Gemmell's application.

Application of Rule 18.2.1

20. Given jurisdiction the question for the Tribunal is whether a reduction in the period of ineligibility of 15 months in place by the CAS decision is justified in light of the change in the 2015 Rules which would no longer characterise Mr Gemmell's conduct as a violation.

21. As the DFSNZ submission correctly states, allowing Rule 18.2.1 to apply where rule changes reduce sanctions or alter the substantive elements of a violation does not undermine the anti-doping regime provided the discretion under the Rule is exercised appropriately. Any change to the period of ineligibility does not change the fact that Mr Gemmell has been found to have committed an anti-doping rule violation of the Rule as it existed at the time.

22. What the Tribunal has to decide is whether it is appropriate to modify the sanction which CAS saw fit to impose for that violation on the basis that the WADA sporting community has decided that the earlier rule was too onerous. An athlete today

who replicated Mr Gemmell's circumstances would commit no violation and face no sanction.

23. In the Tribunal's view the fact that the WADA sporting community has decided that the Rule under which Mr Gemmell is presently subject to a 15 month period of ineligibility was too onerous does justify some reduction in that period of ineligibility.

24. Mr Gemmell's period of ineligibility commenced on 12 February 2014. The Tribunal is satisfied that with the overlay of the DFSNZ appeal to CAS that Mr Gemmell has suffered detriment in pursuing career opportunities since the date the violation charges were laid. He has also suffered the stress, publicity and cost consequences of three hearings. As the Tribunal has noted the fact of a violation remains.

25. Under Rule 3.4 of the 2013 Rules, the minimum period of ineligibility that could have been set was 12 months. CAS set 15 months but, of course, was unable to take into account the 2015 Rule change. CAS did, however, note the possibility of Mr Gemmell making the equivalent of a Rule 18.2.1 application. That application and that Rule explicitly focus on the effect of the 2015 Rules change.

Decision

26. Weighing the factors referred to above, the Tribunal has decided that it would be appropriate to reduce the period of ineligibility to expire at midnight on 12 February 2015, being a 12 month period equivalent to the minimum period that could have been imposed under the old Rule 3.4.

DATED 26 January 2015

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Alan Galbraith QC
Deputy Chair