BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 06/15**

BETWEEN	**DRUG FREE SPORT NEW ZEALAND**
	Applicant
AND	**QUENTIN GARDINER**
	Respondent
AND	**TOUCH NEW ZEALAND**
	Interested Party

DECISION OF SPORTS TRIBUNAL
8 July 2015

Hearing:	On the papers
Counsel:	Paul David QC and Isaac Hikaka for Applicant Andrew Skelton for Respondent
Tribunal:	Sir Bruce Robertson (Chair) Dr Lynne Coleman Rob Hart
Registrar:	Brent Ellis

Introduction

1. Quentin Gardiner faced one anti-doping rule violation proceeding of having the presence of a prohibited substance in a sample taken from him. Having admitted the allegation, he wished to be heard as to sanction. The case is unusual only in that counsel have filed a joint memorandum recording an agreed submission as to outcome.

Background

2. A sample was taken from Mr Gardiner after the final of the Touch Nationals on 8 March 2015. The "A" sample tested positive for methylhexaneamine. Methylhexaneamine is a specified substance under class S6 Stimulants on the WADA 2015 Prohibited List. The athlete did not request a "B" sample analysis.

3. On 29 April 2015, Mr Gardiner was provisionally suspended. Anti-doping rule violation proceedings were brought by Drug Free Sport New Zealand (DFSNZ) on 5 May 2015. A violation of Rule 2.1 of the Sports Anti-Doping Rules 2015 (SADR) was admitted by the Athlete in his Notice of Defence on 14 May 2015.

4. Mr Gardiner says that the source of the positive test for methylhexaneamine was the ingestion of The Curse and/or C4 Extreme supplements. He had listed both these products on his doping control form. He has tendered evidence that suggests that The Curse and C4 Extreme historically contained methylhexaneamine, but no longer do so.

5. Mr Gardiner took The Curse during the Touch Nationals competition. He took C4 Extreme the day before the Touch Nationals, three days before testing. He contended that the container of The Curse and/or C4 Extreme that he used at these times must have come from an old batch.

Relevant provisions

6. The 2015 Code has seen significant amendment to the sanctions regime. Previously, the sanction for this kind of violation involving a specified substance would have fallen under Article 10.4, under which if the athlete

could show no intent to enhance sports performance then the Tribunal would arrive at a sanction by assessing the athlete's fault in connection with the violation.

7. Article 10.4 has in effect been replaced by Article/SADR 10.5.1.1. This provision contains a different threshold for its application. After showing how the prohibited substance came to be in his or her system, the athlete must now show no significant fault or negligence if he or she is to avoid the standard two-year period of ineligibility. 'No significant fault or negligence' is a defined term and standard under the Code and has been present since its inception. The enquiry into a plea of no significant fault involves assessing the fault of the athlete in relation to the violation in the circumstances of the case in the context of the Code as a regime under which the athlete has to exercise utmost caution and take all reasonable steps to avoid positive tests. If no significant fault is shown then under 10.5.1.1 the Tribunal has to assess fault to arrive at a sanction between a reprimand and two years ineligibility. In contrast to the approach under the old Article 10.4, this assessment relates to the degree of fault on the part of the athlete that has been considered to be not significant.

8. Under the current SADR the starting point is Rule 10.2. DFSNZ did not contend that the violation was intentional. A two year period of ineligibility therefore applies pursuant to Rule 10.2.2 unless the Athlete can establish grounds for a reduction.

9. The applicable ground could be under Rule 10.5.1.1, which provides:

> Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

10. No Significant Fault or Negligence is defined in the SADR as:

> The Athlete or other Person's establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the

> Anti-Doping Rule Violation. Except in the case of a Minor, for any violation of Rule 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.

11. No Fault or Negligence is defined as:

> The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or had been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Rule 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.

12. As the joint memorandum noted the issues before us are:

(a) Is the Tribunal satisfied that the Athlete has established how the prohibited substance entered his system?
(b) If so, is the Tribunal satisfied that the Athlete can establish no significant fault or negligence?
(c) If so, what sanction is appropriate (between a reprimand and two years of Ineligibility)?
(d) What should be the start date of any period of ineligibility?

Can the Athlete establish how the prohibited substance entered his system?

13. Mr Gardiner said he took two supplements in the period before the test - C4 and The Curse. Both these substances have historically contained methylhexaneamine.

14. Mr Gardiner could have consumed a batch of either C4 and/or The Curse that was produced in a time when methylhexaneamine was still included as an ingredient.

15. DFSNZ accepted this is sufficient for the Tribunal to be satisfied on the balance of probabilities (as required by SADR 3.1) that the substance entered Mr Gardiner's system through his consumption of C4 and/or The Curse that came from an out-of-date batch.

Is the Tribunal satisfied that the Athlete can establish no significant fault or negligence?

16. DFSNZ accepted it was arguable that Mr Gardiner could establish that he had no significant fault or negligence as:

(a) Mr Gardiner does not recall receiving any education on anti-doping matters (DFSNZ has no record of his attendance at an education seminar);
(b) he was previously told by supplement suppliers that The Curse and C4 Extreme did not contain any banned substances;
(c) gym members and team mates had told him that The Curse was ok to use;
(d) he had checked the label of an earlier container of The Curse and an earlier sachet of C4 Extreme and did not see any warnings or indications that they contained banned substances.

17. We find that Mr Gardiner has established no significant fault or negligence.

Sanction

18. What is the appropriate sanction, having regard to Mr Gardiner's degree of fault? This is a fact specific enquiry.

19. Again, having considered the material filed DFSNZ submitted a period has ineligibility of 15 months was appropriate. In the context of the regime of athlete responsibility imposed by the SADR/Code, Mr Gardiner's fault is at the higher end of the scale as he:

(a) Did not examine the labels of the products he actually took;
(b) Sourced the supplements at a discounted rate from a friend, rather than through a reputable supplier;
(c) Did not conduct any internet searches in respect of the products;
(d) Did not contact DFSNZ in respect of the products; and
(e) Used the supplements immediately before and during competition.

20. In the unusual circumstances of the case, DFSNZ noted that the athlete had checked earlier labels of the same product, which did not note any prohibited substance or give a warning. The current stock of the product appears to not contain any prohibited substances. Mr Gardiner has been caught by what appears to be old stock.

21. DFSNZ also noted that the sanctions regime has recently changed. While this case falls under SADR 2015 and the approach to the assessment of sanctions for this kind of violation involving a specified substance has changed fundamentally under SADR 10.5.1.1, DFSNZ accepted that the consequences of the change are unlikely to have been apparent to all athletes as the new Code was introduced. To avoid any perception of unfairness with proceedings under the old Article 14.4, DFSNZ considered sanctions under that Article in reaching its recommendation (even although the range of fault being considered under Article 14.4 was much wider in scope). The parties accepted that 15 months is at the higher end of the sanctions arrived at by this Tribunal in carrying out assessments of fault under the old Article 14.4 of the 2009 Code but perhaps might be considered a lenient outcome under SADR 10.5.1.1 with its different requirements.

22. DFSNZ submitted its approach in this case should not be used as a precedent as the difference between the time of the old Code and the new Code will mean that potential unfairness will not arise.

23. DFSNZ recommended that the period of ineligibility begin from the date of sample collection on 8 March 2015 under Rule 10.11.2 SADR, on the basis of a timely admission from the Athlete. We agree with that approach.

Decision

24. The Tribunal is satisfied that the submissions in the joint memorandum properly reflect the relevant considerations and Mr Gardiner is ineligible from participating in sport, as set out in Rule 10.12 SADR, for 15 months from 8 March 2015.

Dated 8 July 2015

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Sir Bruce Robertson (Chair)