

BETWEEN DRUG FREE SPORT NEW ZEALAND

Applicant

AND KELSEY KENNARD

Respondent

AND NEW ZEALAND FOOTBALL

Interested Party

**DECISION OF SPORTS TRIBUNAL
1 March 2016**

Hearing: 25 February 2016 in Auckland

Tribunal: Sir Bruce Robertson (Chairperson)
Dr Lynne Coleman
Chantal Brunner

Present: Paul David QC, counsel for Applicant
Jude Ellis, Drug Free Sport NZ
Don Mackinnon and Matthew McGoldrick, counsel for
Respondent

Registrar: Megan Lee-Joe

Proceedings

1. Drug Free Sport New Zealand (DFS) alleged that Ms Kennard committed an anti-doping rule violation as evidenced by the presence of a Prohibited Substance, Probenecid, in a sample taken from her in competition on 22 November 2015. This was in contravention of Rule 2.1 of the Sports Anti-Doping Rules 2015 (SADR). On 23 December 2015, without opposition, Ms Kennard was provisionally suspended on the basis that the substantive application would proceed expeditiously. The substantive application for anti-doping rule violation proceedings was filed by DFS on 13 January 2016.
2. Ms Kennard admitted the allegation but asked to be heard as to the appropriate sanction. Counsel for the parties, having exchanged written briefs of evidence and submissions prior to the hearing, agreed as to the version of events set out below. As the case turns on the application of legal principles to an agreed set of facts, Ms Kennard was not required to give further evidence or be cross-examined at the hearing.

Agreed Facts

3. Ms Kennard has played football for a regional team in the ASB National Women's League (NWL) as well as at club level for six years. She is an amateur and has a seasonal involvement in the sport.
4. For various reasons, Ms Kennard had decided not to play in the 2015 NWL season when training commenced in late August 2015 for that competition.
5. In early September 2015, Ms Kennard developed a small lump on her leg which progressively became worse and more painful. She sought treatment from her doctor a few days later although this initial treatment did not resolve the condition and it became more painful. On the evening of 10 September, Ms Kennard attended an Urgent Doctors' clinic and was diagnosed with a bad case of cellulitis. It was at this time that probenecid was administered as part of the protocol treatment for cellulitis. Ms Kennard returned to the clinic the following two evenings and received the

same treatment including a further dose of probenecid on each occasion. Ms Kennard said that it never crossed her mind to mention to the doctors treating her that she was playing football or to check what medication was being administered because she was not playing football at the time having decided not to play in the NWL.

6. On 12 September, following her final treatment at the clinic, Ms Kennard attended her club prizegiving. After speaking to a number of people, she was persuaded to attend training for the NWL team. Ms Kennard attended a training session on 15 September and soon thereafter committed to playing in the NWL for the 2015 season.
7. As part of the NWL team, Ms Kennard attended a DFS seminar on 24 September 2015 having attended another DFS seminar the previous season on 16 October 2014 with the same NWL team. On both occasions, Ms Kennard was provided with a DFS handbook and wallet card containing information on common medications and whether they are prohibited in sport. Ms Kennard did not make any inquiries about the medication she had taken to treat her cellulitis at, or following, the seminar on 24 September 2015. Again, she said that it did not occur to her to do so.
8. In November 2015, Ms Kennard was prescribed iron medication by her doctor. Ms Kennard checked by searching DFS's website whether she was able to take the iron medication given that she was, at that time, playing football.
9. A sample was taken from Ms Kennard after a NWL game on 22 November 2015. The "A" sample tested positive for probenecid. Ms Kennard had been asked to declare on the Doping Control Form any medication or supplements she had taken in the past 7 – 10 days. Ms Kennard disclosed the iron medication but it did not occur to her to disclose the cellulitis medication given the length of time since treatment.

Relevant provisions

10. Probenecid is prohibited in and out of competition under s5. Diuretics and Masking Agents on the World Anti-Doping Code 2015 Prohibited List.

Probenecid is a specified substance. It is used in medical treatment, often in conjunction with antibiotics to improve their effectiveness. The reason for its inclusion in the List is that it can be used to mask the use of steroids.

11. As DFS did not contend that this case involved the intentional use of a specified substance, the standard period of ineligibility is two years under SADR 10.2.2. For cases involving intentional use, the standard period of ineligibility is four years.
12. The provisions of the SADR that allow for the possible elimination or reduction of the standard period of ineligibility are Rule 10.4 (no fault) and Rule 10.5.1.1 (no significant fault or negligence). This is not a case where it was suggested there was no fault under Rule 10.4.
13. Under Rule 10.5.1.1, where the Respondent can establish "No Significant Fault or Negligence" 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 Respondent's degree of fault.
14. The relevant definitions in SADR are:

"No Significant Fault or Negligence":

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.

"No Fault or Negligence":

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.

“Fault”:

Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person’s degree of Fault include, for example, the Athlete’s or other Person’s experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete’s or other Person’s degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete’s or other Person’s departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Rules 10.5.1 or 10.5.2.

15. DFS accepted that the presence of probenecid in Ms Kennard’s sample could be explained by the treatment she received for cellulitis between 10 – 12 September 2015. Further, DFS acknowledged advice from the testing laboratory that the concentration of probenecid in Ms Kennard’s sample would not be expected to have any effect on the steroid profile and that probenecid can stay in the system for a long time.
16. The issues before us are therefore:
 - (a) Is the Tribunal satisfied that Ms Kennard can establish “No Significant Fault or Negligence” in relation to the violation?
 - (b) If so, what period of ineligibility is appropriate having regard to Ms Kennard’s degree of Fault (between a reprimand / no period of ineligibility and two years of ineligibility)?
 - (c) What should be the start date of any period of ineligibility?
17. As Ms Kennard’s counsel contended in their submissions, her position was simple:

- the probenecid came into her system through the emergency treatment she needed to deal with a serious case of cellulitis;
 - at the time she took the probenecid she was not intending to play for Football South in the National Women's League (NWL);
 - as such, at that time she was not a "National Level Athlete";
 - her decision to not make specific inquiries about the medication she was receiving was entirely reasonable in those circumstances;
 - her decision to play football at a national level was made subsequently; and
 - in all the circumstances, her failure to then realise that she could have a banned substance in her system was completely understandable.
18. It was submitted by Ms Kennard's counsel that the appropriate sanction based on the facts was a reprimand with no period of ineligibility. If a period of ineligibility was ordered, it was contended this should be no more than two months.
19. DFS's counsel accepted that it is open to the Tribunal to find this case does not involve significant fault or negligence but stressed that this needs to be carefully considered and did present some difficulties on the facts. DFS did however acknowledge the exceptional circumstances of this case, in particular:
- (a) the emergency nature of the treatment and the clear therapeutic nature of the substance found in the Respondent's system;
 - (b) the state of mind of the athlete at the time of treatment (she did not intend to play in the NWL);
 - (c) the length of time the substance remained in her system; and
 - (d) the change in status of the athlete (from a non-national level athlete to a national level athlete) between the time of taking the prohibited substance and the time of sample collection.
20. If the Tribunal decides this is a case where there was no significant fault or negligence, DFS contended that a period of ineligibility of between 4 to 12 months would be appropriate given the level of carelessness or fault of the Respondent and the principles of the Code.

No Significant Fault or Negligence

21. The World Anti-Doping Agency (WADA) Code (on which the New Zealand SADR are based) was amended in 2015. Previously, Rule 10.4 set out the grounds on which an athlete who tested positive for a specified substance could seek a reduction of the period of ineligibility. He or she had to establish how the substance entered the athlete's system and that the substance was not intended to enhance sport performance. The athlete also had to provide corroborating evidence. Provided those grounds were established by the athlete, the Tribunal would then assess the athlete's degree of fault in determining any appropriate reduction in the period of ineligibility.
22. The 2015 WADA Code has replaced Rule 10.4 with Rule 10.5.1.1. Now, before the Tribunal can consider any reduction of the two year period of ineligibility for cases involving a specified substance, the athlete must first establish that there was no significant fault or negligence in relation to the violation.
23. DFS's counsel contended this is not an easy threshold to meet. He cautioned against reliance on earlier Tribunal cases considering Rule 10.4 which were cited by the Respondent in support of a reprimand only which arguably might not meet the no significant fault or negligence test if decided under the new Code.
24. Ms Kennard is clearly not a drug cheat. However, athletes still have strict obligations under SADR to exercise utmost caution to ensure what they ingest does not contain a prohibited substance. The SADR apply to all athletes who are members of a signatory national sports organisation whether professional or amateur, national level or non-national level, young or old.
25. Ms Kennard's counsel suggested that the likelihood of her being tested outside of the NWL competition was extremely low. This does accord with the practical reality that DFS's resources are limited and testing is therefore targeted at national and international level athletes. However, the fact remains that an athlete in Ms Kennard's position could have been

tested at any time, whether she was competing as a national level athlete or otherwise.

26. In determining whether Ms Kennard bore no significant fault or negligence, we have taken into account all of the factual circumstances involved. As counsel for both parties have identified, there are a number of exceptional circumstances in this case that have led us to the conclusion that, although there was some level of fault on the part of Ms Kennard, it did not amount to significant fault or negligence.

Degree of Fault and Sanction

27. Having concluded that there was no significant fault or negligence on the part of Ms Kennard, we now consider what should be the appropriate sanction having regard to the degree of her fault or negligence.
28. DFS's counsel suggested that it might assist the Tribunal to adopt the approach taken by the Court of Arbitration of Sport in *Cilic v International Tennis Federation CAS 2013/A/3327*. That decision considered the operation of Rule 10.4 and broadly categorised the degrees of fault into bands of "light degree" of fault carrying a sanction range of 0-8 months, "normal degree" of fault with a sanction range of 8-16 months and "significant degree" of fault with a sanction range of 16-24 months.
29. We do not find it necessary to undertake this type of analysis in this particular case. Each case will turn on its own facts and an assessment of the degree of Ms Kennard's fault can be undertaken without having to go through this exercise.
30. We prefer the approach proposed by Ms Kennard's counsel to look at the three occasions where Ms Kennard may have been at fault and make an assessment as to her degree of fault taking into account all relevant circumstances:
 - (a) the visits to the Urgent Doctors' Clinic between 10 - 12 September 2015 where she took probenecid;
 - (b) her attendance at the DFS seminar on 24 September 2015; and

(c) at the time of testing on 22 November 2015.

Visits to the Urgent Doctors' Clinic – 10 – 12 September 2015

31. DFS highlighted that doctor's visits should raise a red flag for athletes as potentially high risk situations where they may be given medication containing a prohibited substance. Athletes are encouraged to carry and show doctors their DFS wallet card for this purpose. In this case, DFS claimed Ms Kennard had attended a DFS educational seminar the previous season and ought to have shown the doctors her wallet card. Further, Ms Kennard had the opportunity to do so on any one of the three evenings, as opposed to this being a one off emergency treatment.
32. An assessment of the Respondent's actions or lack of action needs to be placed into context and take into account her perceived level of risk at the time of treatment. Ms Kennard was intending to take a break from football for a number of months and not play in the NWL and her chances of being subject to drug testing would have been extremely low. She required urgent medical attention to resolve a serious and painful condition.
33. Weighing up these factors, we find that Ms Kennard's failure to disclose her athlete status to doctors and to make inquiries about what medication was being administered was understandable but not totally explicable. Ms Kennard bore some fault but this was towards the lower end of the scale of not significant fault.

DFS seminar – 24 September 2015

34. At the time of the DFS seminar, Ms Kennard had fully committed to playing football in the NWL and had commenced training for this competition. She attended as part of this team, and this education ought to have turned her mind to compliance with the strict drug testing regime. Her case of cellulitis had occurred in the past fortnight and ought to have been fresh in her mind at the time of the seminar.
35. At the hearing, DFS produced the booklet and wallet card it provides to athletes at its seminars. In both, it clearly informs athletes as to common

medications which may contain prohibited substances – including a reference to antibiotics and the use of probenecid with these.

36. In this environment and given the circumstances, we consider that for Ms Kennard to simply say that it did not occur to her to make inquiries about the medication she had recently been given, fell below the standard of what a reasonable athlete in her position should have done. She did not necessarily need to go as far as applying for a Therapeutic Use Exemption which most likely would have been granted in the circumstances. However, we consider that Ms Kennard bore some fault in not taking any steps to check her position either with DFS or internally within the team set up.

Testing – 22 November 2015

37. The issue here is whether Ms Kennard was at fault for not disclosing her medical treatment for cellulitis on the Doping Control Form at the time of testing. On this occasion, we are satisfied that Ms Kennard's non-disclosure is excusable. Some two and a half months had passed since treatment, the probenecid had remained in her system for a very long time, she had only been asked to disclose medication or supplements taken in the past week, and had in fact disclosed her iron medication which she was currently taking and which she had checked on DFS's website was not a prohibited substance.

Decision

38. We have assessed Ms Kennard's level of culpability on each of the above occasions and based on this assessment, we determine that the appropriate sanction is to suspend Ms Kennard for a period of ineligibility of six months.
39. This is the first case involving the application of Rule 10.5.1.1 where the level of sanction has been contested by the parties before the Tribunal. It has highlighted that the Code is stricter than ever before and that athletes need to remain vigilant about their obligations under SADR. Athletes need

to make inquiries if in doubt about their position under SADR, whether playing at the time or not.

Ineligibility start date

40. Ms Kennard's counsel asked, in the event the Tribunal imposes a period of ineligibility, that we consider exercising our discretion under SADR 10.11.2 to start the period of ineligibility from the date of sample collection, in this case, 22 November 2015. The Tribunal may exercise this discretion where the athlete has promptly admitted the anti-doping rule violation. The usual starting point is to provide credit for the period from the date of provisional suspension of the athlete to the date of the decision.
41. Ms Kennard was overseas at the time DFS notified her of the positive test on 21 December 2015. To her credit, Ms Kennard promptly admitted the alleged violation, arranged for legal representation, and a provisional suspension order was able to be made two days later on 23 December.
42. In these circumstances, the Tribunal exercises its discretion to allow the period of ineligibility to start from 22 November 2015. Under Rule 10.11.2, the athlete shall serve at least one-half of the period of ineligibility from the date of this decision. Although six months from 22 November 2015 expires on 22 May 2016, this proviso means the period of suspension will end on 1 June 2016 (being three months from the date of this decision).

Dated: 1 March 2016



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Sir Bruce Robertson (Chairperson)