

BETWEEN **DRUG FREE SPORT NEW ZEALAND**
Applicant

AND **ADAM KING**
Respondent

AND **NEW ZEALAND CRICKET**
Interested Party

**DECISION OF SPORTS TRIBUNAL
DATED 3 APRIL 2017**

Hearing: 22 March 2017 in Wellington

Tribunal: Sir Bruce Robertson (Chairperson)
Paula Tesoriero
Georgina Earl

Present: Paul David QC, counsel for Applicant
Jude Ellis, Drug Free Sport New Zealand
Andrew Skelton, counsel for Respondent
Adam King, Respondent

Registrar: Megan Lee-Joe

Proceedings

1. Adam King has been a member of the Paraparaumu Cricket Club (PCC) since 2011 and also played cricket at the higher representative level for Horowhenua-Kapiti (HK) in the Central Districts Furlong Cup / Hawke Cup cricket competition in 2013 and 2016. His primary role is a medium-fast bowler, but he is also useful as a batsman. In addition to playing for PCC, he has served as the Club Development Officer, and coached and managed teams, all on a voluntary basis.
2. Drug Free Sport New Zealand (DFSNZ) alleged that Mr King breached two Sports Anti-Doping Rules (SADR) in 2014 and 2015:
 - (a) SADR 3.2 (2014) / SADR 2.2 (2015) - Use or Attempted Use by an Athlete of a Prohibited Substance; and
 - (b) SADR 3.6 (2014) / SADR 2.6 (2015) - Possession of a Prohibited Substance.
3. More particularly, DFSNZ alleged:
 - (a) From August 2014 and at various times in 2014, Mr King was in possession of substances, namely nandrolone and testosterone, which were prohibited at all times under S1 Anabolic Agents of the Prohibited List 2014, in breach of SADR 3.6 (2014).
 - (b) From February 2015 and at various times in 2015, Mr King was in possession of substances, namely tamoxifen and anastrozole, which were prohibited at all times under S4 Hormone and Metabolic Modulators of the Prohibited List 2015, in breach of SADR 2.6 (2015).
 - (c) In August 2014 and at various times in 2014, Mr King used prohibited substances, namely nandrolone and testosterone, which were prohibited at all times under S1 Anabolic Agents of the Prohibited List 2014, in breach of SADR 3.2 (2014).
 - (d) From February 2015 and at various times in 2015, Mr King used prohibited substances, namely tamoxifen and anastrozole, which were prohibited at all times under S4 Hormone and Metabolic Modulators of the Prohibited List 2015, in breach of SADR 2.2 (2015).
4. Nandrolone and Testosterone are anabolic steroids used in cycles to build muscle and strength. They are classed as non-specified substances under WADA's 2014 Prohibited List. Tamoxifen and Anastrozole are hormones used to balance the side effects such as the reduction in testosterone production of using anabolic steroids. They are classed as specified substances under WADA's 2015 Prohibited List.
5. Around September or October 2015, DFSNZ was contacted by the New Zealand Medicines and Medical Devices Safety Authority (Medsafe) who advised they had a significant number of emails which might of relevance

for DFSNZ as a result of Medsafe's investigation into internet drug supplier, NZ Clenbuterol.

6. DFSNZ reviewed the names provided by Medsafe and found that Mr King was subject to the SADR through his membership of a cricket club and hence New Zealand Cricket. On 26 February 2016, Medsafe provided full details of Mr King's internet purchases of the prohibited substances from NZ Clenbuterol.
7. DFSNZ commenced an investigation but by the time it attempted to contact Mr King he had left New Zealand in early April 2016 to play and coach cricket at the Shrewsbury Cricket Club in the United Kingdom. DFSNZ contacted United Kingdom Anti-Doping (UKAD) with a view to arrange to test and / or interview Mr King. There appears to have been some delay by UKAD in responding to this request. DFSNZ provided UKAD with information in order to interview Mr King but by the time UKAD sought to contact him in September 2016 he had returned to New Zealand.
8. Mr King was first notified by DFSNZ of the allegations on 23 November 2016. After contacting Mr Skelton to obtain legal advice, Mr King provided a written statement dated 6 December 2016 to DFSNZ admitting that he had ordered, paid for and used the prohibited substances.
9. On 20 December 2016, Mr King was provisionally suspended without opposition by order of the Tribunal.
10. DFSNZ filed its substantive Application for Anti-Doping Rule Violation Proceedings on 20 January 2017. Mr King admitted the violations but asked to be heard as to the appropriate sanction.
11. More particularly, the admissions made by Mr King in his written statement and as tested by cross-examination at the hearing were:
 - (a) On 25 August 2014, he ordered 10ml at 200mg/ml of Nandrolone and 10ml at 100mg/ml of Testosterone through the NZ Clenbuterol website ("first purchase"). His interest was initially piqued through Facebook advertisements and postings which led him to further research the use of these products through online forums and a mutual friend. He also sought guidance from NZ Clenbuterol through an email exchange which he initiated on 18 August 2014 with the query "Please provide me with a price and direction on doing one cycle of Nandralone (Deca), Looking to put on lean and athletic muscle to improve explosive performance in sport, and prevent injury."
 - (b) He received both products around the end of August 2014, and began using them soon afterwards throughout September 2014. The steroids were injected at regular intervals in private.
 - (c) On 2 October 2014, he ordered a further cycle of Nandrolone and Testosterone from NZ Clenbuterol in the same quantities as the first purchase ("second purchase"). Mr King's statement was "By that

stage, the main reason I wanted to complete the cycle was because I liked looking bigger and more muscular. However, overall, the excessive weight gain leading to a loss of agility and flexibility and tendonitis in my knees was detrimental to my cricket”.

- (d) He received both products around 6 October 2014. This time, he said he used the steroids sporadically and eventually finished the products by about late December 2014. When questioned about the date that he finished using the steroids, he said he had not kept a record of the dosages but recalled that he had stopped taking them soon after a serious quad injury from kicking a rugby ball in November 2014 which prevented him from playing sport.
- (e) On 4 February 2015, he ordered 50 capsules at 20mg/capsule of Tamoxifen (brand name Nolvadex) and 50 capsules at 1mg/capsule of Anastrozole (brand name Arimidex) from NZ Clenbuterol (“third purchase”). In his statement, Mr King explained the reason for the third purchase: “In January 2015, I was looking at an online forum and I came across information that indicated that when taking products such as Nandrolone Decanoate and Testosterone Propionate, it is necessary to take other products to balance out your hormones and avoid conditions such as “gynecomastia” (male breast enlargement). I was shocked because I did not know about this when I purchased the Nandrolone Decanoate and Testosterone Propionate products in 2014 and I had finished using these products about 3 or 4 weeks earlier. I was worried that I might have affected my health and thought that I would need to take these other products if I could find out where to purchase them from”. During cross-examination, Mr King also revealed that he had begun experiencing the symptoms of gynecomastia.
- (f) He received both products in early February 2015 and from February until April / May 2015 used them sporadically as they did not seem particularly effective.

Relevant Provisions – SADR 2014 and SADR 2015

- 12. As the violations occurred over the course of 2014 and 2015, the provisions of both the 2014 and 2015 editions of SADR required consideration.
- 13. Both SADR 14.7.4 (2014) and SADR 10.7.4.1 (2015) treat multiple violations committed before an Athlete receives notice of an alleged anti-doping rule violation as a single anti-doping rule violation, and confirm the sanction imposed shall be based on the violation that carries the most severe sanction. It is important however to ensure a proper assessment and consideration of each year as the critical circumstances are not the same. They are interrelated of course but they are separate.
- 14. The SADR changed significantly in 2015 following the introduction of the new WADA Code on 1 January 2015.
- 15. Under SADR 14.2 (2014), the standard period of ineligibility for violations involving the use or possession of any prohibited substance, specified or

non-specified and whether intentional or unintentional, was two years. The two year period could be increased to a maximum of four years under SADR 14.6 (2014) if DFSNZ could establish the presence of aggravating circumstances. Although the commentary to SADR 14.6 notes that the use or possession of a prohibited substance on multiple occasions can amount to aggravating circumstances, the substantive provision provides that "an athlete or other person can avoid the application of this Rule by admitting the Anti-Doping Rule Violation as asserted promptly after being confronted with the Anti-Doping Rule Violation by an Anti-Doping Organisation". Both counsel accepted the maximum sanction for the violations which occurred in 2014 would be a period of ineligibility of two years.

16. In contrast, SADR 10.2.1.2 (2015) provides if DFSNZ can establish to the "comfortable satisfaction" of the Tribunal that Mr King's possession or use of the specified substances, Tamoxifen and Anastrozole was intentional, the period of ineligibility to be imposed is four years.
17. If DFSNZ cannot show that Mr King's violation was intentional, the period of ineligibility is presumed to be two years under SADR 10.2.2 (2015).
18. The sanctions set out in SADR 10.2 (2015) are subject to potential reduction pursuant to SADR 10.4 (No Fault or Negligence) and 10.5 (No Significant Fault or Negligence for an unintentional violation involving a specified substance). Also potentially of relevance was 10.6 including 10.6.3 (Prompt Admission of an Anti-Doping Rule Violation after being Confronted with a Violation Sanctionable under Rule 10.2.1). Although there was initially some reference to these provisions by the time of the hearing it was common ground that they had no application.
19. Accordingly, the sanction to be imposed in this case arises from the early 2015 violations with regard to the hormones Tamoxifen and Anastrozole. Counsel agreed that the sanction would either be four years (if intentional) or two years (if not intentional) without amelioration.
20. The issues for the Tribunal to determine are:
 - (a) Whether DFSNZ can prove to the comfortable satisfaction of the Tribunal that Mr King engaged in conduct in relation to the 2015 violations of use and possession which was "intentional" as defined in SADR 10.2.3 (2015)?
 - (b) Whether Mr King can establish grounds under SADR 10.11.1 and / or 10.11.2 to allow the Tribunal to backdate the commencement of the period of ineligibility?

Submissions

21. DFSNZ bears the onus of establishing to the comfortable satisfaction of the Tribunal that Mr King's conduct in relation to the 2015 violations was intentional as defined. The standard of proof is greater than a mere balance of probabilities but less than proof beyond a reasonable doubt.

22. The term "intentional" is defined in SADR 10.2.3:

"As used in Rules 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk."

23. Mr David acknowledged each case must be assessed on the specific facts and circumstances. The approach he advised the Tribunal to take was to make an assessment on the totality of the evidence and also Mr King's credibility, then apply that to the definition provided in SADR. However, he warned against putting any gloss on the definition as suggested by Mr Skelton in referring to *Drug Free Sport New Zealand v Adam Jowsey* (New Zealand Rugby Union Judicial Committee, 1 November 2016).
24. Mr David submitted that intention in relation to the 2015 violations should be considered in its full and proper context including the related conduct in purchasing and using steroids in 2014. In relation to Mr King's credibility, Mr David contended the contemporaneous email to NZ Clenbuterol precipitating the first purchase demonstrated Mr King's desire to take his cricket to the next level and to improve his sports performance and was at odds with his statements following the allegations that he did not know the sports rules applied to him or indeed that he was in breach of those rules by taking the steroids. The secretive way in which he concealed his use of the prohibited substances was also indicative in DFSNZ's submission of Mr King's knowledge that he was breaching the sports rules.
25. Mr David cautioned that the backdating provisions in SADR 10.11.1 and 10.11.2 should be reserved for exceptional circumstances where actionable delays could be taken into account.
26. Mr Skelton submitted that in relation to both limbs of the definition in SADR 10.2.3 actual knowledge was required to prove intentional conduct. Further, he contended that Mr King would need to have actual knowledge that the hormone products were on the prohibited list or that there was a high probability that they were on the prohibited list. The authority relied upon was *Jowsey*, which Mr Skelton considered was consistent with recent overseas decisions on the point, *The International Tennis Federation v Maria Sharapova* (The Independent Tribunal Appointed by the International Tennis Federation, 6 June 2016) and *USADA v Robert Lea* (American Arbitration Association, Case No. 01-15-0005-6647, 5 January 2016).
27. It was also submitted by Mr Skelton that "there is a difference between knowing that steroids are prohibited in sport and knowing that hormone drugs taken to counter the side effects of steroids are prohibited. The latter requires an even greater level of experience, awareness and understanding of the issues around prohibition of drugs in sport".

28. Mr Skelton said this was a case where Mr King simply did not address his mind to the fact that his conduct was in breach of SADR or that there was a significant risk that he might be in breach of SADR. Mr King was not a high performance athlete, had received no drug education, did not know what was on WADA's Prohibited List and genuinely did not think the sports rules applied to players at club cricket level. Mr King may have known in a general sense that taking steroids was the wrong thing to do and kept his use secret because of the stigma attached to steroid use at a more general level rather than being aware of the adverse consequences for his participation at a sporting level.
29. Mr Skelton also considered Mr King's mental state affected by the following factors was highly relevant to the decisions he made at the time of the purchases:
- (a) persistent injuries frustrating his cricketing career
 - (b) issues with his employment, including disappointment about a job opportunity at New Zealand Thoroughbred Racing
 - (c) the death of his father
 - (d) a significant drop in weight following a burst appendix and surgery.
30. In summary, "even if the Tribunal was to take the view that Mr King's conduct in relation to the 2014 violations was "intentional" it is submitted that the Tribunal must be comfortably satisfied that, independent of the 2014 violations, Mr King's conduct in 2015 was "intentional". This requires the Tribunal to be comfortably satisfied that Mr King knew that hormone drugs (not steroids) used to counter side effects of steroids were prohibited in sport, or that he knew there was a high probability they were prohibited. This requires the attribution of a level of knowledge which it is unlikely Mr King would have had given that he was not a high performance athlete, he had never received any education on drugs in sport and was not even aware of the WADA prohibited list at the time".
31. Mr Skelton asserted that both allowances for delays in the doping control process not attributable to Mr King under SADR 10.11.1 and for prompt admission of the violations once notified by DFSNZ should operate to backdate the period of ineligibility. His contention was that if Mr King's conduct was found to be intentional and therefore subject to a four year period of ineligibility this should start from the date of the last violation in April / May 2015 but that if Mr King's conduct was found to be not intentional and only subject to a two year period of eligibility this should start from February 2016.

Discussion

32. Although it is clear that the 2015 allegations if proven to be intentional carry the more severe sanction, to embrace the full reality of what happened it is necessary to look at the matters chronologically. Mr King consistently denied any knowledge of or intention to breach anti-doping rules. We are not required under the 2014 Rules to assess whether Mr King's conduct was intentional at that time but accept this has relevance to our assessment of the 2015 conduct. The facts and circumstances behind the purchase and use of the steroids are finely balanced.

33. On the one hand, Mr King was adamant that he had no knowledge of what substances were prohibited or that rules which did exist applied to an athlete such as himself who was not a professional and did not play at the higher levels of his sport. At the time Mr King's participation in cricket was limited due to ongoing injuries and his motivation for using the steroids was said to regain weight and muscle lost as a result of his appendix rupturing.
34. On the other hand, we have difficulty with this explanation for someone who had been involved to the extent he had in cricket over a number of years and in an environment where the commitment to rid sport generally of drug use and abuse and the particular risks associated with steroids are widely understood and appreciated. We do not suggest that when saying that in his initial statement to DFSNZ in his evidence before us and during cross examination that he was wilfully trying to mislead anybody. We accept that is now the way in which he recollects matters and that in 2014 he was desperate to regain his sporting fitness. His express desire to "improve explosive performance in sport" as he noted in an email to NZ Clenbuterol on 18 August 2014 speaks volumes as to his desires and what he was intending to achieve. The fact that he did this surreptitiously is neutral but it is dubious that he did not know that there was a regime which was applicable. The presentation and ethos of the websites which he was using and relying upon must have impinged on his understanding of what he was engaged in. Nonetheless he persisted with this course of action.
35. The position in 2015 we see in a clearer light. After the two rounds of the substances which he abused in 2014, Mr King became aware of potential consequences and became concerned about the effect on his own body. When he turned to the Tamoxifen and Anastazole his aim and intention was to rid his body of the effects of the 2014 steroids and to avoid contamination particularly male breast enlargement. We are satisfied that at that point there was no interest in or intention of breaching the anti-doping regime. His sole concern was to overcome that which he had created in 2014 and there is no available evidential basis to conclude that he turned in his mind in any way to the fact that the hormones could be prohibited substances or that he was in breach of the obligations on him as an athlete not to violate the provisions. Accordingly, we find that although he admits a breach in 2015 this was not intentional. We refrain from adding to the various iterations of what intentional means and rely solely on the words of the rule.
36. On our analysis of the overall circumstances in each of the years the prescribed penalty is suspension for two years.
37. Mr King was provisionally suspended 20 December 2016 so that is the starting point for that period subject to the ability for the Tribunal to allow for an earlier date because of delay between the matter coming to attention and proceedings by DFSNZ and an allowance being made because of his early admission of fault and his co-operation with the authorities.

38. The submissions again focussed on the *Jowsey* decision and we have regard to it but each case requires a fact specific assessment. DFSNZ first had information in February 2016. There was inevitably a period of investigation and assessment before they could sensibly talk to Mr King. He had left on a planned trip to the UK before that occurred. Although endeavours were made to enlist assistance of the authorities there by the time practical steps were taken he had returned to New Zealand. We do not see that the concept of delay needs to have a pejorative overtone. It is simply a recognition of what factually occurred. The fact that Mr King was involved in his sport during this period was noted in *Jowsey* and not seen as a factor to mitigate against some allowance being made.
39. There is no question that after he was contacted by DFSNZ Mr King acted responsibly and cooperatively and is entitled to some allowance for that also. Taking the two factors together we have concluded that although the backdating of commencement should be used with caution and reserved for unusual circumstances this is a case where some relief is required. We rule that the two year period of disqualification should commence on 1 May 2016.

Dated 3 April 2017



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Sir Bruce Robertson
Chairperson