

BETWEEN **DRUG FREE SPORT NEW ZEALAND**

 Applicant

AND **LACHLAN FREAR**

 Respondent

AND **NZ ICE HOCKEY FEDERATION**

 Interested Party

**DECISION OF SPORTS TRIBUNAL
8 DECEMBER 2017**

Hearing: 4 December 2017

Tribunal: Sir Bruce Robertson (Chairperson)
 Georgina Earl
 Ruth Aitken

Present: Paul David QC, counsel for Applicant
 Nick Paterson and Jude Ellis, Drug Free Sport NZ
 Lachlan Frear, Respondent
 Liam Collins, counsel for Respondent
 Mr and Mrs Frear in support of Lachlan Frear

Registrar: Neela Clinton

Background

1. In November 2015, Drug Free Sport New Zealand (DFSNZ) received information from Medsafe, following an investigation on behalf of the Ministry of Health, into an online steroid supplier called *NZ Clenbuterol*, which advertised clenbuterol and other performance and image enhancing drugs (PIEDs). Medsafe is the authority responsible for the regulation of therapeutic products in New Zealand and investigates unlawful importation, manufacture, labelling and supply of medicines.
2. Medsafe investigated the email files from *NZ Clenbuterol* and as a result of reviewing the sales transactions between the supplier and its customers, Medsafe advised DFSNZ it had information implicating athletes, who potentially breached sport anti-doping rules (SADR). DFSNZ analysed Medsafe's information, identifying and investigating athletes who were bound by the SADR.
3. Lachlan Frear, the respondent, is an athlete who was identified in this investigation as potentially committing anti-doping rule violations. DFSNZ reviewed its evidence, and on 8 September 2017 notified the respondent of the information in support of the anti-doping allegations, seeking Mr Frear's response. On 22 September 2017, Mr Frear provided a written statement, advising that he has never "intentionally or otherwise taken a prohibited substance" and said, he:
 - a) made the online purchases, at the time aged 18 years of age;
 - b) had previously purchased online "pre-workout protein powders" (attached product advertisements and order examples);
 - c) was targeted by sponsored ads from *NZ Clenbuterol*, because of these online purchases for "fat burners";
 - d) did not undertake any research of the product, but thought it was a fat burner and was attracted to its low price compared to other similar products used;
 - e) did not receive the product and made enquiries regarding its delivery;
 - f) thought he was the subject of an online scam and made another purchase from what he thought was a different supplier, which again he did not receive;
 - g) never considered the matter again, as he was then working full time, accepted the \$60 loss and had no need for such products as it was the offseason and sport was not a priority at that time;
 - h) was aware he was subject to anti-doping testing, but did not know clenbuterol was a banned substance, and thought it was a low- cost alternative fat burner product;

- i) would not take performance enhancing drugs, and had only used fat burner products to avoid weight gain during the off season; and
 - j) was happy to provide a sample for testing, and was adamant he never received, or used clenbuterol.
- 4. DFSNZ assessed Mr Frear's response, and following a review of its investigation material, commenced anti-doping rule violation proceedings.

Proceedings

- 5. Lachlan Frear is a member of New Zealand Ice Hockey Federation which included being a member of both the Southern Stampede Queenstown Ice Hockey Club and NZ U20 Ice Hockey squad.
- 6. DFSNZ alleged that Mr Frear breached two SADRs 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.
- 7. DFSNZ asserted Mr Frear on 5 November 2014 and 7 February 2015 purchased and used one 10ml bottle of clenbuterol spray on each occasion from *NZ Clenbuterol*. More specifically, DFSNZ contended:
 - a) from about 5 November 2014 the respondent possessed clenbuterol, a prohibited substance under the Prohibited List 2014, in breach of SADR 3.6 (2014).
 - b) from about 7 February 2015 the respondent possessed clenbuterol, a prohibited substance under the Prohibited List 2015, in breach of SADR 2.6 (2015).
 - c) on about 13 November 2014 and at various times thereafter, the respondent used clenbuterol, a prohibited substance under the Prohibited List 2014, in breach of SADR 3.2 (2014).
 - d) on about 10 February 2015 and at various times thereafter, the respondent used clenbuterol, a prohibited substance under the Prohibited List 2015, in breach of SADR 2.2 (2015).
- 8. Clenbuterol is prohibited at all times under the Prohibited List 2014 and 2015 as an *S1 Anabolic Agent*. It is a non-specified substance, prohibited both in-competition and out-of-competition.

9. On 27 October 2017, DFSNZ filed its substantive proceedings for anti-doping rule violations. Following confirmation of service and availability of the parties, the Tribunal Chairperson convened a teleconference on 3 November 2017, to consider the provisional suspension application.
10. On 3 November 2017, prior to the scheduled teleconference, counsel for Mr Frear advised that the respondent did not oppose the provisional suspension application, and filed a Form 2 admitting the violations but requested to be heard as to the appropriate sanction.
11. On 3 November 2017, by order of the Tribunal, Mr Frear was provisionally suspended without opposition.

Relevant SADR Provisions

12. As Mr Frear has admitted the attempted use of a prohibited substance, by placing an online order for clenbuterol, the Tribunal is required to determine the sanction which is to be imposed. Under the Rules multiple violations are treated as a single anti-doping rule violation. The sanction imposed must be based on the violation that carries the most severe sanction.
13. As clenbuterol is classified as an *Anabolic Agent* and is not a specified substance, the relevant starting point is SADR 10.2.1 (2015) which provides that the period of ineligibility shall be four years. If Mr Frear can show the violation was not intentional, the period of ineligibility can be reduced to two years under SADR 10.2.2 (2015).
14. SADR 10.11.1 and 10.11.2 (2015) allow the Tribunal to commence the period of suspension earlier than the hearing date where there have been substantial delays and/ or timely admission by the athlete.

Issues

15. The issues for the Tribunal to determine are:
 - (a) whether Mr Frear's conduct in relation to the 2015 violation of attempted use was "intentional" as defined in SADR 10.2.3 (2015);
 - (b) should the period of ineligibility be reduced because Mr Frear bears "no significant fault or negligence" SADR 10.5.2 (2015); and

- (c) whether Mr Frear can establish grounds under SADR 10.11.1 and / or 10.11.2 (2015) to allow the Tribunal to backdate the commencement of the period of ineligibility.

Submissions

16. Mr Frear filed submissions in support, and was cross-examined at the hearing. Mr Frear referred to his previous affidavit, and in addition stated:
- a) in 2014 he was a high school student, in his final year, studying as well as playing ice hockey;
 - b) after finishing school, he was unemployed and concerned about his future, he had a poor diet, gained weight and was not as physically active during the summer months;
 - c) he was also concerned about his physical appearance and his attendance at various upcoming summer events;
 - d) he did not try to conceal the order in any way because he thought the product was legal, shown by the fact he placed the order in his own name and requested delivery to his home address;
 - e) despite the evidence of the courier tracking information, he did not receive the order;
 - f) he did attend anti-doping education, but was inattentive and did not recall advice about online ordering at the seminar;
 - g) his conversation with DFSNZ was limited given the circumstances and context, he was never asked whether he had received or used the product, only to confirm he made the online purchases;
 - h) he accepts unawareness of his duty to comply with strict anti-doping requirements, which included online purchases; and
 - i) he would never cheat at sports, and when he made the online order, he was only concerned with trying to lose weight to improve his physical appearance.
17. Mr Collins asserted that the majority of cases referred to by DFSNZ were not applicable to the circumstances of the current case. Mr Collins cited a number of Tribunal decisions, and submitted that the factors the Tribunal took into consideration in those cases, equally applied in Mr Frear's case and urged the Tribunal to adopt a similar approach. He contended that the sum total of mitigating factors in the circumstances of this case was sufficient to justify a reduction of the ineligibility period and/ or reflected Mr Frear's lack of intention.

18. Mr Collins referred to Mr Frear's youth and inexperience at the time, that he had never been the subject of drug testing and did not have access to team medical professionals for advice or information. Mr Frear had not sought to enhance his sports performance, and was not a sports cheat, Mr Collins argued, noting there had been no previous or subsequent violations since the 2015 breach.
19. Mr Collins submitted that as Mr Frear had never concealed his identity or the delivery address when he placed his online order, this demonstrated Mr Frear's view he was not doing anything wrong.
20. Mr Collins contended Mr Frear's period of ineligibility should be backdated to the date of the last violation, namely 29 January 2015, and sought a reduced period of less than 2 years. He referred to the prompt and timely admission from Mr Frear and, in reference to the time that had elapsed since the breach, and lengthy period of investigation before proceedings were filed, noting it was not in any way attributable to Mr Frear.
21. DFSNZ in its response, stressed that the Tribunal must carefully follow the provisions of the Code and respond only within the context which it specifically provides. Mr David maintained the Tribunal does not have a jurisdiction to weigh and assess individual circumstances except as they relate to the Code provisions.
22. Mr David submitted that intention should be considered in its full and proper context including the related conduct in attempting to purchase clenbuterol in 2014. In relation to Mr Frear's credibility, Mr David noted the fact Mr Frear placed a second online order to *NZ Clenbuterol* following anti-doping education.
23. 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. Mr David maintained the delay was not attributable to DFSNZ. When considering the full circumstances of the investigation, Mr David contended there was no substantial delay to justify backdating, and referred to the large number of athletes and information involved, the complexity of the investigation, the involvement of Medsafe which meant DFSNZ's investigation activities were subject to another agency and consequent restrictions on access to information.

Discussion

Intention

24. Having considered all available material, and having heard and seen Mr Frear giving evidence and while subject to rigorous cross-examination, the Tribunal accepts that it is probable that Mr Frear did not receive either order and consequently did not use the substance. The inferences which DFSNZ sought to draw that Mr Frear had received and actively used the products are speculative and there is no proper evidential foundation for them.
25. As stated, the SADR provide that the Tribunal must impose a sanction of either four years if intentional, or two years if it was not intentional.
26. 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.”
27. The Tribunal is satisfied Mr Frear has established that the violation was not intentional, based on his evidence about his reasons for wanting to purchase the product and how he came across the online site following previous online purchases. The Tribunal accepts that Mr Frear simply did not turn his mind to the fact that his conduct could be in breach of SADR. He was a young man concerned with his body image, who purchased a substance to aid weight loss and not to enhance his sports performance.
28. Mr Frear did not know that the online purchase constituted a breach, as he thought he was purchasing a fat burning substance, and did not consider that such a purchase may infringe anti-doping rules. He did not disregard his obligations, because he never contemplated them in the first instance. Mr Frear gave evidence he was not aware at the time what clenbuterol was, but from the Facebook advertisements, assumed it was a weight loss product.
29. The Tribunal is satisfied that Mr Frear did not have any intention of breaching the anti-doping regime. As a youth, at that stage and time of his life, he was concerned only with his body image and not sporting performance. He had previously used other fat

burning substances, and thought this was a low cost alternative. As the online site offered products similar to the other websites he had visited and purchased from, he did not consider this product required him to exercise caution as an athlete.

30. The Tribunal finds Mr Frear did not consider the stringent anti-doping regime all athletes are subject to due to his limited exposure to the requirements. He was a relatively young and inexperienced athlete who had only recently undertaken his first anti-doping education seminar and had never been previously tested. Even though Mr Frear did not receive or use the substance under the provisions of the Code he committed a violation in attempting to acquire the substance.
31. Therefore, the Tribunal finds that although Mr Frear admits a breach in 2015 this was not intentional. The presumptive penalty for the violation is a two year period of ineligibility.

No Significant Fault

32. Before the Tribunal can consider any reduction of the two year period of ineligibility for cases involving a specified substance, the athlete must establish that there was no significant fault or negligence in relation to the violation.
33. Mr Frear acknowledged he had been “insufficiently careful in researching and placing orders online”. The Tribunal assessed Mr Frear’s credibility in light of written and oral evidence, but there is no basis to support the athlete’s assertions that he bore no significant fault.
34. The athlete’s level of fault is assessed against what a reasonable person acting in accordance with the strict obligations under SADR ought to have done to avoid breaching the rules, considering the perceived level of risk.
35. Having regard to the evidence presented the Tribunal is unable to conclude Mr Frear bore no significant fault or negligence given he never considered his obligations as an athlete. The Code places a heavy responsibility on every athlete to ensure they do not breach the anti-doping regime, but Mr Frear did nothing in that regard. He bought a substance online, and should have been aware of the risk. He did not talk to his fellow team members, or speak to team management. He did not seek advice from a doctor or any medical personnel. He did not check with DFSNZ. He did not undertake any independent research or checks. This is not conduct consistent with the expectations

and obligations imposed by the anti-doping regime and breaches the standards expected of an athlete.

36. It is a high standard, which Mr Frear took no action to uphold. Mr Frear stated the other products listed were more expensive, so he thought Clenbuterol was a legitimate substance, but made no enquiries or conducted any research to ascertain the status of the products. An athlete that viewed an email stating “there is no risk of seizure or confiscation”, should have been apprehensive. Mr Frear exercised no caution whatsoever in purchasing the product. In the context of the Code requirements expected of athletes, this reflects a significant risk and fault on the part of Mr Frear.
37. In the Tribunal’s view there are no factors presented either individually or even in totality of the circumstances to justify a reduction of the ineligibility period. This includes Mr Frear’s lack of intention, although relevant, the Tribunal considers is not sufficient, and there are no other factors to justify a reduction of the two year period.

Backdate Ineligibility Start Date

38. The Tribunal was asked to backdate the period of commencement to 29 January 2015 when the breach was committed. Mr Frear was provisionally suspended on 3 November 2017, so that is presumptively the starting point.
39. The Tribunal accepts the circumstances of Mr Frear’s online purchase have culminated in events he simply never contemplated at the time. However, the obligation that the Code imposes on all athletes is paramount. As Mr Frear failed to consider the requirements of the Code, the provisions to enable the Tribunal to make any allowances in these circumstances, are very limited.
40. The Tribunal has the discretion to back-date the commencement of the ineligibility period in cases of early admission of the doping offence, and Mr Frear’s cooperation with the authorities also requires some consideration. When confronted by DFSNZ, Mr Frear admitted the purchase, has acted responsibly and cooperated, and should also be entitled to have recognition for that.
41. While DFSNZ accepted Mr Frear was entitled to some credit for his timely admission, it urged the Tribunal to use its discretion of backdating with caution and advised it should be reserved for unusual circumstances.

42. The Tribunal concludes although the backdating of ineligibility commencement should be used with caution and reserved for unusual circumstances, this is a case that justifies some allowance. The Tribunal accepts the base facts and breach, but the hearing has been substantially about wider implications advanced by DFSNZ which the Tribunal do not find sustainable.
43. The other issue for the Tribunal to consider was “whether there had been substantial delays in the hearing process or other aspects of *Doping Control* not attributable to Mr Frear”, to enable the suspension period to be backdated. SADR 10.11.1 states:

Delays Not Attributable to the Athlete or other Person

Where there have been substantial delays in the hearing process or other aspects of *Doping Control* not attributable to the *Athlete* or other *Person*, the body imposing the sanction may start the period of *Ineligibility* at an earlier date commencing as early as the date of *Sample* collection or the date on which another *Anti-Doping Rule Violation* last occurred. All competitive results achieved during the period of *Ineligibility*, including retroactive *Ineligibility*, shall be *Disqualified*.

[Comment to Rule 10.11.1: In cases of Anti-Doping Rule Violations other than under Rule 2.1, the time required for an Anti-Doping Organisation to discover and develop facts sufficient to establish an Anti-Doping Rule Violation may be lengthy, particularly where the Athlete or other Person has taken affirmative action to avoid detection. In these circumstances, the flexibility provided in this Article to start the sanction at an earlier date should not be used.]

44. DFSNZ submitted in the context of the investigation that had been undertaken there had been no substantial delay justifying backdating. However, the Tribunal has concluded, an objective consideration of the timeline of the investigation reveals substantial delay.
45. Mr David helpfully provided a timeline of key dates:

August 2014	Medsafe commence investigation into the activities of “NZ Clenbuterol”.
4 November 2014	Lachlan emails “NZ Clenbuterol” and asks about the cost of 10ml to 20ml.
5 November 2014	Lachlan places an order for 10ml clenbuterol and pays \$30.
13 November 2014	Delivery made to Queenstown Alexandra area.
29 January 2015	Second order of 10ml clenbuterol.

7 February 2015	Payment and delivery details provided, delivery made to Queenstown Alexandra area.
September 2015	Ministry of Health charged the supplier.
10 November 2015	Medsafe advises DFSNZ staff that there is a prosecution underway that may be of interest to DFSNZ and procedures would have to be put in place to allow DFSNZ to review information.
26 January 2016	Medsafe invite DFSNZ staff to attend their offices where she can review emails under the supervision of a Medsafe staff member but cannot take any emails or documents out of the Medsafe office.
11, 17 February 2016	DFSNZ staff attends Medsafe office and begins review of initial spreadsheet of names and emails isolated and provided by Medsafe. Lachlan is not identified from that list.
February 2016 onwards	Further investigation into two other persons suspected of being bound by the SADR. This leads to two proceedings for ADRV violations.
13 to 20 June 2016	When operational demands permit, DFSNZ staff returns to the Medsafe office and completes review of the rest of the first approximately 100 names. She does not identify any other athletes potentially bound by SADR.
8 December 2016	DFSNZ staff requests further access at Medsafe offices to complete the review of other emails in the "NZ Clenbuterol" inbox.
12 January to 6 April 2017	Review of all the remaining emails is completed and a list of 107 individuals who may be bound to the SADR is compiled.
11 July 2017	Electronic copies of the emails are released to DFSNZ to allow further investigation.
August 2017	Evidence against a first group of athletes is considered by DFSNZ. The list includes Lachlan.
8 September 2017	Having decided that there is sufficient evidence to bring ADRV proceedings against Lachlan, DFSNZ contacts Lachlan by telephone. He confirmed that he recalled purchasing clenbuterol. Notice of intention to bring proceedings by email.
22 September 2017	DFSNZ receive a written response from Lachlan admitting purchase of clenbuterol on two occasions and denying use.

27 October 2017	ADRV proceedings and an application for provisional suspension are filed.
3 November 2017	Provisional Suspension Order issued.

46. The Tribunal is concerned about the time which elapsed between the matter initially coming to the attention of DFSNZ in 2015, and the subsequent lengthy investigation process before proceedings were filed against Mr Frear in September 2017.
47. While the Tribunal accepts a significant period of investigation was required given the large volume of information to be assessed, the Tribunal remains concerned there were periods of inactivity in the timeline of the investigation by DFSNZ. DFSNZ advised this was due to resource issues and investigation priorities. However, as noted earlier by the Tribunal, under the Code little room exists for the personalised exercise of discretion or assessment of individual culpability. If a possible breach is apparent there must be a timely and disciplined response by DFSNZ to ensure substantive justice is achieved.
48. During 2016, apart from processing violations against two others, it was only “when operational demands permit” that DFSNZ continued reviewing the information. Between June to December 2016, apart from the prosecution of the two others, no other substantive work was undertaken on the Medsafe investigation. The remaining emails at Medsafe were reviewed within three months to compile a further list of athletes by April 2017. Yet it took another four months before DFSNZ made its decision to institute proceedings. The only evidence produced has been emails, there has been no other forensic material produced.
49. What happened meant there was a substantial delay in advancing the investigation of Mr Frear whose case amounted to two relatively small transactions which could have been more speedily identified and processed by DFSNZ. Between January and April 2017, DFSNZ had a list of athletes who had potentially breached SADR, but Mr Frear was not contacted until September 2017.
50. Mr Frear did not seek to avoid detection, and yet through no fault of the athlete, it has taken too long to file proceedings against Mr Frear and for his case to be before this Tribunal.

51. The Tribunal considers Mr Frear is entitled to some allowance for these delays. Accordingly, this factor in combination with Mr Frear's prompt admission should operate to backdate the commencement period of ineligibility to 1 January 2017.

Conclusion

52. A two year period of suspension as required by the Code is imposed on Mr Frear and shall commence from 1 January 2017.

Dated: 8 December 2017



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Sir Bruce Robertson
Chairperson