

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. Mitchell 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 and asked for 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 the following, he:
 - a) made the online purchases, at the time aged 22 years of age;
 - b) had gained weight while studying and discovered "fat burner" products, which he understood were "primarily caffeine" substances;
 - c) had previously purchased online "pre-workout protein powders" (attached product advertisements and order examples);
 - d) was targeted by sponsored ads from *NZ Clenbuterol*, because of these online purchases for "fat burners";
 - e) asked about "cycle lengths" which were not associated with steroids but any supplement or fat burner product;
 - f) 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;
 - g) received a reply email stating "You can expect to burn fat much faster than normal the entire time you are taking it";
 - h) did not receive the product and thought he was the subject of an online scam;and

- i) 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. Mitchell Frear is a member of New Zealand Ice Hockey Federation which included being a member of two national league teams, and the New Zealand ice hockey team.
6. DFSNZ alleged that Mr Frear breached SADR in 2014:
 - a) SADR 3.2 – Use or Attempted Use by an Athlete of a Prohibited Substance; and
 - b) SADR 3.6 2014 – Possession of a Prohibited Substance.
7. DFSNZ asserted Mr Frear purchased a 10ml bottle of clenbuterol spray from *NZ Clenbuterol*. More specifically, DFSNZ contended:
 - a) from 27 October 2014 onwards the respondent possessed clenbuterol, a prohibited substance under the Prohibited List 2014, in breach of SADR 3.6 (2014).
 - b) on about 29 October and at various times thereafter, the respondent used clenbuterol, a prohibited substance under the Prohibited List 2014, in breach of SADR 3.2 (2014).
8. Clenbuterol is prohibited at all times under the Prohibited List 2014 as an *S1 Anabolic Agent*. It is a non-specified substance, prohibited both in 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, 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.
13. As clenbuterol is classified as an anabolic agent and is not a specified substance, the relevant starting point is SADR14.2 (2014) which provides that the period of ineligibility shall be two years. SADR 14.5.2 allows this period to be reduced if Mr Frear did not bear significant fault or negligence.
14. SADR14.9.1 and 14.9.2 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) should the period of ineligibility be reduced because Mr Frear bears “no significant fault or negligence” SADR14.5.2 (2014); and
 - b) whether Mr Frear can establish grounds under SADR 14.9.1 and/ or 14.9.2 (2014) to allow the Tribunal to backdate the commencement of the period of ineligibility.

Submissions

16. Mr Frear filed his submissions in support, and was cross-examined at the hearing. Mr Frear referred to his previous affidavit, and in addition stated as follows:
 - a) he made one online purchase for what he thought was a fat burning substance, but did not undertake any research of the product;
 - b) while unaware of what clenbuterol was, he had not turned his mind to the strict duty the anti-doping regime places on athletes;
 - c) he was now aware that even an attempted online purchase of a banned substance, never used, still constituted a rule violation;

- d) he had never attempted or sought to cheat or illegally enhance his sporting performance;
 - e) in 2014 he was a tertiary student, with little knowledge of anti-doping rules and had not attended drug free sport education seminars;
 - f) his weight gain during this period was of concern because he had various summer social events to attend and he thought the product would help him with his weight loss and body image issues;
 - g) as a student with limited means, he was attracted to the low cost of the product in comparison to others he had purchased;
 - h) the purchase was made in his own name and delivery to his home address, he did not attempt to conceal the purchase in any way, as he did not think it was illegal;
 - i) despite the courier tracking information provided, he never received delivery of the package; and
 - j) he never followed up delivery of the order, as he was busy trying to complete his course studies, and simply thought he was the subject of an online scam.
17. Mr Collins stated the period of ineligibility should be reduced to less than two years and submitted Mr Frear's youth and inexperience were relevant factors for consideration. He also referred to Mr Frear's lack of anti-doping education, and his lack of access to team medical personnel for advice and support. He noted that Mr Frear had never been previously tested, nor had any doping infringements either previous or subsequent to 2014. Mr Frear had bought the product for weight loss purposes and not to enhance his sports performance.
18. Mr Collins maintained it was appropriate to commence the period of ineligibility from 27 October 2014. As to relevant factors for backdating the suspension period, Mr Collins asserted the relevance of Mr Frear's cooperation, and his timely response. In contrast, Mr Collins referred to DFSNZ's significant delays in bringing proceedings against Mr Frear, which had hampered Mr Frear's ability to provide evidence in support. Mr Collins noted that the delays had in no way been attributable to Mr Frear, who had not sought to avoid detection or frustrate the investigation in any way. Mr Collins argued that DFSNZ had information since 2016, but had prioritised other investigations, which was not Mr Frear's fault, given the time that has elapsed since the attempted purchase was made.
19. DFSNZ submitted that Mr Frear could not show no significant fault, and was not entitled to reduce the period of ineligibility. DFSNZ contended while Mr Fear was entitled to

credit for the period from the provisional suspension, no further allowances should be made to backdate the commencement date of the sanction, as no delays were attributable to DFSNZ. Mr David argued the time taken for the investigations was justified and there was no substantial delay, when considering the full circumstances of the investigation. He referred to the number of athletes involved, the complexity of the investigations and the volume of information to be assessed. Also of relevance was the fact that the information originated from Medsafe, which meant access to the information was restricted.

Discussion

No Significant Fault

20. Mr Frear is liable to a sanction of two years. 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.
21. 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. The Tribunal is not persuaded Mr Frear has established this defence.
22. The SADR definition states:

No Fault or Negligence: The *Athlete’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 been administered the *Prohibited Substance or Prohibited Method*.

No Significant Fault or Negligence: The *Athlete’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*.

23. 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. Based on the evidence presented, the Tribunal finds Mr Frear’s fault was significant.

24. Mr Frear exercised no caution whatsoever in purchasing the product given the obligations on athletes under the Code. A reasonable athlete that viewed an email stating “there is no risk of seizure or confiscation” should have raised concerns. Mr Frear noted the cost of the other substances, assuming the low cost of clenbuterol meant it was likely to be legitimate. This indicates Mr Frear did consider the possibility the other substances therefore may not be legal. Despite this consideration, Mr Frear did not undertake any research, or obtain any further information about the substance he was purchasing online. Mr Frear did not ascertain the status of the product by checking with a team member, coach, DFSNZ, or seek advice from a doctor or any medical personnel. In the context of the Code requirements, this is not conduct that is consistent with the high expectations imposed on athletes to ensure compliance with the anti-doping regime.
25. Mr Frear has played ice hockey at an international level since 2008, having competed in three world championships. Mr Frear purchased a substance online without any consideration of the risks and in breach of the high standards expected of all athletes. He exercised no caution whatsoever in purchasing the product. The Code places a heavy responsibility on every athlete to ensure they do not breach the anti-doping regime. It is a high standard, which Mr Frear took no action to uphold, and reflects a significant risk and fault on the part of Mr Frear.
26. In this context, having considered the totality of the circumstances, as Mr Frear does not satisfy the threshold of no significant fault or negligence, the standard period of ineligibility of two years must apply.

Backdate Ineligibility Start Date

27. Although Mr Frear is not entitled to a reduction of the standard two year period of ineligibility, the Tribunal was requested to backdate the period of commencement to when the breach was committed namely 27 October 2014. Mr Frear was provisionally suspended on 3 November 2017, so that is the presumptive starting point.
28. 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.

29. 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.
30. While DFSNZ accepted Mr Frear was entitled to 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.
31. 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.
32. 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. Rule 14.9.1 provides:

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.

33. 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.
34. 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.
35. Mr David helpfully provided the key dates and background to the investigation:

August 2014	Medsafe commence investigation into the activities of "NZ Clenbuterol".
26 October 2014	Mitchell asks about cycle length and prices for clenbuterol from "NZ Clenbuterol".

27 October 2014	Mitchell places an order for 10ml clenbuterol.
28 October 2014	Mitchell pays \$30.
29 October 2014	Delivery made to Port Chalmers - Wharf Industrial area.
September 2015	Ministry of Health charge 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. Mitchell 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 Mitchell.
12 September 2017	Having decided that there is sufficient evidence to bring ADRV proceedings against Mitchell, DFSNZ sends a notice of intention to bring proceedings by email.

22 September 2017	DFSNZ receive a written response from Mitchell admitting the purchase of clenbuterol and denying use.
27 October 2017	ADRV proceedings and an application for provisional suspension are filed.
3 November 2017	Provisional Suspension Order issued.

36. 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, 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.
37. DFSNZ submitted the Code did not set timeframes for investigations, only that decisions to assess violations had to be made “efficiently and without undue delay”. Mr Frear’s breach relates to a single transaction committed in 2014. 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.
38. The Tribunal finds there were substantial delays in advancing the investigation of Mr Frear, whose case amounted to a single transaction from 2014 which could have been more speedily identified and processed by DFSNZ.
39. 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.
40. 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.

41. 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

42. 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