BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 09/17**

BETWEEN	**DRUG FREE SPORT NEW ZEALAND**
	Applicant
AND	**CHRISTOPHER WARE**
	Respondent
AND	**NZ CRICKET**
	Interested Party

DECISION OF SPORTS TRIBUNAL
21 DECEMBER 2017

Hearing: 19 December 2017 by telephone conference

Tribunal: Dr James Farmer QC (Deputy Chairperson)
Paula Tesoriero
Chantal Brunner

Present: Isaac Hikaka and David Bullock, counsel for Applicant
Jude Ellis, Drug Free Sport NZ
Christopher Ware, Respondent
Andrew Skelton, counsel for Respondent

Registrar: Neela Clinton

Background

1. This is the fourth case to come to the Tribunal arising out of the online supply to athletes of a prohibited drug known as clenbuterol and other performance and image enhancing drugs (PIEDs) by a firm called *NZ Clenbuterol.* Similar cases have been heard by the New Zealand Rugby Union Judiciary Committee which has a similar anti-drug jurisdiction in respect of rugby players to that of this Tribunal in respect of other sports. There are expected to be many more similar cases arising from an investigation into *NZ Clenbuterol* by Medsafe which passed data relating to athletes who had ordered prohibited drugs (primarily clenbuterol) online.

2. The information concerned was supplied to Drug Free Sport New Zealand (DFSNZ) by Medsafe in November 2015. Medsafe is the authority responsible for the regulation of therapeutic products in New Zealand and investigates unlawful importation, manufacture, labelling and supply of medicines.

3. 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.

4. Christopher Ware, the respondent, is an athlete who was identified in this investigation as potentially committing anti-doping rule violations. DFSNZ reviewed the information given to it concerning Mr Ware and on 12 September 2017 notified the respondent of the information in support of the anti-doping allegations, seeking his response. On 29 September 2017, Mr Ware provided a written statement, admitting the violations.

5. DFSNZ assessed Mr Ware's response, and following a review of its investigation material, commenced anti-doping rule violation proceedings. Because of his admission, this proceeding is concerned only with the question of penalty.

Proceedings

6. Chris Ware was a member of New Zealand Cricket at the time of the alleged breaches, playing amateur cricket for Carisbrook Dunedin Cricket Club and Union Cricket Club in Oamaru between 2012 and 2016. Since late 2015 he has played club cricket for Astley & Tyldesley Cricket Club in England. He is not, and never has been, a

professional cricketer, a matter which he relies on and to which we return later in this Decision.

7. DFSNZ alleged that Mr Ware breached two Sports Anti-Doping Rules (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.

8. DFSNZ asserted Mr Ware in 2014 and 2015 purchased and used one 10ml bottle of clenbuterol spray on each occasion from *NZ Clenbuterol*. More specifically, DFSNZ contended:

   a) from about 3 October 2014 and 27 November 2014 Mr Ware possessed clenbuterol, a prohibited substance under the Prohibited List 2014, in breach of SADR 3.6 (2014).
   b) from about 23 January 2015 Mr Ware possessed clenbuterol, a prohibited substance under the Prohibited List 2015, in breach of SADR 2.6 (2015).
   c) on about 3 October 2014 and at various times thereafter, Mr Ware used clenbuterol, a prohibited substance under the Prohibited List 2014, in breach of SADR 3.2 (2014).
   d) on about 23 January 2015 and at various times thereafter, Mr Ware used clenbuterol, a prohibited substance under the Prohibited List 2015, in breach of SADR 2.2 (2015).

9. 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.

10. 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.

11. On 3 November 2017, by order of the Tribunal, Mr Ware was provisionally suspended without opposition.

12. On 17 November 2017 counsel for Mr Ware filed a Form 2 admitting the violations but requested to be heard as to the appropriate sanction.

Relevant SADR Provisions

13. As Mr Ware has admitted the use of clenbuterol, a prohibited substance, 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.

14. 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 Ware can show the violation was not intentional, the period of ineligibility can be reduced to two years under SADR 10.2.2 (2015).

15. 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

16. The issues for the Tribunal to determine are:

(a) whether Mr Ware's conduct in relation to the 2015 violation of attempted use was "intentional" as defined in SADR 10.2.3 (2015); and

(b) whether Mr Ware 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.[1]

Submissions

17. Mr Ware filed submissions in support, and was cross-examined at the hearing. Mr Ware referred to his previous statement, and in addition stated:

a) he was an amateur club cricketer who had never played at first class level;
b) he was not a high performance athlete and had never been part of a high performance programme;
c) he had never been drug tested or part of any registered drug testing pool;
d) he had never received any drug education;

[1] A defence of "no significant fault" was abandoned before the hearing.

e) he was unaware of the WADA prohibited list prior to being contacted by DFSNZ in September 2017;
f) he did not know to check whether a substance was prohibited;
g) he purchased clenbuterol to assist him to reduce his weight, as dieting had not been effective for him in the past;
h) he did not know that clenbuterol was banned in sport and that purchasing and using it would constitute an anti-doping violation.

18. In cross-examination and questioning from the Tribunal, Mr Ware admitted that he knew in general that steroids and performance-enhancing drugs were banned. He admitted that he had known of at least one international cricketer who had been banned for taking drugs but did not know that Shane Warne had been banned for a period. He said that he had had no previous knowledge of clenbuterol before he found it advertised by *NZ Clenbuterol* via a Google search for weight loss products.

19. There was put into evidence the chain of emails between Mr Ware and *NZ Clenbuterol* relating to his purchases of clenbuterol. The first emails date from the end of September/beginning of October 2014 with his initial order being made shortly afterwards. A further order was made in November 2014 by email exchange. Those early emails were brief and related solely to the orders made. Other products sold by *NZ Clenbuterol* were not listed.

20. However, on 14 January 2015, *NZ Clenbuterol* sent a rather longer email to Mr Ware in the nature of a price list and, after pricing clenbuterol in different quantities then listed 11 other products (and their prices) that were available for supply. The first two listed were "Testosterone Enanthate" and "Testosterone Propionate", both prohibited substances. These were followed by a statement as to how delivery was effected. Within that statement was included a sentence which read: "There is no risk of seizure or confiscation."

21. Mr Hikaka, counsel for DFSNZ, questioned Mr Ware closely on this email and it was put to him that at least from this point he must have been aware that *NZ Clenbuterol* was supplying products that were prohibited for sporting purposes. His response was that he only "skimmed" the email and did not pick up on the testosterone references. He said that he does not recall seeing the no risk of seizure statement.

22. Mr Ware's counsel, Mr Skelton, submitted that the previous supply history through emails which did not contain this detail should be taken into account when assessing

his evidence that the references to testosterone and no risk of seizure did not register on him when he read the email of 14 January.

23. The Tribunal considered that Mr Ware was generally a credible witness, notwithstanding that his evidence was being given from England by telephone, and are prepared to accept what he says on this topic.

24. Mr Ware said, in response to a question from the Tribunal, that he had thought that clenbuterol was a fat burner. His evidence was that he was "just a young guy trying to lose some weight, not a drug cheat looking to cheat [his] way into anything professional". He did lose some weight but did not re-order or use the product after January 2015.

Discussion

Intention

25. 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."

26. There are 2 limbs to the definition. The first requires knowledge by the athlete that he or she engaged in conduct that he or she knew constituted an anti-doping rule violation. The second (alternative) requires knowledge by the athlete that there was a significant risk that the conduct might constitute or result in a rule violation and manifestly disregarded that risk.

27. As stated, the SADR provides that the Tribunal must impose a sanction of either four years if intentional, or two years if it was not intentional.

28. Having considered all available material, and having heard Mr Ware giving evidence the Tribunal accepts that Mr Ware did not know that clenbuterol was a prohibited substance under the Rules. He therefore could not have known that ordering and

using the product constituted an anti-doping rule violation. The first limb of SADR 10.2.3 is not therefore established. That was fairly conceded by DFSNZ.

29. Consideration of the second limb turned on the interpretation that was adopted. Mr Skelton relied in this respect on the approach taken by the New Zealand Rugby Union Judicial Committee which, in respect of rugby players, exercises precisely the same jurisdiction on the same wording. In *DFSNZ v. Jowsey* (20 October 2016), the first of the clenbuterol cases, the Judicial Committee, chaired by the Hon. Barry Paterson QC, said that the knowledge required was that there was a high probability that clenbuterol was on the prohibited list and that without that knowledge "an athlete can hardly be said to be cheating" (para. 20). The Committee then considered facts relating to Mr Jowsey that are virtually indistinguishable from those relating to Mr Ware. The same email listing testosterone and other prohibited products and stating "no risk of seizure or confiscation" was received by Mr Jowsey, he admitted that he knew that steroids were prohibited and his motivation for buying the clenbuterol was to lose weight. In the case before us, Mr Ware gave evidence of many and various attempts (including dieting) that he had tried to lose weight before turning to clenbuterol.

30. Mr Hikaka submitted to the Tribunal that the approach in *Jowsey* was incorrect, a matter to which we return below. However, he responsibly and fairly conceded in the course of presenting his submissions that if the *Jowsey* approach is correct, then Mr Ware will have discharged the onus that is on him to establish that he did not have the requisite intention to breach the Rule.

31. That is sufficient to dispose of this aspect of the case before the Tribunal. It follows, in accordance with rule 10.2.2, that the period of ineligibility for Mr Ware is 2 years.

32. DFSNZ, in its written submissions, criticised *Jowsey* on the ground that the second limb does not refer to knowledge of the prohibited list or to knowledge of a high probability that a substance is prohibited (para. 18). It says that the second limb of the test "requires proof by the athlete of the absence of awareness of risk and of conscious risk taking" (para. 16). Our assessment of *Jowsey, DFSNZ v. Lachlan Frear*, a decision of this Tribunal (differently constituted) delivered on 8 December 2017 and of the case before us is that the key fact, common to all 3 cases, is that the athlete purchased clenbuterol because of a belief that it was a weight-loss product and because of a desire to lose weight for reasons other than sport. On that assessment, whether or not the Judicial Committee restated the rule incorrectly is neither here nor there. The result on the facts would have been the same. As it was put by the Tribunal in *Lachlan Frear*

(para. 28): “He did not disregard his obligations, because he never contemplated them in the first instance” (given that he thought he was buying a weight loss product). That did not however mean that he was not careless in failing to investigate the product further. The Tribunal found that Mr Frear was careless and had not complied with his responsibility to ensure that he did not breach the anti-doping regime. For that reason, the mitigating defence of no significant fault was not available to him. But that is a different issue from the one that we are considering here as to whether there was an intention to break the rule under either limb.

33. For the sake of completeness, we record that Mr Skelton raised a proportionality argument to the effect that “to ban a club cricketer such as Mr Ware from all sport for a period of four years in respect of errors of judgment that occurred three years ago when he was trying to lose some weight” would seem harsh. He relied in this respect on commentary on the 2015 Code by Paul David, A Guide to the World Anti-Doping Code, 3rd ed., 342-344. In the light of our finding that Mr Ware did not have an intention to cheat, with the result that the mandatory four year period was reduced to two years, we make no ruling on this argument and leave it to be dealt with in a future case.

Backdate Ineligibility Start Date

34. The Tribunal was asked to backdate the period of commencement to 3 November 2016, one year before the date of the provisional suspension, allowing Mr Ware to serve one half of the period of ineligibility from the date of provisional suspension, 3 November 2017.

35. Mr Ware was provisionally suspended on 3 November 2017, so that is presumptively the starting point.

36. It is not disputed that Mr Ware did make timely admission and otherwise cooperated. That entitles Mr Ware to consideration of backdating the start of the two year ineligibility period under rule 10.11.2.

37. 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 Ware”, 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.]

38. 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.

39. DFSNZ helpfully provided a timeline of key dates:

August 2014	Medsafe commence investigation into the activities of "NZ Clenbuterol".
1 – 3 October 2014	Mr Ware purchases and takes delivery of 10ml of clenbuterol from "NZ Clenbuterol".
25 – 27 November 2014	Mr Ware purchases and takes delivery of 10ml clenbuterol from "NZ Clenbuterol".
16 – 23 January 2015	Mr Ware purchases and takes delivery of 10ml clenbuterol from "NZ Clenbuterol".
September 2015	Ministry of Health charges Joshua Townshend.
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. Chris Ware 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 Mr Ware.
12 September 2017	Having decided that there is sufficient evidence to bring ADRV proceedings against Mr Ware, DFSNZ sends him a notice of intention to bring ADRV proceedings by email.
29 September 2017	DFSNZ receives a written response from Mr Ware admitting the violations.
27 October 2017	ADRV proceedings and an application for provisional suspension are filed.
3 November 2017	Provisional Suspension Order issued.

40. 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 Ware in September 2017.

41. In both *DFSNZ v. Mitchell Frear* and *DFSNZ v. Lachlan Frear* (both decisions delivered on 8 December 2017), the Tribunal found that there was a substantial delay in advancing the investigation and making contact with the athlete and that the athlete was entitled to some allowance for both the delays and for prompt admission. We agree with that analysis on facts which do not relevantly differ from those cases.

Conclusion

42. We therefore impose a two year period of suspension on Mr Ware but rule that the period shall commence from 1 January 2017.

Comment

43. At the start of the presentation of submissions, Mr Hikaka indicated that DFSNZ's view was the *Jowsey* decision was incorrect. Mr Skelton, for Mr Ware, had signalled his intention to rely on that case as a precedent that should be followed by the Tribunal. The particular ruling to which exception was taken related to the second limb of the definition of "intentional" in Rule 10.2.3 which provides that an athlete "cheats" if he or she "knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded the risk". As to this, the Judicial Committee in *Jowsey* said:

> "On the facts of this case, the second limb of the rule has application if Mr Jowsey knew that there was a high probability that by using or possessing Clenbuterol, he was committing an anti-doping violation. Such a violation would only be committed if Clenbuterol was on the prohibited list. Thus the knowledge required under the second limb was that there was a high probability that Clenbuterol was on the prohibited list. Without such knowledge, an athlete could hardly be said to be cheating." (para. 20)

44. Mr Hikaka also advised that there were three more decisions pending from the Rugby Union Judicial Committee involving athletes obtaining substances on-line from *NZ Clenbuterol* and that in the meantime DFSNZ wished to "reserve its position" in relation to the legal analysis that should apply in the present case. When pressed by the Tribunal for clarification of this statement, he said that DFSNZ would "not be pushing too hard [in the present hearing] why the reasoning in *Jowsey* was incorrect". He explained that when the "first full set" of Clenbuterol decisions was out, DFSNZ would have to consider its position further if in its view there were inconsistencies between those decisions and the Code and/or inconsistencies between this Tribunal and the Rugby Union Judicial Committee. In that context, he said that DFSNZ did not accept that it would be unfair to appeal the *Lachlan Frear* decision of the Tribunal that was delivered on 8 December 2017. That decision does not refer expressly to *Jowsey* but one view of the findings by the Tribunal is that they are consistent with the *Jowsey* approach.

45. Mr Hikaka also indicated that DFSNZ was of the view that the findings of substantial delay in the investigation and processing of the prosecutions that were made by the Tribunal in both *Frear* decisions were wrong and that it reserved its position in relation to the similar defence, based on the same facts, that had been raised in the present case.

46. The Tribunal responded to these indications with a direction that DFSNZ should present its full case and submissions to it and that it was not acceptable for DFSNZ to "reserve its position". This Mr Hikaka, responsibly, then did.

47. Our reasons for giving this direction need to be publicly stated in this Decision. This we do as follows:

(1) The only meaning that can be given to DFSNZ reserving its position was that it had a position (that would not be spelled out in full to the Tribunal in this hearing) that it intended to advance on an appeal to the Court of Arbitration for Sport (CAS) against one or more or all the decisions of the Judicial Committee of the Rugby Union and of this Tribunal that dealt with the two issues identified by Mr Hikaka as being (in DFSNZ's view) incorrect.

(2) CAS has, through its case law[2], ruled that appeals before it are to be heard *de novo* and that "its scope of review is not limited to consideration of the evidence that was adduced before the body that issued the challenged decision. Rather, it can extend to all evidence submitted to the Panel". Notwithstanding that such an approach does not accord with the limitations that are recognised in the major common law countries (including New Zealand) on the admission of new evidence and the presentation of new arguments, it is not our role to criticise the case law of CAS. However, when it appears to the Tribunal that its processes are being hampered by full evidence and arguments not being presented to it, we do believe that it is incumbent on us to point out that there is a danger that the initial hearing by the Tribunal becomes something of a dummy run of the real case to be presented on appeal and that a failure to lead relevant evidence which impacts the

[2] See, for example, CAS 2015/A/4059, applied recently by a Panel in 2017/A/4937 (*DFSNZ v. Murray*) in which evidence and arguments were heard over 3 days, as compared with a little over 1 day in the Tribunal (a reversal of the normal situation where an appeal hearing takes considerably less time than the initial hearing because the evidence has been given at the initial hearing and is only exceptionally added to and where the arguments are reduced and refined).

decision can simply be patched up on appeal by calling witnesses who should have been called in the first instance.

(3) That will be true also in relation to submissions if the appellant "reserves its position" and "pulls its punches" and only presents its full arguments on appeal. In our view, parties appearing before the Tribunal have an obligation to respect the authority of the Tribunal and not indulge in strategies that hamper the ability of the Tribunal to give an optimal decision.

(4) Just as seriously, it is grossly unfair to an athlete if he or she does not face an appellant's real case until it reaches the CAS. In that situation, an athlete will have incurred legal and other costs at two levels of the process when only the appellate body is seised of the full evidence and argument on the issues. That in many instances will make the decision of the Tribunal largely irrelevant or readily distinguishable on the grounds that there is now new or different evidence or arguments that are being advanced to the Arbitration Panel. That outcome does little to engender public confidence in the process of sport adjudication.

Further Comment

48. In the present case, Mr Ware said that he had never been a high performance athlete or part of any high performance programme or of any registered drug testing pool. He had never been drug tested or received any education on drugs in sport, including from clubs or representative teams or DFSNZ. The same sort of evidence was given by Mitchell Frear, who nevertheless acknowledged to the Tribunal in his case that he had been "insufficiently careful in researching and placing orders online" (para.21), which was enough to dispose of his no significant fault defence. Similarly, Mr Jowsey was an amateur rugby player who the Rugby Union Judicial Committee found did not have an intention to cheat under either limb of the definition of "intentional", though it did find that he was negligent in not enquiring further as to whether clenbuterol was a prohibited substance so that "no significant fault" was not available to him as a defence either.

49. Given the importance of the anti-drug regime, we think it would be undesirable if amateur or club athletes receive more favourable decisions from adjudicating bodies than elite or professional athletes because of the fact that the latter are exposed to a higher degree of drug education and awareness than the former. There is a responsibility on all athletes to observe the rules. It is also incumbent on the clubs and coaches to take the initiative and invoke the resources of DFSNZ to ensure that the

drug education programme extends into all corners of competitive sport, whether professional or amateur.

Dated: 21 December 2017

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Dr James Farmer QC
Deputy Chairperson