

BETWEEN

DRUG FREE SPORT NEW ZEALAND

Applicant

AND

BEN QAUQAU-DODDS

Respondent

DECISION ON THE ANTI-DOPING VIOLATION APPLICATIONS

21 December 2017

Hearing: 7 December 2017 in Wellington

Committee: Barry Paterson QC (Chair)
Kevin Bell
Bernie Upton

Present: Paul David QC, Counsel for Applicant
Jude Ellis an officer of the Applicant
Andrew McCormick, Counsel for Respondent
Ben Qauqau-Dodds, Respondent

Registrar: Keith Binnie

Introduction

1. The respondent (Mr Qauqau) has admitted the following anti-doping violations under the Sports Anti-Doping Rules 2014 (SADR).
 - (a) Being in possession of Metandienone in breach of SADR 3.6;
 - (b) Using or attempting to use a prohibited substance in breach of SADR 3.2 from 10 May 2014 onwards; and
 - (c) Attempting to use Metandienone on or about 25 July 2014 in breach of SADR 3.7.
2. The issue for determination is the sanction to be imposed upon Mr Qauqau.

The Violations

3. Mr Qauqau ordered a product called Dianabol which contains a prohibited substance Metandienone online from the NZ Clenbuterol website (at that time known as NZ Gear). The first order was placed on 8 May 2014 and this consignment was received and consumed. A further order was placed on 25 July 2014 and this order was received but Mr Qauqau says that he threw it away. He acknowledged enquiring about an order in June 2014 but did not proceed with the order.

Mr Qauqau's Position

4. Mr Qauqau is a 26 year old New Zealand citizen born of a Fijian father and a Māori mother. He has played rugby throughout his life and his father played for Otago while his paternal grandfather played for Fiji.
5. He was educated in Dunedin and spent three years in the First Fifteen of McGlashan College. He was regularly selected for Otago age group representative teams and was selected to attend the New Zealand under 17 training camp. Most of his rugby has been played on the wing.
6. He played senior rugby in Dunedin in 2010, then went to Australia for two years but returned in 2013 and was again selected for his club's premier team. He played for that team in the years 2014 to 2016 and played approximately two-thirds of the game in 2017 when he had a season

interrupted by illness. He has played for the Otago Māori team every season since 2013.

7. In 2015, Mr Qauqau enrolled at the College of Education at Otago University to train to become a primary school teacher. He is due to graduate next month.
8. His explanation for using the prohibited substance was that he was incredibly naïve and made the decision without any appreciation of what medical consequences might follow for him. He never for a moment thought he could get into trouble with the New Zealand Rugby Union for making these orders.
9. He has not received any education from anybody about performance enhancing drugs nor has he ever been tested by the drug testing regime. His position is that he did not think that ordering the steroids would be a problem for him. He now realises he made a big mistake.
10. His explanation for purchasing and using the substance was that he did it out of curiosity. He was hoping to put on muscle and just wanted to see how it went. He acknowledged that he had done some research on the drug and thought if it led to a physical change in him he could take it without much health risk. Mr Qauqau's first order was made after he enquired as to how much it cost for six weeks of Dianabol. The reply was 20mg (2 pills per day) would be sufficient and offered to supply these at a price of \$160. Mr Qauqau ordered two cycles of the drug, gave an address in Dunedin and asked that the package be addressed to "Bryce". The next day he changed the order to one cycle and the recipient's name to "Blake".
11. The July order was for 126 Dianabol pills and although DFSNZ does not have evidence that these pills were delivered, Mr Qauqau has admitted that they were received. In his June enquiry, which presumably did not lead to delivery of the substance, Mr Qauqau said:

"Don't wanna seem like a pain but starting to run quite low now. Got some unreal gains and get the best pump on. Really want some more haha."

The Sanction

12. The violations were committed during 2014 and under SADR 2014 the violations are to be treated as one violation and the sanction, as Dianabol is not a specified substance, is a period of Ineligibility of two years. If the violation had been after 31 December 2014, the period would have been four years.
13. Mr McCormick, counsel for Mr Qauqau, stated that the provisions of SADR which allow for a backdating of the commencement of the period of Ineligibility for timely admissions and delay both apply.
14. In considering the issue of the commencement date of the period of Ineligibility, it was submitted that Mr Qauqau is a young man and was even younger at the time the violations were committed. While accepting that he was naïve and reckless, counsel suggested he acted impulsively and recklessly to his detriment and now regrets what he did. In his teaching profession he will continue to be a positive and contributing member of his community and wishes to be in a position to coach sports teams as part of his role as a teacher.
15. This Committee is required to impose the sanctions provided for by the SADR and is unable to take into account the effect on Mr Qauqau's future. His references show that he has been a positive influence.

Timely Admissions

16. The applicant, Drug Free Sport New Zealand (DFSNZ) acknowledges that this Committee has a discretion to consider starting the period of Ineligibility earlier than the date of the hearing, which would be the usual starting date subject to any credit for provisional suspension. This is because Mr Qauqau admitted purchasing and using Dianabol in a conversation with Ms Ellis on 21 September 2017 and admitted the violations in a written form dated 27 October 2017 and then again in his statement for this hearing which is dated 9 November 2017.
17. Mr David QC for DFSNZ acknowledged that there is no precedent as to how the discretion in such a case should be exercised but submitted that it should not be exercised in this case because:

- (a) Mr Qauqau's emails disclosed that he was a regular user of anabolic agents;
 - (b) He has already received a benefit as a result of the operation of SADR 14.6 which prevents a finding of the existence of aggravated circumstances which would justify an increase in the standard sanction;
 - (c) This Committee should be concerned to ensure that the effective period of Ineligibility is appropriate and properly marks the nature of the breaches of the SADR. This was a deliberate and serious violation. If it had occurred in the following year, the period of Ineligibility under SADR 2015 would have been four years.
18. Mr McCormick in reply does not accept that the emails reveal Mr Qauqau as being a regular user of anabolic agents; that SADR 14.6 would not have applied in this case because aggravated circumstances do not exist; and that Mr Qauqau should not be deprived of the benefit under SADR 14.9.2.
19. Reliance was also placed on the fact that Mr Qauqau has never been subject to a drug testing regime and has never had formal education as to the code or issues relating to drug testing.
20. In this case, the Committee is not prepared to backdate the period of Ineligibility on the basis of a timely admission. It is not satisfied on the balance of probabilities that he did not use one supply of Dianabol and thus cannot be satisfied that his admission was full and frank. Further, this is the case where an athlete who was possibly more than a club athlete and aspiring for higher honours knew the risk he was taking when he ordered the Dianabol. He did so in a clandestine way by requesting that someone else's name be put on the parcels so that he could not be identified. It does not believe that this is an appropriate case to exercise the discretion.

Delay

21. Under the SADR, a backdating of the commencement of the period of Ineligibility is permissible under Rule 14.9.1. There are two possible interpretations of the backdating provision and this Committee agrees with the DFSNZ that the most likely interpretation is that the rule can apply for

any period of Doping Control if substantial delay can be established but any finding that there is substantial delay which justifies backdating in the context of investigation should be approached cautiously and clear proof required.

22. The issue of delay has been covered extensively in the recent decision of this Judicial Committee in *Drug Free Sport New Zealand v Berry* No. 1/17. The history of investigation into the violations can be summarised as follows:

In considering delay, it is necessary to briefly summarise the history of this matter. The activities of NZ Clenbuterol came to the knowledge of DFSNZ because of information provided by Medsafe NZ. It was in November 2015 that Medsafe advised DFSNZ that it was prosecuting Mr Townshend of NZ Clenbuterol in respect of the supply of steroids and that procedures would have to be put in place to allow DFSNZ to review any information. A brief history of some of these steps which were then taken is:

26 January 2016	Medsafe invited a DFSNZ representative to review emails under the supervision of a Medsafe staff member but was not able to take emails or documents out of the Medsafe office.
11, 17 February 2016	DSFNZ representative visited Medsafe office and reviewed spreadsheets provided by Medsafe. Mr Qauqau was not identified from that list.
13 – 20 June 2016	When operational demands permitted, DFSNZ representative returned to Medsafe office and completes a review of the rest of the first list of approximately 100 names provided by Medsafe. Mr Qauqau was not identified on that list.
8 December 2016	DSFNZ representative has further access to Medsafe offices to complete the review of further emails from the NZ Clenbuterol inbox.
12 January – 6 April 2017	Review of emails completed and a list of 107 individuals who may be bound by SADR compiled.

11 July 2017	Electronic copies of emails released to DFSNZ to allow further investigation.
August 2017	Evidence against a first tranche of athletes was considered by DFSNZ and Mr Qauqau's name was identified.
21 September 2017	Mr Qauqau advised of DFSNZ's intention to bring proceedings.

23. After failing in an attempt to contact Mr QauQau on 12 September 2017, Ms Ellis of DFSNZ notified Mr QauQau of the proposed application and Mr Qauqau admitted the purchase and the use of Dianabol.

24. The Committee accepts that SADR 14.9.1 applies as the investigation was part of Doping Control. There were delays and it is not necessary to determine whether DFSNZ could have avoided those delays. The circumstances are complex. A Court of Arbitration for Sport panel said in *WADA v Bellchambers CAS 2015/A/4059* (the Essendon case) "that delay as referred to in this rule carries no pejorative overtones but is a proxy for a passage of time". It also said:

Any delay not attributable to a player can be taken into account, whether or not it otherwise results from factors which are both explicable and reasonable, and imputes no blame to any other person.

25. SADR 14.9.1 gives a discretion. In the Committee's view the rule should not be used to undermine the sanctions provided by the SADR. It does however consider that in the circumstances of this case, which will also apply to many other applications brought as a result of the Medsafe information, there should be an adjustment of three months given under the rule. There was a substantial delay between the committing of the violations and the bringing of the application.


Decision

26. Mr Qauqau is declared to be Ineligible under the terms of the SADR for a term of two years commencing on 31 July 2017. This allows for the three

months backdating from the date of the provisional suspension of 30 October 2017.

27. Under the terms of the SADR, Mr Qauqau may not during the period of Ineligibility participate in any capacity in a Competition or activity authorised or organised by any Signatory of the WADA Code or such Signatory's member organisation or a club or other member organisation of a Signatory's member organisation, or in Competition authorised or organised by any professional league or any International or National-level Event Organisation or any elite or national level sporting activity funded by a governmental agency.
28. Mr QauQau is advised that under Rule 5.1.12 of the New Zealand Rugby Anti-Doping Regulations (2012), he has the right to request a review of this decision by the Post-Hearing Review Body.

Dated 21 December 2017


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Barry Paterson QC
Chairman, Judicial Committee