

BETWEEN **DRUG FREE SPORT NEW ZEALAND**

Applicant

AND **RHYS PEDERSEN**

Respondent

DECISION ON THE ANTI-DOPING VIOLATION APPLICATIONS

21 December 2017

Hearing: 8 December 2017 in Wellington

Committee: Barry Paterson QC (Chair)
Kevin Bell
Roger Drummond

Present: Paul David QC, Counsel for Applicant
Jude Ellis an officer of the Applicant
Andrew Skelton, Counsel for Respondent
Rhys Pedersen, Respondent

Registrar: Keith Binnie

Introduction

1. Drug Free Sport New Zealand (DFSNZ) has brought this application against Mr Pedersen under the provisions of the Sports Anti-Doping Rules 2014 (SADR). The allegations are admitted and are:
 - (a) On about 14 August 2014 and at various times thereafter, Rhys Pedersen was in possession of Clenbuterol, a prohibited substance under the Prohibited List 2014, in breach of SADR 3.6;
 - (b) At various times from about 18 August 2014, Rhys Pedersen used Clenbuterol, a prohibited substance under the Prohibited List 2014 in breach of SADR 3.2.
2. Mr Pedersen's position is:
 - (a) He is entitled to a reduction of the period of Ineligibility on the basis of "no significant fault or negligence" under Rule 14.5.2;
 - (b) He is entitled to have the period of Ineligibility commenced before the date of this decision on the grounds of both substantial delay (SADR 14.9.1) and timely admission (SADR 14.9.2). It is not disputed that the period of Ineligibility should not commence later than 18 October 2017, the date on which Mr Pedersen was provisionally suspended.

The Evidence

3. Mr Pedersen submitted witness statements from himself, his sister Ms Pedersen, Dr P Hanekhon and Mr Robinson, the coach of his senior rugby team.
4. Mr Pedersen's own statement included the following:
 - He is a member of the Old Boys Marist Club playing Senior A premier grade in Palmerston North and has been since 2014. He previously had played in Dannevirke.
 - He had played for Manawatu under 20s in 2011 and 2012, was selected in the Manawatu Rugby Union Academy in 2014 and was also selected

for the Manawatu Development Squad but was unable to complete the season as he suffered severe concussion.

- He captained the Old Boys Marist Senior A team in 2016 and 2017 and was judged Manawatu's premier club rugby best and fairest player in 2017.
- He has never been part of any high performance programme, never been part of any registered drug testing pool and has not received any education on drugs in sport from any club or organisation.
- He is generally aware of the requirements for players not to take drugs to improve performance but before being notified of the present allegations, by DFSNZ on 8 September 2017, he was not aware of the Sports Anti-Doping Rules or the WADA Prohibited List or DFSNZ's role and did not know how to check whether a substance was prohibited.
- In October 2013, a long term relationship ended which led to him being counselled by a clinical psychologist for nine sessions between 11 October and 16 December 2013. During that time he was diagnosed with anxiety and depression and prescribed antidepressant medication.
- Between May and September 2014, he was unable to work and was on the Sickness Benefit.
- In April 2014, he was referred to the acute/crisis mental health centre at the Palmerston North Hospital. He was seen by a psychiatrist.
- He stopped playing rugby in late July/early August 2014 after suffering a serious concussion which was his second concussion of the year. He had also had several concussions in earlier years and there was a question mark on whether he would play again.
- During 2014 he was severely distressed and gained considerable weight.
- About this time he saw a Facebook advertisement about a weight loss product, namely Clenbuterol. He wanted to lose weight to improve his appearance and gain back some self-esteem.

- He first contacted NZ Clenbuterol on 8 August 2014, and subsequently purchased a 10ml bottle of Clenbuterol which was sent to his home address.
 - His evidence was that he took some of the Clenbuterol but did not like the taste so stopped using it before he finished the bottle. He disposed of the bottle and subsequently did not notice any weight loss.
 - At that time he was living with his sister who was single and she wanted to lose weight and asked him to order some Clenbuterol for her.
 - Two subsequent orders of 10ml bottles of Clenbuterol of 27 August 2014 and 6 October 2014 were ordered for his sister. He did not use them.
5. Ms Pedersen also gave a witness statement and attended the hearing by telephone and was cross-examined. She confirmed Mr Pedersen's relationship break-up and the effect that it had on Mr Pedersen. She also confirmed the concussion history.
6. It was also Ms Pedersen's evidence that her brother told her about the loss of weight product and his reason for purchasing it. She then made the decision to try Clenbuterol. Her brother ordered it for her because he had all the details from the website. She found the first order beneficial in that she lost considerable weight and therefore asked her brother to order a second bottle.
7. Dr Hanekhon was Mr Pedersen's GP from October 2012 until July 2016. He had read Mr Pedersen's statement and reviewed his medical file and the notes he had made on the file. He verified the accuracy of the statements made by Mr Pedersen with regard to his medical history including the concussions suffered by him during the relevant period. He also gave evidence that weight gain is a common side effect of depression and anxiety disorders and the two weights he had recorded on the medical notes were above Mr Pedersen's usual weight.
8. While there is often cause to be sceptical of an athlete's explanation of the use of a prohibited substance, the Committee, having heard and reviewed the evidence, accepts Mr Pedersen's evidence in respect of his anxiety and

depression and his concussion. It also accepts, on the balance of probabilities, that his purchase of the Clenbuterol was for the purposes of losing weight and not for performance enhancing purposes. It is necessary to assess against this finding whether Mr Pedersen is entitled to a reduction in the period of Ineligibility because of no significant fault or negligence.

No Significant Fault

9. In support of his submission, Mr Skelton noted that Mr Pedersen was not a high performance athlete, had never been part of a high performance programme, had never been part of a drug testing pool or tested, had not received any education on drugs in sport and was not aware of the SADR or the WADA Prohibited List. He further submitted that at the time of the purchases Mr Pedersen's mental faculties were impaired and he was unable to appreciate or perceive the level of risk involved in the purchases. These purchases were at a time when there was a question mark on whether Mr Pedersen would be able to play rugby again due to multiple concussions.
10. Mr David QC, for DFSNZ, submitted that this Committee should discount the explanation as to what happened to the second and third bottles of Clenbuterol. The fact that the product was purchased on three occasions, that Mr Pedersen did not enquire of anyone as to whether or not Clenbuterol was a prohibited substance, his knowledge that he knew certain drugs were not permitted while playing rugby and his purchases online do not lead to circumstances which are truly exceptional. Thus it was submitted that Mr Pedersen cannot seek relief under the no significant fault principle.
11. The issue of whether fault or negligence is significant has been discussed in several Court of Arbitration for Sport cases. These cases make it clear that every case is to be considered on its own facts and that there is no doctrine of binding precedent. It is necessary to consider the totality of the evidence. While it is necessary to exercise the "utmost caution" and to show that the circumstances are truly exceptional, it has also been determined that the bar should not be set too high for a finding of no significant fault. As was said in *Sharapova v International Tennis Federation* CAS 2016/A/4643, "a deviation from the duty of exercising the "utmost caution" does not imply per se that the athlete's negligence was significant."

12. Mr Pedersen did not exercise the utmost caution. A plea of no significant fault is unlikely to succeed in the majority of cases where Clenbuterol or any other anabolic steroid has been ordered and consumed by a sportsman. In this case the Committee finds the matter finely balanced but has determined on the balance of probabilities that Mr Pedersen is entitled to some relief under the principles of no significant fault. He was undergoing psychological treatment at the time and there was no certainty that he would again play rugby because of his problems with concussion. He was not an athlete who had attended drug education programmes and the submissions made on his behalf and referred to in paragraph 9 above do impinge on the assessment of fault. There was however a reasonable, if not substantial, degree of fault and the Committee is of the view that the backdating in the circumstances should be relatively modest. It will be a period of three months.

Timely Admission

13. Mr Pedersen made a timely admission and this Committee has accepted that it was full and frank. He is entitled to the period of Ineligibility backdated for a period of six months. This is the same allowance as given in *DFSNZ v Robertson* No. 3/17.

Delay

14. For the reasons given in *DFSNZ v Berry* No 1/17 and *DFSNZ v Qauqau* No 2/17, this Committee is prepared to backdate the starting date for a further three months because of substantial delay.


The Sanction

15. The sanction imposed on Mr Pedersen will be 1 year 9 months after allowance is made under SADR 14.5.2 for no significant fault.
16. The starting date will be 1 January 2017 after giving allowances for the period of six months and three months given under the provisions of SADR 14.9.2 and 14.9.1 respectively.
17. Under the terms of the SADR, Mr Pedersen 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

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.

18. Mr Pedersen 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