BEFORE THE NEW ZEALAND RUGY UNION JUDICIAL COMMITTEE

BETWEEN	**DRUG FREE SPORT NEW ZEALAND**
	Applicant
AND	**ADAM JOWSEY**
	Respondent

DECISION ON SANCTIONS

Hearing:	At Wellington on 20 October 2016
Present:	Paul David QC as counsel for Applicant together with Jude Ellis Alison McEwan as counsel for Respondent together with Adam Jowsey the Respondent and his father, Carl Jowsey
Committee:	B J Paterson QC (Chairman) I Murphy B Upton
Registrar:	K Binnie

1. The respondent, Adam Jowsey (Mr Jowsey), has admitted two violations under the Sports Anti-Doping Rules 2015 (the Rules), namely:

   (a) the use or attempted use of a prohibited substance (Rule 2.2 of the Rules);

   (b) possession of a prohibited substance (Rule 2.6 of the Rules).

2. The facts relating to the violation are not in dispute. After making enquiries from NZ Clenbuterol, Mr Jowsey purchased through the Internet from NZ Clenbuterol three 20ml bottles of Clenbuterol. Mr Jowsey paid $180 for these three bottles and they were delivered to a friend of his. Mr Jowsey took one of the bottles and used approximately half of it.

3. This Committee is required to determine the sanction which is to be imposed for the violations. Under the provisions of Rule 10.7.4 of the Rules, the violations are to be treated as one violation for the purposes of imposing the sanction.

4. The issues for determination are:

   (a) Were the violations not intentional – Rule 10.2.1.1 of the Rules? If Mr Jowsey cannot establish that the violations were not intentional, the period of *Ineligibility* is to be four years. If he can establish that the violations were not intentional the period of *Ineligibility* is to be two years;

   (b) Should the period of *Ineligibility* be reduced because Mr Jowsey bears *No Significant Fault or Negligence* – Rule 10.5.2?

   (c) Have there been delays which allow the starting date of the period of *Ineligibility* to be earlier than the hearing date – Rule 10.11.1? and

   (d) Should the starting date of the period of *Ineligibility* be earlier than the hearing date because of Mr Jowsey's timely admission of the violations – Rule 10.11.2?

Period of Ineligibility

5. The starting point in determining the period of *Ineligibility* is Rule 10.2.1 which states:

> 10.2.1 The period of *Ineligibility* shall be four years where:
>
> 10.2.1.1 The *Anti-Doping Rule Violation* does not involve a *Specified Substance*, unless the *Athlete* or other *Person* can establish that the *Anti-Doping Rule Violation* was not intentional.

6. The meaning of "intentional" is found in Rule 10.2.3, the relevant part of which states:

> 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.

7. The effect of these rules is that the period is to be four years unless Mr Jowsey can establish that he did not know that he was committing an anti-doping violation or did not know that there was a significant risk that the purchase and use of the Clenbuterol might constitute or result in a violation under the Rules and manifestly disregarded that risk. Mr Jowsey has the burden of establishing these matters on a balance of probability basis – Rule 3.1.

8. Mr Jowsey was advised of the allegations against him by a letter dated 21 July 2016 from the applicant, Drug Free Sport New Zealand (DFS). He acknowledged the violations in a letter dated 27 July 2016 from his solicitor to DFS and in an interview with a DFS investigator of 10 August 2016. In a witness statement provided for the hearing and during cross-examination at the hearing, his evidence on his intention for committing the violations was consistent at all times. Three other witnesses provided witness statements which supported his evidence, but was not direct evidence of actual intent.

9. Mr Jowsey's evidence was that he obtained and took the Clenbuterol for the purposes of losing weight and not to enhance his sports performance. In fact his loss of weight was detrimental to and did not enhance his performance as a rugby player. At that time because of circumstances

which he described to the Committee, he was going through a low period in his life and wished to substantially reduce his weight and improve his appearance. Further, his evidence was that when he committed the violations he did not know that Clenbuterol was a prohibited substance.

10. It was Mr Jowsey's evidence that before he purchased the Clenbuterol he had commenced a strenuous exercise programme combined with a strict diet. As a result of this regime, Mr Jowsey's weight reduced by 36 kilograms to 76 kilograms. At the time he was working in an orchard in Hawkes Bay and was going to the gym at 3am every morning for at least two hours. He then had a further gym session after 12 hours of physical labour in the orchard.

11. Mr Jowsey was told about Clenbuterol by a friend who had seen an advertisement on Facebook. He suggested that Mr Jowsey try it. Mr Jowsey then discussed the product with another friend and they agreed to buy some together. It was Mr Jowsey who paid for the product but the product was actually sent to the friend who then gave Mr Jowsey the one bottle. Although these two individuals are evidently still in the Hawkes Bay area, they were not called to give evidence to verify what Mr Jowsey said. Mr Jowsey says that he looked at the Facebook page which said that Clenbuterol was the celebrity slimming product of choice. He made no further enquiries and ordered the bottles from the Internet advertisement.

12. Mr Jowsey played at a National Under 19 Rugby Tournament in October 2014. He acknowledged that there was a presentation at that tournament on the use of drugs in sport but said he did not go to that presentation because he had an appointment with the physiotherapist at the same time. He had never had any education on drug use in sport and did not know that Clenbuterol was on the prohibited list. As a result of the loss of weight he lost form and was dropped from the Premier team at Massey University to the Second Division team. He was a front row forward.

13. Mr Jowsey says that he eventually stopped his crazy weight loss regime and eventually retained his place in the Premier team. He continued playing until late July 2016 when he was advised by DFS of the anti-doping violation allegations.

14. DFS produced in evidence an email chain between Mr Jowsey and NZ Clenbuterol. This commenced with an email from Mr Jowsey on 22 January 2015 where he said "just wanting to know the prices of clen". The reply from NZ Clenbuterol on the same day detailed the prices and advised of other products in stock many of which were steroids. It advised how the product would be delivered and requested payment into a bank account if an order were to be made. The email included:

> There is no risk of seizure or confiscation. We are not associated with 'New Zealand Clenbuterol" who stock 150mcg GREEN liquid Clenbuterol, they have scammed many of our customers.

15. An email from NZ Clenbuterol on 26 January 2015 advised the price for the three units of Clenbuterol was $180 and gave details of the bank account into which it was to be paid. That email included:

> Please only write the given reference number on the bank transfer, nothing else. This will allow us to find your payment and courier you your order the quickest. DO NOT write 'Clen', 'NZ Clen' or 'Clenbuterol' etc.

There was also a repeat of the message that there was no risk of seizure or confiscation and that the company was not associated with "New Zealand Clenbuterol". The product was delivered to Mr Jowsey's friend on 30 January 2015.

16. When cross-examined at the hearing, Mr Jowsey's position was that he had not searched the Internet to find out more about Clenbuterol, that he only saw the front page of the website and details of how to order the Clenbuterol and did not do a Google search on the topic. He could not remember how he found the Internet page.

17. The submission of Ms McEwan on behalf of Mr Jowsey was that he did not mean to cheat and the violation did not occur in pursuit of any advantage in any sporting arena and in fact was detrimental to his sporting career. Further, Mr Jowsey's mental state at the time that the violations occurred was such that he lacked the requisite mental capacity to intend to cheat. This mental state and his lack of sleep and physical exhaustion meant that he was physically and mentally unable to have sufficient mental clarity at the time that he ordered the substance to consider whether he ought to have checked further on it.

18. Mr David QC, for DFS, submitted that it was for this Committee to determine whether Mr Jowsey had satisfied it on the balance of probability that he did not intend to commit a violation. Although he left the matter to the Committee, he did make submissions on the approach to be taken and in particular in respect of the second form of intentional conduct in the Rules, namely that an offender knew that there was a significant risk that the conduct might constitute or result in a violation and manifestly disregarded that risk. The approach suggested was to consider whether the evidence established a significant risk that the conduct which gave rise to the violation was likely to lead to a breach of the rules and if there was such a risk, whether Mr Jowsey who committed the violation, was aware of the significant risk and with that knowledge of the risk, deliberately engaged in the conduct which gave rise to the violation.

19. It was submitted that the following matters could be taken into account:

(a) Whether it was unlikely that Mr Jowsey was not aware that Clenbuterol would normally raise concerns;

(b) The email from NZ Clenbuterol referring to other substances which were well known to be steroids;

(c) Whether it was credible to accept that Mr Jowsey's investigations went no further than the front page of the Internet document which referred to celebrity slimming.

20. As is noted below, this Committee is of the view that Mr Jowsey should have known that Clenbuterol was on or was likely to be on the prohibited list. However, what Mr Jowsey should have known is not the test. Rule 10.2.3 requires actual knowledge. The first limb of the rule was satisfied if Mr Jowsey had actual knowledge that Clenbuterol was a prohibited substance. 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.

21. The result of this analysis is that in this case, Mr Jowsey is required on the balance of probability to satisfy the Committee that either he did not know that Clenbuterol was a prohibited substance or alternatively, that he did not know that there was a high probability that Clenbuterol was a prohibited substance. The Committee is of the view that for there to be a "significant risk" there must be a high probability that the event will occur.

22. On the basis of the evidence of Mr Jowsey and the witness statements he produced, Mr Jowsey neither knew that Clenbuterol was on the prohibited list, nor did he know that there was a high probability that it was on the prohibited list. It is therefore necessary to consider the circumstances to determine whether the Committee considers that despite this evidence, the circumstances are such that Mr Jowsey has not discharged the onus on him.

23. The relevant circumstances to be considered are whether the Committee should assume that a substance recommended for weight loss purposes may be a prohibited substance; whether it is well-known within sporting and rugby circles that Clenbuterol is on the prohibited list such that Mr Jowsey must have known that it was a prohibited substance; that Mr Jowsey's reference to "clen" in his email of 21 January 2015 demonstrated that he knew that the use and possession of Clenbuterol was a prohibited substance; that the references to other steroids and the "no risk of seizure or confiscation" in NZ Clenbuterol's reply email indicated that Clenbuterol was either a steroid or a prohibited substance; that the direction in the payment email to "DO NOT write 'Clen', 'NZ Clen' or 'Clenbuterol' should have alerted Mr Jowsey that Clenbuterol was a prohibited substance, and whether Mr Jowsey's evidence as to his knowledge of and investigations of Clenbuterol are credible. Put another way, do these facts undermine the evidence given by Mr Jowsey to the extent that the Committee is unable to accept that Mr Jowsey did not know Clenbuterol was a prohibited substance or alternatively, did not know that there was a high probability that it was a prohibited substance.

24. When these matters are considered in their totality, there are circumstances which suggest Mr Jowsey should have at least been alerted to the possibility that Clenbuterol was a prohibited substance. He had played rugby at the

National Under 19 Rugby Tournament and at the University Tournament and by his own admission knew that steroids were prohibited substances. Some of the products offered by NZ Clenbuterol in its email were steroids and the warnings in the emails including the statement that there was "no risk of seizure or confiscation" should have alerted Mr Jowsey to the possibility that NZ Clenbuterol was warning him not to take steps which may allow detection by the relevant authorities that the substance may not have been a permitted substance in certain circumstances. This Committee is of the view that the facts establish that Mr Jowsey was negligent in not enquiring further as to whether Clenbuterol was a prohibited substance. He cannot rely on the "no significant fault or negligence" provision to have the period of suspension reduced.

25. However, having considered the evidence and Mr Jowsey's response to questions, this Committee does consider that on balance Mr Jowsey has satisfied the onus on him and that he did not have the requisite knowledge either that Clenbuterol was a prohibited substance or that there was a high probability that it was a prohibited substance.

26. In the Committee's view the course of action which led to a dramatic loss of weight and a decline in sporting performance does not indicate that the substance was taken to enhance performance. The motivation was to lose weight which in fact hindered Mr Jowsey's performance as a front row forward. The Committee accepts that it is not sufficient to establish that the Clenbuterol was not taken for performance enhancing purposes as a violation would have been committed if it had been taken with the knowledge that it was a prohibited substance even though the purpose was not performance enhancing. However, the fact that the Committee believes that it was not taken for performance enhancing purposes does corroborate Mr Jowsey's evidence that it was taken for slimming purposes and that he did not address his mind to the fact that it may have been a prohibited substance.

27. The Committee has therefore concluded that Mr Jowsey is entitled to have the four year period of *Ineligibility* reduced to two years because he was unaware that Clenbuterol was on the prohibited list and was unaware that there was a high probability that it was on the prohibited list. As he did not

have this knowledge it is unnecessary to consider whether he manifestly disregarded a risk.

No Significant Fault or Negligence

28. For the reasons given above, Mr Jowsey is not entitled to have the period of suspension reduced because he cannot rely upon the provisions of Rule 10.5.2. When viewed in the totality of the circumstances and taken into account the criteria for *No Fault or Negligence*, the Committee is of the view that Mr Jowsey's actions were significant in relation to the Anti-Doping Rule violations.

Starting Date

29. Ms McEwan sought on behalf of Mr Jowsey to have the suspension commence from January 2015 when the violations were committed. The application was made on the basis of Rules 10.11.1 and 10.11.2.

30. Rule 10.11.1 allows this Committee to start the period of suspension as early as the date on which the violation was committed "where there have been substantial delays in the hearing process or other aspects of *Doping Control* not attributable to Mr Jowsey". There have been delays in this case. The violations took place in January 2015. DFS was informed of the violations in February 2016, 13 months after they occurred. There was a further five months before Mr Jowsey was advised of the allegations against him. Two attempts were made to locate him during that period for out of competition testing but these were unsuccessful. A further attempt to test him during competition was abandoned when it was apparent he was not playing for the Massey University team. It was also necessary for DFS to go through many emails provided to it by Medsafe which had initially advised DFS of Mr Jowsey's purchase of the Clenbuterol.

31. The Committee considers that Mr Jowsey is entitled to some credit for these delays notwithstanding that there may not have been any blame attributable to DFS. It accepts that it was reasonable to endeavour to carry out out of competition testing on Mr Jowsey. However, it is also of the view that it would have been reasonable to have advised Mr Jowsey of the allegations

against him within three months of receiving advice of the purchase of the Clenbuterol.

32. Under Rule 10.11.2 the starting date may be as early as the date of the violation where the athlete promptly admits the violations after being confronted with them by DFS. In the circumstances of this case, Mr Jowsey promptly admitted the violations. He is entitled to relief under Rule 10.11.2.

33. Mr Jowsey was provisionally suspended on 1 September 2016. Before any backdating of the starting point is made, the two year term would commence on that date. In the circumstances of this case this Committee is of the view that the starting date should be 1 February 2016 and the 2 year period should run from that date. This adjustment gives Mr Jowsey credit for his prompt admission and for delays which he did not cause.

34. It is acknowledged that there may appear to be some illogicality in backdating the starting date of the suspension period to a time when Mr Jowsey was still playing rugby. On his evidence he played up until some time in July 2016. However, it is noted that this logicality is permitted by the Rules. Rule 10.11.2, which allows for the backdating of the starting date for a timely admission provides that at least one-half of the period of *Ineligibility* going forward, must be served. It is implicit in this Rule that the period of *Ineligibility* may extend to a period when the athlete is still competing.

Decision

35. The sanction imposed on Mr Jowsey for the violations is to be a period of two years *Ineligibility* commencing on 1 February 2016.

36. Mr Jowsey is advised under Rule 5.1.12 of the New Zealand Rugby Union Andi-Doping Regulations (2012) he has the right to request a review of this decision by the Post-Hearing Review Body.

Dated 1 November 2016

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Barry Paterson QC
Chairman of Committee