BEFORE THE NEW ZEALAND RUGBY UNION JUDICIAL COMMITTEE

No. 7/17

BETWEEN	**DRUG FREE SPORT NEW ZEALAND**
	Applicant
AND	**KALIB HAMIORA WHAKATAKA**
	Respondent

DECISION ON ANTI-DOPING VIOLATIONS

Dated 2 April 2018

Hearing:	By telephone conference on 26 January 2018
Committee:	Barry Paterson QC (Chair) Ian Murphy Chris Smith
Present:	Paul David QC, Counsel for Applicant Jude Ellis an officer of the Applicant Sam Fellows, counsel for Respondent Respondent in person
Registrar:	Keith Binnie

Background

1. The applicant, Drug Free Sport New Zealand (DFSNZ), has brought anti-doping rule violation proceedings against Mr Whakataka. The allegations are that in February 2015, Mr Whakataka was in possession of a Prohibited Substance and in fact used or attempted to use that substance.

2. The applications are brought under the Sports Anti-Doping Rules 2015 (SADR) and alleged breaches of Rule 2.2, namely Use or Attempted Use of a Prohibited Substance and under Rule 2.6, namely Possession of a Prohibited Substance. The substance allegedly was the anabolic agent Clenbuterol which is on the Prohibited List 2015.

3. Mr Whakataka acknowledged that he ordered and used Clenbuterol in February 2015. His position is that the use was related to weight loss and there was no link between his use and sport.

4. Mr Whakataka through his counsel, Mr Fellows, challenges the jurisdiction of the Judicial Committee to consider this matter. If this challenge does not succeed, Mr Whakataka's position is:

   (a) The violation was not intentional and therefore under SADR 10.2.2, the period of Ineligibility is 2 years;

   (b) There have been substantial delays in the hearing process and the starting date for the period of Ineligibility should be in February 2015 when the use and purpose occurred; and

   (c) Mr Whakataka promptly admitted the importation and use of Clenbuterol and as such there should be a further adjustment of the starting date under the SADR 10.11.2.

The Evidence

5. In a written statement, Mr Whakataka acknowledged ordering the Clenbuterol in February 2015 and said he did so because he wanted to lose weight because he was out of shape. His evidence was that he used the Clenbuterol for two

weeks. He said that he did not play in the 2015 and 2016 seasons and presumed the club registered all players who had played the season before. He also denied that he had used the Clenbuterol to enhance sports performance.

6. Under cross-examination at the hearing, Mr Whakataka's evidence in some respects was not consistent with his written statement. He acknowledged that he did sign the registration form in February 2015 and understood that he was agreeing to be bound by various rules, regulations and policies referred to in the form. He also acknowledged that he was intending to play for his club in a Tens tournament at the time he signed the form and that he was training with his club. He said he did not play in the Tens tournament because he was not fit enough and was not keeping up with the others when training.

7. It was Mr Whakataka's evidence that Clenbuterol was recommended to him by another person whom he would not name. If that recommendation was made it would have been made prior to his first enquiry of the supplier on 12 February 2015.

8. Another relevant fact is that at an early stage, Mr Whakataka indicated that he would be providing statements confirming the fact that he did not play in the 2015 season. He did not produce these statements and the reason given was that he could not get in touch with his manager or coach. He had ample time to do so.

Jurisdiction

9. Mr Whakataka's position is that this Judicial Committee has no jurisdiction over him because he did not play four or more games in the 2015 season. This submission is based on a provision in the New Zealand Rugby Registration Procedures (the Procedures).

10. The New Zealand Rugby Union Anti-Doping Regulations (the Regulations) state in Regulation 2 that they apply to:

> All Persons, including minors, who are participants in the game of Rugby in New Zealand are, by virtue of such participation, and/or

> membership of an affiliated Provincial Union and/or Club and/or who are otherwise bound by the Regulations of the NZRU, are deemed to have agreed to be subject to these Regulations, and will, on request, provide written acknowledgement to that effect.

11. The Procedures are stated to be "guidelines clarifying the current registration process ... as a reference point to assist with registration, distribution, funding calculations and goal setting". They include a definition of "senior players" such definition including:

> 6.2.1 Senior players must be aged 16 or over and play four or more games, on at least four or more separate playing days, in a club grade above under 19 level, in a rugby competition involving teams from other clubs or organisations and organised by and under the control and jurisdiction of their Provincial Union.

12. Mr Fellows, on behalf of Mr Whakataka, submitted that the Procedures define an active participant as an individual who plays four or more games in a season. As Mr Whakataka did not play one game, he does not meet these criteria and is therefore not a person subject to the Regulations.

13. This Committee requested a report from the NZRFU on the operation of the Regulations and Procedures. This report was provided by Ms Manttan. In commenting on the four year rule, Ms Manttan noted that in practice a pragmatic approach is taken when applying the guidelines (i.e., the Procedures). That pragmatic approach applies for injured players who are not able to comply with the foregoing rule and their registration remained valid and Provincial Unions are granted funding for these players notwithstanding their non-compliance. The report noted that "for the betterment of the game, NZR has accepted that for the most part Rippa players who are not able to comply with the four game rule still have valid registrations and are granted funding".

14. The Manttan report notes:

> The primary purpose of the Guidelines is to establish a regime whereby NZR is able to capture player registration and participation for funding purposes. The Guidelines also provide a framework that all players' registrations entered into the NRD must be compliant with in order to be active registrations for eligibility purposes whether at Provincial Union or national level.

15. Mr David QC for NZDFS relied on the registration provision in Regulation 2 of the Regulations but also suggested that this Committee should carefully examine Mr Whakataka's evidence as to his participation in the game. Reliance was placed on the change of his evidence in respect of the signing of the registration form, his admission that he was training for a tournament, and the inference that can be drawn from the fact that he did not produce corroborating evidence that he in fact did not play during the 2015 season.

16. In respect of the four game rule argument, Mr David's position is that the Procedures do not prevent registrations being submitted by players who have not played four games at the time they apply and the interpretation and application of the registration Procedures should be consistent with the requirements for the practical operation of an effective system for the management of the game. The analysis suggested is that a player may apply to be registered at any time in the registration term and that it is for NZRFU to determine whether or not to accept the registration. If the registration is accepted, then it becomes a valid registration subject to termination.

17. If the Procedures are given the literal meaning as contended for on behalf of Mr Whakataka, the interpretation leads to peculiar results. It means that a player is not under the disciplinary or doping regulations of the NZR review until four games have been played. This cannot be correct. It is necessary to give the Procedures, which are guidelines with the main purpose for funding, a meaning that does not conflict with the rules which are required to run the sport of rugby. If the argument is correct in the anti-doping field, a player could play after taking a banned substance but because that player had not played four games, could not be subject to an anti-doping violation application on the basis that he was a registered player. However, such a player would be subject to the SADR by participation

18. In the Committee's view, it is necessary to give a purposive interpretation to the Procedures and Regulations and to determine that once a player has applied for registration and the registration has been effected, he is bound by the provisions of the application form which he has signed. That form contains:

> I understand that by signing this form, I am agreeing to be bound by the constitution, regulations, bylaws and policies of the relevant Provincial Union with jurisdiction and control over the competition I am playing in and that I am also bound by the NZRU Rules and Regulations by virtue of being deemed to be a "person" as defined in those regulations.

19. It is therefore determined that Mr Whakataka was under the jurisdiction of this Committee at the time he ordered Clenbuterol notwithstanding that he had not played four senior games. It is not necessary in the circumstances to determine whether he also was subject to the Regulations on the basis he had participated.

20. It is obvious that the present Procedures whose main purpose is funding can lead to confusion and ambiguity in other fields and should be reviewed.

Intentional

21. As the prohibited substance is not a Specified Substance, the period of Ineligibility is to be four years unless Mr Whakataka can establish that the violation was not intentional (SADR 10.2.1.1). Under SADR 10.2.1.2 if DFSNZ can establish that the violation was intentional, the period of Ineligibility is four years. In this case Mr Whakataka relies upon the provisions of SADR 10.2.1.1.

22. SADR 10.2.3 defines the term "intentional" as "meant to identify those athletes who cheat".

23. The submission on behalf of Mr Whakataka is that he was not cheating in that he was unaware that the SADR applied to him as he was never given any information from his club or Provincial Union about the SADR. Further, he was not an active participant in rugby at the time and for the two years following the use he merely used the product to help lose weight. Thus, he was clearly not intending to cheat using Clenbuterol.

24. DFSNZ acknowledges that knowledge is relevant to intent. It submitted that in considering intent, this Committee should take into account that when Mr Whakataka placed the orders in 2015 it was on the basis of an email sent to him by the supplier which included other substances which were also

prohibited substances including testosterone and in respect of which Mr Whakataka admitted that he knew that some of the drugs on the supplier's email were banned substances. Further, his refusal to name the friend who advised him to take Clenbuterol was also said to be a matter which could and should be taken into account. The submission on behalf of DFSNZ was that even if the Committee could not be satisfied that Mr Whakataka knew that Clenbuterol was a prohibited substance, he must have known that in the circumstances the taking of Clenbuterol might constitute an anti-doping rule violation and he manifestly disregarded that risk.

25. The two limbs of SADR 10.2.3 both require knowledge on the part of the athlete. Mr Whakataka is not entitled to the reduction from four years to two years ineligibility offered by the SADR if he knew that Clenbuterol was a prohibited substance or if he knew that there was a significant risk that by taking Clenbuterol he might be committing an anti-doping rule violation and manifestly disregarded that risk.

26. While the Judicial Committee has some concern at some of Mr Whakataka's evidence, it is satisfied that Mr Whakataka has established that he did not know that taking Clenbuterol in the circumstances was an anti-doping violation. He had not been given any information from either his club or his Provincial Union about SADR. He was a club player in a country area and the Committee accepts that it is more likely than not that he did not know that the SADR applied to him. Thus if his actions were intentional in respect of the second limb of SADR 10.2.3, it would be because he knew that there was a significant risk that by taking Clenbuterol, he would be committing an anti-doping rule violation and manifestly disregarded that risk.

27. On the basis of the finding that Mr Whakataka did not know that the SADR applied to him, the Committee finds that he did not know that by taking Clenbuterol there was a significant risk that he might be committing an SADR violation. While players who were familiar with the SADR would have realised the risk, the Committee is of the view that Mr Whakataka has established that he was not aware that there was a significant risk. In the circumstances, Mr Whakataka is entitled to have the period of Ineligibility reduced from four years to two years.

Frank Admission

28. Mr Whakataka submits that he is entitled to have the commencement date backdated because of a timely admission under SADR 10.11.2. That rule allows for the period of Ineligibility to start at an earlier date if the athlete "admits the Anti-Doping Rule Violation after being confronted with the Anti-Doping Rule Violation by DFSNZ". The basis of this submission is that when Mr Whakataka was approached by an officer of DFSNZ, he admitted purchasing and taking the Clenbuterol.

29. SADR 10.11.2 requires a prompt admission of the "Anti-Doping Rule Violation". In this case, Mr Whakataka in his formal response denied that he had committed a violation. It subsequently transpired that the challenge was on the grounds of jurisdiction. However, the Committee is of the view that Mr Whakataka is ineligible for relief under this particular provision as he did challenge the violation. Accordingly, there will be no adjustment under SADR 10.11.2.

Delay

30. In accordance with other decisions of this Committee, Mr Whakataka is entitled to a backdating under SADR 10.11.1 for delays not attributable to him. In accordance with other decisions, the Judicial Committee allows a four months deferment of the start of the period of Ineligibility for delay.

Decision

31. Mr Whakataka was provisionally suspended on 17 November 2017. The two year period of Ineligibility cannot start after that date. When the four month credit for delay is taken into account, the period of Ineligibility will start from 17 July 2017. Mr Whakataka is therefore declared ineligible for a period of two years commencing from 17 July 2017. The prohibition against participation during this period is set out in the next paragraph.

32. Under SADR 10.12.1, Mr Whakataka may not during the period of Ineligibility participate in any capacity in a Competition or activity (other than authorised

anti-doping education or rehabilitation programmes), authorised or organised by any Signatory or Signatory's member organisation, or a club or other member organisation of a Signatory's member organisation, or in Competitions 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.

33. Mr Whakataka is advised that under Regulation 5.2.3 of the Regulations he is entitled to have the findings and/or sanctions in this decision referred to a Post-Hearing review body.

Dated 2 April 2018

Barry Paterson QC
Chairman, Judicial Committee