**BEFORE THE NEW ZEALAND RUGBY UNION JUDICIAL COMMITTEE**

**No. 9/17**

**BETWEEN** **DRUG FREE SPORT NEW ZEALAND**

**Applicant**

**AND** [redacted]

**Respondent**

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**DECISION ON ANTI-DOPING VIOLATIONS**

**Dated [ 14 ] May 2018**

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**Hearing:** In Christchurch on 26 March 2018

**Judicial Committee:** Barry Paterson QC, Chair
Ian Murphy
Nigel Hampton QC

**Present:** Paul David QC, counsel for Applicant
Jude Ellis, an officer of the Applicant
Andrew McCormick, counsel for Respondent
The Respondent in person

**Registrar:** Keith Binnie

1. The applicant, Drug Free Sport New Zealand (DFSNZ), alleges that [redacted] committed anti doping rules violations (ADRV) by both being in possession of and using Clenbuterol in late 2014 and into 2015. As such, he allegedly infringed Rules 3.2 and 3.6 of the Sports Anti-Doping Rules 2014 (SADR 2014) and Rules 2.2 and 2.6 of the Sports Anti Doping Rules 2015 (SADR 2015).

2. [redacted] originally, and before taking legal advice, admitted all allegations and advised he wished to be heard on sanctions. After seeking legal advice, he applied to withdraw his admissions in respect of the alleged violations under SADR 2015. This Committee at the beginning of the hearing gave leave to withdraw these admissions and the hearing proceeded on the basis that the violations of SADR 2014 were admitted but the allegations in respect of SADR 2015 were denied.

**The Evidence**

3. Some of the evidence adduced on behalf of DFSNZ was not disputed and this evidence included:

   - In 2014, [redacted] was a Year 12 student and [redacted] at a secondary school. The following year he became a Year 13 student [redacted]

   - The documentary evidence was that he made several purchases of Clenbuterol in October and November 2014. He made purchases on 14 October 2014 (3x 10ml units), 21 October 2014 (4x 10ml units) and 26 November 2014 (6x 10ml units).

   - [redacted] was given details of the recommended dosage by the supplier. On the basis of the recommended use of the Clenbuterol, [redacted] in fact ordered sufficient Clenbuterol for 520 days' use. The recommended cycle was 10 millilitres for a 40-day cycle. The last order made on 26 November 2014 was delivered on 1 December 2014.

4. Prior to the hearing, [redacted] provided two witness statements. In the first statement his evidence was:

   - He accepted that he ordered the Clenbuterol on three occasions and said that the last purchase was to stockpile the Clenbuterol in case his parents

found and confiscated it. His mother had previously disposed of some supplies he had originally purchased.

- He purchased Clenbuterol to lose weight and make his body look better. He had always been a little overweight so thought by taking Clenbuterol and training in the gym, he could lose weight and improve his body shape.

- As it happened he got work over the summer [redacted] He knew he would not be able to go to the gym as such so in December 2014 he disposed of what he had left of his supplies.

- He knew that the drug was not illegal in terms of the law and given that he was not a representative sports person, he did not think that it would matter that he was taking the drug. He was aware to some degree of the potential health issues that might flow from taking steroids, however, he wanted to try it.

- He has never received any educational advice about using performance enhancing drugs in a sporting context while he was at school. He now knows a lot more about the issue of drugs in sport and realises that by purchasing the Clenbuterol at the time when he was a registered rugby player, he has infringed the provisions of the Anti Doping Rules.

- He denied being in possession of Clenbuterol or using it in the calendar year 2015.

5. His second statement was to explain why he originally admitted violations of SADR 2015 and was made in support of his application to withdraw that admission. The admission was made before taking legal advice and his evidence was that he did no realise that there was any issue with the timeframe that was alleged. He thought that there was in effect only one charge against him and did not realise the significance of the two years involved. On the basis of this statement, the Committee allowed [redacted] to withdraw his admissions in respect of the 2015 year and the hearing proceeded on the basis that in respect of the 2015 allegations, it was necessary for DFSNZ to comfortably satisfy the Committee that [redacted] committed ADRVs in that year.

6. [redacted] was cross-examined by counsel for DFSNZ at the hearing and was asked questions by members of this Committee. Some of his evidence was consistent with his written statements but it is difficult to reconcile some of the answers given in cross-examination. Further evidence which is relevant included:

(a) Inconsistencies in respect of the disposal of the Clenbuterol. In his written statement he said that as he was unable to go to the gym as much, he disposed of what he had left of the supplies in December 2014. He was consistent under cross-examination when he said that he chucked the remaining Clenbuterol in the bin when he went to [redacted], which was in December 2014. However, he also said that he "took a wee bit to [redacted]" and that he "took the remainder to [redacted]". It is noted in this respect that he received the last order on 1 December 2014. For the first time under cross-examination he said that his parents took the rest and disposed of it and also said that his parents were involved in more than one throwing out of the Clenbuterol. It was his evidence that his parents found taking Clenbuterol not acceptable as they did not like him taking medicine.

(b) He acknowledged a greater knowledge of Clenbuterol than he had done in his written statement. Matters covered in cross-examination include:

- After hearing about Clenbuterol by word of mouth he did search Google for details of it as well as searching You Tube.

- The supplier sent him several emails before and during the period in which he was purchasing the Clenbuterol which gave a list of the products being supplied by that supplier. He acknowledged that he knew that many of those products were steroids but said that he did not think that Clenbuterol was a steroid.

- He acknowledged he knew that at the time taking it would be wrong if the purpose of taking it was to enhance sports performance. His position was he took it for cosmetic reasons.

- He knew steroids were banned in sport but did not think Clenbuterol was one of those banned.

- While he said he was using Clenbuterol for weight loss, he also knew that it would strengthen his muscular power and he knew he would be a more powerful player if he shed fat.

- He used less of the drug than recommended as he was not sure that it was safe.

(c) [redacted] acknowledged that at the time he was trying to make the First Fifteen and was training to achieve that goal.

7. The email exchange also contains relevant evidence. Apart from sending out a list of steroids which were available from the supplier, there are two other comments of note:

(a) In giving instructions as to how to make payment by bank transfer, the supplier stated in several emails:

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

An inference which can be drawn from these emails is that the supplier did not want it to be known that the product being couriered was Clenbuterol. This should have alerted a person who knew that many of the products being supplied by that supplier were steroids and banned in sport to the possibility Clenbuterol was banned.

(b) Other emails noted that "orders are shipped discreet and free". It is possible to draw inferences from these two emails.

**The 2015 Issue**

8. DFSNZ's position is that the Committee should not accept [redacted] evidence in respect of the 2015 year. There are two reasons for this:

(a) The inferences that can be drawn from the amount ordered and delivered. As noted, it appears as though [redacted] ordered sufficient Clenbuterol for 520 days' supply at the usual dosage rate;

(b) The credibility issue surrounding [redacted] parents destroying the Clenbuterol, the inconsistencies in his evidence around this suggestion

and the changes in his evidence between the written statement and the evidence given in cross examination.

9. The Committee's view on the two submissions referred to in the previous paragraph is:

(a) There is a strong inference from the purchases made by [redacted] over a short period that his intention was to use the Clenbuterol for a considerable period of time. He was at that time hoping to make the First Fifteen and that season would not start until a few months into 2015;

(b) While the supply issue may not on its own have been sufficient to resolve this matter against [redacted], the evidence he gave was unconvincing. The conflicting evidence on the disposal of the Clenbuterol and the evidence which only came out in cross-examination that the last order of Clenbuterol was disposed of by his parents does undermine [redacted] credibility on this particular issue. If the parents had taken the role that he suggests, a witness statement could have no doubt been provided from one of them setting out the position.

10. Having considered the evidence in total, this Committee is comfortably satisfied that [redacted] was in possession of Clenbuterol and used Clenbuterol in the 2015 year.

**Sanctions**

11. Under SADR 2014, the sanction for the violation is a period of two years ineligibility. However, under SADR 2015, the sanction was increased as from 1 January 2015 to a 4 year period of Ineligibility. Under Rule 10.7.4.1 SADR 2015, it is necessary to treat both violations as one and impose a sanction based on the ADRV that carries the most severe sanction. As the allegations in respect of the 2015 year have been made out, the starting point is a period of Ineligibility of four years.

12. [redacted] seeks to have this period of Ineligibility reduced by:

(a) the 2015 ADRVs were not intentional – Rule 10.2 of SADR 2015;

(b) that there was no significant fault or negligence on his part – Rule 10.5 of SADR 2015; and

(c) delay Rule 10.11.1 SADR 2015.

*Not intentional*

13. As Clenbuterol is not a Specified Substance, [redacted] seeks under the provisions of Rule 10.2.1 SADR 2015 to have the period of Ineligibility reduced to two years. The term "intentional" is defined in Rule 10.2.3, the relevant part of which reads:

> 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.

14. The submission on behalf of [redacted] was that he did not have an intention to cheat and that he used Clenbuterol for cosmetic purposes although he was aware of the broader health risks associated with using an anabolic steroid. The submission was that he had been reckless as to the maintenance of his health as opposed to attempting to cheat by enhancing his sporting performance. It was also submitted that it would be counterintuitive for a person hoping to progress as a front row forward to use Clenbuterol ([redacted] usually played as a front row forward).

15. DFSNZ, on the other hand, referred to the alternative in Rule 10.2.3 of knowing "that there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk". In summary the submission was that an athlete who knows that it is wrong in sport to use and possess a steroid and is aware that they are likely to be acting contrary to the rules by doing so, would be aware of a significant risk of committing an anti-doping rule violation.

16. The onus is on [redacted] to satisfy the Committee on the balance of probabilities that he did not know that there was a significant risk in using the Clenbuterol and that such use might constitute or result in an ADRV and manifestly disregarded that risk. The Committee is not satisfied that [redacted] has discharged the onus on him.

17. The reasons for the Committee's view is that on its assessment of the evidence, [redacted] has not satisfied it on the balance of probabilities that he was not aware that he was taking a significant risk. His statement that he bought the drug merely to lose weight heading into the 2014-15 summer is not sufficient to discharge the onus in view of the accumulation of the other evidence which includes:

- Given that he was not a representative sports person, he did not think it would matter that he was taking the drug.
- He was aware to some degree of the potential health issue that might flow from taking steroids, however he wanted to try it.
- He knew that it would be wrong if the purpose of taking it was to enhance sports performance.
- He knew steroids were banned in sport but did not think Clenbuterol was one of those banned although he knew that many of the drugs on the supplier's price list were steroids.
- He knew that Clenbuterol would strengthen his muscular power and he knew he would be a more powerful player if he shed fat. He was trying to make the First Fifteen.
- The references in the emails referred to in paragraph 7 above were a warning not to use words which would identify the substance as Clenbuterol. These warnings suggest that there may be some prohibition on the use of Clenbuterol.
- His evidence that his parents had warned him about the use of the drug.

It therefore follows that [redacted] cannot have the period of Ineligibility reduced on the grounds that the use was not intentional in accordance with the provisions of Rule 10.2 SADR 2015.

*No significant fault*

18. [redacted] also seeks to have the period of Ineligibility reduced under the provisions of Rule 10.5.2 SADR 2015 on the grounds that there was no

significant fault or negligence. The comment in SADR 2015 in respect of Rule 10.5.2 is that the provision will only apply in exceptional circumstances. To rely upon this provision, an athlete is required to establish that the athlete's fault or negligence when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence, was not significant in relation to the ADRV. As has been stated in cases in the Court of Arbitration for Sport, it must be established that the circumstances justifying a deviation from the duty of exercising the "utmost caution" are truly exceptional. They are not present in the vast majority of cases.

19. On behalf of [redacted], it was submitted that the issue of the degree of fault displayed by [redacted] should be assessed against his very young age at the relevant time. He relied on criminal law precedents which refer to the growing body of scientific evidence on adolescent brain development that demonstrates that young people are significantly different to adults. Added to [redacted] youth at the time, is the fact that he had received no anti-doping education.

20. It is necessary to consider the totality of the circumstances and while exceptional youth or inexperience may have a bearing, they and the lack of anti-doping education alone are not sufficient to justify a reduction of sanction see *WADA v Niliforushan* CAS 2012-A-2959.

21. In this case, the findings in respect of the intentional aspect are also relevant to the no significant fault issue. While [redacted] was youthful and had not received anti-doping education, he was aware that steroids were prohibited in sport, that many of the products on the price list contained in the email sent by the supplier were steroids and must, by his own admission, have known that there was a risk in taking such a product which may have health risks. This is not an exceptional case where [redacted] took the utmost care. The Committee is unable to reduce the period of Ineligibility on the grounds that there was no significant fault or negligence on [redacted] behalf.

*Delay*

22. This Committee has in other cases allowed a period of four months backdating on the basis of delay not attributable to the athlete Rule 10.11.1 SADR 2015. It makes the same allowance in this case.

**The Order**

23. [redacted] was provisionally suspended on 1 December 2017. The commencement date of the sanction cannot be after that date. After allowing for the backdating of four months for delay, the four-year sanction will therefore commence on 1 August 2017.

24. The sanction imposed on [redacted] is a period of Ineligibility of four years commencing on 1 August 2017.

25. Under Rule 10.12.1 SADR 2015, [redacted] 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 Signatories member organisation, or a club or other member organisation of a Signatories 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.

26. [redacted] is advised that under Regulation 5.2.3 of the New Zealand Rugby Union's Anti-Doping Regulations 2012, he is entitled to have the findings and/or sanctions in this decision referred to a Post-Hearing review body.

**Publication**

27. The mandatory reporting required by Rule 14.3.2 SADR 2015 shall in this case not be required as [redacted] was a minor at the time of the violations.

Dated [ 14 ] May 2018

**Barry Paterson QC**
**Chairman, Judicial Committee**