NEW ZEALAND RUGBY UNION POST HEARING REVIEW BODY ("PHRB")

BETWEEN **PARATENE EDWARDS**

Applicant

AND **DRUG FREE SPORT NEW ZEALAND ("DFSNZ")**

Respondent

REASONS FOR DECISION OF PHRB, GIVEN ORALLY ON 3 MAY 2019

Hearing: 3 May 2019

PHRB: Nigel Hampton QC, Chair
Roger Drummond

Counsel: Andrew Skelton for the Applicant
Paul David QC for the Respondent

Registrar: Stuart Doig (NZRU)

PRELIMINARY MATTERS

Make up of PHRB

1. The PHRB as originally appointed, consisted of three members (2 lawyers, 1 medical doctor), but the third member being unavailable to take part in the hearing conducted on 3 May 2019, the NZRU allowed the remaining members of the PHRB (the 2 lawyers) to conduct the Review sought by the Applicant (Regulation 5.2.2 New Zealand Rugby Union Anti-Doping Regulations 2012 – "NZRU ADR"). The hearing conducted on 3 May was a "protest to jurisdiction" hearing, essentially involving matters of law and not involving matters of fact where the specialist knowledge of a medical practitioner might be seen to be of significant value.

Extension of Time

2. The Respondent, at the outset of the hearing (and repeated later in its final submissions) asked the PHRB to re-visit its decision of 1 February 2019 granting the Applicant an extension of time within which to lodge his application for review. The PHRB was not prepared to re-visit that earlier decision, expressing the view during argument that if the Respondent was dissatisfied with that decision its concerns could still be raised and considered further if it chose to exercise its rights of appeal.

3. In its decision of 1 February 2019 the PHRB stated that it was satisfied that the Applicant did not know of the decision of the NZRU Judicial Committee ("NZRU JC") of 26 November 2018 (finding that the Applicant had committed anti-doping volations and sanctioning him by rendering him ineligible for 4 years, commencing 21 September 2017), until reading of that decision in the media on or about 12 December 2018.

4. The reasons for the Applicant's lack of actual knowledge of the NZRU JC decision were set out in detail in paragraphs 3 to 7 of the Applicant's statement, which was confimed on oath at the 3 May hearing. In short, on 19 August 2018 the Applicant had sustained serious head, wrist and leg injuries in a motor accident requiring considerable hospitalisation and ongoing treatment, which had led to considerable disruption of his normal life and communications. If anything, the reasons for the PHRB having extended time, were reinforced by the evidence heard by it on 3 May 2019.

Reg 5.2.10 NZRU ADR

5. The original hearing of the anti-doping violations alleged against the Applicant, took place in front of the NZRU JC, by way of telephone conference, on 15 November 2018 with a Decision (finding all 6 alleged violations made out and sanction imposed) given on 26 November 2018.

6. The Applicant played no part in that hearing, it proceeding in his absence as effectively a matter of "formal proof" on the papers filed by the Respondent.

7. The reasons why the Applicant did not play a part are referred to in paragraphs 3 and 4 above.

8. On behalf of the Respondent it is now argued that, given a strict literal reading of Regulation 5.2.10, the PHRB on its review hearing cannot receive any evidence from the Applicant and his other (4) witnesses (let alone its further witness, Mr Tapper) setting out the Applicant's entire case, namely that he was not a "participant" nor a "member" at all relevant times as alleged ("*On or about 12 October 2014…(to)…on or about 8 January 2015, and at various times thereafter…"*).

9. The Respondent claims that all of the Applicant's evidence was *"…on reasonable enquiry, available at the time of the original hearing."*

10. The Applicant contends that this provision is designed to deal with the situation where a Review Applicant has played a part in the original hearing and then comes to the PHRB subsequently and attempts to adduce further evidence.

11. With this latter contention, the PHRB agrees. It sees Regulation 5.2.10 as rather akin to the criminal jurisdictions' "fresh evidence" rule – i.e. if the material was reasonably available at the trial, then prima facie it will not be found to be an acceptable base to succeed on appeal and enable a re-trial. But the criminal law, sensibly, will not put such constraints on a defendant who has not (for whatever reason) played a part in the first trial or hearing and seeks a re-hearing on the basis that they will now participate, present their defence including any evidence, and let that defence (and evidence) be assessed and weighed.

12. To put the construction on Regulation 5.2.10 which the Respondent urges, would render the Applicant's right to apply for a review completely nugatory - it would be a pointless review. That would fly in the face of any concepts of justice (whether natural or otherwise) and fairness.

13. The PHRB takes the view that, in light of the Applicant's injuries and continuing disabilities and consequences following from the 19 August 2018 motor accident, he was not in a position to take part in the original hearing, took no part in it, and was not in a position to make reasonable enquiries and put evidence before the original hearing. The PHRB finds that the Applicant has shown that as soon as he was in a state and a realistic position to reasonably enquire and gather available evidence he did so, and then placed it before the PHRB.

General Observations

14. This case relates to a person, the Applicant, who, on an objective view of the evidence, has not played rugby since 2010 – indeed since he ruptured an achilles

tendon in 2010 (and subsequently had surgery, in 2011 and 2017, for underlying serious osteo-arthritic problems in both hips) he has been medically unfit to play, the PHRB finds.

15. What the Applicant said to a representative of the Respondent on 11 May 2018, when first approached about the allegations, was that he had *"had two hip operations and does not play sport and hasn't played in ten years. He also stated that he does not coach either."*

16. With all the evidence before it, the PHRB is of the view that, at its highest (i.e. at its worst against the Applicant, putting matters in the worst possible light) the case against him shows that he attended a few training "run throughs" of a MAC women's team his sister played in, and attended a February 2016 sevens tournament, answering his sister's requests to offer advise and ideas based on his experience. He was not the coach of that team (his father was), nor did he hold any formal coaching role. This was, in the PHRB's opinion, no more than the advice or input any family member might offer, informally, if in attendance at say a sibling's, or a child's or a grandchild's training or match.

17. What seems to the PHRB to be extraordinary, is the amount of resources, money, people and time which the Respondent has continued to expend on this case – a sledgehammer and the attempting to crack the tiniest of nuts (if one existed at all) comes to mind. An appropriate use of resources?, the PHRB does ponder.

HISTORY

18. On 18 May 2018 the Respondent formally commenced Anti-Doping Rule Violation Proceedings against the Applicant, alleging 6 violations of Sports Anti-Doping Rules ("SADR"s of 2014, 2015) from 12 October 2014 until 8 January 2015 "*and at various times thereafter"*; and claiming that the Applicant was, at *"the relevant time…participating in the game of rugby…was registered with New Zealand Rugby in 2014 and 2015…"* and thereby was bound by the NZRU ADR (by Regulation 2, which relevantly reads: *"All Persons…who are participants…are, by virtue of such participation, and/or membership of an affiliated…Club…deemed to have agreed to be subject to these Regulations…"*).

19. As already set out, and for reasons found acceptable by the PHRB, the Applicant took no formal steps in relation to the Proceedings, which proceeded to a "formal proof" hearing (on the papers) before the NZRU JC on 15 November 2018.

20. That "formal proof" hearing proceeded on the allegation that *"At all material times Mr Edwards was participating in the game of rugby union as a player with MAC Sports Association in the Hawkes Bay Premier Competition. He has been registered as a player from 2008 to 2015"* . This is taken from paragraph 6 of the Respondent's Memorandum of 5 November 2018 – in effect summarising the

Jurisdiction provision, at paragraph 4, in the original Violations Application of 18 May 2018. It should be noted that that Jurisdiction provision was prefaced by the words *"At the relevant time Mr Edwards was participating…"*. Which begs the question, especially in view of the arguments mounted by the Respondent at this Review hearing (see paragraphs 27 to 29 below) – what was that relevant time?.

21. That assertion was based on the evidence of Ms Grace who, in her affidavit of 19 July 2018, deposed that the Applicant was so registered (paragraph 53) and that in a MAC Facebook page in December 2015 *"Mr Edwards was announced as Assistant Coach of Women's Rugby for the club for the 2016 season"* (paragraph 54). In addition (at paragraph 52) Ms Grace set out the statement made to her by the Applicant on 11 May 2018 when he commented that he had not played in 10 years and did not coach either (see paragraph 15 of these Reasons, above). The Respondent does not seem to have enquired further as to those claims made immediately by the Applicant – or at least not until March and April 2019 (by Mr Tapper) when, by then, these Review proceedings were coming to a hearing.

22. The NZRU JC Decision was given on 26 November 2018; it not unexpectedly found the violations made out. The Decision referred to the 6 violations as running from on or about 12 October 2014 to on or about 8 January 2015. The Decision made no mention of the *"at various times thereafter"* aspect, which was made the subject of considerable argument by the Respondent at the PHRB hearing – the PHRB notes that the Respondent in the Memorandum of 5 November 2018 (paragraph 13) referred to the January 2015 purchase of clenbuterol, by the Applicant as a *"regular user",* as providing for *"2 cycles of 40 days' use".* That would indicate a use allegation ending before the completion of the 2014/2015 rugby season (on 31 August 2015) and certainly well before the alleged Facebook "announcements" of December 2015 and any "coaching" allegations of February 2016. These comments are of some particular relevance when it comes to the PHRB's discussions later in these Reasons of when alleged contractual periods cease.

23. Shortly (re)stated for chronology purposes – on or about 12 December 2018, and through the media, the PHRB finds that the Applicant learnt of the NZRU JC Decision; he then took advice and, out of time, applied for (13 December 2018) and obtained from PHRB (1 February 2019) leave to extend time to apply for this Review.

PROTEST THE JURISDICTION

24. From the start of these Review proceedings the Applicant entered a challenge or demurrer to the jurisdiction. As developed (in the Applicant's Submissions of 19 February 2019 at paragraphs 12 to 18, and further in oral evidence before the PHRB and in closing submissions) the argument was/is as follows:
    (a) the Applicant was not bound by the NZRU ADR and/or by the SADRs;
    (b) the effect of Regulation 2 NZRU ADR is to raise a contractual relationship between each person ("participant") and NZRU;

(c) the alleged violations occurred in the (relevant) 2014/2015 season – the "2015 season", running from 1 September 2014 until 31 August 2015;
(d) the Applicant had not played rugby since 2010 and that, specifically, in the 2015 season he had not trained with, played for or coached any team, let alone an MAC team;
(e) although the Applicant was shown as registered as a player with the NZRU in the 2015 season, that was done without his authorisation, consent or knowledge – he had not signed any registration form (nor, in evidence subsequently stated, paid any subscription) – registrations were routinely "rolled over" by clubs, including MAC, according to the impressive witness called for the Applicant, Mr Morley – indeed he deposed that about 10 former club players' registrations were rolled over by MAC, as with the Applicant's. He deposed such rolling over was for a number of reasons including, inter alia, such as NZRU policy (Health and Safety and ACC purposes), club loyalty, player "protection from poaching" and "the chance of a player returning, say, from injury";
(f) so that the Applicant was not bound, contractually, by the NZRU ADR and/or the SADRs at the times of the alleged violations.

25. Many of the contentions advanced on behalf of the Applicant (say at paragraph 24 (d) and (e) above), were dependent on factual findings to be made by the PHRB on all the evidence it heard from the Applicant, his four supporting (corroborative) witnesses and the Respondent's Mr Tapper.

RESPONDENT'S RESPONSE TO DEMURRER

26. First, the Respondent challenged the credibility of the Applicant and the evidence of the four supportive witnesses (who, in general terms, agreed with the Applicant's claim that he had not played, trained with or coached MAC rugby teams since 2010; and that his registration had been rolled over without his knowledge or cnsent – in particular, the MAC Club President, Mr Morley, gave comprehensive and detailed evidence, and was well-tested on cross-examination as to such matters).

27. Secondly, the Respondent argued that the term of the Applicant's participation contract ran on until the end of the calendar year 2015 (relying on SADR 2015 running through to that date) and that the alleged violation last occurring (framed as it was as "*on or about 8 January 2015, and at various times thereafter"*) carried through the whole of the calendar year of 2015, and therefore was still running when the Facebook entry and announcement of early December 2015 was made as to assistant coaching for the MAC's women's team for the 2016 season; thus showing the Applicant's "participation" at that time (and that so, even if the PHRB was to find that the Applicant had not played or been knowingly registered as a player since 2010).

28. Indeed, if the PHRB understood it correctly, the Respondent submitted that the phrase "*and at various times thereafter"* enabled the violations alleged to extend

so far as the Applicant's involvement in women's rugby in February 2016 (and the facts as to that, as well as the Facebook entry will be discussed later in these Reasons).

29. From the submissions made on behalf of the Respondent, the PHRB was left uncertain as to how far "*various times thereafter"* might extend – it had an a troublingly (to the PHRB) indefinite character to it. What then was "*The relevant time"*? Rhetorically, the PHRB mused as to how a potential alleged violator would know exactly what were the allegations she/he was facing, how far did they stretch. The dictates of (natural) justice would seem to be against such an approach.

DISCUSSION

30. The PHRB repeats what was said in its oral Decision of 3 May 2019 as to credibility. It had "*listened carefully to, and formed clear views about, the witnesses heard orally today and in relation to credibility make findings that we accept the evidence given by both Mr Edwards and the four corroborative witnesses called on his behalf; and indeed on evidence generally find some further corroboration in terms of Mr Tapper's evidence of his inquiries".*

31. Simply put, there was no evidence to show that the Applicant had played (or trained) with MAC teams since 2010. So far as it went, Mr Tapper's searches of MAC team sheets (from relevant times) supported that conclusion.

32. Specifically, as to the 2015 season there was no evidence to show the Applicant was a participant during that time ("participant" bearing the definition accorded it by SADRs 2014 and 2015, through the application of Regulation 2 NZRU ADR – the same definition in both SADRs). The PHRB was comfortably satisfied that the Applicant was not a "participant".

33. Again specifically, as to the 2015 season the PHRB found, as to the registration and/or membership "leg" which might give jurisdiction, that *"given the findings of credibility, accepting Mr Edwards' evidence and the supporting or corroborative evidence, he (Mr Edwards) has satisfied the Board on the balance of probabilities that he did not intend to register as a member and was unaware he was so registered, as he didn't authorise and/or didn't know".* Indeed, the PHRB goes further and states that it found that none of the "roll-overs" of registration for the seasons of 2011, 2012, 2013, 2014 and 2015 (Exh LG7) were authorised, or known of, by the Applicant.

34. The PHRB will return to the Respondent's claim that the alleged violations extended on to the end of 2015 calendar year and into 2016 soon, but will deal with the two remaining factual aspects first.

35. The MAC Facebook page (Exh LG8), authored by we know not whom (let alone by whose authority) said that for MAC rugby for 2016, the Applicant was to be

the Assistant Coach of woman's rugby. The Applicant says in evidence (again with corroboration from other witnesses) that he was under some family pressure to take up the role, but that he never did. There is no evidence that he did take up the role. It is noted that the woman's rugby Manager named in the Facebook entry was not the 2016 manager. The PHRB also noted that Mr Tapper's searches of the MAC Club's official Handbook for the 2016 season did not list the Applicant as the women's assistant coach. The PHRB was comfortably satisfied that the Applicant did not become (in the 2016 season, in any event) a "participant" through some coaching role.

36. Which leaves the alleged February 2016 assistance given his sister's MAC women's team by the Applicant – at its height (i.e. its worst against the Applicant) the evidence showed that the Applicant, as a family member and in relation to a team coached (officially) by his father, played in by his sister and managed by his aunt, was put under pressure to go to, and did go to, a few training runs to give some guidance before a forthcoming 7s tournament which he went to. The PHRB did not find that this amounted to a coaching role and formed the clear view that this was no more than might happen daily, up and down the country, when family members (whether parents, grandparents, aunts, uncles, siblings) offer advice and a hand sometimes with run-throughs and drills. De minimis involvement at worst. Scarcely a foundation on which to build this case. In the end, the PHRB was comfortably satisfied that the Applicant was not a participant in relation to that aspect.

37. In any event, and this particularly affects the matters touched on in paragraphs 35 and 36 above, the PHRB was of the clear opinion that the contractual arrangements being considered and discussed here were rugby specific seasonal contracts, relying on and following the reasoning in previous NZRU JC decisions such as *Raimona* (8/17), *Skipwith* (5/17) and an unpublished 2018 decision, where no jurisdiction was found established and alleged violations dismissed, and which the PHRB, for present purposes, refers to as *ABC* (6/18).

38. Such seasonal contractual relationships would seem to underlie all NZRU arrangements with its constituent Unions and through those Unions, with Clubs and Players. Certainly, in the PHRB's view, that seasonal relationship underlies the registration procedures and guidelines and, by necessary transference, the application and enforcement of the NZRU ADR.

39. Which means, in the PHRB's view, that the alleged violations, if they were to succeed, had to have contractual jurisdiction founded in the 2015 season; and not founded in the 2016 season (as would be the case if the factual suggestions in paragraphs 35 and 36 were, first, made out [they were not] and, secondly, attempted to be relied on to found jurisdiction).

CONCLUSIONS

40. As recorded in the oral Decision (at paragraph 8), pursuant to Regulation 5.2.16 of the NZRU ADR the PHRB exercised its power to quash, and did so quash the Decision of the NZRU JC of 26 November 2018 and quashed the (4 year ineligibility) sanction imposed therein, on the basis that the Applicant's challenge to jurisdiction (and therefore his Review Application) was successful.

41. It follows also that the Respondent's original Application for Anti-Doping Rule Violation Proceedings, of 18 May 2018, should be, and is dismissed.

42. As to costs, in all the circumstances, the PHRB directed that costs should lie where they fell, i.e. that there would be no orders as to costs either way.

Nigel Hampton QC
Chair of PHRB
8 May 2019