

BEFORE THE NEW ZEALAND RUGBY UNION JUDICIAL COMMITTEE

No. 1/17

BETWEEN

DRUG FREE SPORT NEW ZEALAND

Applicant

AND

ZOEY BERRY

Respondent

DECISION ON ANTI-DOPING VIOLATION APPLICATIONS

21 **December 2017**

Hearing: 7 December 2017 in Wellington

Committee: Barry Paterson QC (Chair)
Kevin Bell
Bernie Upton

Present: Paul David QC, Counsel for Applicant
Jude Ellis an officer of the Applicant
Willie Hamilton, Counsel for Respondent
Zoey Berry, Respondent

Registrar: K Binnie

Introduction

1. Drug Free Sport New Zealand (DFSNZ) has instituted anti-doping violation proceedings against Ms Berry under the provisions of the Sports Anti-Doping Rules 2015 (SADR). The allegations are:
 - (a) On about 27 February 2015 and at various times thereafter, Ms Berry was in possession of Clenbuterol, a prohibited substance under the Prohibited List 2015 in breach of SADR 2.6.
 - (b) At various times from about 4 March 2015, Ms Berry used Clenbuterol a prohibited substance under the Prohibited List 2015 in breach of SADR 2.2.
2. Ms Berry's position is:
 - (a) She admits she possessed Clenbuterol but says that her violation was not "intentional" such that a reduced sanction of two years should be imposed pursuant to SADR 10.2.1.
 - (b) She denies that she used Clenbuterol.
 - (c) She denies that she attempted to use Clenbuterol; and
 - (d) In relation to the sanction to be imposed she should receive a credit for her timely admission (SADR 10.11.2) and that the sanction should be backdated to reflect the delays in the investigation process (SADR 10.11.1).
3. This judicial committee is required to determine:
 - (a) Did Ms Berry infringe SADR 2.2 by using or attempting to use Clenbuterol?
 - (b) If it is determined that she used or attempted to use Clenbuterol, was that use "intentional"?
 - (c) What sanction should be imposed?

4. There is no challenge to the jurisdiction of this Committee and Ms Berry accepts that at the relevant time she was bound by the NZRFU anti-doping regulations of 26 July 2012 and that the SADR apply.

The Factual Situation

5. A summary of Ms Berry's playing background is:
 - (a) She played 15 aside rugby at provincial representative level from 2002 until 2013.
 - (b) In 2012, she was selected for the Black Ferns and toured England with that team. She played one Test.
 - (c) In 2013, she withdrew from the Black Ferns' programme and decided not to be available for Canterbury. She gave up club rugby at the 15 team level before the 2014 season.
 - (d) She has had limited involvement in rugby at club level since 2012 but has played some matches for clubs in the Christchurch area.
 - (e) After giving up 15 aside rugby, she did play sevens rugby and represented Canterbury at the sevens level from 2012 to 2014. She played in the National Sevens Tournament in January 2012, 2013 and 2014. In January 2015, she played in both the Mt Maunganui Sevens and the National Sevens Tournament. She has not played Sevens at any level since the National Sevens Tournament in January 2015.
 - (f) She did however return to club rugby for a local team after receiving a text message from another player on 23 March 2015. She replied to the text by saying she would come to training the following night. She subsequently re-registered as a player.
6. Ms Berry acknowledged that she was aware that Clenbuterol was on the prohibited list and had been to doping education seminars as a player.
7. Ms Berry purchased the Clenbuterol online from NZ Clenbuterol. Her first email enquiring about the cost of the product was on 24 February 2015. She asked for the price of a 50ml bottle but ended up buying a 20ml bottle.

Her evidence was that at the time she was not playing rugby and did not intend to play rugby again.

8. Her evidence was that having decided not to play rugby, she had the opportunity to focus more on herself and see what goals she could achieve. She wanted to lose body fat and see how lean she could get. She has a qualification in exercise, science and nutrition and says she was interested to see whether Clenbuterol would have any significant effect when combined with diet and exercise programmes.
9. The Clenbuterol was delivered to Ms Berry on 6 March 2015 and came in a small spray bottle with instructions to spray a small amount on to the tongue. She says that at the time of the purchase she was not sure that she would use the product as knowing about nutrition she knew that it was not the safest thing to be putting into her body especially as she had purchased it off the internet. She knew someone that used Clenbuterol, although she was not prepared to name who this was, who tasted it for her. That person told her that it was bad quality and she then threw it away in late March 2015.
10. This Committee does not accept Ms Berry's explanations. At the time she placed the order, she had recently played in two seven tournaments and no doubt would have been relatively fit. Her position in the 15 aside game was as halfback. It is difficult to see that there would be much need to lose weight in February 2015. It is also difficult to accept that having purchased the Clenbuterol she was not in the circumstances intending to use it. Her refusal to say who told her about the Clenbuterol and who tested it for her and her decision not to call that person as a witness does not assist her. It is also difficult to accept that a person can determine that the Clenbuterol was of bad quality merely by tasting it.
11. In the circumstances, the Committee is comfortably satisfied that Ms Berry used the Clenbuterol and that she therefore committed the violation alleged.
12. As the Committee has determined there was use, it is not necessary to consider the submission made by Mr Hamilton on behalf of Ms Berry that there was no attempt to use because Ms Berry had renounced any intention to use that she may have had.

Sanction

13. Under SADR 10.7.4, the two violations are to be treated as one violation for the purposes of imposing a sanction. Under SADR 10.2, the sanction for a violation which does not involve a Specified Substance is a period of Ineligibility for four years unless the athlete can establish that the anti-doping rule violation was not intentional in which case the period of Ineligibility is to be two years.
14. Under SADR 10.11, the period of Ineligibility is to start on the date of this decision with a credit to be given for any period of provisional suspension. Ms Berry was provisionally suspended on 30 October 2017. There is however a discretion to start the period of Ineligibility at an earlier date if there has been a timely admission (SADR 10.11.2) or if there have been delays not attributable to the athlete (SADR 10.11.1).

Intentional

15. As noted above, the period of Ineligibility may be reduced from four years to two years if Ms Berry can establish on the balance of probabilities that her violations were not intentional. SADR 10.2.3 states that for the purposes of SADR 10.2.1, the term "intentional" is meant to identify those athletes who cheat. SADR 10.2.3 includes:

The term, therefore, requires the Athlete ... 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 a result in an Anti-Doping Rule Violation and manifestly disregarded that risk.

16. Mr Hamilton submitted that Ms Berry's conduct was not intentional as at the time of the purchase she was not intending to play rugby again at any level; set some goals in relation to her body composition that she wanted to see whether she could achieve now that her rugby career was over; thought that she would not be in violation of the SADR for simply having purchased Clenbuterol; and thought that she could use the Clenbuterol so long as she was not playing any sport in the future.
17. On the factual findings already made, this Committee does not accept that on the balance of probabilities Ms Berry has discharged the onus on her. In

the Committee's view, she knew that purchasing and using Clenbuterol was an Anti-Doping Rule violation and she has not discharged the onus on her to establish that she did not intend to play rugby again at the time she purchased the Clenbuterol.

Timely Admission

18. In view of the Committee's findings that it is comfortably satisfied that Ms Berry knew what she was doing and used the Clenbuterol, she cannot rely upon the timely admission provision as she did not give a full and frank admission.

Delay

19. SADR 10.11 provides that the period of Ineligibility shall commence from the date of this decision subject to certain exceptions. One exception which does apply is that a credit is to be given for the period of provisional suspension. Another exception is contained in SADR 10.11.1 which is headed "Delays Not Attributable to the Athlete or other Person". That Rule then states:

Where there have been substantial delays in the hearing process or other aspects of *Doping Control* not attributable to the *Athlete* or other *Person*, the body imposing the sanction may start the period of *Ineligibility* at an earlier date commencing as early as the date of *Sample* collection or the date on which another *Anti-Doping Rule Violation* last occurred. All competitive results achieved during the period of *Ineligibility*, including retroactive *Ineligibility*, shall be *Disqualified*.

20. Under SADR 17.2.1, comments to the Rules are to be used to interpret them. The comment on Rule 10.11.1 is:

Comment to Rule 10.11.1: In cases of Anti-Doping Rule Violations other than under Rule 2.1, the time required for an Anti-Doping Organisation to discover and develop facts sufficient to establish an Anti-Doping Rule Violation may be lengthy, particularly where the Athlete or other Person has taken affirmative action to avoid detection. In these circumstances, the flexibility provided in this Article to start the sanction at an earlier date should not be used.

21. There was a considerable period between the committing of the violations and the date on which DFSNZ advised Ms Berry of its intention to bring these proceedings. That delay was a little over three years.

22. In considering delay, it is necessary to briefly summarise the history of this matter. The activities of NZ Clenbuterol came to the knowledge of DFSNZ because of information provided by Medsafe NZ. It was in November 2015 that Medsafe advised DFSNZ that it was prosecuting Mr Townshend of NZ Clenbuterol in respect of the supply of steroids and that procedures would have to be put in place to allow DFSNZ to review any information. A brief history of some of these steps which were then taken is:

26 January 2016	Medsafe invited a DFSNZ representative to review emails under the supervision of a Medsafe staff member but was not able to take emails or documents out of the Medsafe office.
11, 17 February 2016	DSFNZ representative visited Medsafe office and reviewed spreadsheets provided by Medsafe. Ms Berry was not identified from that list.
13 – 20 June 2016	When operational demands permitted, DFSNZ representative returned to Medsafe office and completes a review of the rest of the first list of approximately 100 names provided by Medsafe. Ms Berry was not identified on that list.
8 December 2016	DSFNZ representative has further access to Medsafe offices to complete the review of further emails from the NZ Clenbuterol inbox.
12 January – 6 April 2017	Review of emails completed and a list of 107 individuals who may be bound by SADR compiled.
11 July 2017	Electronic copies of emails released to DFSNZ to allow further investigation.
August 2017	Evidence against a first tranche of athletes was considered by DFSNZ and Ms Berry's name was identified.
8 September 2017	Ms Berry advised of DFSNZ's intention to bring proceedings.

23. This was a complex investigation and there was no way in which DFSNZ could have detected the violations until it was advised of potential violations

by Medsafe in November 2015. The information was made available to DFSNZ in a very controlled manner and the initial information made available did not identify Ms Berry. It is understood that approximately 100 athletes have been identified as potentially being in violation of the SADR because of this investigation. On behalf of DFSNZ, it was submitted that other operational requirements and available resources prevented DFSNZ completing its investigation and bringing the application against Ms Berry at an earlier date.

24. The Committee accepts that SADR 10.11.1 applies as the investigation was part of Doping Control. There were delays and it is not necessary to determine whether DFSNZ could have avoided those delays. The circumstances are complex. A Court of Arbitration for Sport panel said in *WADA v Bellchambers CAS 2015/A/4059* (the Essendon case) "that delay as referred to in this rule carries no pejorative overtones but is a proxy for a passage of time". It also said:

Any delay not attributable to a player can be taken into account, whether or not it otherwise results from factors which are both explicable and reasonable, and imputes no blame to any other person.

25. SADR 10.11.1 gives a discretion. In the Committee's view the rule should not be used to undermine the sanctions provided by the SADR. It does however consider that in the circumstances of this case, which will also apply to many other applications brought as a result of the Medsafe information, there should be an adjustment of three months given under the rule. There was a substantial delay between the committing of the violations and the bringing of the application.

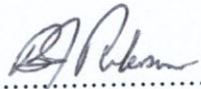
Sanction

26. After making the adjustment referred to above and taking into account the date of the provisional suspension, Ms Berry is declared to be ineligible under the terms of the SADR for a period of four years commencing on 31 July 2017.
27. Under the terms of the SADR, Ms Berry 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

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.

28. Ms Berry is advised that under Rule 5.1.12 of the New Zealand Rugby Anti-Doping Regulations (2012), she 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