

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

**BETWEEN**

**DRUG FREE SPORT NEW ZEALAND**

**Applicant**

**AND**

**ANDREW LEICESTER BURNE**

**Respondent**

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**DECISION OF COMMITTEE**

**Dated 4 May 2016**

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**Hearing:** 28 April 2016 (by teleconference)

**Committee:** Barry Paterson QC (Chair)  
Ian Murphy  
Shannon Paku

**Present:** Paul David QC as counsel and Graeme Steele and Jude Ellis  
for Applicant  
Keith Jeffries as counsel for Respondent  
Andrew Burne, Respondent

**Registrar:** Keith Binnie

## Introduction

1. Mr Burne faced three anti-doping violations under the Sports Anti-Doping Rules (2013) (SADR), namely:
  - (a) Use or Attempted Use by an athlete of a Prohibited Substance or a Prohibited Method – Rule 3.2 SADR.
  - (b) Possession of Prohibited Substances and Methods – Rule 3.6 SADR.
  - (c) Trafficking or Attempted Trafficking in any Prohibited Substance or Prohibited Method – Rule 3.7 SADR.
2. This Committee provisionally suspended Mr Burne on 23 December 2015 pending determination of the applications.
3. After initially denying the allegations, Mr Burne, on 3 March 2016, admitted the violation. Rule 14.7.4 SADR requires that the sanction to be imposed is to be for the violation which carries the most serious sanction. This is the trafficking violation.
4. The definition of “trafficking” under the SADR is:

**Trafficking:** Selling, giving, transporting, sending, delivering or distributing a *Prohibited Substance* or *Prohibited Method* (either physically or by any electronic or other means) by an *Athlete*, *Athlete Support Personnel* or any other *Person* subject to the jurisdiction of an *Anti-Doping Organisation* to any third party; provided, however, this definition shall not include the actions of “*bona fide*” medical personnel involving a *Prohibited Substance* used for genuine and legal therapeutic purposes or other acceptable justification, and shall not include actions involving *Prohibited Substances* which are not prohibited in *Out-of-Competition Testing* unless the circumstances as a whole demonstrate such *Prohibited Substances* are not intended for genuine and legal therapeutic purposes.

## Facts

5. The essential facts are taken from a Police interview with Mr Burne and the original summary of facts presented to the Wellington District Court when Mr Burne was sentenced on charges which related to the anti-doping violations. Under Rule 4.2.3 SADR, these facts “shall be irrebuttable evidence” against the respondent.

6. As a result of an investigation into drug operation, Mr Burne's house was searched and he was interviewed. During the house search four bottles of Dianabol were discovered and Mr Burne admitted that they were for his own use. He admitted that he used anabolic steroids and sold them and other prohibited substances to third parties. The purpose of his own use was in order to gain mass size and strength to improve his sporting opportunities in Rugby Union. At the time Mr Burne was playing rugby for Johnsonville Premiers in the Wellington rugby competition. He had also played for the Wellington Maori team during the 2013 season.
7. Mr Burne had become involved in drugs while being active in the Wellington gym and sports scene. He purchased the drugs including the anabolic steroids from a bulk supplier. The District Court statement of fact noted that an analysis of Mr Burne's cell phone between 18 August 2013 and 22 September 2013 showed that the defendant was involved in the sale and distribution of prescription medications including steroids and related substances. It also said that Mr Burne added a mark-up to the price when he on-sold the substances so that he received a profit from the sale. In an interview with Drug Free Sport in February 2016, he denied that he received money. The District Court statement of fact however is irrebuttable evidence. Further, in view of the extent of the dealing, the Committee is sceptical of Mr Burne's denial. He admitted in his Police interview that he had sold steroids to other people "heaps of times".
8. The District Court judge discharged Mr Burne without conviction for the offences with which he was charged in that Court. Those offences were selling prescription medicine contrary to the provisions of the Medicines Act 1981.

### **The Submissions**

9. Mr David QC for Drug Free Sport (DFS) characterised the trafficking violation as organised, regular but relatively low level, dealing in prohibited substances for commercial gain. He accepted that the trafficking did not involve large quantities of the prohibited substance, but said that the trafficking involved a regular supply of prohibited substances to various individuals and Mr Burne had committed the violation on many occasions.

Counsel accepted that there were no tariff guidelines for this type of offence but did refer to several overseas cases and the New Zealand Sports Tribunal case of *DFS v Daniel Milne* (ST 11/14). The *Milne* case also referred to the overseas cases and concluded that they demonstrate how fact and circumstance specific the sanction exercise is.

10. DFS submitted that Mr Burne was not entitled to a discount for substantial assistance (Rule 14.5.3 SADR) or to have any period of ineligibility reduced because of a timely admission (Rule 14.9.2 SADR).
11. While accepting that it was a matter for the Committee, the submission of DFS was that an appropriate sanction in this case was a period of ineligibility between 6 and 8 years. It accepts that there may be mitigating factors taken into account in arriving at a proportionate sanction and that those included the fact that Mr Burne was young at the time of the breach (about 21 years old), has expressed remorse and has since February 2016 been generally co-operative in assisting DFS to further its investigations.
12. Mr Jeffries for Mr Burne submitted that any period of ineligibility should be substantially reduced because of various mitigating factors. Under Rule 14.3.2 SADR, the period of ineligibility is to be a minimum of 4 years and may be for a lifetime. Mr Jeffries sought a 75% discount on the grounds of the mitigating factors which would reduce the period of ineligibility to one year. In his submission, a period of 4 years without discount would be manifestly excessive and fail to take into account the significant mitigating circumstances in this case.
13. The suggested mitigating circumstances will be discussed more fully below. The fact that the minimum period of ineligibility is 4 years and that the period may be for a respondent's lifetime, indicates the seriousness of the trafficking offence.

### **Discussion**

14. As noted above, the Committee does not accept that Mr Burne did not make money from his involvement. It accepts that the trafficking was at a low level.

15. It was suggested that Mr Burne was dragged into the scene by a bulk supplier and that he was duped into becoming involved in the distribution of steroids amongst a tight-knit group at the gym. While the Committee accepts that most of the recipients of the trafficking violation were a group at the gym, it does not accept on the evidence of the Police interview and the agreed statement of fact that Mr Burne was not aware of what he was doing. His own admissions on the number of transactions, albeit that they may be at the lower level of drug dealing, do not fit comfortably with this submission.
16. The submission that the supply was only to immediate gym training colleagues and not to rugby players is also difficult to accept. DFS submits that at least five rugby players were involved. The evidence does not necessarily establish this but it is unlikely in view of whom the recipients were that some of them were not rugby sports players bound by the SADR.
17. The bulk supplier, as submitted, may have used Mr Burne's phone to effect sales but the evidence establishes that Mr Burne also used that phone on many occasions to effect sales.
18. A further submission was that Mr Burne did not realise the seriousness of the transactions. There may be some strength in this submission in that many of the recipients of the steroids were obviously weightlifters who were not bound by the SADR. However, it is apparent from the interview and the agreed statement of fact that Mr Burne was aware that he was transgressing.
19. It is not accepted that the use of the steroids in the off-season was not a use for performance enhancing on the rugby field. The purpose of the use was to bulk up so that Mr Burne could make himself a better rugby player. Thus he did use substances to enhance his rugby performance.
20. A substantial discount of up to 75% can be given for substantial assistance (Rule 14.5.3 SADR). Mr David submitted that it was for DFS and not the Committee to determine whether substantial assistance has been given. DFS does not believe that such assistance has been given. It was submitted that under the 2015 SADR, it is made clear that the decision is that of DFS and not this Committee. It is not necessary to resolve whether the

jurisdiction is with DFS or this Committee as in this Committee's view, Mr Burne cannot qualify under the Substantial Assistance rule.

21. The reason for this view is the definition of "Substantial Assistance" in the SADR and the terms of Rule 14.5.3. The interview with DFS on 16 February did not in the Committee's view entitle Mr Burne to any concessions under Rule 14.5.3. It is not necessary to set out the provisions of Rule 14.5.3 or the definition but it is relevant to note that the evidence must be credible and must comprise an important part of any case which is initiated or must provide a sufficient basis on which a case could have been brought. The information must result in discovering or establishing an Anti-Doping Rule Violation by another person. While Mr Burne was co-operative in the interview, he declined to answer questions which would have identified other Anti-Doping Rule Violations by specific persons and in reality only provided general information in respect of information which was already in the hands of DFS. He did not give substantial assistance within the meaning of Rule 14.5.3.
22. Mr Burne can only avail himself of the timely admission adjustment to the starting date of the period of ineligibility if he has promptly admitted the violation. In this case, the application was served on him in mid-December 2015. On 4 February 2016 he filed a notice advising that he intended to defend the application as there was no proof of the actual substances alleged and no proof as to the alleged purchasers. Before admitting the allegations he requested full disclosure of documents from DFS and it was not until two weeks later in an interview with DFS that he admitted the allegations. This was not a timely admission.
23. As noted by the Sports Tribunal in the *Milne* case, there are no precedents in trafficking cases and each case is fact specific. This was not an isolated case and although relatively low level, it involved a reasonable number of recipients and extended over a reasonable period. It involved anabolic steroids. The minimum starting point of 4 years ineligibility indicates that the SADR, which is based on the WADA Code, considers trafficking a serious offence.

24. The violations in the present case cannot be categorised at the minimum sanction level. In the Committee's view a starting point of around 8 years would be appropriate.
25. The Committee is aware that any sanction of 4 years or more will seriously impact on Mr Burne's rugby career and may even terminate it. It is also aware of his youthfulness and accepts that there may have been a certain amount of naivety involved in the offending. While some rugby players may have been supplied, he did not target them. He has expressed remorse. For these reasons the Committee has determined that there are mitigating factors and it is appropriate to reduce the starting point by 2 years and impose a period of ineligibility of 6 years.
26. The Committee does not accept that it has jurisdiction to reduce the 4 year period. This can only be done in the case of substantial assistance.

#### **Decision**

27. Mr Burne is declared to be ineligible under the terms of the SADR for a period of 6 years commencing on 23 December 2015 (the date on which he was provisionally suspended).
28. Mr Burne is advised that under the terms of the SADR he may not during the period of ineligibility participate in any capacity in a competition or activity authorised or organised by the New Zealand Rugby Football Union or a member organisation of it or a club or other member organisation of a signatory to SADR or in competitions authorised or organised by any professional league or any international or national level event organisation.
29. Under Rule 14.10 SADR, Mr Burne may after completing 4 years of the period of ineligibility participate in local sports events in a sport other than the sport of Rugby Union, but so long as the local sport event is not at a level that could otherwise qualify Mr Burne to compete in a national or international event.
30. Mr Burne is advised that under Rule 5.1.12 New Zealand Rugby Union Anti-Doping Regulations (2012) he has the right to request a review of this decision by the Post Hearing Review Body.

Dated 4 May 2016

A handwritten signature in black ink, appearing to read 'B. Paterson', written over a horizontal dotted line.

**Barry Paterson QC**  
**Chair**