

NEW ZEALAND RUGBY UNION JUDICIAL COMMITTEE (“the Committee”)

No 8/17

BETWEEN **DRUG FREE SPORT NEW ZEALAND (“DFSNZ”)**
Applicant

AND **TUKITERANGI JAHNA RAIMONA**
Respondent

DECISION OF THE COMMITTEE ON ANTI-DOPING VIOLATIONS BY THE RESPONDENT

Hearing (at Wellington): 18 June 2018

Decision: 30 June 2018

The Committee: Nigel Hampton QC (Chair), Michael Heron QC and Ian Murphy

Counsel for the Applicant: Paul David QC and Sarah Wroe

Counsel for the Respondent: Paul Radich QC and Asher Emanuel

Registrar: Keith Binnie

SUMMARY

1. DFSNZ originally (in November 2017) brought 2 anti-doping rule violations against the Respondent – for alleged possession and use of metandienone (dianabol), a prohibited substance, in February 2015, in breach of Sports Anti-Doping Rules 2015 (“SADR”).
2. The Respondent, in a frank statement of evidence, revealed his possession and use of dianabol in January 2015 and accepted his possession, but not use, of dianabol in February 2015. As a consequence, DFSNZ brought 2 further alleged violations against him, relating to the January 2015 events.
3. The Respondent, along with another rugby player (*Lionel Skipwith, No 5/17*), through the input of the New Zealand Rugby Players Association (“NZRPA”), and whilst making factual admissions as to his involvement with the banned substance in 2015, advanced an important (and in the Committee’s view, as discussed later, arguable) point of principle as to jurisdiction on behalf of players generally. The extent of the hearing(s) before the Committee reflected the significance of the point – whereas the factual aspects and discussions as to potential sanctions occupied limited time.
4. The Committee found that it did have jurisdiction and, in the case of the Respondent, found the first three violations made out (possession and use in January 2015, possession in February 2015).
5. The Committee found that the Respondent had established that his violations were “*not intentional*”; and that the consequential two (2) year period of ineligibility should be back-dated by a total of six (6) months from the date of the provisional suspension imposed on the Respondent, being 28 November 2017.
6. The Respondent has imposed upon him a period of two (2) years ineligibility commencing on 28 May 2017.

BRIEF CHRONOLOGY

7. 2012 and 2013 the Respondent plays for Invercargill Marist Club and Southland RFU.
8. 2014, after hip surgery, the Respondent played 2 matches for Stratford Rugby Club, and suffered a broken jaw.
9. Late 2014, early 2015, the Respondent returns to Southland, recuperating and takes wharf employment.
10. January 2015, the Respondent orders through the internet, and briefly uses, dianabol.
11. 17 February 2015, the Respondent orders more dianabol.
12. 26 (or 28) February 2015, the Respondent takes part in an Invercargill Marist “touch-and-pass” session.
13. 6 March 2015, the Respondent plays for Invercargill Marist in a pre-season match.
14. 18 March 2015, the Respondent applies for NZR registration.
15. 26 March 2015, his registration was approved.

16. November 2015 – February 2016, DFSNZ commence investigations into NZ *Clenbuterol* (an online steroid supplier) and possible links with athletes and players.
17. January 2017 – July 2017, DFSNZ resume such investigations.
18. 12 September 2017, DFSNZ notify the Respondent of alleged anti-doping violations.
19. 18 September 2017 – 11 October 2017, exchange of emails between NZRPA and DFSNZ, where on behalf of the Respondent a challenge is made as to jurisdiction.
20. 2 November 2017, anti-doping violation proceedings commenced by DFSNZ against the Respondent.
21. 28 November 2017, the Respondent was provisionally suspended by NZRU Judicial Committee.
22. 15 December 2017, the Respondent, on jurisdictional grounds, applies to strike out the proceedings.
23. 26 March 2018, decision by Judicial Committee, dismissing the Respondent's application to strike out.
24. 18 June 2018, substantive hearing is held, decision reserved.

JURISDICTION

25. The argument for the Respondent was:
 - .1. The SADR do not apply to conduct prior to the time at which an athlete/player becomes subject to the SADR in terms of SADR 1.1.5, either by participating in the sport or becoming a member of the relevant National Sporting Organisation ("NSO" – here the NZR), except to the limited extent that the SADR expressly provide otherwise in 5.7 and 7.11, neither of which is relevant here.
 - .2. Therefore, conduct prior to the time at which a player becomes subject to the SADR, in terms of SADR 1.1.5, cannot found an allegation of an anti-doping violation (except to the limited extent that the SADR expressly provide otherwise).
 - .3. As a consequence, the SADR govern the determination of the allegations and nothing in the NZR rules or regulations extends the application of the SADR to conduct prior to a time at which a player becomes subject to the SADR in terms of SADR 1.1.5.
 - .4. The fact that a player participates for the first time, or registers, part way through a 1 September to 31 August rugby season does not mean that the NZR rules and regulations apply to them as from the beginning of the season (i.e. from 1 September). The dates indicated in the NZR Guidelines for a rugby season have no bearing on the point at which a player becomes bound by the SADR – a player only becomes bound at the time at which they either participate or register, whichever first occurs.
 - .5. That in any event, the Guidelines themselves are not NZR rules or regulations and that the agreement contained in the registration form which the Respondent signed on 18 March 2015, only confirmed that he agreed

that he was bound by the “NZR Rules and Regulations”, but did not state that he agreed that he was bound by the Guidelines.

26. The response for DFSNZ was:

.1. The Respondent is bound by his membership of NZR, as evidenced by his registration for the 2014-2015 season. The effect of this registration under the rules by and through which NZR operates, including the Guidelines, is that the Respondent was bound to and by the rules and regulations of NZR for the period provided for by the applicable NZR rules, namely 1 September 2014 and 31 August 2015.

.2. As an alternative, DFSNZ submits that even if the Guidelines are not strictly a part of the NZR rules and regulations, they are a part of NZR’s policies which policies devolve down to each of the Provincial Unions to apply and administer; and that, when the Respondent signed the registration form on 18 March 2015, he agreed to be bound to and by such policies.

.3. On its primary argument, DFSNZ submits that the effect of reistration as a member is to agree to the rules for the term covered by the membership.

.4. DFSNZ relies on the reasoning of the Judicial Committee in its strike out decision of 26 March 2018, where it stated:

13. A player contractually agrees to be bound by the Rules and Regulations of the NZRFU when he registers and agrees to be so registered for the complete season. There are certain benefits enjoyed by a player and his Provincial Union in being registered for the season. In the view of this Committee there can be no objection to a player accepting obligations which commenced before the registration form was submitted and accepted, if there are good policy reasons for doing so. In the anti-doping field there is a sound policy reason for a player registering after the season has started being required to be subject to the SADR for the whole season.”

27. This Committee, differently constituted, notes that this decision was made in the context of a strike out application, was made without the benefit of full argument from each side and should be read accordingly.

28. The argument for DFSNZ relies upon the evidence of Kate Mantann of NZR (23 February 2018) which outlines the NZR Registration Procedures (the Guidelines). The relevant parts of that evidence are:

“5. 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 player Registrations entered into the NRD (National Rugby Database) must be Compliant with these procedures in order to be active registrations.

7. A senior player can register to play rugby for one of the 26 Provincial Unions in one of two ways:

a. The player can complete a paper registration form and submit this to their Club or Provincial Union administrator for inputting into the NRD; or

b. The player can complete an online registration form via the online player registration website www.sporty.co.nz (“Sporty”). The registration created in Sporty updates directly into the NRD.

8. When a player registered as a 2015 Senior rugby player, they were agreeing either on the form or via Sporty to be bound by the constitution, regul-

ations, bylaws and policies of the relevant Provincial Union with jurisdiction and control over the competition the player is playing in. The player also agreed to be bound by the NZRU Rules and Regulations.

- 9. All 26 Provincial Unions enter into a Participation Agreement with NZR which sets out, amongst other things, a Provincial Union's general obligations including:
 - a. To abide by the rules and regulations of the NZRU; and*
 - b. To comply with NZR directions as a result of decisions of the Board.**
- 10. The Provincial Union funding regime, as recorded within the Provincial Union Participation Agreement, is determined by a decision of the NZR which is applied in accordance with the policies, rules and regulations of NZR which include the NZR Registration Procedures. The NZR Board decides a formula for funding all Provincial Unions, in recent times on a five-yearly basis, and it is then up to each Union to comply with the relevant requirements in order to be eligible to receive that funding. One such requirement is to comply with the Guidelines.*
 - 11. Paragraph 13.1 of the Guidelines outlines that a registration season is from 1 September to 31 August the following year ("NZR Registration Term"). For example, the 2015 registration period begins from 1 September 2014 and ends on 31 August 2015.*
 - 12. This specific NZR Registration Term was established to:
 - a. Align a player's registration term with the NZR funding to Provincial Unions for player registration and player participation numbers;*
 - b. Align with the period of time a player participates in and is engaged with their rugby club, for example pre-season training and pre-season games (including Sevens) through to the end of the club season; and*
 - c. Provide NZR with records of registered players who are entitled to insurance cover (life and trauma cover) which NZR arranges for all persons playing the Game throughout New Zealand.**
 - 13. This also allows for Provincial Unions and/or players without the ability to access Sporty to complete a paper registration form which is input into the NRD at a later date. This is a common occurrence as the authorised Club and Schools Administrators who enter player data and/or approve Sporty registrations are often volunteers and do not complete the data entry until part way through the season.*
 - 14. The intention behind backdating of the player registration to cover the NZR Registration Term enables the player to:
 - a. comply with eligibility requirements at a Provincial Union level, in particular their participation in Sevens tournaments which run from October to February;*
 - b. gain insurance cover as provided for by the NZR life and trauma insurance policy for their entire playing season irrespective of when their registration was input into the NRD; and*
 - c. allow a Club and/or Provincial Union to look back in the season to check that the player played in four games on four separate games before entering their registration into the NRD. It is worth noting that this last criterion is not commonly operated in practice."**

29. The Guidelines provide that the registration year runs from 1 September to 31 August of the following year. The relevant period for the Respondent was 1 September 2014 to 31 August 2015.
30. The Respondent argues that his first participation was late February 2015 at the earliest (a practice touch-and-pass run with the club team) and he accepts that he certainly participated by 6 March 2015 (a pre-season club match).
31. His registration first occurred through his club on 18 March 2015 and the registration was confirmed in the NRD on 26 March 2015. He submits that he is bound by the SADR only from the time of his earliest participation (late February – 26 or 28 - or the 6 March pre-season game).
32. The argument is that he had not decided until then to return to and to participate in rugby and that it was only from about that time that he decided to do so, after suffering the serious injury referred to above.
33. The Respondent submits that the SADR binds him prospectively only and that nothing in the NZR rules and/or regulations acts to extend the effect of the SADR.
34. This argument primarily depends on the interpretation of the SADR and the NZR's adoption of them. The Respondent submits:
"The SADR 2015 were in force at the time of the alleged violations. NZR had adopted the SADR as its own anti-doping regulations by regulation 1 of its NZR Anti-Doping Regulations 2012: '...the regulations of ...NZRU for anti-doping shall be the Sports Anti-Doping Rules made by...(DFSNZ) under the Sports Anti-Doping Act 2006, as amended from time to time ("the Rules")'.
*Regulation 2 of the NZR Anti-Doping Regulations...provides also that (emphasis added): 'All persons...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, deemed to have agreed to be subject to these Regulations...'*
The SADR make substantially similar provision for their application. They apply to all persons who:
are members of a (NSO) that has agreed to the Rules;
are members of any club, team, association, league or other organisation that has agreed to the application of the Rules with a (NSO); or
are Participants who agree to the Rules as part of the conditions of participation in any capacity in any activity organised, held, convened or authorised by a (NSO) or one or more of its member organisations, clubs, teams, associations, leagues or other organisations, regardless of whether the person is a member of any such organisation; or otherwise agree to the Rules.
Accordingly, a person can become subject to the SADR through membership of a (NSO), or through participation and agreement to the Rules."
35. The Respondent argues that the SADR have specific provisions which provide for them to apply before a player wishes to return to participation or after a player has retired (Rules 5.7 and 7.11).

36. The Respondent submits that the premise of Rules 5.7 and 7.11 is that DFSNZ has no jurisdiction in relation to conduct prior to a player's active participation in sport or after their retirement, unless the rules otherwise make specific provision.
37. As a matter of contract, the Respondent submits that he cannot be bound by rules which only apply to him once he has contracted, unless those rules make it clear that they apply retrospectively.
38. The Respondent further submits that Clause 13.1 of the Guidelines does not operate to create a retrospective regime. The submission is that the statement in Clause 13.1 is descriptive, but is not clear or sufficiently clear that each player will be bound by the rules (including the SADR) for the whole season, whenever they register.
39. DFSNZ submits that this Committee should construe the rules made by NZR and the SADR in accordance with their text and in light of their purpose. This is a standard interpretative approach. The aim of the interpretation exercise, submits DFSNZ, is to give the rules a workable construction consistent with their purpose, consistent with the aims of managing and furthering the amateur game and applying the code formed by the rules to all players in order to create an effective regime.
40. DFSNZ argues that the effect of registration is to bind the member to the rules and regulations of NZR, which includes the Guidelines, either directly or indirectly through the club and the relevant Provincial Union.
41. The registration form states:

"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 by those regulations."
42. As already noted above, Ms Mantann in her uncontradicted evidence stated that when registering, either physically or online, the player is agreeing to be bound by those rules, regulations, bylaws and policies, which includes the Guidelines (the Provincial Unions have *"to comply with the Guidelines"*, and a player, on registration, is bound by the policies of their relevant Provincial Union). In the Committee's view the expression "rules and regulations" is used in a generic sense in the registration form, and does so include the Guidelines.
43. Although the Committee's view on the evidence as set out immediately above is decisive of the issue, it is appropriate however to deal with the alternative argument made on behalf of the Respondent that the Guidelines, strictly, are not "NZR Rules and Regulations" and that, in registering as a player, his agreement to be bound did not extend to the Guidelines. Even if such a narrow meaning was to be ascribed to the expression "NZR Rules and Regulations", the necessary devolution down from the NZR to the Provincial Unions of policies such as the Guidelines, for the Provincial Unions to apply and administer (as described by Ms Mantann in her evidence, especially at paragraphs 9, 10 and 11) means, in the view of the Committee, that the Respondent, in registering as a

player, agreed to be bound by the Guidelines (i.e. *“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...”*).

44. This Committee accepts the arguments of DFSNZ as to the jurisdictional issues. The Respondent’s argument is an orthodox and respectable one, relying on the ordinary principles of (for example) statutory interpretation that rules apply prospectively only, unless they are very clear as to retrospectivity. (Refer, say, to s7 Interpretation Act 1999).
45. The position is different with a contractual situation such as this. NZR is not precluded by the SADR from having rules or policies which mean that a member is bound by them for a particular timeframe, whether that is prospective, retrospective or (as in this case) both. (For example, the Incorporated Societies Act (s6) allows for the rules of a society to contain any other provisions that are not inconsistent with that Act or with law. There is nothing in the law which prevents NZR from adopting the approach explained above as to the application of the season).
46. The “backdating” of registration, as it is referred to, makes sense for a range of reasons described by Ms Mantann. In particular, it is to ensure that players get the benefit of insurance (both life and trauma, and for the entire rugby season – a clear indication of the need for retrospectivity) and comply with eligibility requirements. The purpose of the Guidelines is to provide for coverage over the season, in part so that there is uniformity of application across all players. That goal is particularly relevant with issues relating to player welfare such as insurance and anti-doping.
47. In this Committee’s view, the player binds himself or herself to the effect of the New Zealand rugby season by virtue of the registration form. Even if that is not the case, the player has become bound by virtue of membership of the society (NZR), by the seasonal approach as adopted in the Guidelines. In short, it does not matter whether the player expressly agreed, because those are the rules of the society, which bind the members whether they expressly agree or not.
48. For those reasons, the Committee rejects the jurisdictional challenge made on behalf of the Respondent. The Committee does note that it would be of considerable value to players if the NZR made it clear to players when they register that they are subjecting themselves to the SADR for the whole season (backward and forward, potentially).

SANCTIONING - factual conclusions by the Committee and its reasoning as to Sanction

49. The Respondent obtained, possessed and used dianabol (metandienone), a prohibited anabolic agent, in January 2015; and obtained and possessed further dianabol in February 2015.
50. After he broke his jaw in a game of Taranaki club rugby in 2014, in combination with other ongoing personal issues, he became depressed (at least in lay terms, there being no formal assessment as to his state) and

resolved in his own mind (and as expressed by him to others, including his foster parents and friends) that not only his rugby aspirations (to be a top class, fully professional player) were at an end, but that effectively his playing days, at whatever level, were over. The broken jaw, to him, was the last straw.

51. Having taken alternative, and very physical, employment at Bluff, and in what he now accepts was a misguided attempt to build himself up, especially as a consequence of the limitations imposed upon him whilst convalescing and recovering from a wired-up broken jaw, he ordered and obtained dianabol.
52. The Respondent used some of the January 2015 purchase of dianabol and found it did not agree with him. However, he did purchase further dianabol (17-20 February 2015) but claims that that was given away by him to a friend.
53. In any event, to the Judicial Committee, there was no conclusive evidence of use by him of the banned agent from late February 2015 on.
54. Against his resolution to quit the game, and having come down to the Invercargill Marist club ground to meet up with former team-mates and take part in a bit of "touch-and-pass" on or about either the 26th or 28th February 2015, he "weakened" and took part in a pre-season club match on 6th March 2015. That experience, and the pressure put on him by team-mates and coaches (the latter concerned by the shortage of props, the Respondent being a prop) led to the Respondent changing his mind and deciding to resume playing the game.
55. In accordance with that change of mind, he resumed rugby training about the second week of March 2015 and registered himself, as a player.
56. The Committee found that the anti-doping violations established pre-dated that March 2015 change of mind by the Respondent. The issue here for the Committee was whether, in these unusual factual circumstances, the Respondent had established the violations by him were "*not intentional*" as that term is defined in SADR 10.2.3.
57. The Committee concluded that, given the Respondent's state of mind and his clearly stated (to others) intention to never play rugby again, when the proven violations took place the Respondent (a) did not know that his conduct constituted an anti-doping violation, and (b) did not apprehend that there was a significant risk that his conduct might constitute such a violation.
58. He believed, at the relevant times, that "*because I was off contract, not registered for a rugby club anywhere in NZ and I was not planning on playing rugby again, I thought that the rules did not apply to me*". To the Committee, this evidence by the Respondent, supported as it was by testimony from others, was sufficient to show that his violations were not intentional.
59. That conclusion by the Committee had the effect, pursuant to SADR 10.2.1 and 10.2.2, of reducing the period of the Respondent's ineligibility from a term of four (4) years to one of two (2) years.
60. The Respondent, through his counsel, raised the claim that, relying on SADR 10.5.1, there was on his part "*No Significant Fault or Negligence*" thereby allowing the Committee, in its discretion, to further reduce the period of ineligibility (for a period ranging from the maximum of 2 years to a minimum of of a reprimand and no period of ineligibility). The Committee found that, on

the facts here, there was no reduction available to the Respondent under 10.5.1.

61. The Respondent was an experienced player who previously had received drug education. He deliberately approached a website with the intention of purchasing, and did purchase, an anabolic agent. This led, directly, to his anti-doping violations, whether non-intentional (as found) or intentional. Pursuant to 10.5.1, it is for the Respondent to establish no significant fault or negligence if a further reduction is to be contemplated. On the facts here, he has not established no fault or negligence on his part.
62. The Committee further observes as to 10.5.1, that in its view that provision is not designed for the sort of situation as in the present case. In a deliberately created anti-drug use regime, founded on the need for utmost caution by the individual athlete/player, this Rule is there to cover "*exceptional circumstances*" where a violation has occurred despite all due care by the athlete.
63. By SADR 10.11.1, there is a discretion in the Judicial Committee to allow a "back-dating" of the period of ineligibility where there has been, as here, "*substantial delays in the hearing process not attributable to the athlete*". Given the circumstances set out in the chronology, and in keeping with a number of previous Judicial Committee decisions, the Committee came to the view that an allowance of four (4) months was appropriate here.
64. The Respondent's case, along with that of Mr Skipwith, and with the instigation, advocacy and backing of the NZRPA, became the means to test out the jurisdictional issues discussed above, whilst not, as such, factually challenging his involvement in the proven violations. It was argued on behalf of the Respondent that, notwithstanding the jurisdictional challenge and pursuant to SADR 10.11.2, he should be allowed a further back-dating of the commencement of the ineligibility period, as he had "*accepted from the outset the underlying facts and has sought only to have determined the jurisdictional point..(and)..has at all times been frank..(that)..he should not in all fairness be prejudiced by taking an arguable procedural point*".
65. As already noted, it was the Respondent's frank admissions which led to an additional 2 violations being brought against him. And, as to the jurisdictional argument, that was not a hopeless cause, in terms of orthodox administrative law; and it was advanced by the Respondent (and the other player) on an arguable point of principle on behalf of rugby players generally.
66. The Committee took the view that there was both merit and justice in giving some recognition of his admissions in these rather unique circumstances, and that a further two (2) months allowance might appropriately be added to the back-dated commencement time – i.e. a cumulative six (6) months.
67. The two (2) year period of ineligibility imposed, in all the circumstances, should be back-dated by six (6) months from the date of the provisional suspension imposed on the Respondent, being 28 November 2017.
68. Which means that the Respondent is sanctioned by having a period of two (2) years ineligibility imposed upon him, commencing on 28 May 2017.

ORDERS

69. The Respondent, Tukiterangi Jahna Raimona, is hereby sanctioned by having imposed upon him a period of ineligibility of two (2) years, commencing on 28 May 2017.
70. In accordance with SADR 10.12.1 the Respondent may not, during his 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 or any elite or national-level Event organisation or any elite or national-level sporting activity funded by a governmental agency.
71. The Respondent is advised that, under Regulation 5.2.3 of the NZRU's Anti-Doping Regulations 2012, he is entitled to have these findings and/or sanctions in this Decision referred to a Post-hearing review body.

Nigel Hampton QC

Chair of the Judicial Committee

30 June 2018