BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 14/10**

BETWEEN	**DRUG FREE SPORT NEW ZEALAND**
	Applicant
AND	**RANGIMARIA BRIGHTWATER-WHARF**
	Respondent
AND	**NZ POWERLIFTING FEDERATION**
	Interested Party

DECISION OF TRIBUNAL
Dated 29 November 2010

Hearing dates:	2 September 2010 in Wellington 16 November 2010 by teleconference
Attendances:	Paul David, counsel for Drug Free Sport New Zealand Jayne Kernohan, Drug Free Sport New Zealand Sandy Baigent, counsel for Rangimaria Brightwater-Wharf Geneva Lowe, assisting Ms Baigent Rangimaria Brightwater-Wharf Warren Trent, in support of Rangimaria Brightwater-Wharf Steve Lousich, New Zealand Powerlifting Federation
Tribunal Panel:	Alan Galbraith QC (Deputy Chair) Adrienne Greenwood
Registrar:	Brent Ellis

Background

1. On 27 July 2010 the Tribunal made a provisional suspension order in respect to the athlete, Ms Brightwater-Wharf, on the application of New Zealand Powerlifting Federation (Inc) arising from an adverse analytical finding on testing of her sample. The test was positive for the prohibited substance dimethylpentylamine.

2. On 2 September 2010 the Tribunal heard the ensuing application by Drug Free Sport New Zealand seeking a substantive order for suspension under Rule 3.1 of the Sports Anti-Doping Rules (SADR). At the hearing Drug Free Sport was represented by Mr Paul David and Ms Brightwater-Wharf by Ms Sandy Baigent and Ms Geneva Lowe. Ms Quirk sat as a member of that tribunal but subsequently retired as a member of the Sports Tribunal.

3. As intimated by counsel at the provisional suspension hearing Ms Brightwater-Wharf accepted the presence of the prohibited substance in the tested sample. What was in issue at the hearing was the question whether Ms Brightwater-Wharf could claim the benefit of either the Rule 14.5.1 no fault or Rule 14.5.2 no significant fault defences.

4. The Tribunal was about to issue its decision when Drug Free Sport, through its counsel, Mr David, advised the Tribunal that the World Anti-Doping Authority (WADA) had determined to remove dimethylpentylamine as a prohibited substance as from 1 January 2011 and re-classify it as a specified substance.

5. The impending change of classification raised the inevitable question of how this Tribunal, and for that matter similar tribunals in other countries, should treat that pending change in relation to dimethylpentylamine or methylhexaneamine as it is also, perhaps more commonly, known.

6. In a memorandum dated 13 October 2010 Drug Free Sport advised, inter alia:

"3. Positive tests were recently returned by several Indian weightlifters for the prohibited substance before the Commonwealth Games. In connection with those matters, WADA appears to have stated that the principle of *lex mitior* can be applied before the Prohibited List comes into force, thereby allowing the athlete to rely (potentially) on the more lenient regime as to sanctions for specified substances under Article 10.4 of the Code. As far as DFSNZ is aware, no substantive hearings have, as yet, taken place on this basis. If this course were to be followed, the specified substance regime under Article 10.4 of the Code (SADR 15.4) could be applied by a Tribunal if an athlete could establish the requirements for the application of the Article.

4. WADA has informally indicated to DFSNZ that the *lex mitior* principle can be applied to cases currently being heard. DFSNZ has sought more formal information from WADA on the basis upon which it says the *lex mitior* principle can be applied before the List comes into force. A response is awaited.

5. DFSNZ has also become aware that the United States Anti-Doping Agency ("USADA") has entered into a sanctions agreement with an athlete (a form of plea bargain under the US system) under which a doping violation involving methylhexaneamine which occurred in 2010 was subject to an agreed sanction on the basis that the specified substance regime (which can only apply to the substance in 2011) could be applied in 2010.

Lex Mitior

6. The doctrine of *lex mitior*, which is a principle of criminal law in many legal systems, has been developed and applied by CAS in anti-doping matters. It provides an exception to the general rule that the law which applies to an allegation is the law which is in force at the time when the facts in issue occur. The principle of *lex mitior* allows a later law, which is in force at the time of the hearing, to be applied if that law is more lenient than the law in force at the time of the offending. (For the application of *lex mitior* in relation to anti-doping allegations, see, eg. CAS 94/128 UCI v CONI, Advisory Opinion; CAS 96/149 A.C. v FINA; TAS 2000/A/289 UCI v FFC page 427.) The WADA statement in relation to the application of the principle the change in status of methylhexaneamine in the 2011 Prohibited List appears to extend this principle beyond its established application to cases which occur before a new law or rule comes into force.

7. DFSNZ considers that the Tribunal and Respondent may wish to consider these developments and the possible application of the principle of *lex mitior*. If the doctrine is held to be applicable, a further hearing would be required so that the particular requirements of SADR 15.4 could be addressed.

8. DFSNZ is concerned that allegations are treated in a consistent, principled manner world wide. Counsel will forward any further statement which is received from WADA to the Tribunal."

7. Subsequently Drug Free Sport provided the Tribunal with email advice from WADA that:

> "WADA is satisfied that as of the publication of the List, i.e. a few days ago, any substance that has changed category and that could then result in a more favourable treatment of a pending case should be taken into account immediately.
>
> While legally, the *lex mitior* would only apply as of 1st January when the List is fully enforced, we accept for practical reason that this principle be applied by anticipation to existing pending cases. It means that WADA would not appeal a decision where a non-specified substance is already considered as a specified.
>
> We agree there is no specific legal justification to this advice. Our sole intention is to be pragmatic. Therefore, sanctioning bodies remain free to decide as they wish."

8. As a result of these communications the Tribunal re-convened on 16 November 2010, with the consent of the parties as a tribunal of two members, to hear submissions and further evidence.

9. Mr David for Drug Free Sport provided a helpful memorandum in advance of the hearing identifying four issues for consideration:

- Can the matter now be re-considered on the basis that the changed status of the prohibited substance in 2011 makes SADR 14.4 potentially applicable?

- If the matter can be considered under SADR 14.4, can the athlete discharge the onus on her to show on the balance of probabilities how the substance came to be in her system?

- Can the athlete establish to the higher standard of "comfortable satisfaction" the absence of intent to enhance sport performance with the required corroborating evidence on this point in addition to her word (see SADR 14.4 and notes)?

- If the athlete establishes that the requirements for the possible application of SADR 14.4 have been established, what, in the context of a regime which imposes obligations of utmost caution on the athlete, is her degree of fault in connection with the violation and what is the appropriate sanction?

Facts

10. Ms Brightwater-Wharf has been powerlifting for approximately 15 years. She has competed extensively both in New Zealand and overseas, placing first in the 2003 Queensland State Champs, first at the 2005 World Masters in Pretoria, first at the 2006 World Masters in Texas and second at the 2007 World Masters in Ostrava.

11. She was tested in all but the Texas competition and tested clean and has in addition been tested randomly many times, including a recent out of season test in December 2009. All her previous tests have been clear.

12. The Tribunal heard evidence at both hearings from Ms Brightwater-Wharf and her coach, Mr Warren Trent. Mr Trent operates a Wellington gym. It was apparent from Mr Trent's evidence that he prides himself upon his gym being drug free. Mr Trent is himself a competitive powerlifter and his gym is obviously a focal point for a large number of serious competitors in powerlifting and weight sports.

13. Mr Trent confirmed Ms Brightwater-Wharf's evidence that because of injury problems they had put her international competing on pause after the Ostrava championships. With those injuries improving they had planned for Ms Brightwater-Wharf to return to international competition, and the North Island Championships, where she was tested positive, was to ease her back into competition after almost two years off. Mr Trent's evidence was that this competition was but a minor step. Ms Brightwater-Wharf competed "raw" without any special powerlifting equipment, which on the evidence would reduce her performance by between 10 and 30 kgs. She was the only

competitor in her class, a fact which Ms Brightwater-Wharf was aware of well before the competition day.

14. We accept without any reservation Mr Trent's confidence that Ms Brightwater-Wharf's violation was entirely accidental and the result of a belief that the supplement capsule which she took preceding the competition did not contain any prohibited substance. It is perhaps of some moment to note that Mr Trent was the person within the Federation who was responsible for arranging a room for drug testing at the North Island Championships and, while he quite properly did not communicate that information to any of the competing athletes, it is quite clear that he had no expectation at all that Ms Brightwater-Wharf might incur a violation.

15. We also accept Ms Brightwater-Wharf's evidence that she prides herself on her ability to compete and succeed with a clean body and that it is important to her, her gym and her family that she competes honestly. Mr Trent positively confirmed Ms Brightwater-Wharf's values in those respects.

16. Ms Brightwater-Wharf has been in full-time employment as a manager at Health 2000 Retail Ltd for some four or five years. That company operates some 75 retail stores throughout New Zealand. As its name suggests it is a retailer of a variety of health products, including products suitable for and purchased by competitive athletes.

17. Ms Brightwater-Wharf gave evidence that when a product, Ripped Freak, was received from the company's New Zealand distributor in around September 2009 she enquired of the distributor as to the makeup of the product and whether it contained any prohibited substances. The distributor enquired of the manufacturer and advised Ms Brightwater-Wharf that the product was clear of prohibited substances. The Tribunal believes it is a fair matter of inference that this enquiry made by Ms Brightwater-Wharf was both on her own behalf and for her information as a person responsible for the sale of the product. Accordingly we have no doubt that the enquiry of the distributor and on to the manufacturer would have been taken seriously by both.

18. There is a history surrounding the entry of this substance as a prohibited substance on the WADA list which may explain why Ms Brightwater-Wharf's enquiry produced a negative result. The substance dimethylpentylamine is found in geranium oil. Enquiries which Ms Brightwater-Wharf has made subsequent to her returning a positive test indicates that generally only the leaves and stalks of the plant are used for the extraction of geranium oil. The particular product, Ripped Freak, states on the packet that it contained a geranium seed extract. It did not refer to dimethylpentylamine. The first step therefore in recognising that dimethylpentylamine was present in the product required recognition that dimethylpentylamine could be a product of geranium seed as well as geranium oil.

19. The second step which would have been required in 2009 to recognise that the product contained a banned substance would have been to know that dimethylpentylamine was a prohibited substance. In fact this was not a substance specifically named in the 2009 Prohibited list. In that year some Jamaican athletes were charged with a doping violation because of the presence of dimethylpentylamine in their system. After some uncertainty they were found guilty on the basis that dimethylpentylamine was a substance related to other substances on the prohibited list. Accordingly the connection was not explicit on the List and this may explain why the manufacturer's advice was positive.

20. However, as a result of the 2009 experience WADA added dimethylpentylamine to the 2010 Prohibited List. It is a prohibited substance under that list. The consequence of a violation for a prohibited substance is a minimum two years' suspension unless no fault can be shown or a minimum 12 months suspension if no significant fault can be established. As previously described, the decision has now been made by WADA to re-classify dimethylpentylamine as a specified substance as from 1 January 2011.

21. It appears from the evidence that Ms Brightwater-Wharf retained a sample capsule of Ripped Freak in her pill container. Her evidence was that her daily supplements were fish oil, joint repair, magnesium and iron as well as high vitamin B complex, spirulina, broccoli extract and wheatgrass. However, she told the Tribunal that for the last 12 months she had been going through

physical and mental difficulties arising through pre-menopause, as a result of which she had been recommended and was taking iron supplements. On the morning of the North Island Championships she felt low and in addition to taking her normal supplements she took the capsule of Ripped Freak. When she took the capsule she did not have any concerns as to her eligibility to compete in the competition and believed that there were no banned substances in the product.

22. She competed in the competition, won her class, was required to be tested, and fully completed the athlete's testing and disclosure form. On that form she set out the supplements she had taken in the past 24 hours including the capsule of Ripped Freak. The result of the test showed the presence of dimethylpentylamine.

Issue 1

23. Mr David in both Drug Free Sport's 13 October 2010 and 15 November 2010 memoranda, made the point that the principle of *lex mitior* should strictly only apply where a rule change is effective at the date of the hearing. On that principled approach the Tribunal would have to continue to consider this as a charge involving a prohibited substance with the consequence of a suspension of two years or a minimum of one year if no fault or no significant fault could be established.

24. However, as indicated by the WADA email of 14 October 2010 referred to at para. 7 above, WADA itself is taking the pragmatic position that the change of status of dimethylpentylamine should be immediately taken into account. Mr David has provided us with a short report of a US case which has proceeded on that basis and where the athlete Sean Mahoney accepted a penalty of six months' suspension for a positive methylhexaneamine test and the full decision in *UK Anti-Doping v Rachel Wallader* of the UK Anti-Doping Panel (decision 29 October 2010) where leave was given to appeal out of time in respect of a penalty of 12 months for a dimethylpentylamine charge and a penalty of four months substituted. In that Panel decision it was said:

> "5. Consistently with its duty of fairness in prosecuting doping cases UKAD accepted that the athlete should have permission to appeal out of time and also accepted that the principle of *lex mitior*, reflected in Article 25.2 of the WADA Code, should apply so that the athlete should be entitled to take advantage of a subsequent change in the applicable law, if that change is favourable to the athlete."

25. In the exceptional circumstances of the position taken by WADA and the fact that favourable decisions are being made respecting athletes in other jurisdictions, fairness to New Zealand athletes justifies this Tribunal in applying that same criteria. Accordingly the Tribunal will now deal with the consequences of Ms Brightwater-Wharf's breach under Rule 14.4 as a specified substance.

Issue 2

26. The evidence clearly establishes that the dimethylpentylamine found on test was the result of Ms Brightwater-Wharf taking the Ripped Freak capsule on 12 June 2010 which was the morning of the NZ Powerlifting North Island Championships.

Issue 3

27. Determination of this issue will generally be a matter of direct evidence and inference from all of the attendant circumstances. A relevant consideration to such determination will be the knowledge which the athlete has of the presence of the prohibited substance. There are many substances which may influence performance, e.g. caffeine, which are not generally prohibited (unless in excess). If an athlete has a cup of coffee, which may influence performance but the coffee has been laced with a specified substance without her knowledge, it does not follow that her intent relative to the coffee automatically translates to an intent in relation to the specified substance of which she was ignorant.

28. The evidence here is that the Ripped Freak packages, which the sample capsule accompanied, did not identify dimethylpentylamine as an ingredient.

Instead it referred to geranium seed extract. As previously described Ms Brightwater-Wharf did make enquiry of the manufacturer through the New Zealand agent and was told that the product did not contain any prohibited substance. The packaging, typical of this type of supplement, might best be described as vibrant with a heavy emphasis on its claimed fat burning qualities. Those qualities might be expected to be associated with a product that stimulated function.

29. Ms Brightwater-Wharf's evidence was that she took the capsule because that morning she was having significant pre-menstrual effects including feeling depressed. Her principal hope was that the capsule might lift her mental state.

30. It might, of course, be said that almost anything drunk or eaten leading up to a competition is taken with the intent of benefitting performance. Hydrating before a marathon is an obvious example. In a general sense that will always be so. In the Tribunal's view the intent relevant under Rule 14.4 has to be more specific than that. And it must be considered in all of the circumstances.

31. Here the circumstances were that Ms Brightwater-Wharf well knew that she was the only competitor in her class. So she could not have taken the capsule in order to beat her competitors – there were none. On the other hand, Mr David was correct to say that the competitive motivation might in many circumstances be to meet or beat a goal or previous performance. But on the evidence here it is clear that Ms Brightwater-Wharf was not out to do so. As Mr Trent said, she was participating to get the feel again of being on stage, with judges, and an audience. Had she been out to make a goal she clearly would not have lifted "raw" but with appropriate lifting gear.

32. Those objective factors were corroborated by Mr Trent's evidence. And Ms Brightwater-Wharf's completion of the drug testing form with full disclosure of the substances she had taken, including the Ripped Freak capsule, are again corroboration of both her belief that the capsule did not contain any prohibited substance and that she was not trying to gain any unfair competitive advantage.

33. To these reasons the Tribunal members would add their observation of Ms Brightwater-Wharf at the first hearing and the positive view which they then formed as to Ms Brightwater-Wharf's honesty and values. Accordingly the Tribunal is comfortably satisfied that Ms Brightwater-Wharf did not take the capsule with an intent to enhance her performance.

Issue 4

34. This is the most difficult issue. The Sports Anti-Doping Rules place an extremely heavy onus on athletes. The onus is justified because there are athletes who deliberately seek to gain unfair advantage and detection and proof of intent is difficult. One consequence is that in considering degree of fault relevant to reduction of penalty the Tribunal has to keep in mind that an athlete is responsible for the decision to take any substance and the Rules imply a principle of utmost caution.

35. On the facts the assessment to be struck is between what the athlete did do and what the athlete could or should have done. How that is determined will be influenced by the athlete's status. Ms Brightwater-Wharf was a senior athlete, she had been part of the Drug Free Sport programme since 2005 and had attended an Education Presentation in 2007, she had the benefit of the Drug Free Sport literature although she had no recall of a specific publication warning of the risk of supplements, and she had knowledge of and access to the Drug Free Sport call line.

36. Ms Brightwater-Wharf's evidence was that she had been employed in the health products industry for five years or so, had a familiarity with the range of supplement products, and relied and had confidence in natural health practitioners to assist her when she needed additional knowledge or advice. It was clear from her evidence that, at least at the time of this breach, she placed little reliance upon, and had little contact with, registered medical practitioners.

37. There is nothing at all wrong with a person such as Ms Brightwater-Wharf preferring natural health remedies and advice. Nor is there anything to be criticised about Ms Brightwater-Wharf's self-reliance; indeed it is probably a

strength in the sport which she follows. However, when something goes wrong, as it did here, the question is how far that reliance and the enquiries made of the manufacturer justifies reduction in the presumptive penalty of two years. We also note the following statement in *Wallader* at para 46:

> *"….Any athlete who takes a supplement without first taking advice from a qualified medical practitioner with expertise in doping control places herself at real risk of committing a rule violation. Only in the most exceptional cases could such an athlete expect to escape a substantial sanction if a Prohibited Substance is then detected."*

38. For Drug Free Sport, Mr David suggested a minimum penalty of 9-12 months was appropriate. His submission correctly emphasised that in other cases the Tribunal has held that the failure to utilise the advisory service provided by Drug Free Sport is significant in assessing the degree of fault. He also submitted that this was not a case, unlike other Tribunal cases such as *Drug Free Sport NZ v Dane Boswell* (ST 01/09, reasons for decision 24 February 2009), *Drug Free Sport NZ v Tom Wallace* (ST 15/08, decision 5 March 2009) or *Drug Free Sport NZ v Dawn Chalmers* (ST 13/09, decision 11 March 2010), where medical practitioners had prescribed the offending substance, circumstances that the tribunals in those cases had seen as extenuating.

39. While we respect Ms Brightwater-Wharf's self-reliance the Tribunal accepts, as previous tribunals have, that particularly in the case of athletes who have participated in the Drug Free Sport programme and been specifically provided with access details to Drug Free Sport's advisory services, there is a degree of fault when no enquiry is made (except in true emergency situations). We accept that such an enquiry on the Saturday morning may not have resulted in specific information about the presence of the prohibited substance but equally we accept Mr Steel's evidence that advice would have been given not to take the Ripped Freak capsule in the absence of certainty. As well, of course, enquiry could have been made at an earlier time.

40. The Tribunal members understand how the apparent needs of a particular moment can lead to a decision such as the one made by Ms Brightwater-

Wharf. However, it is important that athletes who are in the programme do recognise that their first instinct, for their own protection, must be to be safe and, so far as possible, to be certain. It is important that the Tribunal reinforces that message and the service which Drug Free Sport does provide.

41. Ms Baigent very properly emphasized Ms Brightwater-Wharf's personal circumstances. As we have earlier said we unreservedly accept Ms Brightwater-Wharf's values and honesty. Ms Baigent urged on the Tribunal the imposition of a penalty of four months, equal to that imposed by the UK Anti-Doping Panel in the Wallader case.

42. The Tribunal has seriously considered that possibility. But there were factors in that case differing from the present, including the apparent lack of availability to Ms Wallader of any equivalent of the Drug Free Sport hotline and her relatively junior status and justifiable reliance on the enquiries made by her coach Geoff Capes who had supplied the supplements to her as part of a sponsorship deal he had arranged for his athletes. As part of that process he had enquired and received assurances that the supplements did not contain prohibited substances.

43. As well the Tribunal does need to ensure that any penalty is commensurate to that imposed by divisions of the Sports Tribunal in other cases. The two most comparable previous decisions of the Sports Tribunal are the *Boswell* and *Chalmers* cases (see para 38 above for references). In the first a suspension of two months was imposed, and in the *Chalmers*' case, with a more senior athlete, five months. In both cases medical practitioners were involved and this was seen by both Tribunals as a mitigating factor. That mitigation is not present here and given that circumstance the Tribunal's view is that for reasons of consistency a somewhat longer suspension is required than the five months suspension imposed upon Ms Chalmers. Accordingly the Tribunal imposes a suspension of six months to run from the date of provisional suspension on 27 July 2010.

44. A consequential order is made that Ms Brightwater-Wharf is disqualified from her placing at the 2010 North Island Powerlifting Championship.

DATED this 29th day of November 2010

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A R Galbraith QC
Deputy Chairman