

BETWEEN DRUG FREE SPORT NEW ZEALAND

Applicant

AND DAWN CHALMERS

Respondent

**DECISION OF TRIBUNAL
Dated the 11th day of March 2010**

Hearing Date: 17 February 2010

Tribunal: Alan Galbraith QC, Deputy Chairman
Dr Lynne Coleman
Carol Quirk

Registrar: Brent Ellis

Counsel: Paul David for Applicant
Graeme Steel and Jayne Kernohan for Applicant
Garry Barkle for Respondent
Deirdre Rodgers and Robert Lyall for Boxing New Zealand

In Attendance: Dawn Chalmers, Respondent
Dr McKenzie-Pollock, witness for Respondent

Introduction

1. The facts of the present case have caused the Tribunal some anxious consideration.
2. The facts raise concerns beyond the direct implication for Ms Chalmers' circumstances about the failure of athletes and their medical advisors to take advantage of the information access provided by Drug Free Sport New Zealand and an additional concern about the adequacy of medical advice provided to women athletes.
3. These are not matters that can be dealt with directly in this decision but this Panel will be referring those matters to general consideration by the Tribunal.

The facts

4. Dawn Chalmers is a practising physiotherapist with a substantial sporting background as a New Zealand representative in water polo and an Otago representative in surf lifesaving and basketball. Since 2003 she has achieved such success in women's boxing that she is a potential candidate for the 2012 Olympic Games.
5. On 10 October 2009 she was tested after winning her division at the New Zealand Boxing Championships. The result was a positive test to Furosemide. Ms Chalmers was advised of this on 4 November and wrote to Mr Steel at Drug Free Sport New Zealand on 6 November accepting the result and detailing the circumstances in which she had come to take a Furosemide tablet two days prior to her bout at the Championships.
6. We do not find it necessary to repeat the detail of her medical condition which led to her doctor, Dr McKenzie-Pollock, prescribing Furosemide other than to say it was to mitigate difficulties with swelling and pain that Ms Chalmers had suffered from for several years associated with menstruation.
7. The evidence of Dr McKenzie-Pollock was that he had been Ms Chalmers' medical practitioner for some time, she had consulted him about this particular problem and he had judged it clinically appropriate to prescribe Furosemide. When doing so he was aware of her boxing involvement and he had told her

not to take the Furosemide “*close to*” or “*around*” competition. Dr McKenzie-Pollock is an experienced sports medicine practitioner.

8. Ms Chalmers’ evidence was that she accepted this advice from her doctor, confirmed it with her pharmacist, but did not take any steps to check this advice with Drug Free Sport New Zealand or to clarify what were the parameters of “*close to*” or “*around*” competition. Had she done so she would have been told that Furosemide is a specified substance not to be taken in or out of competition unless the athlete has obtained a therapeutic use exemption (TUE).
9. One of the concerns which the Tribunal has had is that Furosemide is a substance which is capable both of enhancing performance by reducing fluid retention and hence weight which may be vital in a weight restricted competition; and also is capable of masking other substances such as steroids. Given that there are other possible treatments for Ms Chalmers’ problem there is no certainty that if a TUE had been sought it would have in fact been granted.
10. Ms Chalmers’ evidence was categoric that her approach to Dr McKenzie-Pollock was not prompted by any intention to enhance her sporting performance but solely to deal with what had become a persistent lifestyle problem. Her evidence was that she had never had a problem meeting any of the weight classes in which she had competed. Ms Chalmers was tested on this evidence by Mr David in cross-examination.
11. Dr McKenzie-Pollock’s evidence was that he assessed that it was clinically appropriate to prescribe Furosemide to mitigate Ms Chalmers condition. Obviously Dr McKenzie-Pollock understood the potential for Furosemide to be used for improper purposes and would not have prescribed it had he had any concerns that Ms Chalmers was seeking it for other than its therapeutic benefit.
12. Ms Chalmers’ evidence confirmed that she was in the registered testing pool of athletes and had been tested for the presence of prohibited substances on a number of occasions, both in and out of competition. She accepted that she had signed a form acknowledging that she understood her responsibilities as an athlete in the anti-doping programme and also that she had received from Drug Free Sport New Zealand a wallet guide and athlete handbook. She also

accepted that she had the principal responsibility to ensure that she did not take any substance which infringed the Code and that she had failed in her obligations in not checking with Drug Free Sport New Zealand the status of Furosemide.

Sports anti-doping rules

13. Furosemide is a prohibited substance at all times in and out of competition under the World Anti-Doping Agency (WADA) Prohibited List – Diuretics and Masking Agents. The relevant anti-doping rules at the time of the violation in this case were the Sports Anti-Doping Rules 2009 (SADR) which Boxing New Zealand had adopted as their anti-doping rules. The WADA Prohibited List is incorporated into the SADR - see SADR 5.1. The standard period of ineligibility arising from a positive test for Furosemide is two years under SADR 14.2. However, Furosemide is a specified substance under the terms of the Prohibited List. This means that the athlete may be able to reduce or eliminate the period of ineligibility under the specific circumstances under SADR 14.4.
14. In order to rely on SADR 14.4, the athlete will have to establish:
 - (a) How the substance entered her body;
 - (b) That the use of the substance was not intended to enhance the athlete's sport performance or mask the use of a performance enhancing substance.
15. It is necessary for the athlete to produce corroborating evidence sufficient to satisfy the Tribunal to the standard of comfortable satisfaction of the absence of an intent to enhance performance or mask the use of a performance enhancing substance.
16. If the Tribunal is not comfortably satisfied then the two year period of ineligibility applies. If the athlete does satisfy the Tribunal then the Tribunal has to assess the athlete's degree of default.

Relevant precedents

17. Mr David, as counsel for Drug Free Sport New Zealand, referred the Tribunal to a number of decisions both of the Tribunal and overseas tribunals. In

particular he referred to the New Zealand decisions in *Drug Free Sport New Zealand v Dane Boswell (ST 01/09, decision 12 February 2009)* and *Drug Free Sport New Zealand v Tom (Zig Zag) Wallace (ST 15/08, decision 5 March 2009)* and to the UK decision in *The Anti-Doping Commission of the International Boxing Association v Jade Mellor (decision 16 November 2009)*. The latter case arose in circumstances in which a female boxer took a diuretic in order to bring herself within a weight division. Mr Barkle for Ms Chalmers also made submissions in respect to the relevance of these three cases.

18. Inevitably there are differences in the facts of those cases from those in the present case. In *Boswell* a young rower failed to tell the accident and emergency doctor that he was a carded athlete and was prescribed a treatment which resulted in a positive test. The Tribunal considered a suspension of three months would normally be appropriate but for reasons relating to the specific circumstances of that case (particularly around the athlete not having been previously provisionally suspended but having not competed for a month) the Tribunal imposed a suspension of two months. In *Wallace* a young athlete inquired whether a prescribed drug would cause him any problems in relation to drug testing and was wrongly told by the doctor that the drug was not prohibited. While this did not absolve the athlete of his responsibilities to further check the status of prescribed medication, the Tribunal considered that a warning and reprimand was an appropriate sanction in these circumstances. In *Mellor* the UK tribunal's finding was that the substance was taken for the purpose of bringing the athlete within a weight class and she could not establish to the required standard that her taking of the substance was not intended to enhance her sports performance. As a consequence, she was suspended for the mandatory period of two years.

Decision

19. The Tribunal accepts the evidence of Ms Chalmers and Dr McKenzie-Pollock that the prescribing of Furosemide and its use by Ms Chalmers on this occasion was for therapeutic purposes and not for the purpose of enhancing performance, bringing Ms Chalmers within a weight class, or masking the use of any other prohibited substance.

20. In the present case assessing the degree of Ms Chalmers' fault and an appropriate penalty has caused this Tribunal some anxiety. Mr David's submission on behalf of Drug Free Sport New Zealand was that this was a more serious case than **Boswell**. We agree with that submission.
21. The reasons we have come to that conclusion are:
- (a) Ms Chalmers was a senior athlete with knowledge of her obligations and experience of the testing programme.
 - (b) As she acknowledged, she had a Drug Free Sport New Zealand Wallet Guide and athlete handbook and ready access to the information services which Drug Free Sport provides.
 - (c) While Dr McKenzie-Pollock had misstated the status of Furosemide she had at least been explicitly alerted that Furosemide was a substance not to be taken "*close to*" or "*around*" competition.
 - (d) She acknowledged the logic that as Furosemide reduced fluid retention it would reduce weight and could have performance consequences.
 - (e) Despite the uncertainty surrounding Dr McKenzie-Pollock's caution she did nothing to clarify the parameters of "*close to*" or "*around*" which created the potential for a problem even if the substance had been only banned in competition.
22. On the positive side we have taken into account Ms Chalmers' openness and prompt admission of fault, the fact that she obviously knew that she was likely to be tested if she won her division at the Championships, and that she had received mistaken advice from both Dr McKenzie-Pollock and her pharmacist. Those are ameliorating considerations.
23. However, as we have said we regard the facts as more serious than **Boswell** because of Ms Chalmers' explicit knowledge that there was an issue about Furosemide and her failure to clarify the position.
24. Ms Chalmers was provisionally suspended as from 21 December 2009. Accordingly by the date of our hearing on 17 February 2010 she had already been suspended for almost two months. In the circumstances we impose a

further period of ineligibility of three months commencing on 17 February 2010 until the night of 16 May 2010.

25. Although we understand that Ms Chalmers' sporting focus is solely on boxing at the moment we do note for completeness that the ineligibility is to have cross-sport effect.

Dated this 11th day of March 2010

A handwritten signature in black ink, consisting of a large, stylized initial 'A' followed by a long, horizontal, slightly wavy line.

Alan Galbraith QC, (Deputy Chairperson for Sports Tribunal)

Dr Lynne Coleman

Carol Quirk