

**BEFORE THE SPORTS TRIBUNAL  
OF NEW ZEALAND**

**ST 01/11**

**BETWEEN**                      **Drug Free Sport New Zealand**

Applicant

**AND**                              **Graham O'Grady**

Respondent

**AND**                              **Triathlon New Zealand**

Interested Party

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**DECISION OF TRIBUNAL**

**Dated 21 March 2011**

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**Hearing:**                      14 March 2011 at Auckland

**Tribunal:**                      Alan Galbraith QC (Deputy Chairperson)  
Anna Richards  
Chantal Brunner

**Present:**                      Paul David, counsel for Drug Free Sport New Zealand  
Graeme Steel and Jayne Kernohan, Drug Free Sport  
New Zealand  
Mark Hammond, counsel for Graham O'Grady  
Graham O'Grady  
Ross O'Grady, Christine O'Grady and Donna Swart in  
support of Graham O'Grady  
Peter Fitzsimmons, Triathlon New Zealand

**Registrar:**                      Brent Ellis

1. This was an unusual case in the experience of this Tribunal. On 18 February 2011 the Tribunal made a provisional suspension order as to the result of a positive test to morphine returned by Mr O'Grady after an in-competition test on 8 January 2011. The test showed a concentration of morphine of 1.4ug/ml against a WADA threshold of 1.2ug/ml and a combined uncertainty standard of 0.1ug/ml at the WADA threshold. On that day Mr O'Grady had won the Tauranga half ironman/NZ Champs.
2. The matter came back before the Tribunal on 14 March 2011 as the result of Drug Free Sport New Zealand (DFS) charging Mr O'Grady with a breach of Rule 3.1 of the Sports Anti-Doping Rules ("Rules"). Morphine is a prohibited substance under section 7 of the 2011 Prohibited List International Standards.
3. Mr O'Grady did not challenge the test results, which had been confirmed by both the A and B sample tests. Under the Rules an athlete is strictly liable for the presence of a prohibited substance in his sample and the presence of such substance constitutes a violation under Rule 3.1.
4. The mandatory period of ineligibility under Rule 14.2 is applicable, unless a defence can be established by the athlete under Rules 14.5.1 or 14.5.2 or the athlete can meet the requirements of Rule 14.4. Mr O'Grady, in his defence, relied solely on the "no fault" defence under Rule 14.5.1.
5. In order to establish a defence under Rule 14.5.1, the athlete must show by persuasive evidence:
  - (a) How the prohibited substance came into his or her system;
  - (b) If it is established how the substance came into his or her system, that he or she bears no fault. In order to show no fault or negligence, the athlete needs to establish that in the circumstances "he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had used or been administered the prohibited substance". (See the definition of "No Fault or Negligence" in the Rules).

The standard of proof is the balance of probabilities.

6. The WADA Code commentary adopted in the Rules states that Rules 14.5.1 and 14.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases. In the Tribunal's view that statement is the consequence of the difficulty which any athlete will have in establishing the factors required to satisfy a "no fault" defence but should not be read as imposing any additional obligation or burden above that of producing evidence which on a balance of probabilities does establish those factors.
7. The essence of Mr O'Grady's factual defence was that the presence of morphine in his test results was the result of his consuming, over several days before and on the morning of the 8 January competition, gluten free poppy seed bread which he could not reasonably have anticipated would result in a morphine breach.
8. Another division of this Tribunal faced a similar situation in the Potae case (*Softball New Zealand v Cindy Potae*, ST 04/07, decision 27 February 2008). There it was determined that the positive test for morphine resulted from the athlete taking two Nurofen Plus tablets which is a codeine based medication. Scientific evidence was given that codeine can metabolise to morphine, although the extent to which this occurs will vary from individual to individual. The medication itself, Nurofen Plus, and its codeine constituent, was not a prohibited substance under the WADA Code. The Tribunal accepted that there was no fault on Ms Potae in taking the tablets, given that they were not on the prohibited list and that an athlete could not be expected to know that the codeine base might metabolise in the case of some athletes to morphine.
9. In the present case, the no fault defence proceeds on the basis that the morphine found in Mr O'Grady's samples was the product of his consumption of poppy seeds in a standard commercially purchased loaf of bread.
10. Mr O'Grady called evidence from Dr Ralph Richardson as to the possibility of the production of morphine from the consumption of poppy seeds. DFS

produced expert evidence from Dr Catrin Goebel of the Australian Sports Drug Testing Agency Laboratory on that same issue. The Tribunal's knowledge of the morphine producing properties of poppy seeds was very considerably expanded by the numerous articles referred to by Dr Richardson and the articles referred to and provided by Dr Goebel.

11. As a generalisation, what the evidence and the articles made clear is that poppy seeds are a potential, if not certain, source of morphine. What is also clear from the articles is that the concentration of morphine that may result from the consumption of poppy seeds in food is subject to multiple variables including the source and type of poppy seeds, the food production processes to which they were subject, the concentration in the food product and the volume consumed, the passage of time between consumption and the test, the urinary concentration of the athlete when the test was taken, and no doubt variables relating to the individual athlete.
12. It was accepted by both experts that it was not possible to, in hindsight, reconstruct all of those variables in respect to Mr O'Grady's situation and make a calculation as to whether the particular volumetric reading was consistent with the factual position asserted by Mr O'Grady. Given this limitation Dr Goebel's evidence was that it was possible that Mr O'Grady's morphine reading had resulted from consumption of the poppy seed bread, with the reservation that as the concentration was above the WADA threshold that there would have had to have been a combination of unfavourable variables. Dr Richardson, for Mr O'Grady, in his written brief expressed the view that there was a very strong likelihood that the morphine had resulted from the poppy seed consumption. In his oral evidence, he modified this to "likely" as a result of his correcting a misinterpretation he had earlier made as to the use of hydrolysis in the procedures and hence concentrations reported in a number of the articles.
13. Dr Richardson supported his opinion by reference to inquiries he had made that confirmed the source of the poppy seeds as Australian and therefore likely to have a relatively high level of morphine, that the bread production process involved a low baking temperature of 85 degrees for

only 20 minutes which would reduce processing loss, the volume of consumption over a period, and the likely concentration of the urine sample taken immediately after the race. In combination these factors would inflate the morphine concentration.

14. The Tribunal therefore accepts that on the scientific evidence the morphine concentration in Mr O'Grady's test samples was a "possible" or "likely" consequence of the consumption of poppy seed bread which he had described in his written brief of evidence.
15. However, that is not the end of the enquiry. While the scientific evidence establishes the possibility of the contamination arising from the poppy seed consumption, the Tribunal still has to be satisfied, on a balance of probabilities that the source of the morphine concentration was more likely than not that consumption and, if so satisfied, that Mr O'Grady could not reasonably have known or suspected that outcome.
16. Accordingly the Tribunal heard evidence from Mr O'Grady, Mr O'Grady's mother, Ms Swart who had spent considerable time with Mr O'Grady leading up to 8 January and from Dr Milne, Mr O'Grady's long time doctor.
17. Mrs O'Grady's evidence was that she and Mr O'Grady had taken up a gluten free dietary programme some time before and as a result she had begun buying the particular commercial gluten free poppy seed bread. In the few days leading up to 8 January Mr O'Grady and Ms Swart had come to stay with his parents at Pauanui and she had purchased a loaf of that bread anticipating the visit. Mrs O'Grady gave evidence that she saw Mr O'Grady consuming slices of the bread at various times during the two or three days that he and Ms Swart were staying with his parents. She also gave evidence that when Mr O'Grady and Ms Swart left Pauanui to stay in a motel closer to the start of the Tauranga race that she packed up the remainder of the loaf, along with some other food stuffs, for them to take with them. In cross examination by Mr David for DFS she was asked whether there were codeine based painkillers in the Pauanui house, confirmed this was so, but also said that she believed that Mr O'Grady would have told her had he taken any such painkillers and that he did not

do so. Mrs O'Grady is herself a competing triathlete, it is evident that she and her son have a supportive and close relationship, and she gave evidence that she was confident that her son would have told her if he had been taking any medication leading up to the race.

18. The background to those particular questions by Mr David was evidence that the Tribunal had from Dr Milne and also Mr O'Grady that he had sustained a knee injury in November 2010 which, after consultation with Dr Milne on 9 December 2010, he had been treating with Voltaren. Dr Milne's evidence was that he saw Mr O'Grady on only one occasion in respect to this injury, when he prescribed the use of Voltaren, and that he would have expected Mr O'Grady to return to see him had the injury not cleared. Mr O'Grady's evidence was that for a short period he had had to reduce the volume of his running training, but not his swimming or bike training. Indeed the fact that Mr O'Grady won both the Rotorua Half Ironman and the Surfbreaker Sprint in December 2010 confirms that the injury cannot have been unduly debilitating. Mr O'Grady's evidence was that he had stopped using the Voltaren at least a week before the 8 January race and that he had no particular concerns about his knee injury heading into that race. Mr David's questions were appropriately directed to the possibility that because of the pain associated with the injury that Mr O'Grady might have taken a codeine based medication which would provide a different explanation for the presence of morphine than the poppy seed consumption.
19. Ms Swart, who was with Mr O'Grady for the period from 20 December 2010 past 8 January gave evidence both that she had seen Mr O'Grady consume the poppy seed bread at Pauanui and in the motel at Tauranga and that she had not seen or been told by Mr O'Grady of either continuing pain from the knee injury or that he had taken any pain medication in the period leading up to the race.
20. As the Tribunal has already noted, it was appropriate for Mr David to test this evidence and the possible alternative source of the morphine concentration. However, the Tribunal accepts without any reservation the evidence of the consumption by Mr O'Grady of the poppy seed

impregnated bread and has no reason to doubt the evidence as to the absence of consumption of any codeine based medication.

21. This latter finding is important because, as Mr David quite correctly submitted, the Tribunal has to be satisfied as to the probable source of the morphine concentration. On the evidence there are four alternative possible sources. One is the taking of a codeine based medication. The second is the taking of heroin which the tests do not in any way indicate and DFS did not in any way suggest was the source of Mr O'Grady's positive test. The third is the poppy seed impregnated bread. The fourth is, of course, the taking of morphine itself either orally or by injection.
22. The Tribunal is again satisfied without any reservation that the source of Mr O'Grady's morphine reading was not the taking of morphine itself. Not only is morphine a restricted drug so that access is difficult to obtain, it is a painkiller with negative side effects including dulling reaction time which would make it an extremely unlikely choice for an athlete about to compete in a triathlon. There are many pain killing agents much more readily available than morphine. Indeed the codeine medications previously referred to are in that category and are not prohibited.
23. Having heard and seen Mr O'Grady and the other witnesses the Tribunal is satisfied well beyond the balance of probabilities that the source of Mr O'Grady's positive test was the consumption of the poppy seed bread. On the evidence there is no other credible explanation.
24. That leaves the question whether Mr O'Grady could reasonably have known or suspected that consuming this commercial bread product might introduce morphine into his system and ultimately result in a test beyond the WADA threshold. Quite properly Mr David for DFS did not submit that if the Tribunal was satisfied that the source of the morphine concentration was the consumption of the commercial bread product that Mr O'Grady could be suggested to be in any way at fault for not anticipating the morphine outcome. As the Tribunal found in the Potae case, this Tribunal also finds that such a result could not reasonably have been anticipated by Mr O'Grady. Given our conclusion that Mr O'Grady's morphine

concentration was the result of the consumption of the poppy seeds, Mr O'Grady's defence under Rule 14.5.1 therefore succeeds.

25. The immediate consequence is that the provisional suspension order made on 18 February 2011 lapses.
26. The second consequence is that no period of ineligibility can be imposed for a violation under Rule 3.1. However, the finding that the no fault defence succeeds does not mean that DFS has not succeeded in establishing a violation under Rule 3.1.
27. Mr Hammond, who ably argued Mr O'Grady's case, submitted that if the Tribunal was satisfied that Mr O'Grady had established his no fault defence then the positive test should not be considered a violation and accordingly that Mr O'Grady's competition result on 8 January 2011 should stand.
28. The Rules do not permit the Tribunal to take that course. Rule 14.5.1 provides:

"In the event that this Rule is applied and the period of Ineligibility otherwise applicable is eliminated, the Anti-Doping Rule Violation shall not be considered a Violation for the limited purpose of determining the period of Ineligibility for multiple Violations under Rules 14.7."

29. The effect therefore is that the positive test remains a violation of Rule 3.1 with the consequence under Rule 14.1.2 of an automatic disqualification of Mr O'Grady's result obtained in the 8 January 2011 competition, which includes forfeiture of any medals, points and prizes. That the result is to be automatically disqualified, even if the athlete is found to have no fault or negligence for the violation, is reinforced in the commentary to Rule 14.1.2 which states:

"When an Athlete wins a gold medal with a Prohibited Substance in his or her system, that is unfair to the other Athletes in that Competition regardless of whether the gold medallist was at fault in any way. Only a "clean" Athlete should be allowed to benefit from his or her competitive results."

The Tribunal accordingly makes that order for disqualification and forfeiture.



30. The benefit of the success of the no fault defence is that Mr O'Grady cannot be made subject to a period of ineligibility and, although there has been a violation under Rule 3.1, that violation would not count against Mr O'Grady should he ever face another violation charge. Having said that, the Tribunal is confident that such an occasion will not arise in Mr O'Grady's case.
31. This judgment commences by recording that this is, in this Tribunal's experience, an unusual case. As will be evident from the Tribunal's description of the evidence the positive test was a major shock to Mr O'Grady. As a result he has been provisionally suspended for a period and missed at least two significant competitions. Undoubtedly that is unfortunate given that the Tribunal is satisfied that Mr O'Grady was not at fault in respect to the breach of Rule 3.1 but all parties, including DFS, and for that matter the Tribunal, have sought to expedite the hearing.

Dated this 21<sup>st</sup> day of March 2011



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**Alan Galbraith QC**  
**Deputy Chairperson**

**Anna Richards**

**Chantal Brunner**