

**BEFORE THE SPORTS TRIBUNAL  
OF NEW ZEALAND**

**ST 01/11**

**BETWEEN**                      **Triathlon New Zealand Inc**

Applicant

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

Respondent

---

**REASONS OF TRIBUNAL FOR  
PROVISIONAL SUSPENSION DECISION**

**Dated 24 February 2011**

---

**Tribunal:**                      Alan Galbraith QC (Deputy Chairperson)  
Anna Richards  
Dr Lynne Coleman

**Decision:**                      18 February 2011

**Present:**                      Dave Beeche, Triathlon NZ Inc  
Mark Hammond, counsel for Graham O'Grady  
Graham O'Grady  
Ross O'Grady in support  
Paul David, Counsel for Drug Free Sport  
Graeme Steel, Drug Free Sport  
Jayne Kernohan, Drug Free Sport

**Registrar:**                      Brent Ellis

## Reasons

1. The Tribunal issued its decision on 18 February 2011 determining that Mr O'Grady be provisionally suspended as from that date. The Tribunal's decision indicated that reasons would be given subsequently.
2. The Tribunal's decision followed a telephone hearing of an application by Triathlon New Zealand for a provisional suspension order arising from a positive A test to morphine returned after an in competition test on 8 January 2011. At the time of the hearing and the issue of the decision the result of a test of the B sample was still awaited. The expectation was that the B sample result would be available on Monday 21 February 2011.
3. At the hearing Mr Hammond, counsel for Mr O'Grady, submitted that the Tribunal should not make a provisional suspension order in any event. The grounds for that submission were that Mr O'Grady had and would voluntarily withdraw from competition pending the substantive hearing, that there was a relatively small excess over the permitted limit for morphine, the possibility was that the morphine reading had resulted from the consumption of poppy seeds on a staple bread product, and that the stigma that would attach to a provisional suspension order was unfair when ultimately there may be no breach or no or a limited penalty. As an alternative Mr Hammond submitted that no provisional suspension order should be made until the B sample result was received.
4. The Tribunal should immediately record that Mr Beeche, for Triathlon New Zealand, made it very clear that so far as Triathlon New Zealand was concerned that Mr O'Grady was held in high standing and there had never been any question about his integrity.
5. In opposing the suggestion that the Tribunal should not impose a provisional suspension order, Mr David for Drug Free Sport submitted that although the imposition of a provisional suspension order is in the discretion of the Tribunal where a specified substance is involved that

there was nothing in the factors advanced on Mr O'Grady's behalf to take this out of the normal run of cases. Mr David and Mr Steel of Drug Free Sport also pointed out that there is in fact a benefit to a person in Mr O'Grady's position from an order for provisional suspension because that order will start time running which will be taken into account in respect to any penalty if ultimately a substantive breach is determined.

6. In considering the submissions the Tribunal was conscious that the situation of a delayed B sample is not uncommon. In the Tribunal's view the making of a provisional suspension order in that circumstance would not in itself be prejudicial to an athlete because such an order would lapse automatically if the B sample result proved negative. Additionally the making of a provisional suspension order is required by Rule 12.7 to remain confidential until publication of the final decision. The Tribunal did have a concern that a decision to delay determination of the provisional suspension application in this case would have some precedential effect.
7. As subsequently transpired, the results of the B sample test became available late on Friday 18 February 2011. That result confirmed the A sample result.
8. In respect to the submission that no provisional suspension order should be made the Tribunal agrees with the Drug Free Sport submission that the factors relied on do not take this case out of the normal run, that the Tribunal cannot presume the result of the substantive hearing, that unless the positive tests can be challenged there will be an onus on Mr O'Grady at the substantive hearing to bring the facts within the qualifications in Rule 14.4 that allow the Tribunal to exercise a discretion as to penalty, and that there is in fact an advantage to Mr O'Grady in having the time for suspension beginning to run.
9. In respect to that latter consideration, the Tribunal was advised that Mr O'Grady was planning to compete in an event in Dubai for which he would leave New Zealand on 5 March. The Tribunal cannot in the context of the provisional suspension application come to any conclusion

as to what if any penalty may ultimately be imposed but the commencement of a provisional suspension order from 18 February 2011 may ultimately be of assistance to Mr O'Grady.

10. In that same context the Tribunal did indicate that it would do whatever it practicably could to assist in having a determination of the substantive application as soon as possible. However, it was acknowledged by all parties that an early date of hearing would depend upon Mr O'Grady and his counsel being able to provide the necessary evidence to Drug Free Sport in sufficient time in advance of the hearing for Drug Free Sport to satisfy itself as to that evidence or obtain its own evidence.

Dated this 24th day of February 2011



---

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

**Anna Richards**

**Dr Lynne Coleman**