



## Proceedings

1. Drug Free Sport New Zealand (DFSNZ) alleged an anti-doping rule violation against Gareth Dawson who played for the Canterbury Rams NBL basketball team, in that he breached Rule 2.1 of the Sports Anti-Doping Rules 2017 (SADR) as evidenced by the presence of a prohibited substance, higenamine, in a sample collected from Mr Dawson after a NBL match on 27 May 2017.
2. DFSNZ applied for provisional suspension of Mr Dawson on 4 August 2017. Mr Dawson resides in Western Australia, and there were delays confirming service, and difficulties involving Mr Dawson in the proceedings, who despite numerous attempts did not respond to contact from the Tribunal offering assistance and advice.
3. Due to the time that had elapsed with no communication from Mr Dawson and the ongoing delays, the Tribunal convened a teleconference to consider the provisional suspension application. This led to the first contact from Mr Dawson, advising he was unable to attend due to work commitments. An offer to reschedule to facilitate his attendance went unanswered. Therefore, on 4 September 2017 the Tribunal ordered the provisional suspension of Mr Dawson with effect from that date. The Tribunal cautioned Mr Dawson that he was subject to substantial mandatory penalties and the onus was on him if there was to be any mitigation of the consequences.
4. On 18 September 2017, DFSNZ filed an application for substantive anti-doping rule violation proceedings. Mr Dawson confirmed receipt on 25 September 2017.
5. On 18 October 2017, Mr Dawson filed his Form 2 notice admitting the anti-doping violation but requested the opportunity to be heard on the issue of the appropriate sanction to be imposed.
6. A pre-hearing teleconference was set for 24 October 2017, but Mr Dawson advised he was unable to attend. He confirmed his availability for the sanction hearing.
7. On 20 October 2017, the Tribunal Chairperson directed the teleconference be vacated and issued a Minute. The Chair reiterated the need for Mr Dawson to obtain legal advice and the necessity for Mr Dawson to provide an explanation for how the banned substance entered his system. In the absence of obtaining his own legal advice, the Tribunal Chair encouraged Mr Dawson to contact DFSNZ or the Sports Tribunal for assistance. Again, the Chair warned Mr Dawson of the substantial mandatory

penalties he faced unless he presented evidence which could mitigate in defence. The matter was set down for a hearing at a time which recognised Mr Dawson's residence and work commitments in Perth.

8. On 25 October 2017, Mr Dawson confirmed his availability for the hearing on 27 November 2017. He was subsequently provided with the telephone conference connection details.
9. On 21 November 2017, DFSNZ filed and served a Memorandum in support of its application. Mr Dawson was asked if he intended to respond or file any material in support. On 22 November 2017 he confirmed his attendance for the hearing and filed a statement in support of his case.
10. On 26 November 2017, DFSNZ filed a further Memorandum and statement in response to Mr Dawson's material for the hearing.
11. On 27 November 2017, 11 minutes before the hearing was to begin, Mr Dawson emailed to advise he was unable to attend. He said he had not finished work and was unable to attend the hearing as he was still 1200km away from Perth. Further, he advised as he had made his submission, the matter could be decided based on the material he had submitted.
12. The Tribunal adjourned the matter to enable Mr Dawson to be advised of his current position and to have one final opportunity to participate in a hearing. The Tribunal noted that without his attendance, including being available for cross examination, the material he had filed was not sufficient to reduce the mandatory four year suspension period. In order for the Tribunal to consider his circumstances, Mr Dawson was requested to confirm a date when he was available to attend a hearing. Failure to participate in a hearing would leave the Tribunal no option but to determine his case on the material filed and impose the mandatory sanction as required by SADR.
13. The Tribunal provided Mr Dawson with the opportunity to respond to the further material filed by DFSNZ and information submitted by Basketball NZ.
14. On 6 December 2017, Mr Dawson again declined the offer to participate in a hearing. He repeated that he had outlined his circumstances and did not want to be involved any further. He said he was returning to New Zealand over the holiday period,

consequently he was offered the opportunity to appear in person for a hearing before the Tribunal. Mr Dawson also declined that offer.

15. The Tribunal convened a hearing for 14 December 2017 to deal with matter based on the material filed but without Mr Dawson's direct participation.

### **Background**

16. On 27 May 2017, Mr Dawson was competing in a NBL basketball match in Christchurch and was tested after the game. On his Doping Control Form, Mr Dawson disclosed a number of medications, related to cold symptoms, but nothing that explained the presence of higenamine. Mr Dawson subsequently advised that he was taking the supplement "Oxyshred".
17. Mr Dawson expressed his concern saying he had been taking the supplement for many years and had been cautious following his previous case to ensure he checked the products he was taking complied with anti-doping rules. Mr Dawson had committed an anti-doping violation in 2014, for which he was suspended for 12 months.
18. Higenamine was found to be present in Mr Dawson's May 2017 sample. Higenamine is a specified substance which is prohibited at all times under class S3 Beta-2 Agonists on the 2017 Prohibited List. Before 2017 it was not specifically listed in the Prohibited List but higenamine was always prohibited under the same category of substances.
19. DFSNZ accepted that the source of higenamine in Mr Dawson's system was from the supplement "Oxyshred", a thermogenic fat burner product. DFSNZ advised that on some sites advertising Oxyshred the labels specifically list higenamine as an ingredient, but on others it is not specifically disclosed in the advertised labelling.

### **Relevant SADR Provisions**

20. DFSNZ did not seek to establish that Mr Dawson's conduct was intentional. Accordingly, the period of ineligibility under SADR 10.2.2 of two years ineligibility was applicable.
21. Mr Dawson having admitted the violation, and as this was his second anti-doping violation, DFSNZ submitted that a period of ineligibility be imposed in accordance with SADR 10.7.1. That rule provides:

## 10.7 Multiple Violations

10.7.1 For an *Athlete* or other *Person's* second anti-doping rule violation, the period of *Ineligibility* shall be the greater of:

- 10.7.1.1 six months;
- 10.7.1.2 one-half of the period of *Ineligibility* imposed for the first anti-doping rule violation without taking into account any reduction under Rule 10.6; or
- 10.7.1.3 twice the period of *Ineligibility* otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, without taking into account any reduction under Rule 10.6.

The period of *Ineligibility* established above may then be further reduced by the application of Rule 10.6

- 22. Rule 10.6 relates to non- *Fault* related reductions. There are no possible reductions applicable in this case.

## Issues

- 23. The core issue for consideration by the Tribunal is the period of ineligibility to be imposed.

## Mr Dawson's Submissions

- 24. On 21 November 2017, Mr Dawson filed a statement which he said he would elaborate further on during the hearing and answer any questions. Mr Dawson made the following submissions in his written material:
  - a) he was surprised at testing positive for a banned substance and had never heard of higenamine;
  - b) following a Google search which indicated that it was a "chemical compound found in a variety of plants including fruits, roots, stems and vines", he was not any wiser as to how he had tested positive for such a substance;
  - c) following further investigations of the supplements he took, he established that it was contained in a supplement by EHPLABS called "Oxyshred";
  - d) he had been consuming this product since 2015, and had checked with DFSNZ at the time that it was permitted and was advised it was acceptable;
  - e) further he had passed several drug tests while taking the supplement;

- f) upon further investigation he discovered that in 2017 higenamine had been added to the Prohibited List by WADA;
- g) while accepting that he had tested positive for a banned substance, his contention was simply higenamine had now only recently become a banned substance and yet was an ingredient in a supplement he had been taking for a couple of years;
- h) he submitted that taking the supplement was part of his pre-game routine and that such routines were part of his life as an athlete, which had been in place since 2015, and which had not caused any issues until now;
- i) he raised concern about the “duty of care and due diligence” provided by Basketball New Zealand and DFSNZ raising his awareness of a newly banned substance;
- j) citing provision 4.1 of the 2015 Code, Mr Dawson referred to the lack of education provided by either Basketball NZ or DFSNZ about the Prohibited List and noted he had never received notice of the Prohibited List or indeed was aware it was updated annually;
- k) education from DFSNZ had diminished over the last eight years since he had started his NBL career. He advised that in the past DFSNZ would update athletes at the start of the season with a review and update on changes, but this had changed to large team seminars and online videos and questionnaires;
- l) he referred to a large number of athletes who had tested positive for higenamine, and submitted given the difficulty for athletes to keep up with the constant changes to the anti-doping regime, national doping agencies should increase their education to athletes;
- m) following his previous breach of the rules he was diligent to ensure he checked all products were permitted;
- n) he was not aware of a responsibility to check the Prohibited List annually, he had not signed anything to that effect, and DFSNZ previously advised athletes of such information; and
- o) having reviewed the criteria to add a substance to the WADA Prohibited List, he argued it was difficult to understand why higenamine had been added. Based on his research the substance did not satisfy the requisite elements to “enhance sport performance” or have any “health risks to the athlete”.

### **DFSNZ’s Submissions**

25. DFSNZ submitted that under SADR the period of ineligibility for a first violation of SADR 2.1 involving a specified substance is 2 years unless DFSNZ establishes that the conduct which led to the violation was “intentional” as defined in SADR 10.2.3. Where

an athlete has committed an earlier violation the period of ineligibility for a second violation has to be calculated under the provisions for Multiple Violations under SADR 10.7.1.

26. DFSNZ submitted the period of ineligibility was not subject to possible reduction under SADR 10.6. Arriving at the period under SADR 10.7.1 for the purposes of the provision at SADR 10.7.1.3 involved applying any possible defence under SADR 10.4 or 10.5.
27. DFSNZ contended if no defence is asserted, or that the violation was intentional, the applicable period of ineligibility would be two years. DFSNZ consequently argued that for the second violation, the applicable period of ineligibility would be 4 years under SADR 10.7.1 as Mr Dawson had not met the onus on him.
28. The only applicable provision would be under SADR 10.5.1.1 where an athlete proved how the prohibited substance came to be in his sample and that his fault or lack of care was not significant.
29. Based on information provided by Mr Dawson, DFSNZ submitted he should have done more to avoid a positive test and his fault or lack of care was high. DFSNZ said Mr Dawson:
  - a) was an experienced professional athlete, who should have been extremely careful to comply with his obligations under the Code given his previous violation;
  - b) should have been aware of the risk of taking a product such as Oxyshred, whose advertising marks it as a supplement which poses a risk for athletes subject to the Code;
  - c) appeared to have made no effort to check the labelling of the product against the Prohibited List, nor searched the internet for information about the product or its ingredients;
  - d) had not asked his team management about his use of the supplement; and
  - e) had demonstrated a cavalier attitude to the use of educational material provided by DFSNZ.
30. Regarding Mr Dawson's statement that DFSNZ had indicated that Oxyshred was safe for him to use, DFSNZ submitted that:

- a) Higenamine is a specified substance banned in and out of competition and is on the Prohibited List 2017. Before 2017 while not specifically listed, it was still prohibited under class S3 Beta-2 Agonists;
- b) The Prohibited List is published every year and DFSNZ publishes the proposed changes in advance and posts the new List on its website;
- c) DFSNZ provides a wide range of information on its website for athletes regarding the operation of the SADR/Code including specific information on medication and supplements and the risks of taking them;
- d) Mr Dawson's records show he attended a DFSNZ seminar on 27 February 2016. This seminar would have covered the obligations of athletes under SADR, including the need to take care with medicines and the risks of supplements;
- e) DFSNZ also provides E-learning modules designed to allow athletes to work through relevant information in a user-friendly way. The modules contain information about athletes' obligations, the risks with products such as supplements and how athletes can obtain information to help them meet their obligations;
- f) Mr Dawson completed E-learning level 1 and level 2 on 13 and 14 March 2017. The level 2 course covers the risks with supplements and labelling and included a specific question about higenamine as a banned ingredient in supplements;
- g) When DFSNZ staff respond to enquiries about supplements their approach is to provide information about the high risk posed by supplements and they should not be taken. DFSNZ staff would never state that any supplement is completely safe to take, nor would they advise a supplement was not on a "banned substances" list; and
- h) DFSNZ had examined advertising for OxysHred on a number of websites and on some sites the labelling specifically listed higenamine as an ingredient, but not on others.

### **Basketball NZ's Statement**

31. At the request of the Tribunal, Basketball NZ filed information about the education materials it had sent by email to all teams in the 2017 NBL. This material detailed the resources and the education options available to players through attending seminars or completing online education modules. The material also included the Prohibited List 2017 and WADA's summary of modifications to the list among other relevant information.

32. Mr Potter, Chief Executive of Basketball NZ, advised that Mr Dawson had not attended either of the 'Blitz' events where the drug seminars were held as he was a late recruit for the Canterbury Rams. However, the email from Basketball NZ showed he was advised through team management to complete the online drug education. Mr Potter advised NZNBL regulations required players to complete the drug education, whether in person or online, to participate in the NBL season. The report showed Mr Dawson had completed his 2017 drug education module online and consequently was cleared to play.

### Discussion

33. The presence of the prohibited substance in Mr Dawson's sample establishes an anti-doping violation under SADR 2.1. The period of ineligibility for a first violation is two years, where DFSNZ does not assert that the violation was intentional.
34. The relevant clause under SADR 10.7.1 to consider the period of ineligibility for a second violation is 10.7.1.3. Mr Dawson did not present evidence or make himself available for cross examination to advance a defence which would justify a reduction of the period of ineligibility. Consequently, Mr Dawson is subject to "twice the period of *ineligibility*" otherwise applicable. The applicable period of ineligibility is four years.
35. There are no factors argued by Mr Dawson that would allow the Tribunal to consider any elimination or reduction in the period of ineligibility. Given the consequences to Mr Dawson of a second anti-doping violation, the Tribunal made numerous attempts to assist and encourage Mr Dawson to obtain advice. He has been provided with ample opportunity to consider his position and take action.
36. The Tribunal has tried to engage Mr Dawson several times throughout the process, offered advice and information, including providing him with the Legal Assistance Panel List, to help him appoint a lawyer. Mr Dawson did not contact DFSNZ or the Sports Tribunal for advice, obtain legal advice or appoint a representative to act on his behalf.
37. In assessing the appropriate sanction, the Tribunal notes Mr Dawson is an experienced athlete who has received anti-doping education, including being suspended for a previous anti-doping violation. He was aware of his responsibilities to ensure

prohibited substances did not enter his system. His failure to be diligent about the status of the supplement has resulted in a second violation.

38. The fact that the prohibited substance was a listed ingredient in the Oxyshred supplement reflects Mr Dawson's attitude towards his responsibilities, as supplement products are generally well publicised sources of banned substances for athletes. Mr Dawson failed to check the product or even the ingredients, and made no attempt given his previous experience to seek advice about the product, or showed any degree of caution. If he had used the product for several years he was irresponsible about the use of such products as an athlete subject to strict anti-doping obligations.
39. The Tribunal noted Mr Dawson's submission that he had been taking the supplement since 2015 and had never returned a positive result, until the current case in May 2017. A check with DFSNZ verified that Mr Dawson has not been the subject of any testing in 2015 or 2016. Mr Dawson's records show since his first 2014 violation, he was tested again in 2014, which was negative, and that he has not been tested again until May 2017.
40. The Tribunal concludes that the period of ineligibility cannot be less than four years. Mr Dawson was an athlete who failed to consider his duty or exercise care when he purchased and used a risky supplement product. His previous breach should have served as a reminder of the compliance required for all sport participants. This is a stern response, but it is what is mandatory under the Code.

## **Conclusion**

41. The Tribunal is satisfied, in the absence of any evidence from Mr Dawson, that there is no alternative but to impose on Mr Dawson the sanction provided by SADR 10.7.1.3 which is a four year period of ineligibility.
42. A credit is always provided for the period from the date of provisional suspension of the athlete to the date of the decision. Further, the Tribunal has a discretion to back date the commencement of the period of ineligibility to as early as the date of the sample collection which was 27 May 2017. This discretion is used with caution and reserved for unusual circumstances. None has been established.
43. The period of disqualification must necessarily run from the provisional suspension imposed on 4 September 2017. A further small allowance can be made for Mr

Dawson's timely admission, but he has otherwise not been helpful or cooperative, and has failed to come anywhere near fulfilling the onus on him if there was to be a reduction in the period of ineligibility.

44. The four year period of disqualification will commence from 31 July 2017.

Dated: 15 December 2017



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**Sir Bruce Robertson**  
**Chairperson**