

Background

1. This is the Tribunal's tenth case arising from Medsafe's *NZ Clenbuterol* investigation. Medsafe passed information from the website's database to Drug Free Sport New Zealand (DFSNZ), which investigated the names to see who were registered as members of New Zealand sports organisations and therefore subject to the Sports Anti-Doping Rules (SADR).
2. DFSNZ confirmed a list of customers who were bound by SADR and details of their internet purchases of clenbuterol and other anabolic steroids from *NZ Clenbuterol*. In October 2017 DFSNZ commenced its first batch of proceedings against those who had purchased prohibited substances online.

Proceedings

3. Hayden Blackley, the respondent, is an athlete identified in the Medsafe investigation. DFSNZ filed proceedings against Mr Blackley on 7 September 2018 but was unable to confirm service of the proceedings on the Respondent until 10 October. DFSNZ alleged Mr Blackley on or about 13 February 2015 purchased 20ml of clenbuterol from the *NZ Clenbuterol* website and used it at various times in breach of 2015 SADR 2.2 and 2.6. At the time of the alleged breach Mr Blackley was registered with New Zealand Rugby League.
4. Mr Blackley was provisionally suspended without opposition on 15 October 2018. On 18 October he filed his Form 2 admitting the violation, so the Tribunal was only required to determine the penalty to be imposed. Under SADR 10.2 the sanction is a four year period of ineligibility, but if the athlete can establish the violation was unintentional, the period of ineligibility can be reduced to two years.
5. Mr Blackley advised that he had previously used powder and drink supplements and purchased clenbuterol because he thought it was an alternative weight loss product. He said he was not aware clenbuterol was a banned substance but did not use it on the advice of his friends.
6. It was accepted on the evidence that Mr Blackley's violation was not intentional. SADR 10.11.1 and 10.11.2 enables the Tribunal to commence the period of suspension earlier than the hearing date where there have been substantial delays and/or timely admission by the athlete.

7. On 26 October the parties filed a joint memorandum in relation to sanction which recorded the relevant facts and jointly proposed an appropriate sanction. A copy of the memorandum is annexed.
8. The Tribunal having considered all available material is satisfied it is able to accept the proposed sanction without the need for a hearing and makes the orders proposed. The circumstances here are similar to those in previous cases determined by the Tribunal.

Order

9. Mr Blackley's suspension will be for a period of two years backdated by 12 months to commence from 15 October 2017.

Dated: 29 October 2018



.....
Sir Bruce Robertson
Chairman

ANNEXURE:

New Zealand Sports Tribunal

ST 14/18

between

DRUG FREE SPORT NEW ZEALAND
Applicant

and

HAYDEN BLACKLEY
Respondent

JOINT MEMORANDUM ON SANCTION

25 October 2018

Lee Salmon Long

Barristers and Solicitors

LEVEL 16 VERO CENTRE 48 SHORTLAND STREET
PO BOX 2026 SHORTLAND STREET AUCKLAND NEW ZEALAND
TELEPHONE 64 9 912 7100 FACSIMILE 64 9 912 7109
EMAIL: isaac.hikaka@lsl.co.nz SOLICITOR ON RECORD: ISAAC HIKAKA
EMAIL: harriet.bush@lsl.co.nz SOLICITOR ACTING: HARRIET BUSH

JOINT MEMORANDUM ON SANCTION

MAY IT PLEASE THE TRIBUNAL

1. On 7 September 2018, the applicant, DFSNZ, filed anti-doping rule violation proceedings against Mr Blackley arising out of Medsafe New Zealand's investigation into the website trading as NZ Clenbuterol. Mr Blackley has admitted the violations and set out his position in Form 2.
2. The parties have now had the opportunity to consider the statements filed in this matter and other recent Tribunal cases involving athletes who purchased substances from NZ Clenbuterol and the sanctions imposed in those matters.
3. The parties jointly submit that the appropriate sanction for Mr Blackley for breach of rules 2.2 and 2.6 of the Sports Anti-Doping Rules 2015 (**SADRs**) is a period of **two years ineligibility backdated by 12 months from the date of preliminary suspension**, being 15 October 2018.

Background

4. On 24 August 2018, DFSNZ notified Mr Blackley that it intended to bring allegations before the Sports Tribunal that Mr Blackley had breached rr 2.2 (use or attempted use of a prohibited substance) and 2.6 (possession of a prohibited substance) by:
 - (a) Purchasing two 10ml bottles of clenbuterol on or about 13 February 2015; and
 - (b) Using or attempting to use it at various times after that date.
5. Mr Blackley did not respond to the notification and DFSNZ subsequently filed the proceeding. At the provisional suspension hearing on 15 October 2018, Mr Blackley signalled that he would admit the allegations. He then filed Form 2 admitting the violations.
6. Clenbuterol is prohibited at all times as a S1 anabolic agent under the Prohibited List 2015. It is a non-specified substance, prohibited both in-competition and out-of-competition.
7. Under r 10.2 of the SADRs, the period of ineligibility for breach of rr 2.2 and 2.6 for a violation involving a non-specified substance is four years. Where the athlete can establish that the anti-doping rule violation was unintentional, the period of ineligibility shall be two years.

Two or four year starting point

8. In order for the period of ineligibility to be reduced to two years, the athlete must satisfy the Tribunal, on the balance of probabilities, that the violation was unintentional. SADR 10.2.3 provides that the concept of intention in r 10.2, is "meant to identify athletes who cheat." An intentional violation involves either:

- (a) Knowledge by the athlete that he or she engaged in conduct that they knew constituted an anti-doping rule violation; or
 - (b) Knowledge by the athlete that there was a significant risk that the conduct might constitute or result in a rule violation and manifestly disregarded that risk.
9. In this case the parties agree that there is evidence from which the Tribunal could be satisfied that Mr Blackley's violation was unintentional:
- (a) Mr Blackley's evidence is that:
 - (i) he purchased clenbuterol for weight loss;
 - (ii) he had no idea what clenbuterol was or that it was banned;
 - (iii) he has never received any drug training; and
 - (iv) when the product arrived it looked suspicious and he threw it away without using it.
 - (b) The email evidence obtained by DFSNZ only shows Mr Blackley purchasing clenbuterol on one occasion.
 - (c) In similar cases where an athlete purchased clenbuterol and did not turn his mind to his obligations under the SADR's the Tribunal has held that the violation was unintentional.¹
10. Accordingly, the parties jointly submit that the appropriate period of ineligibility in this case is two years.

Backdating

11. The starting point under the SADR's 2015 is that the period of ineligibility should start from the date of the final hearing. Any period of provisional suspension shall be credited against the total period of ineligibility served.
12. Under r 10.11.1 the Tribunal has discretion to start the period of ineligibility at an earlier date where there have been "substantial delays in the hearing process not attributable to the athlete". In decisions involving the Medsafe Clenbuterol investigation, including *DFSNZ v Lachlan Frear* and *DFSNZ v Ware*, the Tribunal has considered that the time it had taken DFSNZ to advance the investigation has resulted in substantial delay for which the athletes were entitled to some allowance.
13. Rule 10.11.2 also allows the period of ineligibility to be backdated where the athlete promptly admits the violation after being confronted by DFSNZ. As noted, Mr Blackley signalled his intention to admit the allegations at the provisional suspension application, shortly after the proceeding was served on him. The parties agree that the Tribunal could properly find that this amounts to a timely admission.

¹ See for example *Drug Free Sport New Zealand v Lachlan Frear* ST 07/17.

14. A combination of delay and a timely admission has previously led the Sports Tribunal in cases involving NZ Clenbuterol to backdate the period of ineligibility by six to ten months. In *DFSNZ v Jones*, the Tribunal informed the parties that it considered backdating the period of ineligibility by 12 months was appropriate for the combination of delay and timely admission, given the further time that had passed since the first cases involving the Medsafe Clenbuterol investigation were decided.²

Conclusion

15. For the above reasons, the parties respectfully submit that it would be open to, and appropriate for the Tribunal to impose a period of two years ineligibility backdated by 12 months from the date of preliminary suspension, being 15 October 2018, on Mr Blackley for breaches of rr 3.2 and 3.6 of the SADR.
16. If the Tribunal considers that the proposed sanction is appropriate, the parties agree that the matter can be dealt with on the papers and respectfully request that the hearing scheduled for Wednesday 31 October 2018 be adjourned.

Dated 26 October 2018



Harriet Bush Counsel
for the Applicant



John Mooney Advocate for
the Respondent

² *Drug Free Sport New Zealand v Jones* ST 05/18.