

Background

1. Siliga Kepaoa, the respondent, plays rugby league for the Point Chevalier Pirates in the Fox Memorial competition, the highest level of amateur rugby league in the Auckland region. He is also a member of the Akarana Falcons which competes in the National Premiership.
2. Mr Kepaoa was tested on 19 September 2017 following a training session and after the National Premiership final on 7 October 2017. On the doping control form on both occasions Mr Kepaoa listed he used the product "Oxyshred".

Proceedings

3. DFSNZ applied for provisional suspension of Mr Kepaoa on 8 November 2017. DFSNZ alleged that Mr Kepaoa had 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 taken from him on 19 September 2017.
4. On 13 November 2017 a telephone conference was convened to consider the provisional suspension application. Counsel for Mr Kepaoa advised that the respondent did not oppose the provisional suspension application, waived his right to request an analysis of his "B" sample and admitted the violation but requested to be heard as to the appropriate sanction. Mr Kepaoa was provisionally suspended on 13 November 2017.
5. On 17 November 2017, DFSNZ filed its substantive proceedings for two anti-doping rule violations against Mr Kepaoa. The second application related to the sample taken on 7 October 2017. The second violation occurred prior to Mr Kepaoa being notified of the first violation relating to his September sample.
6. As Mr Kepaoa had already been provisionally suspended, a second application was not necessary. Mr Kepaoa again waived his right to request a B sample analysis. The timetabling orders set for the first application were agreed to apply to the second application.
7. On 1 December 2017 Mr Kepaoa filed his Form 2 admitting the violations and provided material in support.
8. The matter was set down for hearing on 16 January 2018.

9. On 9 January 2018, a joint memorandum was filed with the Tribunal on behalf of DFSNZ and Mr Kepaoa. As set out below, that memorandum recorded an agreement between the parties as to an appropriate penalty, based on an agreement that there had been no significant fault but that there was a degree of fault falling within the “high end of the range of the defence”.
10. The Tribunal must of course consider whether it is appropriate to make a consent order comprising that agreement, particularly given the large degree of public interest in the Tribunal’s adjudicatory powers relating to drug offences in sport. Given the evidence that has been filed by the parties and the very detailed and helpful memorandum that they have jointly filed, the Tribunal considers that it is able to make the orders consented to and to do so without holding a hearing.

Relevant SADR Provisions

11. As is evident, Mr Kepaoa has admitted the use of higenamine, a prohibited substance, and so the Tribunal is required to determine the sanction which is to be imposed in relation to that offence. Under the Rules, multiple violations are treated as a single anti-doping rule violation.
12. Higenamine is classified as an S3 Beta-2 Agonist, a specified substance banned in and out of competition. The relevant starting point is SADR 10.2. As DFSNZ did not seek to establish that Mr Kepaoa’s conduct was intentional, the two year period of ineligibility under SADR 10.2.2 applies, unless one of the defences under SADR 10.5 is established. Mr Kepaoa, submitted he could establish the mitigating defence of no significant fault or negligence under SADR 10.5.1.1.

Mr Kepaoa’s Submissions

13. Mr Kepaoa submissions, as filed stated:
 - a) he was an amateur rugby league player who had never played professionally;
 - b) he was a member of the Point Chevalier Pirates which competes in the Auckland rugby league competition;
 - c) he was also a member of the Akarana Falcons which is a representative team competing in the National Premiership and is the current national champion;
 - d) he was aware that he could be tested for drugs as a member of the Falcons;
 - e) he had received some education about drugs in sport prior to the start of Falcon’s 2017 season;

- f) he was aware that he needed to ensure he was not using supplements with banned substances in them;
 - g) prior to these proceedings he did not know that he could check his supplements with DFSNZ;
 - h) until testing positive he had never heard of higenamine and did not know he was taking a banned substance;
 - i) he was taking a supplement called Oxyshred which he bought at a retail shop specialising in supplements on the North Shore;
 - j) Oxyshred is a weight loss product and does not claim to boost performance – higenamine is a listed ingredient in Oxyshred;
 - k) he asked the salesperson at the shop if the supplement was safe to use given he was subject to drug testing as a member of the Falcons and was told it was safe;
 - l) he accepts he should not have relied on this person's advice and should have checked the product for himself; and
 - m) he declared his use of Oxyshred on his testing form.
14. DFSNZ accepted that the source of higenamine in Mr Kepaoa's system was from the supplement Oxyshred, a thermogenic fat burner product, which he had purchased from a retail outlet.

Decision

15. The Tribunal considered the joint memorandum of counsel in relation to sanction. The memorandum records the relevant facts and a proposed sanction which both parties accept.
16. The Tribunal agrees that it was open on the evidence for the parties to agree and the Tribunal accepts that Mr Kepaoa has established a no significant fault defence but also agrees that he has done so by a relatively low margin.
17. Mr Kepaoa acknowledged he had received some education about drugs in sport prior to the start of the Falcon's 2017 season and was aware that he needed to ensure he was not using supplements with banned substances in them. He also accepted he should not have relied on a salesperson's advice as to whether Oxyshred contained a banned substance and should have checked the product for himself. The Tribunal considers Mr Kepaoa should have taken more care but that his failure to do so should be reflected in the relatively limited deduction that will be allowed from the otherwise mandatory two year suspension period. That is agreed by the parties and the Tribunal

considers it is appropriate to accept their recommendation of an 18 month suspension period.

18. The Tribunal also agrees it is appropriate to backdate the period of ineligibility to the first sample collection date.

Orders

19. An 18 month period of suspension is imposed on Mr Kepaoa and shall commence from 19 September 2017.

Postscript

20. The Tribunal commends the parties for the responsible way in which they have worked this proceeding through to an agreed position, aided by the very full detailed submission supporting that position, that the Tribunal has been able to accept without the need for a hearing. While the evidence has not been tested by cross-examination, DFSNZ would not have entered into this agreement without satisfying itself that the facts were clear and that also is our impression.
21. As stated above, there is a strong public interest in this jurisdiction but there is also a public interest in efficient administration of the jurisdiction where there are unlikely to be strong differences between the parties in relation to the facts and the issues arising from them.

Dated: 16 January 2018



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Dr James Farmer QC
Deputy Chairperson