

BETWEEN **DRUG FREE SPORT NEW ZEALAND**

 Applicant

AND **SAMUEL HENRY**

 Respondent

AND **NEW ZEALAND RUGBY LEAGUE**

 Interested Party

DECISION OF SPORTS TRIBUNAL
25 February 2019

Hearing At the request of the parties the decision was made on the papers

Tribunal Sir Bruce Robertson (Chairman)
 Ruth Aitken
 Chantal Brunner

Participants Harriet Bush, counsel for Applicant
 Hayden Tapper, Drug Free Sport New Zealand
 Samuel Henry
 Kevin Bailey, for New Zealand Rugby League

Registrar Mike Selwyn

Background

1. On 8 October 2018, Samuel Henry, a registered member of New Zealand Rugby League, was tested during a rugby league match. The test result was positive for 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid (a metabolite of THC), in a concentration above the WADA Decision Limit. This metabolite is a specified substance, prohibited in-competition, under class S8 Cannabinoids on the WADA Prohibited List 2018. On the doping control form, Mr Henry listed a protein shake, turmeric pills and BCAA as medications or supplements he had taken within the last seven days.

Proceedings

2. On 26 November 2018, Drug Free Sport New Zealand (DFSNZ) filed proceedings alleging a violation of Rule 2.1 of the Sports Anti-Doping Rules 2018 (SADR) evidenced by the presence of a prohibited substance in the sample collected.
3. Mr Henry had been tested at a competition rugby league match on 6 October 2018. This tested positive for a metabolite of cannabis at a level of 547 ng/ml. The WADA Decision Limit is 180 ng/ml. Mr Henry did not request a 'B' sample analysis.
4. Mr Henry was provisionally suspended without opposition on 10 December 2018. On 17 December 2018, DFSNZ filed an application for substantive anti-doping rule violation proceedings.
5. On 29 January 2019, a telephone conference was held to provide timetabling directions and confirm a hearing date. The Chairman explained to Mr Henry that the starting point was a ban of two years, unless he could show that the violation was due to no significant fault or negligence of his. The Chairman also said that the ban could be increased to four years if DFSNZ could prove that the violation was intentional. DFSNZ advised that they did not have any evidence to show the violation was intentional.

Issue

6. The sole issue for the Tribunal was to determine the penalty to be imposed.

Relevant SADR Provisions

7. SADR 10.2 provides:

Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances or Prohibited Methods

The period of *Ineligibility* imposed for a violation of Rules 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Rules 10.4, 10.5 or 10.6:

10.2.1 The period of *Ineligibility* shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a *Specified Substance*, unless the *Athlete* or other *Person* can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a *Specified Substance* and *DFSNZ* can establish that the anti-doping rule violation was intentional.

10.2.2 If Rule 10.2.1 does not apply, the period of *Ineligibility* shall be two years.

8. SADR 10.5 is:

Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

10.5.1 Reduction of Sanctions for *Specified Substances* or *Contaminated Products* for Violations of Rule 2.1, 2.2 or 2.6

10.5.1.1 *Specified Substances*

Where the anti-doping rule violation involves a *Specified Substance*, and the *Athlete* or other *Person* can establish *No Significant Fault or Negligence*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two years of *Ineligibility*, depending on the *Athlete's* or other *Person's* degree of *Fault*.

10.5.1.2 *Contaminated Products*

[...]

DFSNZ's Submissions

9. On 7 February 2019, DFSNZ filed its' submissions on sanction. The memorandum submitted that the applicable sanction was two years' ineligibility, backdated by one month from the date of the provisional suspension. The memorandum further

submitted that the appropriate sanction would be between six and 12 months, backdated by one month from the provisional suspension, should Mr Henry establish no significant fault.

10. DFSNZ submitted that Mr Henry could reduce the sanction due to no significant fault or negligence, if he could clearly demonstrate that the context of the use was unrelated to sport performance (commentary to r 10.5.1 of the SADR).
11. DFSNZ further submitted that the recent cases of *DFSNZ v Ngatoko* (ST 16/16) and *DFSNZ v Mikara* (ST 17/16) established that recreational use of cannabis met the criteria for no significant fault. DFSNZ argued that Mr Henry had failed to establish no significant fault (and therefore a ban of two years was warranted), but conceded that a further opportunity could be given for him to establish no significant fault given he was not represented by a lawyer. DFSNZ submitted that should Mr Henry establish no significant fault, a ban of between six and 12 months would be appropriate (noting the concentration of the banned substance was much higher than in *Ngatoko* and *Mikara*).
12. DFSNZ argued that the ban should be backdated to one month prior to the provisional suspension, on the basis of steps taken by Mr Henry that could be construed as a timely admission (though it noted that Mr Henry had not formally admitted the violation). DFSNZ compared Mr Henry's situation to that in *Mikara*, which also involved a high level of the banned substance (though not as high).

Mr Henry's Submissions

13. On 11 February 2019, Mr Henry filed his response to DFSNZ's submissions on sanction. He accepted the violation, and explained that in 2016 he was diagnosed with Post Traumatic Stress Syndrome (PTSD), and that he used cannabis recreationally as a way of dealing with the symptoms of the disorder. He submitted that the week prior to the test was an intense one for him and his team, and that he had "smoked a joint" as a way of dealing with the pressure of the competition.
14. Mr Henry further submitted that he did not intend to cheat, and he was also not seeking any form of performance enhancement from smoking the cannabis. He explained that he had played rugby league since he was 13 years old (he is now 30), and that he would like to continue playing for a few more years.

DFSNZ – No Significant Fault

15. On 22 February 2019, DFSNZ acknowledged that Mr Henry had established no significant fault.

Degree of Fault and Sanction

16. The critical issue is the athlete's level of fault assessed against what a reasonable person acting in accordance with the strict obligations under SADR ought to have done to avoid breaching the rules, considering the perceived level of risk.
17. The Tribunal noted DFSNZ's submission that recreational cannabis use had met the criteria for no significant fault in prior cases. The Tribunal accepted Mr Henry's evidence of his use of cannabis to alleviate the symptoms of PTSD, and that the test occurred after a weekend of intense training where he had unfortunately chosen to smoke cannabis to ease the pressure involved in that stage of the competition.
18. The Tribunal found that the circumstances of Mr Henry's use of cannabis met the threshold of no significant fault or negligence, and would therefore attract a lower penalty. That meant that a ban of between six and 12 months, backdated by one month from the date of the provisional suspension, was appropriate.
19. The Tribunal considered its' earlier decisions of *Ngatoko* and *Mikara*. It observed that *Ngatoko* was of limited assistance because of the "extremely low" reading recorded (189 ng/ml when the threshold was 180 ng/ml). Isolated cannabis use would in theory not return a test result that was over this threshold. It recognised that WADA had increased the threshold limit in 2013 to avoid such instances of cannabis use resulting in positive tests.
20. The level in *Mikara*, at 269 ng/ml, was substantially lower than that found in the present case. At the time, the Tribunal described the reading in *Mikara* as "relatively high". The Tribunal did not need to make a finding on the extent of Mr Henry's cannabis use, but the level of THC recorded (547 ng/ml) was higher than prior cases. The level recorded in *Mikara* signalled "an extensive and continual use of cannabis over a long period". An element of deterrence was necessary to signal that such cannabis use was unacceptable in sport.

Conclusion

21. Having regard to the level recorded and the circumstances of Mr Henry's use of cannabis, we are satisfied that the minimum sanction must be a ban of seven months, backdated by one month prior to the date of his provisional suspension.
22. Mr Henry is ineligible to participate in any competitive sport until 10 June 2019.

Dated: 25 February 2019



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Sir Bruce Robertson
Chairman