BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 01/09**

BETWEEN **DRUG FREE SPORT NEW ZEALAND**

Applicant

AND **DANE BOSWELL**

Respondent

REASONS FOR DECISION OF TRIBUNAL GIVEN ON 12 FEBRUARY 2009
Dated 24 February 2009

Hearing:	11 February 2009 at Hamilton
Counsel:	Paul David for Applicant Mark Hammond for Respondent
In attendance:	Graeme Steel for Applicant Respondent in person
Interested party:	Alan Cotter and Luke van Velthooven for Rowing New Zealand
Tribunal Members	Hon Barry Paterson QC Adrienne Greenwood Carol Quirk
Registrar:	Brent Ellis

Introduction

1. The Tribunal heard the anti-doping rule violation proceeding on 11 February 2009 and issued a decision on 12 February 2009 imposing a period of ineligibility of two months as and from 11 February 2009 on the respondent Dane Boswell.

2. It now gives its reasons for the decision.

Background

3. The respondent is a rower who has represented New Zealand overseas in the eights. He has competed for New Zealand in the Under 23 and has recently been in the Regional Performance Centre based in Cambridge. He works part-time and lives in Cambridge.

4. Mr Boswell gave a urine sample in an out of competition test on 17 November 2008. He had competed in intensive trials between 7 and 13 November. The urine sample tested positive for the stimulant Probenecid and Mr Boswell was advised of the result of the testing of the A sample in December 2008.

5. Probenecid was on the prohibited list current at the time in the S5 category of diuretics and other masking agents. It is still so categorised under the WADA 2009 Prohibited List.

6. Under the Sports Anti-Doping Rules (2007) (the 2007 rules) in force at the time of the violation, the mandatory period of ineligibility for such a violation was 2 years. The only way in which there could be an elimination of this period was if the no fault principle applied. If the athlete was able to establish the lesser defence of no significant fault, the period could be reduced to a minimum of one year's ineligibility.

7. The position changed at 1 January 2009 under the Sports Anti-Doping Rules (2009) ("the rules"). For violations which occur after 1 January 2009 Probenecid is now a specified substance, and if the provisions of rule 14.4 of the rules can be established, the sanction on a first violation is at a minimum, a reprimand and no period of ineligibility and

at a maximum a period of 2 year's ineligibility. Rule 22.1.2 of the rules provides that the provisions of the previous rules in force at the time of the violation are the relevant rules, "*Unless the Sports Tribunal hearing the case determines the principle of 'lex mitior' as applied by CAS should be applied in the circumstances of the case*". CAS is the international Court of Arbitration for Sport.

8. It is relevant in this case to note that Rowing New Zealand in accordance with the 2007 rules applied for provisional suspension. A panel of the Tribunal was immediately convened and a hearing by telephone conference to determine this application was held on 19 December 2008. At that time Mr Boswell, who represented himself, advised that he had exercised his right to have the B sample tested. He had provided to the applicant (DFS) his medical records showing how the Probenecid had been prescribed. He advised that if the B sample tested positive, he would seek to establish that there should be no period of ineligibility on the basis of the no fault provision in the rulings. He did not intend to compete again until 16 January 2009. In the circumstances, the Tribunal declined the application for provisional suspension but gave Rowing NZ the right to make a new application if circumstances changed. It noted that if DFS filed an application for anti-doping violation proceedings it would urgently convene a hearing.

9. Mr Boswell's B sample also tested positive for Probenecid. Consequently, DFS filed the current application on 13 January 2009.

10. Mr Boswell filed his own notice of defence on 21 January 2009. He advised that he wished to defend the application, the grounds being:

> "My regular doctor was away when I had an infected hand, and after finishing training on Saturday, I had no other choice than to go to Anglesea Clinic. I had to make the doctor aware that I was an athlete subject to drug testing but he settled on IV antibiotics as the best treatment. He did not make me aware that what he was prescribing may or may not have been a controlled substance."

11. On 22 January 2009, Mr Hammond, Mr Boswell's solicitor who had subsequently been instructed wrote to the Tribunal advising that Mr

Boswell admitted the violation but wished to participate in a hearing to make submissions on any penalty that may be imposed on a no fault basis.

12. A practical difficulty from an evidential point of view was that the doctor who had prescribed Probenecid was in South Africa at the time of the hearing. This fact was confirmed by the Anglesea Medical Clinic. The doctor sent an email advising that he had been consulted by Mr Boswell on 15 November 2008 and to the best of his knowledge did not discuss Probenecid with him during that consultation. The medical records of Anglesea Clinic were also produced and they confirm that Mr Boswell consulted the clinic on 15 November 2008. The first note was *"rowing caluses [sic] hands"*. The notes state that Mr Boswell got blisters while training and now had an infected right hand. They confirm that the doctor prescribed, amongst other things, Probenecid. The Tribunal is entitled to accept evidence in this form and accepts that the source of the Probenecid was a prescription by the doctor as part of Mr Boswell's medication for his infected hand.

Submissions on behalf of Mr Boswell

13. Mr Boswell provided a statement of evidence and was cross-examined by counsel for DFS. His evidence was that his usual doctor, who was familiar with his rowing involvement, was not available and he therefore went to the Anglesea Clinic in Hamilton. He was prescribed an antibiotic which he could take either orally or intravenously. He chose the latter. He said he was also given other medication in the form of a single tablet, which he was told to take orally. This was given to him by a nurse in the clinic and not by prescription. He did not know that the medication was Probenecid or even what Probenecid was at that stage. He returned the following day for further treatment and was given another Probenecid tablet.

14. In his written statement, from which he resiled slightly under cross-examination, he claimed that neither Rowing NZ nor any other sporting or educational group with whom he had been involved had provided any

comprehensive education on banned substances. He had been given a pamphlet advising on the dangers of drug use, but he did not recall that the pamphlet, which was given in 2004, listed banned substances and he had not been alerted to Probenecid or that it was a masking drug or banned substance. He did recall going to an anti-doping seminar in Hamilton in 2007 and said "*that seminar was fairly superficial and simply warned us of the dangers of taking drugs. Again, there was no list provided or mention made of actual banned substances and the masking agent probenecid was not mentioned*." Other than these events he said he had had no education on banned substances.

15. His rowing manager had told him to go to a particular doctor for medical issues. He understood that the doctor specialised in sports medicine but because the doctor was not available when he had his hand problem, he went to the Anglesea Clinic.

16. At the trial, Mr Hammond for Mr Boswell concentrated on the *lex mitior* principle and submitted that this was a case for its application and that the sanction in the circumstances should be a reprimand and that no period of ineligibility should be ordered. The underlying basis for this submission was that Mr Boswell's level of fault was relatively low. In addition, he had been frank and contrite and the experience had been a powerful and salutary learning experience. He submitted that there was no issue of deterrence generally given the confidential nature of the proceedings. This was a first offence and otherwise Mr Boswell was an impressive young man of exemplary character. A period of ineligibility would have harsh consequences on Mr Boswell.

17. The degree of fault submission was based on the fact that Mr Boswell had told the doctor that he was a rower and was in actual fact wearing a New Zealand rowing shirt at the time of the consultation. The Probenecid was given by a nurse without any explanation as a secondary or ancillary medicine. There was nothing to alert Mr Boswell to make an inquiry, although on hindsight he accepts he should have. The substance was taken innocently and not with an intent to gain any competitive advantage.

DFS's Submissions

18. A statement of evidence was given by Mr Steel, the Chief Executive of DFS. He provided the following history of Mr Boswell's testing and education:

- He entered the registered testing pool on 26 May 2006 when he signed a form which confirmed in summary that he understood his responsibilities as an athlete in the anti-doping programme. That form contained the following:

> "4. I have read and understand the "Testing Information Booklet" published by DFSNZ and agree to meet the requirements set out in that booklet.
>
> 5. I understand that a positive test result and/or failure to comply in full with the anti-doping regulations of *Rowing New Zealand* may lead to penalties being imposed on me under *Rowing New Zealand* Constitution/Rules.
>
> 6. I understand that a positive test result and/or failure to comply in full with the anti-doping regulations of *Rowing New Zealand* may lead to publication of my name by *Rowing New Zealand*."

- From the time he entered the DFS registered testing pool, Mr Boswell received:
  - 2007 Wallet Guide and Athlete Guide
  - 2008 Wallet Guide and Athlete Handbook
  - 2009 Wallet Guide and Athlete Handbook (this was received after the date of the test).
- The seminar to which Mr Boswell had referred to in his evidence was presented by a Doctor Johnson. Mr Boswell signed the attendance register which had noted at the top of it the topics covered in the seminar. These included "*banned drug list*" and "*inadvertent doping*". While Mr Steel was not present at the seminar which Mr Boswell attended, he advised that all presenters at DFS seminars are required to cover the core matters. He had attended other

seminars conducted by Dr Johnson and in Mr Steel's view the doctor provided a clear outline of the anti-doping rules with particular emphasis on the responsibility of the athlete under the rules. In the seminars Dr Johnson explains the prohibited lists. Further, a video is played at the seminar which emphasises the need for athletes to check medications which are prescribed. The main message given is not that athletes should try to remember lists of prohibited substances but that they must inform the person prescribing medication that they are subject to testing and that they must insist that the doctor responsible for prescribing the medication (or other medical professional) checks the status of any substances they are considering prescribing. Mr Steel had never heard of any Dr Johnson's presentations being termed "superficial".

- A slide from the video shown by Dr Johnson at his seminars was produced in evidence. It included the following:

> Always tell your doctor or pharmacist that you are subject to drug testing before they prescribe medicine.
>
> Refer to the Drug Free Sport NZ resources that you have been provided (Asthma Guide, Wallet Card, Athlete Guide).
>
> Call 0800 DRUG FREE to check any medication.

19. The wallet card which Mr Boswell acknowledged he had received advised the athlete to "*always advise your doctor/chemist that you are an athlete subject to sports drug testing before you are prescribed medication – ask that you doctor/pharmacist refers to the MIMS New Ethicals Catalogue to clarify status of substances – ensure that all TUE requirements are met*". The card made it clear that it was possible to text "*drug info*" to a specified number for instructions. There is similar material in the athlete handbook.

20. It is not necessary to deal with DFS's submissions on the no fault principle because this was virtually abandoned by Mr Boswell at the hearing. The Tribunal notes that in the circumstances neither the no

fault argument nor the no substantial fault argument could have succeeded.

21. Mr David for DFS accepted that if the Tribunal was satisfied that the requirements of rule 14.4 of the rules had been satisfied, the *lex mitior* principle allowed the Tribunal to consider the sanctions available for a specified substance. It was DFS's position that if the *lex mitior* principle was to be applied, it was necessary to assess the fault of the athlete in arriving at an appropriate sanction.

22. Mr David also submitted that this was not a case where the Tribunal should merely reprimand Mr Boswell. He referred to a note to rule 14.4 of the rules which said "*it is anticipated that the period of ineligibility will be eliminated entirely in only the most exceptional cases*". It was DFS's position that there had been a clear failure of personal responsibility by Mr Boswell and that the facts of this case did not place the case in the most exceptional category.

Discussion

23. As noted above, and because of the factual findings below, the Tribunal is of the view that this is not a case of no fault. Nor is it a case of no significant fault. In fact the application of the *lex mitior* principle means that any sanction under rule 14.4 would be less severe than the sanction available to the Tribunal under the no significant fault principle.

24. The principle of *lex mitior* is that if the rules have changed by the time a matter is heard, and the new rules provide for a more lenient sanction than the earlier rules which applied at the time of the alleged violation, then the Tribunal may apply the more lenient rules.

25. There are many CAS decisions where the *lex mitior* principle has been applied. As was said in *advisory opinion CAS 94/128* "*this principle applies to anti-doping regulations in view of the penal or at the very least disciplinary nature of the penalties that they allow to be imposed*". The independent anti-doping Tribunal decision in *International Tennis Federation v Volandri*, given in January this year, is a recent case which

applied the principle of *lex mitior*. It referred to previous cases where when considering the question of fault of the athlete, the consideration was the athlete's personal fault and not the fault of the athlete's agent or medical advisor. Rule 14.4 of the rules states:

> The *Athlete's* or other *Person's* degree of fault shall be the criterion considered in assessing any reduction of the period of *Ineligibility*.

Although the matter was not argued before the Tribunal and it is not necessary to determine it for the purposes of this decision, the Tribunal's provisional view is that fault of a doctor may be a factor in considering the sanction under rule 14.4.

26. Another decision of the independent anti-doping Tribunal in *International Tennis Federation v Koubek* accepted that an important consideration in applying a sanction was the degree of fault of the athlete. In that case the Tribunal considered the degree of the player's fault to be neither trivial nor very grave but between the two extremes.

27. Turning to the provisions of rule 14.4 of the rules, this Tribunal finds on the basis of Mr Boswell's evidence and the corroborating evidence referred to above:

    (a) The Probenecid entered Mr Boswell's body in the form of a tablet prescribed by Mr Boswell's doctor and taken on two occasions.

    (b) Mr Boswell did not intend to enhance his sports performance or mask the use of a performance enhancing substance. He may have been unaware that he was even taking Probenecid. He did not know that it was a prohibited substance.

    The Tribunal accepts that Mr Boswell did not deliberately take a prohibited substance. He is not a drug cheat.

28. The Tribunal does not however accept that Mr Boswell's fault was as low as submitted on his behalf. Despite his evidence to the contrary, the Tribunal is satisfied that Mr Boswell did receive appropriate drug education. He had material, which included the wallet guide which he

should have carried with him in his wallet, which made it abundantly clear that the onus was on him to tell the doctor that he was an athlete subject to sports drug testing. On the evidence, the Tribunal was satisfied he did not advise the doctor that he was subject to sports drug testing. He did not, as the wallet requested him to do, advise the doctor to refer to the MIMS New Ethicals Catalogue to clarify the status of the substance which the doctor intended to prescribe. This is not a case of a trivial fault. Mr Boswell did not discharge his obligations. It would have been possible for the doctor to have prescribed him a drug which would have been performance enhancing. He could have been prescribed with a steroid without his knowledge.

29. The Tribunal accepts the submission on behalf of the DFS that this was a case of a failure of personal responsibility. It does not accept that there is no general deterrence value. If the Tribunal were to impose a reprimand and no other sanction, it would be sending the wrong message to athletes. They would be able to be careless and casual in their drug responsibilities and expect to receive nothing more than a reprimand. This is not an exceptional circumstance which would allow the Tribunal not to impose a period of ineligibility.

30. The period of ineligibility is a more difficult issue, this being the first case of this type which has come before the Tribunal. It has dealt with other specified substances, but in the future, as in this case, will be considering substances which were previously not specified substances and which have a greater effect on the athlete's performance than do some of the substances which have previously been considered by the Tribunal. While all cases will depend on their own facts, the Tribunal is of the view that an appropriate sanction for the current violation is a period of three months' ineligibility.

31. The decision issued on 12 February reduced that period of three months to a period of two months ineligibility. In the circumstances of this case, the reduction was not as a result of finding the doctor bore some of the fault. The doctor who was possibly a locum and who has returned to South Africa may not have been familiar with the prohibited drug list, although if he had been alerted, as he should have been, he would have been able to have checked the position in the New Ethicals Catalogue. An athlete who has not alerted a doctor of his obligations under the rules cannot hide behind the doctor's actions.

32. The reason for the reduction is that the Tribunal did not provisionally suspend Mr Boswell in December last. If it had done so the period of provisional suspension would have been taken into account and the period of ineligibility would have expired on 19 March 2009. Viewed in retrospect, the decision of the Tribunal in December 2008, which comprised the same panel members as the present tribunal, is perfectly understandable. Mr Boswell was alleging no fault and was having the B sample tested. He was not competing for approximately a month.

33. Based on the experience in this case, the Tribunal will need to consider the possible long term implications of not provisionally suspending if there is such an application and if the testing of the B sample is a factor, whether to adjourn the application and have the matter brought on again immediately after the B sample test is received.

34. In giving a credit because of the provisional suspension issue, the Tribunal may be being unduly lenient to Mr Boswell, but in the circumstances has determined that the period should be reduced from three months to two months.

35. The period of ineligibility will have prevented Mr Boswell from competing in the New Zealand Rowing Championships from which the elite rowing squads are selected. His carelessness may well have cost him a place in a New Zealand rowing squad and even a trip overseas. These are not factors which would make the case an exceptional one or normally affect the length of the sanction. However, because of the

provisional suspension decision, the Tribunal has decided to extend some leniency to Mr Boswell in the circumstances. It was for this reason that the decision was that a period of two months ineligibility be imposed.

Dated 24 February 2009

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Hon Barry Paterson QC
Chairman of Sports Tribunal