

**BETWEEN            DRUG FREE SPORT NEW ZEALAND**

**Applicant**

**AND                 GARETH DAWSON**

**Respondent**

**AND                 BASKETBALL NEW ZEALAND**

**Interested Party**

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**DECISION OF TRIBUNAL  
DATED 1 AUGUST 2014**

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**Hearing**            29 July 2014 by telephone conference

**Tribunal**            Sir Bruce Robertson (Chair)  
Chantal Brunner  
Ron Cheatley

**Present**            Paul David, counsel for Drug Free Sport New Zealand  
Graeme Steel, Drug Free Sport New Zealand  
Jude Ellis, Drug Free Sport New Zealand  
Gareth Dawson, Respondent  
Gareth Davis, counsel for Gareth Dawson  
Dr Peter Finlayson, witness for Gareth Dawson

**Registrar**          Brent Ellis

## **Proceedings**

1. Drug Free Sport New Zealand (DFS) alleged an anti-doping rule violation against Gareth Dawson who plays for the Southland Sharks NBL basketball team.
2. DFS contended that the analysis of a sample collected from Mr Dawson, during a pre-season NBL tournament on 22 March 2014, confirmed the presence of the prohibited substance 3-Hydroxy-4-Methoxy-Tamoxifen (a metabolite of Tamoxifen).
3. DFS applied for provisional suspension of Mr Dawson on 6 May 2014. The Tribunal heard that application on 15 May and made an order provisionally suspending Mr Dawson from that date.
4. Mr Dawson requested that his B sample be tested. The Tribunal adjourned the matter until 4 June to allow for testing and analysis of the B sample which was also positive.
5. DFS filed an application for anti-doping rule violation proceedings.
6. At a pre-hearing teleconference on 4 June, the Tribunal made timetable orders and set the matter down for hearing on 27 June 2014.
7. Counsel for Mr Dawson, Mr Davis, subsequently requested a time extension until 16 June to finalise medical evidence which was granted.
8. In the Notice of Defence and submissions filed, Mr Dawson admitted the violation and elected to participate in the proceedings to make submissions on the appropriate penalty. However, further time was needed by Mr Davis to file statements of witnesses and this did not occur until 26 June.
9. Given the statements were filed the day before the hearing, DFS requested an adjournment of the hearing to give it sufficient time to consider and respond to the evidence filed. Mr Davis did not oppose the request for adjournment and the hearing was adjourned until 9 am on 29 July. DFS filed its submissions in response on 28 July.

10. On the night of 28 July, Mr Davis requested that the hearing be rescheduled to later on the day of 29 July as a witness (Dr Finlayson) was not available at 9am. The Tribunal rescheduled the hearing to 1.30 pm on 29 July.

### **Status of Tamoxifen**

11. Tamoxifen and its metabolites are prohibited in sport. Tamoxifen is classified as a "specified substance" under the 2014 World Anti-Doping Prohibited List. The issues before the Tribunal are:
  - Whether Rule 14.4 of the Sports Anti-Doping Rules 2014 (SADR) applies in this particular case (Rule 14.4 allows for the possibility of a reduced penalty when the prohibited substance is a specified substance so long as the athlete can establish certain things); and
  - what the appropriate penalty for the violation is.

### **Evidence and submissions on behalf of Mr Dawson**

12. Mr Dawson in 2011 noticed a medical abnormality which was sore and annoying while competing in sport.
13. He went to see his family doctor in Timaru, Dr Smith, who gave him a diagnosis but did not prescribe any treatment at the time and told Mr Dawson to come back if it got worse.
14. The condition went away for about 18 months but then returned.
15. Mr Dawson in late 2013, who by then was living in Invercargill, researched online by googling the diagnosed phenomena and seeing what treatments were available. He saw references to tamoxifen and ordered tamoxifen tablets from an online pharmacy.
16. He did not receive this tamoxifen. The parcel containing his tamoxifen was intercepted in the mail by New Zealand Customs who referred it to the Ministry of Health. Mr Dawson did not follow up its non-receipt.

17. When the substance did not arrive Mr Dawson consulted Dr Finlayson, a doctor in Invercargill. He had prescribed medicines to the Southland Sharks but was not the team doctor. Mr Dawson requested a repeat prescription of tamoxifen. Dr Finlayson prescribed Mr Dawson tamoxifen.
18. There was factual dispute between Mr Dawson and Dr Finlayson as to exactly what occurred between them but it does not need to be resolved as it does not go to the substance of Mr Dawson's culpability.
19. Mr Dawson took approximately 10 tamoxifen over 10 days in November and December 2013. The medical problem came back in late January just as the team was completing pre-season training and Mr Dawson completed the remainder of the prescription and the problem went away again. The medication was taken prior to the commencement of the 2014 NBL season. Dr Finlayson did not apply for a Therapeutic Use Exemption ("TUE") for the tamoxifen because it was used outside competition.
20. Mr Dawson completed the prescribed tamoxifen around 11 March 2014. He had a urine sample taken by DFS on 22 March 2014 at a pre-season tournament in Porirua. This is the test that returned positive.
21. Mr Dawson was tested again by DFS in Wellington on 17 April 2014. This test returned a negative result and Mr Dawson was advised accordingly by DFS in a letter dated 15 May 2014. At the time of the second test being conducted, Mr Dawson was unaware of the first sample providing a positive result.
22. Mr Dawson in evidence said he has never taken any drugs or other medicines knowingly aware that they were on the WADA prohibited list. He contended that this lapse was unintentional and that he sought the tamoxifen purely to relieve what was an embarrassing and painful medical condition.
23. Mr Dawson said that had he been told or otherwise made aware that this drug was prohibited and could cost him his basketball career, he would never have taken it.

24. Mr Dawson is adamant that he was not told by the doctor who prescribed the tamoxifen about DFS' TUE. Had Mr Dawson known about a) the tamoxifen being prohibited and b) the opportunity to apply for a TUE, Mr Dawson says that he would have asked him to do so.
25. Subsequent to Mr Dawson's positive drug test the doctor prescribing the tamoxifen was willing to complete a TUE for the purpose of Mr Dawson applying for a TUE retrospectively. The grounds for the granting a retrospective TUE are set out in Clause 4.3 of the World Anti-Doping Code – International Standard (Therapeutic Use Exemptions). It was acknowledged that the circumstances of Mr Dawson's case would not be sufficient grounds for such an application. However, it was submitted it showed that the doctor was prepared to apply for a TUE on the basis that the use of tamoxifen by Mr Dawson was for therapeutic reasons only and not for any performance enhancing purpose.
26. Particular emphasis was placed on the fact that if Mr Dawson was taking tamoxifen to gain an unfair advantage and as he was not aware of his positive test from the sample given on 22 March 2014, he would have continued to take tamoxifen throughout the 2014 NBL season. It is submitted that the negative test from the sample of 17 April 2014 (during the 2014 NBL season) is evidence that Mr Dawson only took tamoxifen for his medical condition and out of season.

### **Relevant provisions of the Sports Anti-Doping Rules**

27. The presence of the prohibited substance in Mr Dawson's sample establishes an anti-doping violation under SADR 3.1. The period of ineligibility for a violation of SADR 3.1 is 2 years under SADR 14.2 unless the athlete can establish that the requirements for a reduced sanction under SADR 14.4 apply.
28. Where the positive test is for a "specified substance" the period of ineligibility can be a sanction ranging from a reprimand and no period of ineligibility to a maximum of 2 years ineligibility under SADR 14.4

29. Many substances are now designated as specified substances under the Prohibited List and many of those substances can be used to enhance sports performance. As a consequence, in order to justify any elimination or reduction in the period of ineligibility under SADR 14.4, the athlete has to show how the prohibited substance entered his or her system and satisfy the Tribunal hearing the allegation that he did not take the substance with an intent to enhance sport performance or mask the use of a performance enhancing substance.
30. The standard of proof on the first element is the balance of probabilities but the athlete has to establish the absence of intent to enhance sport performance to the higher comfortable satisfaction standard and provide evidence corroborating his or her evidence on that absence of intent to enhance sport performance.

### **Threshold and Discretion**

31. On the basis of the totality of the available material we are satisfied how the prohibited substance entered his body and that Mr Dawson did not intend to enhance his sports performance or to mask the use of a performance enhancing substance.
32. The requirements of SADR 14.4 have been satisfied. Therefore we now turn to decide the appropriate sanction, within the range available under SADR 14.4, by assessing Mr Dawson's fault in connection with the violation.
33. We accept that the prohibited substance was obtained by prescription and taken to deal with a difficult and embarrassing medical condition.
34. Mr Dawson has no history of drug violations during his semi-professional career in New Zealand and Australia. Although he is vague about the anti-doping education he has received, we are satisfied that he will have been made fully aware of his responsibilities.
35. All athletes know that there exists a regime where they have strict personal responsibility to ensure that prohibited substances do not enter their bodies. If athletes are casual and inattentive to the education

provided or fail to utilise the advice and direction available, they do so at their peril.

36. It was suggested that by trying to self-medicate he was silly or careless. We do not agree. Mr Dawson was foolhardy and his culpability was not at the low end of a minimal point.
37. It is not instructive to become heavily enmeshed in previous cases as each is fact specific.
38. This is an experienced athlete who has had ample opportunity to know and understand the environment. Having obtained a medical diagnosis he irresponsibly subsequently tried to get a prescription medicine from the Internet to treat it. The fact that he had a geographical shift of residence is not persuasive as a reason for that decision.
39. He made no attempt to contact DFS to check about tamoxifen or otherwise obtain any information about its anti-doping status and made little effort in exercising the proper caution to be expected of a semi-professional and experienced athlete to avoid taking prohibited substances. When obtaining tamoxifen from the Internet was not a successful avenue, he was less forthcoming with the next doctor he contacted than he should have been in asking for a repeat prescription.

### **Decision**

40. We have concluded that the period of ineligibility cannot be less than 12 months because of his failures to meet his personal responsibilities in this drug free environment. He is entitled to credit for the period since the provisional suspension.
41. Mr Dawson is suspended from all participation in sport until 15 May 2015 (which is 12 months from the date of his provisional suspension).

42. The Tribunal advises Mr Dawson that under SADR 14.10, he may not during the period of ineligibility participate in any capacity in a competition or activity authorised or organised by Basketball New Zealand or a basketball club or other member organisation. Nor during this time can he participate in any capacity in competitions authorised or organised by any professional league or any international or national level event organisation. He also cannot participate in any similar activities in any other sport, which is a signatory to the WADA Code, while he is suspended.

Dated 1 August 2014



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**Sir Bruce Robertson (Chair)**