

The Proceedings

1. Drug Free Sport New Zealand (DFS) brought anti-doping proceedings against power lifter Damon Tafatu.
2. DFS alleged Mr Tafatu committed a violation of Rule 3.1 of the Sports Anti-Doping Rules 2012 (the Rules) by competing at the New Zealand Powerlifting Championships on 3 November 2012 with a prohibited substance in his system.
3. Mr Tafatu provided a urine sample for drug testing which was subsequently analysed by the Australian Sports Drug Testing Laboratory (the Laboratory). On 29 November 2012, the Laboratory produced a report confirming the presence of 1, 3 dimethylpentylamine (also known as methylhexaneamine) in the sample. 1, 3 dimethylpentylamine is listed as a prohibited substance in S6 of the World Anti-Doping Authority (WADA) 2012 Prohibited List. It is a “specified substance” under the Prohibited List.
4. DFS applied for Mr Tafatu’s provisional suspension and this occurred on 5 December 2012. He was prevented from competing in the Oceania Powerlifting Championships in December.
5. Mr Tafatu requested that his B sample be analysed. This was done by the Laboratory which produced a report, dated 13 December 2012, confirming the presence of 1, 3 dimethylpentylamine in Mr Tafatu’s B sample.
6. On 25 January 2013, DFS filed an application for anti-doping rule violation proceedings against Mr Tafatu.
7. On 27 February 2013, Mr Tafatu filed his Notice of Defence or Wish to Participate on Sanctions. He admitted the violation and elected to participate in the proceedings to make submissions on the appropriate penalty.

8. Therefore, the questions before the Tribunal are:
 - Whether Rule 14.4 of the Rules 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.
9. The hearing was conducted by teleconference on 24 April 2013. Mr Tafatu filed a statement prior to the hearing and this was supplemented by his oral evidence at the hearing. He also filed statements from two witnesses for the purposes of corroborating his evidence but only one of these witnesses gave evidence at the hearing. DFS filed one witness statement and both counsel filed written submissions prior to the hearing and supplemented these submissions at the hearing.

Evidence of Damon Tafatu

10. Mr Tafatu competes as a power lifter in the bench press, dead lift and back squat disciplines. He said he has limited experience in top level events. He competed in “many events” between 2006 and 2007 but between then and November 2012, he has only competed in regional events. He said he has been previously drug tested twice and returned negative results each time.
11. On 26 March 2012, Mr Tafatu signed the following documents of the New Zealand Powerlifting Federation (NZPF):
 - NZPF registration form;
 - NZPF athlete acknowledgment and agreement concerning sports anti-doping rules (2007) and provision of personal information form; and
 - NZPF code of conduct.
12. Mr Tafatu won the Open Male 120 Kg division, as well as setting two new records in the back squat and bench press, at the New Zealand Powerlifting Championships on 3 November 2012. Despite his success, Mr Tafatu was disappointed with his

performance and the results were well below what he had lifted in training the week before.

13. He declared on the DFS doping control form that he had taken two substances on that day: "Pre Workout Jacked 3D 1 scoop" and "Super Pump Max 1 scoop".
14. Mr Tafatu is sponsored by a sports nutrition shop in Lower Hutt. Since mid-2012, the shop has been supplying him with the supplement "Jack3d Micro". The reference to "Jacked 3D" on the doping control form is a reference to "Jack3d Micro". Mr Tafatu said he understood it did not contain any prohibited substance. He provided to DFS a bottle of Jack3d Micro which DFS had tested by the Laboratory. The Laboratory concluded that the sample did not contain 1, 3 dimethylpentylamine. This is in contrast to other Jack3d products that have been implicated in previous Tribunal anti-doping cases as containing 1, 3 dimethylpentylamine.
15. The reference to "Super Pump Max" on the doping control form is to the supplement "Super Pump 250". Mr Tafatu states he was given a sample pack of this supplement at the Central Districts Powerhouse Bench Competition around March 2012. He consumed the sample pack of Super Pump 250 mixed with Jack3d Micro and water as a "pre-workout mix" on 3 November to provide an energy boost as he was tired from lack of sleep the evening before. He said it had a negative impact on his performance. He stated he felt weak after consuming part of the mix and only consumed half of it.
16. Mr Tafatu has not provided any evidence that either of these products contain 1, 3 dimethylpentylamine as an ingredient or that they are the source of his positive test. After being notified of his positive test he undertook research of his own on the Internet. He did not find evidence of either Jack3d Micro or Super Pump 250 containing 1, 3 dimethylpentylamine.
17. In doing his research, Mr Tafatu states he found another product, that he had taken, which lists 1, 3 dimethylpentylamine as an ingredient. This product is 1 MR.

18. Mr Tafatu's position is that the positive test is due to his consuming the product, 1 MR, the night before the competition. He got a sample pack of 1 MR at the Central Districts Powerhouse Bench Competition. He says he consumed the 1 MR for the purpose of staying awake on the drive between Wellington and Tauranga for the competition and that it ended up keeping him awake until 3 am on the morning of the competition.
19. He states he did not list 1 MR on the doping control form as he thought it was only necessary to note the supplements he had consumed on the day of the competition.
20. While Mr Tafatu is now aware that that 1 MR does list 1, 3 dimethylpentylamine as an ingredient, he states that he was not aware that it was a prohibited substance at the time he consumed it and was unaware that 1 MR may contain a prohibited substance.
21. Mr Tafatu said he had no formal anti-doping education training and while generally aware of the risks of consuming prohibited substances, he was very naïve about the supplements provided and in the risks in taking them. At the hearing he stated that NZ Powerlifting should have provided better education on anti-doping matters.
22. He did not carry out any research or make any inquiries about the three supplements prior to consuming them. He believed they were "legal supplements" that he was allowed to consume in competition. The reasons for this were that he had been given the samples of 1 MR and Super Pump 250 at a powerlifting competition and the sports nutrition shop had supplied him with Jack3d Micro knowing he was a competitive lifter.
23. He said he has always trained naturally and without using performance enhancing substances. He was distraught when he found out that he had tested positive to a prohibited substance.
24. Mr Tafatu's evidence is that the source of the positive test must have been the 1 MR he consumed, that when he took the 1 MR he was unaware that it contained a

prohibited substance and that he did not use a prohibited substance with the intention of enhancing his sports performance.

Evidence of Witnesses

25. A witness statement in affidavit form was filed by Mr Williams who is also a powerlifter and trains with Mr Tafatu. He was at the powerlifting championships at Tauranga and watched Mr Tafatu consume a pre-workout mix. At that time Mr Williams did not know what the mix contained but said he subsequently found out that it was a mix of Jack3d Micro and Super Pump 250. He also said that Mr Tafatu had subsequently told him that he consumed 1 MR while driving from Wellington to Tuaranga the night before the competition. He expressed his opinion based on Mr Tafatu's attitude towards training that he would not have taken the supplement in an attempt to enhance his performance.
26. Mr Tafatu's partner, who was in the car with him on 2 November when he drove from Wellington to Tauranga filed an unsworn witness statement on 15 April. She affirmed it as true at the hearing. Her evidence was that Mr Tafatu felt tired and fatigued from driving and in order to keep him awake, he mixed a sample pack of 1 MR into some water and drank it. She confirmed that this kept him awake until 3am on 3 November 2012, the morning of the competition. Under cross-examination she said that she saw Mr Tafatu take a supplement from a supplement bag given to him by his sponsor but she did not see the label and the supplement he took. Her evidence therefore is that he took a supplement but she was unaware as to what that supplement was. Her written statement that it was 1 MR can only have come subsequently from advice she received from her partner, Mr Tafatu.
27. Ms Farrell filed a witness statement on behalf of DFS. She was not cross-examined on it. In her evidence she referred to the problems with supplements and that for many years DFS has given warnings about supplements on its website. Both Jack3d and 1 MR have provided positive tests and information to this effect has been on the DFS website from about April 2012. The NZ Powerlifting website also contains anti-doping information as well as links to the WADA and DFS websites.

28. Prior to the hearing Mr Tafatu sent a sample of Jack3d Micro to DFS which had it tested by the Laboratory. This sample produced a negative result.

The Sanction provided by the Rules

29. The Rules provide that the sanction for a violation of Rule 3.1 of the Rules is a period of ineligibility of two years. There are provisions under which this sanction can be reduced. Mr Tafatu relies upon one of these, namely Rule 14.4.
30. For an athlete to obtain a reduced penalty under Rule 14.4 of the Rules it is necessary for the athlete to:
- i. establish how the substance got into the athlete's system; and
 - ii. establish to the "comfortable satisfaction" of the Tribunal that the taking of the prohibited substance was not intended to enhance the athlete's sports performance.

The Submissions

31. Mr Tafatu relies on upon Rule 14.4 and the summary of the submissions on his behalf is:
- i. The methylhexaneamine entered his body by him ingesting 1 MR during his trip from Wellington to Tauranga;
 - ii. Mr Tafatu did not know that 1 MR contained methylhexaneamine and decisions of CAS and this Tribunal establish that ignorance of the fact that a supplement contained a prohibited substance establishes that the athlete had no intention to enhance his sporting performance;
 - iii. In any case Mr Tafatu did not ingest the 1 MR with the intention of enhancing performance;
 - iv. Acceptance of the above submissions means that Rule 14.4 applies which means that Mr Tafatu's degree of fault is the criterion considered in assessing

any reduction in the period of ineligibility. In this respect it was conceded that there was a degree of fault but there were also mitigating factors.

32. DFS challenged each of the submissions made on behalf of Mr Tafatu. Its position is summarised as follows:
- i. It does not accept that Mr Tafatu has established how the methylhexaneamine entered his body;
 - ii. The case law which Mr Tafatu relies upon is incorrectly decided and it is not necessary for the athlete to know that the supplement contained the prohibited substance for there to be a finding that the athlete intended to enhance the athlete's sports performance;
 - iii. The evidence is not such that the Tribunal can be comfortably satisfied that Mr Tafatu did not intend to enhance his performance when he ingested the methylhexaneamine;
 - iv. If Rule 14.4 does apply there was a very high degree of fault on Mr Tafatu.

Discussion

33. The notes to Rule 14.4 state the rule "applies only in those cases where the hearing panel is comfortably satisfied by the objective circumstances of the case" that the athlete did not intend to enhance the athlete's sports performance. It also states that the timing of the ingestion of the substance is a relevant factor and that generally "the greater the potential performance enhancing benefit, the higher the burden on the athlete to prove lack of intent to enhance sports performance". The first element, namely how this substance got into Mr Tafatu's body, only has to be proved on the balance of probability.
34. There are difficulties in accepting Mr Tafatu's explanation. His evidence has been inconsistent. On DFS's doping control form which Mr Tafatu signed on 3 November 2012, he referred to two substances only, namely "Pre Workout Jacked 3D 1 scoop" and "Super Pump Max". He did not refer to Jack3d Micro nor to 1 MR. His

explanation in his written statement sworn in March this year is that he thought it was only necessary to note the supplements he had consumed on the day of the competition. The section in which the supplements were noted has alongside its heading: "List any prescription or non-prescription, medications and supplements taken over the past three days".

35. Mr Tafatu sent an email to the Tribunal advising of the supplements he had taken over a four week training period. He said that he had found that 1 MR has a banned substance in its ingredients and that "It was a sample pack given to me at the Bench Nationals a week prior to National 3 Lift". He added comments to details of the supplements and included the following:

"1 MR sample – this was taken four days before competition, from the lifters pack."

There was no mention that he had taken this substance the night before competition, as he now says he did.

36. The corroborative evidence does not take the matter any further. Mr Walker relied upon what Mr Tafatu told him in respect of taking the 1 MR. Ms Graham says she saw Mr Tafatu take a supplement but did not see which supplement it was and again was relying on what Mr Tafatu told her.
37. Under cross-examination Mr Tafatu acknowledged that he had been taking four supplements, although he downplayed the use of 1 MR. He agreed that these supplements were to give him a lift in his energy.
38. Mr Reid submitted that the inconsistencies in Mr Tafatu's evidence can be explained by the fact that Mr Tafatu was not a sophisticated litigant. This also explains why in his Notice of Defence he merely said, "the workout preparation concerned was noted in the doping control form" and that one substance at least was not noted, namely 1 MR. Notwithstanding this submission, the Tribunal does not accept even on the balance of probability that Mr Tafatu has discharged the onus on him in respect of how the banned substance was ingested.

39. There are too many inconsistencies in Mr Tafatu's evidence, to enable the Tribunal to accept on the balance of probabilities that the 1 MR was the source, that he took Jack3d Micro and not Jack3d on the day of the competition, or even that the substance tested by DFS was the substance which he took. These 'inconsistencies' mean that his evidence cannot be relied upon to satisfy how the prohibited substance entered Mr Tafatu's body. He cannot rely upon Rule 14.4.
40. While it is not necessary to comment on the remaining submissions on behalf of DFS, it is appropriate to comment on them. For reasons similar to those given above, the Tribunal could not have determined to its comfortable satisfaction that the prohibited substance was not taken for performance enhancing purposes. Mr Tafatu was clearly taking supplements to give him a lift, as he acknowledged. He took supplements prior to competing. They were for the purpose of giving him further energy. The fact that Mr Tafatu did not compete up to his expectations is irrelevant. The substances were stimulants and may well have contained the prohibited substance.
41. If the Tribunal had determined that rule 14.4 applied, the Tribunal's view is that the degree of fault on Mr Tafatu's part was high. He had on more than one occasion signed NZ Powerlifting registration forms which contained an acknowledgement that he would sign the athlete's agreement form pertaining to anti-doping. In March 2012 he had signed the athlete's agreement acknowledging the rules and that he is bound by them. In March 2012 he had signed a Code of Conduct for New Zealand Powerlifting under which he agreed to submit to a drug test if selected at various competitions. He was familiar with the use of the Internet and had obviously visited the New Zealand Powerlifting website on occasions. He had been tested in the past. Yet the evidence suggests that despite all these warnings he took no precautions at all to ensure that the supplements which he took did not contain prohibited substances. It is debateable whether he would have been entitled to any deduction from the two year period of ineligibility.
42. The Tribunal does not accept Mr Tafatu's criticism of the education he received on anti-doping matters. The above information confirms NZ Powerlifting takes anti-

doping matters seriously and there is appropriate information on its website. Mr Tafatu had a contractual obligation and appears to have treated his obligations in a casual manner.

43. Mr David submitted strongly that this Tribunal should clearly state that an athlete's lack of knowledge that a supplement contained a prohibited substance was not sufficient to bring Rule 14.4 into play. In view of the findings made above it is not necessary to address this point. The same Panel in *DFS v Takerei* (ST 01/12, decision 8 June 2012) addressed this point and was divided on it. As stated in that case, one member of the Tribunal is of the view that to follow cases such as *Oliveira v USADA* (CAS 2010/A/2107) and *UCI v Kolobnev* (CAS 2011/A/2465) is not the correct approach. He supports the view expressed in *Kutrovsky v International Tennis Federation* (CAS 2012/A/2804) that ignorance of the fact that a supplement contains a prohibited substance does not allow an athlete to utilise the provisions in Rule 14.4. Subsequent cases in other jurisdictions support that view. However as it is not necessary to determine the issue in this case, this Tribunal will leave it to another case, where the matter is relevant to determine the appropriate position in New Zealand.

Decision

44. The violation having been admitted and the Tribunal having determined that the provisions of Rule 14.4 did not assist Mr Tafatu, a sanction of a two year period of ineligibility is imposed with such period to commence from 5 December 2012.
45. Mr Tafatu's results at the New Zealand Powerlifting championships held on 3 November 2012 are disqualified in accordance with Rule 14.8 of the Rules, as are his results in any other competition held between that date and the date of this decision.

Dated 30 April 2013

A handwritten signature in blue ink, appearing to read 'Barry Paterson', is positioned above a horizontal dotted line.

Barry Paterson QC
Chairman