

**BETWEEN                      DRUG FREE SPORT NEW ZEALAND**

**Applicant**

**AND                              WIREMU TAKEREI**

**Respondent**

**AND                              TOUCH NEW ZEALAND**

**Interested Party**

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**DECISION**

**Dated 8<sup>th</sup> June 2012**

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**Tribunal:** Barry Paterson QC (Chairman)  
Ron Cheatley  
Rob Hart

**Hearing:** By telephone conference on 17 May 2012

**Present:** Michael Smyth, Counsel for Wiremu Takerei  
Wiremu Takerei in person  
Paul David, Counsel for Drug Free Sport New Zealand  
Jayne Kernohan for Drug Free Sport New Zealand  
Joe Sprangers for Touch New Zealand  
Jamie Laufiso and Ben Stewart-McCallum for part of the  
time as witnesses for Wiremu Takerei

**Registrar:** Brent Ellis

1. The allegation made by Drug Free Sport New Zealand (DFS) is that on 3 March 2012 Wiremu Takerei competed in the National Touch Championships in Palmerston North with the substance 1,3-dimethylpentylamine (methylhexaneamine) in his system. Wiremu does not deny the allegation and waived the analysis of the "B" sample.
2. This Tribunal provisionally suspended Wiremu Takerei under the provisions of the Sports Anti-Doping Rules 2012 (the Rules) on 5 April 2012.
3. The hearing was conducted by telephone conference on 17 May 2011. Both Wiremu and DFS were represented by counsel and the Interested Party, Touch New Zealand, was also represented. During the hearing two witnesses joined the conference to give evidence on behalf of Wiremu Takerei.

### **Background**

4. Prior to being provisionally suspended, Wiremu Takerei played touch rugby for the Auckland region during the summer months and during the winter played club rugby league for the Te Atatu Roosters. Wiremu is now aged 27 years and did represent New Zealand in touch rugby as a representative of the under 21 team at a World Cup. In recent years he has never competed above regional level and has never represented New Zealand at rugby league or in any other sport.
5. The National Touch Championships played in early March were used as a selection event for a Trans-Tasman event in Sydney. Wiremu was not selected for that event although some of his teammates were.
6. Wiremu's evidence is that he only once participated in formal drug education and that was when he was selected in the under 21 team six years ago. His recollection of that education is hazy,

although he suspects he attended a seminar. He says he never received a DFS wallet card. He said that he has been selected for drug testing on many occasions and has never before tested positive. His evidence was that this was because he was aware of the need not to take performance enhancing drugs or other recreational drugs because he knew they were banned. He had not previously heard of methylhexaneamine nor did he know that it was a prohibited substance. It is only since he tested positive and received notification of this violation that he has learnt about the DFS text messaging service to discover if a product contains substances on the prohibited list.

7. Information provided by DFS suggests that this may be only the second time that he was tested and the previous test was on 7 March 2009. The records show that he attended an anti-doping presentation in 2007. DFS did provide Touch NZ with drug resources for their teams for the 2011/12 year but was unable to say if these were provided to Wiremu's team or made available to the players at a training session. Wiremu's evidence suggests that they were not. There was no requirement for Wiremu to sign a drug education acceptance form as there is in some sports as Touch NZ does not require this unless the athletes are in a regional or national team.
8. Wiremu is employed as a storeman and usually works between 3am and 11.30am. His evidence is that he sleeps between noon and 4pm, then gets up to eat and trains from about 6pm until 8.30pm. He goes to sleep again about 10pm and wakes up at 2am in order to get to work.
9. The New Zealand Touch Championships were played over three days in early March this year. Wiremu played ten games as his team progressed through to the final. His evidence was that by the third day he was feeling pretty sleepy during the middle of the day as this was the time he normally slept. On 3 March 2012,

there was the semi-final at about 9am and then the final at 2.30pm.

10. A team mate who also worked with Wiremu and was having the same difficulties in respect of sleeping, offered Wiremu an energy drink which he said may help him keep awake. The drink was pre-mixed and was in a plain water bottle. Wiremu asked what the drink was and was told that it was called Jack3d and that it had been bought in a health store. The teammate had purchased Jack3d rather than other supplements because it was on sale and therefore cheaper. When he took Jack3d, Wiremu did not know that it contained methylhexaneamine.
11. Wiremu says that he has since found out that the Jack3d was at a sale price because the store was endeavouring to clear its stocks because the supplement was banned. At the time he made an incorrect assumption that the drink was safe to take. He put it in the same category as other supplements which he took and his evidence was that he never saw the packaging and thus did not check the ingredients.
12. Wiremu's evidence was that he got an immediate burst of energy which did keep him awake but by the time the game commenced at 2.30pm he believed that the drink was starting to have negative effects on his performance, and that it did have a negative effect on his performance.
13. When he was selected for drug testing Wiremu advised the tester that he had taken Jack3d and this was noted on the testing form (although it was spelt incorrectly on the form it was accepted that this was supposed to be a reference to Jack3d).
14. The reason which Wiremu gave for taking the supplement was to counter the unusual sleep patterns caused by working shift work. He took the supplement several hours prior to the final game and says it was solely for the purposes of keeping his eyes open and

not drifting off to sleep since that was what his body was used to at that time of day.

15. When questioned by counsel for DFS during the hearing, Wiremu accepted that he took the supplement because he wanted it for energy. It was in fact an energy booster to enable him to play in the final and so he could have some energy for the final.
16. Wiremu's team coach and one of his teammates gave evidence. The team mate was also offered the supplement but declined on the grounds that he did not need it and had his own supplement which he takes regularly. He noted however that Wiremu accepted the supplement and drank some before the final. The coach also worked with Wiremu but was not the supplier of the Jack3d. He confirmed Wiremu's work habits. Wiremu told him how the supplement got into his system. Both witnesses expressed surprise that Wiremu had taken a prohibited substance. The teammate who provided the substance did not give evidence although hearsay evidence was given that he did not know that Jack3d contained a prohibited substance and thought that as he had bought it in a retail shop over the counter it would not have contained such a substance.

#### **Submissions on behalf of Wiremu**

17. Mr Smyth for Wiremu submitted that this was a case where the provisions of r 14.4 of the Rules applied and the period of ineligibility should be reduced from the standard two year period because Wiremu had established how the methylhexaneamine entered into his body and that he had not taken it to enhance his sports performance or mask the use of a performance enhancing substance.
18. It was conceded that Wiremu was at fault and that based on previous decisions of the Tribunal, the period of ineligibility should fall in the range of six months to 12 months.

19. The main submission on behalf of Wiremu was that he had no intent to enhance his sporting performance and matters which the Tribunal should consider were:
- (a) Its role is to determine whether Wiremu intended to enhance his sporting performance rather than whether the ingestion of the substance did enhance his sporting performance.
  - (b) In the present case on the basis of Wiremu's evidence and one of the other witnesses, his performance was adversely affected by taking Jack3d. The submission was that no athlete would take a substance with the intent to enhance sporting performance where that would not produce the desired effect.
  - (c) The crucial issue is whether Wiremu took the prohibited substance, namely methylhexaneamine with the intent to enhance sporting performance and not whether he took the supplement with the intent to enhance sporting performance. The fact that Wiremu did not know that what he ingested contained a prohibited substance is a relevant consideration when determining whether Wiremu had the necessary intent.
  - (d) The evidence suggests that Wiremu is not a drug cheat and that he would not have taken the substance if he had known that it was.
  - (e) If Wiremu had been a drug cheat he would not have declared on the doping form that he had taken Jack3d.
  - (f) He did not know or see the ingredient list on any promotional material relating to the supplement.
  - (g) The actual reason why the respondent took the supplement was to negate the negative effect of his shift work caused by his job. It was taken to prevent him falling asleep in

between games and not to enhance his sporting performance on the field.

### **DFS's Submissions**

20. Mr David referred to the current conflict in CAS awards on the proper approach to determining whether an athlete had an intent to enhance sports performance in taking the specified substance. In particular, he referred to the conflict between the Australian case of *Foggo v NRL* (CAS A2/2011) and two other cases – one relating to a Russian cyclist *UCI v Kolobnev* (CAS 2011/A/2465) and the other being the American case of *Oliveira v USADA* (CAS 2010/A/2107). These cases will be referred to below.
21. Mr David submitted that the *Foggo* decision was the correct one and it was for the Tribunal to assess on the basis of that decision whether the specified substance had been taken for performance enhancing purposes.

### **Discussion**

22. The Tribunal is satisfied on the evidence, including the corroborating evidence to the level of comfortable satisfaction, that the Methylhexaneamine entered Wiremu's body through the Jack3d which he took after the semi-final but before the final.
23. There are three factors to be considered in determining whether Wiremu can rely upon r 14.4, namely:
  - (a) on the evidence, was there an intention to enhance sports performance?;
  - (b) if the intention was to enhance sports performance, can r 14.4 of the Rules be relied upon?; and
  - (c) if r 14.4 can be relied upon, do the facts allow Wiremu to do so?

24. The thrust of Wiremu's evidence-in-chief was that he did not take Jack3d with the intent to commit an anti-doping violation or to enhance sporting performance by unlawful means. He took the supplement in order to counter the unusual sleep patterns caused by working shift work. He took it prior to the final game solely for the purpose of keeping his eyes open and not drifting off to sleep since that was what his body was used to at that time of day. He takes his sport very seriously and requested the Tribunal to exercise its discretion to reduce the period of ineligibility in order that he may return to sport. The defence he put forward was based in many respects on the findings in the Tribunal's earlier case of *Drug Free Sport NZ v Blair Jacobs* (ST 24/10, decision 22 June 2011). Under cross-examination, however, Wiremu acknowledged that a reason for taking the Jack3d was to give him energy to play in the final.
25. Recently, the independent Anti-Doping Tribunal of the International Tennis Federation in the case of *Dimitar Kutrovsky* (decision 15 May 2012) usefully summarised several decisions in this field, many of them from CAS. *Kutrovsky* was a lower instance decision and the ITF Tribunal noted the conflict between the CAS cases and this will be referred to below. However, for the purposes of assessing an athlete's intention to enhance sporting performance, the case gives a useful analysis of those cases where it has been held that the connection between taking the prohibited substance and the performance is so remote that the athlete is entitled to rely upon r 14.4. The summary also refers to those cases where it has been held that the athlete can not rely upon r 14.4 of the Rules.
26. The principle was summarised in paragraph 82 of *Kutrovsky* in the following terms:

For example, where a player takes the product to get a "boost" just before a match, it is extremely unlikely that he could satisfy the tribunal that he lacked the requisite intent. Conversely, if he only takes the product between competitions with a long gap



between the competition and taking the product, he could (with corroborating evidence) comfortably satisfy the tribunal that he lacked the requisite intent.

27. In considering whether the athlete intended to enhance sports performance, the notes to r 14.4 of the Rules (which notes also appear in the WADA Code) state:

This Rule applies only in those cases where the hearing panel is comfortably satisfied by the objective circumstances of the case that the Athlete in taking or Possessing a Prohibited Substance did not intend to enhance his or her sports performance. Examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent would include: the fact that the nature of the Specified Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete's open Use or disclosure of his or her Use of the Specified Substance...

28. If the circumstances referred to in the note to the Rules are applied in this case, there are two which do not assist Wiremu and one that does. Those that do not assist are that Jack3d is a stimulant, and the timing was before the final with the intent of giving him energy for the final. He is, however, assisted by declaring on the doping form that he took Jack3d.
29. It is not necessary to analyse the various cases referred to in *Kutrovsky*. As a result of analysing those cases, the ITF Tribunal drew a line between those which were too remote, enabling the player to satisfy the test in r 14.4, and those where the connection between the use of the product and taking part in the competition was too close for the player to be able to satisfy the test.
30. The Tribunal is of the view that Wiremu has not satisfied it to its comfortable satisfaction that he did not take Jack3d to enhance his performance. The reasons for this view are:
- (a) Jack3d is performance-enhancing. It is a stimulant and the player intended to take it to increase his energy for the final.

- (b) He took the substance before the final and after he had played in the semi-final on the third day of a tournament. There was a close time proximity.
  - (c) The final was obviously a very important match and Wiremu obviously wished to perform to his best ability.
  - (d) As the CAS Panel said in *Kolobnev*, an intent to enhance performance is indicated where a substance is taken to help an athlete recover from physical effort or better prepare for sporting performance.
31. Having held that the intention was to enhance Wiremu's sports performance, it is necessary to consider whether he can rely upon the principle applied in *Oliveira* and *Kolobnev*. This principle is that a player can rely upon r 14.4 if the player does not know that the product he took contained a substance which was, in fact, a Specified Substance. It was suggested that the absence of intent to enhance sports performance must be interpreted to mean absence of intent to cheat. Thus, if an athlete does not know the substance is prohibited, he is not a cheat because he does not have a guilty mind.
32. Two members of the Tribunal believe that on the evidence Wiremu has satisfied them to their comfortable satisfaction that his intent was not to take the drug for performance-enhancing purposes. Wiremu's evidence is that he did not know what substance was in the Jack3d and was not aware that it included a Prohibited Substance. The Tribunal accepts this evidence.
33. One member of the Tribunal does not accept that the principles in *Oliveira* and *Kolobnev* have been correctly stated. He accepts that if he is correct in this view, the consequences are extremely harsh on an athlete such as Wiremu. He is a club athlete, he does not play at representative level at this time and he was unaware that he was taking a Prohibited Substance. He had not

received extensive drug education and sport which he plays throughout the year is obviously a large part of his life. The Tribunal does not know Wiremu's position but many of the athletes who participate in his two sports come from a lower socio-economic group where sport is often an important and beneficial factor in the athlete's life. If WADA intended to penalise such an athlete for a period of two years, when the athlete is clearly not a dope cheat, it is a very harsh policy.

34. His view is that, as was said in *Kutrovsky*, to follow the reasoning in *Oliveira* and *Kolobnev* undermines the foundation of the WADA Code and the anti-doping programme. It erodes the principle of strict liability, dilutes the athlete's personal responsibility for what he or she ingests and excuses ignorance of the Rules which is not a defence under the Code. In the words of the *Foggo* decision, the words of r 14.4 are to be given effect to by giving them their natural and ordinary meaning, having regard to the context of the Rules as a whole. The effect of the rule is to require the athlete to show that the ingestion of the product which contained the Specified Substance was not intended to enhance his/her sports performance. The rule focuses on the nexus or link between the taking of the substance and the performance as a player of the sport. Thus interpreting the Rules in accordance with normal construction principles, the member who dissents on this point would decide this point against Wiremu.
35. In response to a submission made on behalf of Wiremu, it should be stated that the fact that taking Jack3d may not have enhanced Wiremu's sports performance is irrelevant in the interpretation of the Rules.
36. It follows that the majority of the Tribunal have determined that Wiremu can rely upon the reasoning in the two CAS decisions. Presumably, WADA will move to bring certainty to the position in the near future. The present position is unsatisfactory.

37. It also follows that the facts do allow Wiremu to take the benefit of r 14.4. He did not know that he was taking a Prohibited Substance.

### **Sanction**

38. Rule 14.4 states that the athlete's degree of fault should be the criterion considered in assessing any reduction of the period of ineligibility. Mr Smyth on behalf of Wiremu has conceded that there was a degree of fault in this matter and submitted on the basis of previous decisions of this Tribunal that the suspension should be for a period of between six and 12 months. In support of this submission, he submitted:

- (a) Wiremu is not a high performance athlete and is not part of any registered testing pool;
- (b) the only occasion on which he has participated in any drug-free education was six years ago and thus he was not as alert as a high performance athlete to the danger of supplements, Methylhexaneamine is relatively new, he did not carry a DFS wallet card, and he was unaware of the DFS service which allows athletes to check supplements for the presence of Prohibited Substances;
- (c) he is an honest athlete, having never been found to have committed any anti-doping rule violation and openly declared the use of the supplement on the doping control form; and while admitting that he was at fault in not checking the ingredients of the supplement he did not himself purchase the supplement and was therefore unaware of the supplement's ingredient list or its promotional material to make further enquiries.

39. Mr David on behalf of DFS referred to the notes to r 14.4 which emphasise the fault is assessed by reference to matters relevant to explain the athlete's failure to meet the expected standard

under the Code. It was submitted that there was a significant degree of fault in this case because the substance was taken immediately before competition.

40. The Tribunal accepts that there was a reasonable degree of fault in this matter. Wiremu knew about the dangers of performance-enhancing drugs and recreational drugs but made no enquiry when the supplement was given to him to drink. He took it immediately before an important match and this should have alerted him to check what he was taking. He had been drug tested previously (by his own account, several times) and he had albeit several years ago had some drug education.
41. The Tribunal believes in being consistent in imposing sanctions, albeit that each case turns on its own facts. The most recent comparable decision of the Tribunal was in the *Jacobs* case. *Jacobs* was suspended for 12 months and it is difficult to see how Wiremu's suspension can be any less than this period. The Tribunal has therefore resolved that the period of ineligibility will be 12 months to reflect the degree of fault.

### **Decision**

Wiremu Takerei accepted the violation. The Tribunal imposes a sanction of a 12 month period of ineligibility, such period to commence from 5 April 2012, the date of provisional suspension.

Dated 8th June 2012



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**B J Paterson QC**  
**Chairman**