BEFORE THE SPORTS DISPUTES TRIBUNAL
OF NEW ZEALAND

SDT/12/04

Anti-doping rule violation proceedings

BETWEEN	**NEW ZEALAND RUGBY LEAGUE INCORPORATED**
	Applicant
A N D	**BARRY TAWERA**
	Defendant
A N D	**THE NEW ZEALAND SPORTS DRUG AGENCY**
	Interested Party
Tribunal:	Kit Toogood QC (presiding member) Ron Cheatley Carol Quirk
Representation:	Kevin Bailey for New Zealand Rugby League Incorporated Barry Tawera in person, assisted by John Devonshire Paul David and Julia Carlyon for New Zealand Sports Drug Agency
Hearing at Auckland:	29 April 2005
Written decision:	6 May 2005

WRITTEN DECISION OF TRIBUNAL

Decision

For the reasons set out below, the Tribunal imposes on Barry Tawera of Hamilton a period of one year's ineligibility under By-Law 11 of the New Zealand Rugby League Anti-Doping By-Laws, effective from 18 November 2004.

Background

[1] This is the written decision of the Tribunal under rule 22.3 of the Tribunal's Rules, following the issuing of an oral decision at the conclusion of a hearing on 29 April 2004, in respect of an application by New Zealand Rugby League Incorporated ("NZRL") against Barry Tawera for anti-doping rule violation proceedings under Rule 11.2 of the Tribunal's Rules. The application was based on a Notice from the New Zealand Sports Drug Agency ("the Agency") dated 16 November 2004 stating that the Board of the Agency determined that, on 23 October 2004, the defendant did not have reasonable cause to fail to provide a sample which he was required to provide under the New Zealand Sports Drug Agency Act 1994 ("the Act") and regulations.

[2] NZRL acted promptly in suspending Mr Tawera from all rugby league and referred the matter to the Tribunal, pursuant to By-Law 19 of NZRL's Anti-Doping By-Laws, for the imposition of appropriate sanctions in accordance with By-Laws 11-15. By-Law 11 incorporates the provisions of the World Anti-Doping Code ("the WADA Code").

[3] The combined effect of Articles 2.3 and 10.4 of the WADA Code is that Mr Tawera faced a period of two years' ineligibility from participation in sport, other than for purely recreational purposes.

Procedural matters

[4] It has taken far longer than is usual for this matter to reach the stage of determination by the Tribunal. Without going into detail, the explanation is that Mr Tawera was extended considerable leniency, with the consent of NZRL, to explore other avenues for challenging the Agency's determination. It is unlikely he would have been permitted such leeway if he had not been suspended immediately following the determination.

[5] In the end, Mr Tawera was content to rest his case in respect of penalty on Art. 10.5.2 of the WADA Code, which provides the Tribunal with a discretion to impose a period of ineligibility of less than two years (but not less than one year) if the athlete establishes that "he or she bears *No Significant Fault or Negligence*".

[6] Having regard to the basis upon which Mr Tawera sought to have a reduced period of ineligibility imposed, the Agency accepted the Tribunal's invitation under rule 19.1 to become an interested party to the proceedings, and it was joined accordingly.

[7] The hearing of evidence and submissions as to penalty took place in Auckland on Friday, 29 April 2005.

The facts

[8] Because of the Tribunal's view that this case involved truly exceptional circumstances, it is desirable to set out our view of the facts of the case in some detail.

[9] Mr Tawera participated in a Pacific Rim tournament rugby league match at North Harbour Stadium on 23 October 2004, as a member of the New Zealand Māori team. He was a player selected at random for testing and was asked to provide a urine sample. The drug control officer from the Agency ("the DCO"), who was required to act as a chaperone for Mr Tawera throughout the process, explained to Mr Tawera that he would stay with him until

he was ready to provide a witnessed urine sample. We are satisfied that the process was adequately explained to Mr Tawera by the DCO. We are satisfied, in particular, that Mr Tawera was told he was required, under the regulations, to stay in the DCO's sight until he provided the sample and that the DCO had to watch him give the sample.

[10] After Mr Tawera had showered, he and the DCO walked from the dressing room to the drug control room underneath the stands, accompanied by John Devonshire, Mr Tawera's manager, and the supervising drug testing official ("DTO"). Mr Tawera drank the water provided by the Agency while he waited to provide the sample.

[11] Mr Tawera was somewhat anxious about his partner, who was due to give birth and who had been expecting Mr Tawera to return to her in Hawkes Bay immediately following the match. Mr Tawera borrowed the DCO's cell phone to call his partner and explain that he was delayed. Mr Tawera's partner rang back a few minutes later and the DCO gathered from the call that Mr Tawera was given "a very hard time" by his partner who had expected him to be on his way to see her.

[12] When Mr Tawera was ready to provide a sample, he went into the bathroom area, followed by the DCO. Although there was a urinal in the area, Mr Tawera entered a toilet cubicle which would give more privacy. The DCO, who was behind him, explained to Mr Tawera, again, that it was important that he see Mr Tawera passing the sample. Mr Tawera started to pass the sample.

[13] The DCO's evidence about what happened next was this:

> Because I could not properly see the sample passing from him, I asked him to turn side on to me in order to enable me to see better as he was quite a big person**.** Mr Tawera did not reply, so I asked him again and tried to look over his shoulder to get a better view. Mr Tawera asked me what I was doing. I explained that it was my job to witness the sample leaving the body. Mr Tawera became more agitated and said that we were the only ones in the cubicle. I explained that it did not matter and I still needed to see the sample leaving the body. Mr Tawera became increasingly agitated and I got slightly nervous at his more aggressive manner.
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> At this point, perhaps 20 to 30 seconds after I had asked him to turn towards me, Mr Tawera threw the sample into the toilet and said "fail me". He had passed approximately 50ml – 60ml when he threw it into the toilet. I told Mr Tawera that if he did not give a sample he would be failing to comply with a request to provide a sample and he could automatically be banned from playing rugby league for two years. Mr Tawera said "fail me, I don't care". I left the cubicle followed by Mr Tawera.

[14] We are satisfied that this is a generally accurate description of what occurred, although we think it is more probable that, in order to get a better view of the sample, the DCO pushed his head closer to Mr Tawera's hip than his shoulder. Mr Tawera said in evidence that he dropped the sample, rather than throwing it into the toilet. Taking all of the

circumstances into account, we are more inclined to think he discarded it deliberately, but the point is not material and we do not need to decide it. We are also satisfied that the DCO's actions were entirely proper and in accordance with his responsibilities under the regulations. The cubicle was cramped but not unsuitable for the purpose. Although an athlete is entitled to privacy, it is a requirement of the testing regime that a drug official must observe the sample passing from the athlete's body. What was required for a satisfactory process was a degree of co-operation from Mr Tawera. He did not give it.

[15] Mr Tawera was plainly agitated at this time and we have no doubt that the discarding of the sample was a spontaneous over-reaction to the circumstances at a time when Mr Tawera was anxious to get the process over and done with and get on the road to Hawkes Bay.

[16] The DTO explained to Mr Devonshire and Mr Tawera that a refusal to do the test would be deemed to be a failure and could result in a two year ban. Mr Devonshire said that Mr Tawera understood that he could face a two year ban. Mr Tawera said that he was going to leave the room; there was a suggestion at the hearing that Mr Devonshire had told me Tawera to "wait outside" in order to calm the situation. However it occurred, Mr Tawera did leave the drug control room without having provided a sample. He was aware of the consequences of doing so, but ignored them. He was then out of the sight of the DCO who was chaperoning him. The Board of the Agency determined that this amounted to an unreasonable failure to provide a sample and was a breach of the anti-doping rules: ss 14(3) and 18(1) of the Act. We are bound by that ruling: s 14(5) of the Act, and rule 11.9.2 of the Tribunal's Rules.

[17] There was some discussion between the officials and Mr Devonshire about "cultural sensitivity" over what occurred in the cubicle, but we do not think that is a relevant consideration here. The Agency's view was that the "failure" occurred when Mr Tawera left the room and the sight of the chaperone; it was implicit in what was said to him before he walked out that, if he had remained in sight and provided another sample, he would have not have been in breach of the rule.

[18] We do not think Mr Tawera was out of the room any longer than was required for the drug officials to talk to Mr Devonshire, which may have been two or three minutes, and for Mr Devonshire to then counsel Mr Tawera into returning. Having questioned Mr Tawera on the point, we are satisfied that Mr Tawera did not leave the immediate vicinity of the drug control room, but remained just outside the door. We are also satisfied that he did not do anything that might have altered the nature or quality of any urine sample he might give subsequently from that which existed at the time he gave the discarded sample.

[19] When Mr Tawera returned to the room, Mr Devonshire explained that Mr Tawera would now provide a sample, but with the supervising official, rather than the designated chaperone, watching. The supervising DTO explained to them that by leaving the sight of the chaperone he had failed to comply with the in-competition testing process and that any subsequent test would not remedy this failure. He then called a senior manager at the

Agency and a further sample was authorised, on the basis that it was to be an out-of-competition test. The DTO explained to Mr Devonshire that there was no guarantee that the Agency would test Mr Tawera's sample and that, even if it did, the failure to comply stood. Mr Tawera then successfully provided a second sample, in the sight of the supervising official.

[20] Although the second sample had been taken on the basis that it was an out-of-competition test, the sample was given a more rigorous screening as if it was an in-competition sample. The screening produce a negative result and Mr Tawera was notified accordingly. He was also formally notified, however, that the Agency considered he had failed to provide a sample without reasonable excuse, and was given an opportunity to explain. After considering Mr Tawera's explanation, the Board of the Agency determined, on the casting vote of the Chair, that he had committed a violation. Mr Tawera was notified of that decision by letter dated 16 November 2004, but took no steps to challenge the findings by exercising his appeal rights under the New Zealand Sports Drug Agency Act 1994.

The decision

[21] We agree with the observation by Mr David, for the Agency, that this has not been an easy case. That is so, in part, because of the obvious sympathy felt by everybody, including the Members of the Tribunal, for Mr Tawera's predicament. It is common in these cases for the Tribunal, where it is appropriate, to comment that "there is no evidence that the athlete was a drug cheat". Because of the unique circumstances of this case, and for reasons which are more fully discussed below, we feel we can go further and say that it is clear to us that Mr Tawera is not a drug cheat. His failure to provide a sample was a hot-headed, spur of the moment over-reaction to momentary inconvenience or embarrassment and was not motivated by a desire to avoid the detection of an anti-doping rule violation. In spite of that, he faces a two year ban from participation in sport. That makes it a difficult case for us.

[22] It is also difficult because of the legal issues which arise in respect of the interpretation and application of the WADA code. There do not appear to be any cases decided in any jurisdiction to assist us with the particular issues of interpretation and application which confront us. Certainly, experienced counsel for the Agency were unable to refer us to any relevant ruling.

[23] Although it is not material to the legal effect of the determination made by the Agency, it is indicative of the difficulty we have mentioned that the Board of the Agency recorded that the four members of the Board were equally divided on the question of whether Mr Tawera had committed an anti-doping rule violation and that the matter had been decided by the exercise of the Chair's casting vote.

The WADA Code

[24] The relevant parts of Art. 10.5.2 of the WADA Code, and the commentary to it, read as follows:

> 10.5.2 *No Significant Fault or Negligence*
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> This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 (presence of *Prohibited Substance* or its *Metabolytes* or *Markers*), *Use* of a *Prohibited Substance* or Prohibited Method under Article 2.2, failing to submit to *Sample* collection under Article 2.3, or administration of a *Prohibited Substance* or *Prohibited Method* under Article 2.8. If an *Athlete* establishes in an individual case involving such violations that he or she bears *No Significant Fault* or *Negligence*, then the period of *Ineligibility* may be reduced, but the reduced period may not be less than one-half of the minimum period of ineligibility otherwise applicable.
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> . . .
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> *[Comment: The trend in doping cases has been to recognize that there must be some opportunity in the course of the hearing process to consider the unique facts and circumstances of each particular case in imposing sanctions. This principle was accepted at the World Conference on Doping in Sport and was incorporated into the OMADC which provides that sanctions can be reduced in "exceptional circumstances".* [The Tribunal comments that the Olympic Movement Anti-Doping Code or "OMADC" was the forerunner to the WADA Code.] *The Code also provides for the possible reduction or elimination of the period of Ineligibility in the unique circumstance where the athlete can establish that he or she had No Fault or Negligence, or No Significant Fault or Negligence in connection with the violation. This approach is consistent with basic principles of human rights and provides a balance between those Anti-Doping Organizations that argue for a much narrower exception, or none at all, and those that would reduce a two year suspension based on a range of other factors even when the Athlete was admittedly at fault. These articles apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred.*
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> *Article 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.*
>
> *. . .*
>
> *Article 10.2.5 applies only to the identified anti-doping rule violations because these violations may be based on conduct that is not intentional or purposeful. . . .*

[25] It is also necessary to consider the definition of "No Significant Fault or Negligence" in the Code. It means:

> The *Athlete's* establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault or Negligence*, was not significant in relationship to the anti-doping rule violation.

[26] The criteria for *No Fault or Negligence* offer little assistance, as they deal with the use or administration of prohibited substances or methods.

The central question

[27] The central question we have to determine is whether Mr Tawera has satisfied us that he "bears no significant fault or negligence" in relation to the violation, so as to justify less than the mandatory penalty of two years ineligibility.

[28] In his submissions on the legal issues, Mr David took us through the relevant provisions of the Code. He argued that, where there has been an unreasonable refusal to provide a sample, it will be rare that an athlete establishes no significant fault or negligence. Referring to the reference in the commentary to the Code providing a degree of leniency in case where conduct was "not intentional or purposeful", he submitted that it followed that conduct which, as here, was intentional would necessarily involve substantial fault and, therefore, not justify a reduced sanction. Mr David suggested that there could only be no significant fault or negligence where there was some "element of inadvertence" in the failure to provide a sample.

[29] He also argued that the only circumstances to be considered in relation to the proof of "no significant fault or negligence" are those which occurred up to and including the violation; that is, the refusal and, on the facts of this particular case, the time at which Mr Tawera left the drug control room. If that view is right, acts or circumstances occurring after the violation has been committed are not relevant to the issue of fault or negligence.

Applying the Code to the facts

[30] Looking at Rule 10.5.2 without reference to the comments in the WADA Code, the Tribunal can see the force in Mr David's argument that the only circumstances to be considered are those which occurred up to and including the violation. If that is right, it is difficult to see how what Mr David correctly characterised as an intentional or purposeful refusal could be anything other than one involving a significant degree of fault.

[31] However, any remedial set of rules such as the WADA Code calls for a purposive approach to interpretation and application; that is, an approach which looks at the purpose of a rule and applies that purpose in its interpretation. For this reason, as the Tribunal has said on other occasions[1], we believe that the commentary to the WADA Code is a valuable aid to interpretation. We think also that we must give some recognition to the requirement, in the definition of "no significant fault or negligence", to view "the totality of the circumstances" and to regard that as meaning all relevant matters.

[32] It is necessary and important to recognise the need to uphold the integrity of the WADA Code and the strict application of the procedures set out in the Sports Drug Agency Act 1994 and the regulations. We accept that, as a general principle, it is proper to treat a

[1] For example, *NZRL v Eribe,* SDT/09/04, 4 April 2005 at para 60

failure to supply a sample as seriously as the provision of a sample which returns a positive result; otherwise, athletes would have an incentive to cheat. But the commentary to Art. 10.5.2 makes it clear that the purpose of the Article is to balance that kind of consideration against the interests of athletes in recognising that the anti-doping regime can produce harsh results. Further, while Mr David is undoubtedly right that it will be rare for an athlete to prove no significant fault in the case of an intentional refusal to provide a sample, we do not think the wording of the Code should be read down to limit the application of Art. 10.5.2, in cases of failure to supply, to cases of inadvertence.

[33] We have emphasised that we do not accept Mr Tawera's criticism of one of the Agency's officials in this case. Both officials carried out their duties in the manner which was required and expected of them. But there was an unfortunate combination of circumstances in this case and we regard as understandable, if not excusable, Mr Tawera's reaction in the cramped cubicle to the proper attempts by the drug official to ensure that the sample was properly passing.

[34] In the end, however, Mr Tawera must accept responsibility for his failure to be more co-operative in the cubicle and, particularly, for the crucial decision which he made to leave the drug control room albeit briefly. He is clearly at fault. However, we think there is a truly exceptional circumstance here. We are satisfied that, in the short time he was out of the room, Mr Tawera had no opportunity to do anything - and did not do anything - which might have affected the negative result of the screening of the second sample. That means that we are confident that, if the first sample had been provided and screened, it would also have shown a negative result.

[35] The provision of a second sample which returned a negative result, and our conclusion from that that the first sample would necessarily also have been negative, is a truly exceptional circumstance. In most cases of refusal or failure to provide a sample, it is not possible to say with certainty what the result of the analysis would have been. But we believe we can be certain here.

[36] That means that the intentional failure to provide a sample assumes less significance "when viewed in the totality of the circumstances". We feel able to hold, therefore, in the particular and exceptional circumstances of this case, that Mr Tawera has satisfied us that there was no "significant" fault or negligence on his part. We do so.

[37] Accordingly, it is open to us to impose a lesser period of ineligibility of between one year and two years. We acknowledge that it is a harsh outcome for Mr Tawera to miss one rugby league season - a year of competitive sport – because of a momentary lapse of judgment, but the penalty reflects the seriousness of the breach of which he is guilty. However, we think that limiting that period of ineligibility to one year provides the appropriate balance which is required by the Code. Applying Article 10.8 of the WADA Code, the ineligibility period will run from the date Mr Tawera was suspended by the NZRL.

Sanction

[38] The Tribunal imposes on Barry Tawera of Hamilton a period of one year's ineligibility under Bylaw 11 of the New Zealand Rugby League Anti-Doping Bylaw, effective from 18 November 2004.

Deputy Chairperson, for the Tribunal