

BEFORE THE SPORTS TRIBUNAL OF NEW ZEALAND

ST 14/08

BETWEEN DRUG FREE SPORT

Applicant

A N D DUANE WINETI

Respondent

ATTENDING: Duane Wineti, on his own behalf
Paul David (Counsel Drug Free Sport)
Graeme Steel (Drug Free Sport)
Jayne Kernohan (Drug Free Sport)
Kevin Bailey (Competitions Commissioner NZRL)

HEARING: By teleconference Monday 15 December 2008

TRIBUNAL Nicholas Davidson QC (Deputy Chairperson)
Dr Lynne Coleman
Ms Anna Richards

Registrar: Brent Ellis

**DECISION OF THE TRIBUNAL
DATED 19th DECEMBER 2008**

Introduction

1. An application was made to the Tribunal by Drug Free Sport New Zealand (“DFS”) alleging an anti-doping rule violation by Duane Wineti (“*the athlete*”) based on the presence of cannabis, D-amphetamine, and D-methamphetamine in his bodily specimen, taken at the Bartercard Premiership Final, between Canterbury and Auckland, played in Auckland on 28 September 2008.
2. These substances are prohibited under the World Anti-Doping Code 2008 (“WADA”), incorporated into the Sports Anti-Doping Rules 2007 (“SADR”). SADR Rule 3.1 prohibits the presence of a prohibited substance or its metabolites or markers in an athlete’s bodily specimen.
3. The analysis was made from the WADA accredited laboratory, (the Australian Sports Drug Testing Laboratory). The analysis of the “A” bottle sample was dated 20 October 2008, and the “B” bottle sample dated 5 November 2008.
4. The athlete was notified of the “A” sample adverse and multiple finding by letter of 22 October 2008.
5. DFS sought penalties be imposed in line with SADR Rule 14.2.

The notice of defence

6. Mr Wineti by letter of 28 October 2008 advised that he admitted the violation for cannabis use, but did not admit the violation for the presence of D-amphetamine or D-methamphetamine.
 7. He said that he was at a 30th birthday party on Friday 26 September where people were using amphetamines, but he was not aware it could be absorbed into his system, thus suggesting that as the source. He said he would not knowingly have put himself in that predicament, especially before a grand final, having regard to the importance of his rugby league to him. He denied any known connection with D-amphetamine or D-
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methamphetamine, or any other "hard drugs", while repeating his admission of smoking cannabis.

8. The Tribunal, through the Registrar, pointed Mr Wineti in the direction of *pro bono* legal advice, and encouraged that course. He did not take such advice, although at the teleconference hearing on Monday 15 December he advised that he had spoken with his coaches, and decided not to contest the violations alleged by Drug Free Sport, notwithstanding the Statement of Defence.
9. Mr Wineti and the Tribunal had the benefit of a Memorandum filed by Mr Paul David as Counsel for Drug Free Sport, which emphasised the obligation on the athlete to explain the source of the prohibited substance in his/her system, to obtain any leniency in sanction. The legal position as set out by Mr David is held to be accurate in the Tribunal's view, but first we record the matters which evolved at the hearing.

Hearing

10. Mr Wineti admitted the use of cannabis, some five weeks previously, after a club grand final. His inference is that this may have remained in his system. He said that he was at the 30th birthday party over "a couple of hours" and others were taking amphetamines or methamphetamines. He knew he was in a situation which exposed him to risk. He chose not to "walk out of the room", but he did not participate in using amphetamines or methamphetamines. He said he was not a user of amphetamines, nor was he a regular user of cannabis, but he took it "once in a blue moon".
 11. Later in the hearing Mr Wineti admitted to smoking cannabis at the birthday party two days before the Bartercard Cup Final.
 12. The Tribunal has no room to manoeuvre on the evidence available but to conclude that the application by Drug Free Sport must result in findings of breach of the SADR in respect of all three substances.
 13. Mr Wineti, with knowledge of the onus upon him to explain the circumstances in which consumption occurred, either to a breach or to
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take advantage of more lenient sanctions available under the SADR, did not attempt to discharge that onus.

14. Mr David is correct that anything said by Mr Wineti falls far short of establishing how the prohibited substance entered into his system, a precondition for any possible consideration of SADR Rules 14.5.1 or 14.5.2, which allow for elimination or reduction in penalty if the athlete can establish no fault or negligence or no significant fault or negligence. Decisions of the Court of Arbitration for Sport on these issues have required more than assertion or speculation before the athlete can discharge an obligation which allows the possibility of SADR Rules 14.5.1 or 14.5.2 applying. Mr David referred to the decisions of **IRB v Keyter** (CAS 2006/A/1067) and **WADA v Stanic** (CAS 2006/A/1130).
15. The burden placed on an athlete to obtain any degree of leniency from the sanctions described is considerable. The athlete has an obligation of diligence which is a prerequisite for establishing an absence of fault or significant fault, and will never be discharged based on speculation. The athlete must prove how the prohibited substance came to be in his or her system, and on the balance of probabilities on evidence which is tenable, would have to show how there was a situation where amphetamine or methamphetamine was being taken, by others, and entered his system without his realising that fact or the risk of it.

Sanction imposed

16. Mr David observed that where there is one violation relating to two prohibited substances, the sanction is that based on that which carries the most severe sanction under SADR Rule 14.6.2. The period of ineligibility for the violation of SADR Rule 3.1 is two years, under SADR Rule 14.2, because D-amphetamine and D-methamphetamine are not specified substances.
 17. For the amphetamine and methamphetamine violations a suspension for two years is mandatory for a first offence. Accordingly Mr Wineti is suspended for a period of two years from the date of hearing, and the Decision reached, up to and including 15 December 2010.
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18. In respect of cannabis use, the Tribunal has observed in a number of cases, that depending on the circumstances, a sanction of ineligibility ranging between one to two months should be imposed, depending on the presence of aggravating or mitigating factors. For example, see ***Drug Free Sport New Zealand v Stacey Lambert*** (ST 10/08, decision 16 July 2008), ***Drug Free Sport New Zealand v Ted Hunia*** (ST 03/08, decision 21 May 2008), ***Drug Free Sport New Zealand v Steven Robinson*** (ST 05/08, reasons for decision 11 June 2008), ***Drug Free Sport New Zealand v Nat Connell*** (ST 04/08, reasons for decision 11 June 2008) and ***New Zealand Rugby League Inc v Timoti Broughton*** (ST 14/07, decision 20 December 2007). The Tribunal noted a caution to sports and athletes in the ***Hunia*** decision (at page 3) that *“At the date of this offence the Tribunal will remain within the range of sanctions indicated, except where there are proper grounds for departure, but it cautions that with this and other cannabis matters before the Tribunal, the position may be revisited”* and more recently in ***Lambert*** (at para 13) that *“Several cases in the last year or two establish that the Tribunal, for a first cannabis infringement when the drug was not taken for performance enhancing purposes, normally imposes a period of ineligibility of between one month and two months ... the time may be approaching for the Tribunal to take a tougher stance if the message is not having a positive effect...[on the particular sporting community involved in that decision]”*. The Tribunal notes that there have been a number of cases involving cannabis infringements by rugby league players over the past few years and this message should be noted.
19. In this case, a sanction of two months’ ineligibility is appropriate having regard to the presence of aggravating factors. These include the deliberate consumption of cannabis only two days before a grand final, and the explanation that Mr Wineti took cannabis after he made an enquiry which led him (wrongly) to believe that no drug testing would take place at the final. No such enquiry or answer will avail the athlete in any circumstances. Mitigation extends only to the plea and the realistic approach to sanction.
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20. Mr Bailey for NZRL explained the process of educational workshopping, and advice to players regarding drug free obligation and risk, including their signing of a participation agreement. Mr Wineti did not seek to offer any excuse such as ignorance or misunderstanding. In the circumstances, concurrent with the sanction for the presence of amphetamine and methamphetamine, Mr Wineti is suspended for a period of two months from 15 December 2008 for cannabis violation, up to and including 15 February 2009.

Backdating of the suspension

21. The Tribunal has the power to backdate a suspension, if there has been a *de facto* or formal provisional suspension. There is no indication of that.

Further discussion

22. The Tribunal cannot reach any conclusion as to how amphetamine or methamphetamine came to enter Mr Wineti's system. The comments that follow are drawn from discussion.
 23. One member of this Tribunal, Dr Lynne Coleman, has specialist medical knowledge, and gives the Tribunal added understanding of issues relevant to drug taking in sport and the community.
 24. The combined presence of cannabis, amphetamine and methamphetamine is troubling. It will be explicable in some cases by deliberate consumption. Dr Coleman also advised of the possibility of consumption of amphetamine and methamphetamine, and perhaps other substances through lacing of cannabis. The Tribunal understands that suppliers of illegal drugs sometimes, surreptitiously or otherwise, lace cannabis with other "harder" drugs, such as methamphetamine, in order to "hook" or induce cannabis users into taking harder drugs. However, the Tribunal repeats that there is no indication that such lacing occurred or may have occurred in this instance.
 25. Mr Steel, of Drug Free Sport, advised it would appear that there has not been much evidence of these particular combined substances observed through drug testing in sport, in or out of competition.
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26. There was speculation by Mr Wineti that the presence of amphetamine and methamphetamine may have come from passive inhalation. The Tribunal has no sound research or clinically based evidence in this regard on which it can make any proper observation, but as it has been raised in the Tribunal, this is recorded in this Decision, as it will be potentially of moment to sport, and to Drug Free Sport, and this Tribunal.
27. While Mr David did not press the point, he indicated that his enquiries suggested passive inhalation was not a likely cause of the presence of amphetamine and methamphetamine, but the Tribunal reaches no findings in this regard. The question of passive consumption is for another day, on other facts.
28. Finally, while the Tribunal for itself does not make too much of this, it was concerned about Mr Wineti's description of the culture surrounding his team. It does not take these remarks to apply to any particular player, and Mr Wineti did not suggest otherwise. But the indication given of the circumstances in which the breaches occurred, is such as to raise a distinct caution to the sport, particularly as to the environment in which Mr Wineti played.

DATED at Wellington this 19th day of December 2008.

Nicholas Davidson ...

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Nicholas Davidson QC
Deputy Chairperson (for the Tribunal)

Dr Lynne Coleman
Ms Anna Richards
