NEW ZEALAND RUGBY UNION JUDICIAL COMMITTEE ("the Committee")

No 3/18

BETWEEN	**DRUG FREE SPORT NEW ZEALAND ("DFSNZ")**
	Applicant
AND	**BLAKE ENSOR**
	Respondent

DECISION OF THE COMMITTEE ON ANTI-DOPING APPLICATION BY DFSNZ

Hearing: 12 December 2018

Committee: Nigel Hampton QC, Chair; Dr Ian Murphy; Bernie Upton.

Counsel: David Bullock for DFSNZ
Andrew Scott-Howman for the Respondent

Registrar: Stuart Doig

SUMMARY

1. DFSNZ brought 9 alleged anti-doping violations against the Respondent in May 2018 – in short form: for alleged possession and use of prohibited substances (metandienone/dianabol and clenbuterol) in August 2014, in breach of rr 3.6 and 3.2 of the Sports Anti-Doping Rules ("SADR") 2014; for alleged trafficking or attempted trafficking of metandienone and clenbuterol in August and the succeeding months of 2014, in breach of r 3.7 SADR 2014; for alleged possession and use of metandienone in September 2014, in breach of rr 3.6 and 3.2 SADR 2014; for alleged possession and use of clenbuterol in October 2014, in breach of rr 3.6 and 3.2 SADR 2014; and for alleged possession and use of metandienone and tamoxifen/nolvadex (a further prohibited substance) in February 2015, in breach of rr 2.6 and 2.2 SADR 2015.
2. The Respondent admitted 7 of the alleged violations; but denied the trafficking/attempted trafficking allegation and the alleged use of metandienone and tamoxifen in February 2015. In addition, as to the alleged possession and use of prohibited substances in February 2015, the Respondent pleaded that his possession and/or use (if the latter was proved) were not intentional, within the meaning given that term in r 10.2.3 SADR 2015.
3. The Committee found that, on all the evidence, it could not be comfortably satisfied that DFSNZ had proved (a) the trafficking/attempted trafficking allegation; and (b) the use (or as well, and as argued by DFSNZ, attempted use, such being inherently contained within a "use" allegation) allegation from February 2015. Both those allegations were dismissed by the Committee.
4. In addition, on the allegation of possession of metandienone and tamoxifen in February 2015, the Committee found that the Respondent had established that such possession by him was "not intentional" (r 10.2.1.1 SADR 2015).
5. Which meant that the Respondent, compulsorily, faced a suspension for 2 years, and that period of suspension (for reasons, primarily, of delay) should be back-dated by a total of 8 months from the date of the provisional suspension imposed on the Respondent, being 9 August 2018.
6. The Respondent has imposed upon him a period of 2 years ineligibility commencing on 9 December 2017.

TRAFFICKING/ATTEMPTED TRAFFICKING (2nd allegation)

7. Both these (alternative) allegations were based on, and DFSNZ relied on, the words contained in, and certain claimed inferences to be drawn from, exchanges of emails between the Respondent and the "NZ Clenbuterol" website starting in July 2014 and through into October 2014, together with the cumulative amount of prohibited substances bought by the Respondent during that period and the expert opinion (Mr Morrow's) proffered on those

quantities bought, that such amounts would be consistent with use by multiple persons (and to be contrasted with the February 2015 purchases – the expert's view: conceivably "*consistent with individual use only*").

8. The expert opinion, importantly in the Committee's view, whilst noting that the volume and the timing of the 2014 purchases "*are inconsistent with personal use by a single person and are consistent with multiple cycles by different people",* also observed that that opinion was conditional, namely *"assuming the products ordered were being used".*
9. It is on that last point that, ultimately, the DFSNZ case on these alleged violations failed.
10. The Committee notes that there was no extrinsic evidence before it, coming from any source at all, indicating that the Respondent was dealing prohibited substances ("dealing" being used as shorthand here for any of the 6 proscribed methods of "trafficking", as that latter word is defined in SADR 2014).
11. The Respondent denied trafficking in any form. He was strongly cross-examined on behalf of DFSNZ and taken through the email exchanges, the quantities purchased, his reasons (both physical and psychological) for his purchase and his use, the quantities he claimed he "stock-piled", his reasons for doing that and his ultimate claimed disposal of the remainder unused. He was questioned closely, as well, by Committee members.
12. The Respondent was unshaken in his account. The account he put forward was a plausible one in the Committee's view. There was in his account, the Committee found, both consistency and coherency, which allowed the Committee to see that account as a credible one, which dealt with and effectively explained all the email correspondence (especially those of the Respondent's of 15 and 17 August 2014), the various purchases of different substances and the quantities of such purchases.

FEBRUARY 2015 USE ALLEGATION (9th allegation)

13. The Respondent fully accepted the purchase by him of both metandienone and tamoxifen in February 2015 (as mentioned at paragraph 7 above – "*consistent with individual use only"*) and accepted his liability for possession of such (allegation 8), but denied use of the substances.
14. In keeping with the findings as to the Respondent's credibility already made (at paragraph 12), the Committee found the Respondent's account of his February purchase, and what he then did (or rather did not do) with the substances, as plausible and acceptable to such an extent as to leave the Committee less than comfortably satisfied that DFSNZ had proved this charge. The Respondent decided that the affects which the substances were having on him – weight gains, better body image, with some improvement of his depressive state – were not worth it.
15. By then, he was over his recovery from a serious ankle injury he had suffered in early 2014 (which meant he had not played rugby through the 2014 season) and to the Committee, he seemed to have formed a rather more positive attitude about himself and his life.

16. DFSNZ argued that, as an "attempt to use" was necessarily included in a "use" allegation, the accepted evidence that the Respondent had made these purchases in February 2015 with the original intent to use the substances, that at the least an "attempt to use" violation had been made out on allegation 9.
17. As opposed to allegation 2 where DFSNZ had pleaded both "trafficking or attempted trafficking", in allegation 9 "use" only had been alleged. Given the delays (to be considered later) and the surrounding circumstances here (which will be discussed shortly) the Committee were not of a mind to amend the charge in the manner impliedly suggested by DFSNZ.
18. As to the surrounding circumstances referred to, primarily the Committee was affected in its thinking by the fact that the only evidence which might be relied on to prove an attempted usage was exactly the same factual material which was being used to support the 8th allegation, i.e. the possession of the same substances (that evidence, in short, being the relevant email exchanges, the purchase and the delivery). In the Committee's view, the interests of justice would not require a double finding of culpability on the exact same evidential material.

SANCTIONING

19. Given the factual conclusions reached on, and the rejection of, allegations 2 and 9, the Respondent potentially faced the greatest sanction on his admitted breach (as set out in allegation 8) of r 2.6 SADR 2015, namely a 4 year suspension unless, in the words of r 10.2.1.1, he could establish that this violation *"was not intentional".*
20. *As to "intentional"* it is defined (in r 10.2.3) as covering both actual knowledge that the conduct constituted an anti-doping violation and deemed "reckless" knowledge (i.e. that there was knowledge that there was a significant risk that the conduct might constitute such a violation and a manifest disregard of such risk).
21. The Respondent, the Committee found, was and is a "social" rugby player. He has not had high level involvement in the game, nor has he had education as to prohibited substances.
22. Following his early 2014 ankle injury, he did some research by himself as to ways to stop the decline in his physical fitness and conditioning, to improve his body image (and his perceptions as to that) and to improve his depressional state. Which led to his varous purchases, his rather intermittent use and his stockpiling through 2014 and into 2015, including the tamoxifen purchase in February 2015 to try and counter some of the depressive effects he was suffering from the other substances.
23. Given the evidence of the Respondent and the favourable impression he made on the Committee as a truthful witness (backed as to that by a degree of character evidence put forward on his behalf, although that evidence was not given any considerable weight in the circumstances; but, rather, the Committee relied on its own assessments as to honesty and credibility having scrutinised the Respondent with care, whilst he was under some

considerable pressure of examination before it), given such favourable impression the Committee concluded that the Respondent had comfortably satisfied the onus of proof on him and had established that his purchases and possession of prohibited substances throughout 2014, and in particular in February 2015, were not committed with either actual knowledge or deemed reckless knowledge (as defined in r 10.2.3). The Committee was satisfied that the Respondent's own research, or his wider background and friendships, had not provided him with either type of knowledge so as to result in his substance violations being intentional.

24. Because of his injury, the Respondent did not register as a rugby player in or during the 2014 playing season (i.e. from 1 September 2013 until 31 August 2014) and given, as the Committee found, a certain self doubt then as to his playing future, he did not register again as a player until well through the 2015 playing season (on 6 June 2015). From the evidence given (both from the Respondent and from the DFSNZ expert under cross-examination) the Committee concluded that any effects of any of the substances used by the Respondent had dissapated, by the time the Respondent resumed playing rugby in the first half of 2015.
25. Unfortunately, these proceedings were not formally commenced against the Respondent until 30 May 2018 (with informal notice of intention to bring them being given to the Respondent in mid April 2018). This was some 3 to 4 years after the violations. In the course of cross-examination of a DFSNZ witness (Ms Grace) it became apparent to the Committee that the bringing of these "NZ Clenbuterol" cases against alleged violators, and in particular the timing of bringing these cases and the delays in bringing such cases, was a lottery – the claimed lack of time and resources meant that in one instance referrred to in DFSNZ's evidence (from Ms Grace's evidence at her amended paragraph 50) a player from the same city, apparently known to the Respondent, was charged and dealt with by this Committee in December 2017, whereas the Respondent, with the (un)luck of the draw was dealt with a year later.
26. The sense of injustice from this is apparent to this Committee and is an influential factor in the overall back-dating of sanction starting date allowance made to the Respondent. Of recent time, in decisions of this Committee, a back-dating component of 6 months has been allowed and DFSNZ submitted that such a period would be appropriate here. (Reference is made to r 10.11.1 – substantial delay not attributable to the Respondent).
27. For the Respondent, it was claimed that an additional period of back-dating should be allowed reflecting the Respondent's timely admissions of his violations (predicated on an anticipated upholding of the Respondent's various challenges to some of the alleged violations, as traversed earlier in this decision).
28. The Respondent pointed to r 10.11.2 (prompt admission after confrontation), however the difficulty with that submission became apparent when it was accepted that the Respondent, after confrontation (in April 2018) had played rugby – "*competes again*".

29. It was explained that the Respondent, after advice, believed that he had not committed any violations through 2014 and 2015 because he was not registered as a player with NZ Rugby during the relevant period of time (refer back to paragraph 24 above) – and a notice of objection to this Committee's jurisdiction was lodged. He was made aware that 2 other players were defending their alleged violations before this Committee on that very basis - i.e. that registration only took effect from the date of registration and did not have retrospective effect by back-dating such registration, whenever it occurred in a rugby playing season, to the 1 September start date of a registration year and carrying through to the 31 August termination of such registration year.
30. The decisions of this Committee in *Raimona (8/17)* and *Skipwith (5/17),* delivered at the end of June 2018, put paid to that jurisdictional challenge, and on receipt of further advice the Respondent promptly made his admissions, agreed to his provisional suspension (made 9 August 2018) and gave up any sporting activity.
31. In each of the *Raimona* and *Skipwith* matters a further 2 month back-dating allowance for timely admissions was made, notwithstanding the jurisdictional challenges. The Committee here was of the firm view that justice would be served by allowing a similar discount here but, given the exclusionary provision in r 10.11.2 (refer paragraph 28 above), such an allowance should be made by extending the delay component by 2 months, to a total of 8 months.

ORDER

32. The Respondent, Blake Ensor, is hereby sanctioned by having imposed upon him a period of ineligibility of two (2) years, commencing on 9 December 2017.
33. In accordance with r 10.12.1 SADR the Respondent may not, during his period of ineligibility, participate in any capacity in a Competition or activity (other than authorised anti-doping education or rehabilitation programmes) authorised or organised by any Signatory or Signatory's member organisation, or a club or other member organisation of a Signatory's member organisation, or in Competitions authorised or organised by any professional league or any international- or national-level event or any elite or national-level event organisation or any elite or national-level sporting activity funded by a governmental agency.
34. The Respondent is advised that, under Regulation 5.2.3 of the NZRU's Anti-Doping Regulations 2012, he is entitled to have these findings and/or sanctions in this Decision referred to a post-hearing review body.

Nigel Hampton QC
Chair of the Judicial Committee
19 December 2018