

BEFORE THE NEW ZEALAND RUGBY UNION JUDICIAL COMMITTEE

No. 11/17

BETWEEN **DRUG FREE SPORT NEW ZEALAND**
 Applicant

AND **AROHA NUKU**
 Respondent

DECISION ON ANTI-DOPING VIOLATION

Dated 16 April 2018

Hearing: In Wellington on 23 March 2018

Committee: Barry Paterson QC, Chair
 Ian Murphy
 Roger Drummond

Present: Paul David QC, Counsel for Applicant
 Jude Ellis, an officer of the Applicant
 Andrew Skelton, Counsel for Respondent
 The Respondent in person

Registrar: Keith Binnie

1. The applicant, Drug Free Sport New Zealand (DFSNZ) brings an anti-doping rule violation (ADRV) application against Ms Nuku under Rule 2.1 of the Sports Anti-Doping Rules 2015 (SADR). The allegation, which is admitted by Ms Nuku, is that she infringed Rule 2.1, namely that there was the presence of a Prohibited Substance or its Metabolites or Markers in Ms Nuku's sample.
2. Ms Nuku was tested after playing for the Manawatu Cyclones in a Farah Palmer Cup match in Palmerston North on 22 September 2017. Both her A and B samples confirmed the presence of Methamphetamine and De-Amphetamine/Dextroamphetamine. Both substances are non-Specified Substances under SADR and are prohibited in competition being Class 6a Stimulants on the 2017 Prohibited List.
3. While accepting the presence of the substances in the sample, Ms Nuku seeks a reduction of the period of Ineligibility from 4 years to 2 years under SADR 10.2.3 on the basis that the taking of the substance was not intentional. She also seeks a backdating of the starting point of the period of Ineligibility under SADR 10.11.2 on the basis of a prompt admission of the ADRV.
4. The substances are not Specified Substances and under SADR 10.2.1.1 and SADR 10.2.2, the period of ineligibility is reduced from 4 years to 2 years if the athlete can establish that the ADRV was not intentional. SADR 10.2.3 defines intentional and for the purposes of this application, the relevant portion reads:

10.2.3 As used in Rules 10.2 and 10.3, the term "intentional" is meant to identify those *Athletes* who cheat. The term, therefore, requires that the *Athlete* or other *Person* engaged in conduct which he or she knew constituted an *Anti-Doping Rule Violation* or knew that there was a significant risk that the conduct might constitute or result in an *Anti-Doping Rule Violation* and manifestly disregarded that risk. ... An *Anti-Doping Rule Violation* resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall not be considered "intentional" if the substance is not a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance* was *Used Out-of-Competition* in a context unrelated to sport performance.

The Evidence

5. Ms Nuku and her friend, Ms Loye, gave evidence in person at the hearing. Two other witnesses, Mr Feaunati, the coach of the Cyclones Team and Doctor

Poulsen, also provided witness statements and Mr Feaunati was cross-examined on a conference telephone call.

6. A summary of the evidence of Ms Nuku is:

- She was an amateur rugby player but played representative rugby at provincial level for the Manawatu Cyclones for a period of years.
- She was not a high performance (elite or international player) although she had been selected for a Black Ferns training camp in 2013 but was unable to attend the camp because of an injury.
- She has never been part of any registered drug testing pool and prior to 22 September 2017, had never been drug tested in relation to her involvement in sport.
- Prior to the start of the 2017 season, she did attend a presentation on anti-doping given to the team by DFSNZ. This was the only time she has had any education on drugs and sport. She acknowledged being given a little blue booklet at the seminar.
- The Cyclones trained in Palmerston North which was a 2½ hour drive from where Ms Nuku lived. She travelled to Palmerston North two to three times a week, for training on Tuesdays and Thursdays and for games on either Friday night or at the weekend.
- She attended training in Palmerston North on Tuesday, 19 September 2017. She travelled to Palmerston North with teammate, Ms Loye, as she had left her car in Palmerston North the previous weekend.
- There was a team issue which had to be resolved on the Tuesday evening and she, Ms Loye, and some other team members spent considerable time resolving this issue.
- She and Ms Loye left Palmerston North about 2am travelling in convoy. They both found it difficult to stay awake and kept talking to each other by phone, eating and drinking to make it easier to drive. They stopped at Wanganui and bought lollipops and Red Bull to help with the last 90 minutes of the driving.

- The lollipops and Red Bull did not have the desired effect and they both pulled into a rest area.
 - Ms Loye offered Ms Nuku a white powder to help her stay awake. She told Ms Nuku that the powder was crushed Ritalin pills which Ms Nuku knew was a medicine and a drug given to children.
 - She was told by Ms Loye that the latter had run out of No Doz which was what she used to keep awake when driving. Ms Loye had to be back at her home by 4.30am to commence milking on a dairy farm.
 - She and Ms Loye tipped some of the white powder into their Red Bull, drank it and this helped them stay awake and they were a bit more alert.
 - She did not know that the white powder which she was told was Ritalin contained a substance prohibited in sport and it did not occur to her that it might contain a substance prohibited in sport or that conduct might constitute an ADRV.
 - She was selected for drug testing after the game between the Cyclones and Waikato on Friday evening, 22 September 2017.
 - Ms Loye has not got any of the white powder left so she was unable to have it tested.
7. Ms Nuku was cross-examined by counsel for DFSNZ and questioned by the Committee members. In the main her answers were consistent with her written statement. She was questioned on the form which she signed at the time the sample was taken. A question required her to state any prescription or non-prescription medicine and supplements taken over the past seven days. She included three items, one of which was for hay fever. She did not declare the Ritalin. The form also contained a statement that Mrs Nuku was worried about possible exposure to marijuana because she is in regular contact with somebody who uses marijuana.
8. Two other relevant matters emerged during the cross-examination, namely:
- (a) In respect of the source of the substance, Ms Nuku's evidence was that she asked Ms Loye to talk to the co-worker who provided the powder to

Ms Loye. She asked Ms Loye to get the worker to confirm what it was. However, she did not know whether any attempt was made to get the co-worker to give evidence. She herself did not contact the co-worker; and

(b) Although not cross-examined on the point, her evidence was that the issue which she and Ms Loye had to sort out with other team members was done at a home after she had gone out to dinner. In her witness statement she said that the majority of the training session "was spent in the changing room sorting out some issues with team dynamics. I and some other team members had to stay very late to help resolve the issues". She was not cross-examined on this possible discrepancy.

9. Ms Loye gave corroborating evidence. She too played for the Cyclones and travelled from Hawera to Palmerston North for training sessions and matches. Like Ms Nuku, she has never been part of a registered drug testing pool and has never been drug tested in relation to her involvement in sport. She acknowledged however that she did attend the pre-season anti-doping presentation by DFSNZ. Her evidence in respect to the trip from Palmerston North back to Hawera in the early hours of the morning of Wednesday, 20 September, was similar to that of Ms Nuku.

10. Two matters arose from her cross-examination:

(a) The only question that she asked her co-worker who supplied the powder was if he had any more of the powder. Apparently, she did not ask the co-worker where the powder came from and what it contained, nor did she suggest that the co-worker be asked to give evidence;

(b) Her version of the events after training to resolve the issues on 19 September did not include the evidence given by Ms Nuku, namely that they had dinner in Palmerston North before resolving the issues.

11. The evidence of Mr Feaunati was in part a character reference for Ms Nuku. He did not believe that either she or Ms Loye would be involved in taking prohibited substances to enhance their performance in rugby. However, he could not give any direct evidence on the crucial issue which this Committee has to resolve, namely whether it accepts the evidence of Ms Nuku and

Ms Loye. His evidence did however confirm that there was an issue to be resolved on the evening of 19 September, although he did not take part in the discussions and did not know what time Ms Nuku left Palmerston North to travel back to Hawera.

12. Doctor Poulsen's evidence was relevant to when Methamphetamine, if ingested, can be detected in a urine sample. Her opinion is that it is not possible to tell from a urine sample if Methamphetamine was used that day or if it had been used within the previous 24 hours or if it had been used four days earlier or somewhere in between.

Respondent's Submissions

13. Mr Skelton, for Ms Nuku, submitted that the evidence established to the required standard of proof, on the balance of probabilities, that the Methamphetamine was used inadvertently and out of competition in a context unrelated to sports performance. In particular:
 - (a) The Methamphetamine was ingested inadvertently some two days before the commencement of the In-Competition period, namely around 3am on Wednesday, 20 September 2017, when the In-Competition period commenced around 5am on Friday, 22 September 2017; and
 - (b) The Methamphetamine was ingested solely for the purposes of staying awake and alert while driving in the early morning and this is clearly a context unrelated to sports performance.
14. Counsel submitted that Ms Nuku's evidence that it did not cross her mind to disclose the Ritalin on the drug testing form was credible and that the discrepancy between the evidence of Ms Nuku and Ms Loye relating to having dinner in Palmerston North was not sufficient to undermine Ms Nuku's evidence.

DFSNZ's Position

15. Mr David QC, counsel for DFSNZ, acknowledged that the issue of the application of SADR 10.2.3 depended upon the credibility of the explanation given by Ms Nuku and corroborated by Ms Loye. He referred to the following factors:

- The discrepancy in the explanations given by Ms Nuku and Ms Loye as to the events of the evening on 19 September with particular reference to whether or not they went into Palmerston North for dinner.
- The first time Ms Nuku gave that explanation was on 25 January 2018.
- The failure to declare the taking of the Ritalin on the drug testing form particularly as she carefully recorded three other substances.
- That Ms Nuku had recently been to a seminar run by DFSNZ on anti-doping and had taken away a booklet from that seminar.
- The failure to attempt to adduce evidence from the supplier of the powder and requesting that person to advise what the powder was.

Discussion

16. Both Ms Nuku and Ms Loye gave their evidence in a manner which on the face of it appeared to give credibility to their evidence. The issue is whether the matters raised by DFSNZ in respect of a player who had played representative rugby for several years undermine their credibility to the extent that Ms Nuku have not established on the balance of probabilities that the Methamphetamine was taken in the manner they suggest namely that it was taken out of competition in a context unrelated to sports performance.
17. Some of the matters raised by DFSNZ are troubling in respect of a representative player. These include the failure to refer to the Ritalin on the doping form when other substances were recorded and the failure to obtain further evidence as to the source and nature of the powder. Nevertheless, the Committee has come to the view after hearing both Ms Nuku and Ms Loye, that they accept their evidence and that Ms Nuku has established on the balance of probabilities that the source of the Methamphetamine was the powder taken by Ms Nuku on the morning of 20 September 2017 and that it was taken for the purposes of keeping her awake and not for sports performance.
18. It follows that as Methamphetamine is not a specified substance and is only prohibited In-Competition, the use of it Out-of-Competition in a context to

keep Ms Nuku awake, cannot be considered "intentional" under the provisions of SADR 10.2.3.

19. It follows therefore that Ms Nuku's period of Ineligibility is under the provisions of SADR 10.2.1.1 and 10.2.2, a period of two years.

Commencement of Period of Ineligibility

20. Ms Nuku seeks to have the period of Ineligibility start at an earlier date and particularly at the date of the sample collection on the basis of SADR 10.11.2. Under that provision, the period of Ineligibility may start as early as the date of the sample collection if the athlete promptly admits the ADRV after being confronted with it by DFSNZ.
21. Ms Nuku was advised of the positive test on sample A on 26 October 2017. After obtaining legal advice, she requested that her B sample be analysed on 2 November 2017. It was submitted that this request was made only because Ms Nuku generally thought there may have been a mistake made in the testing. After the result was confirmed by the testing of the B sample, Ms Nuku promptly admitted the violation.
22. Mr David accepted on behalf of DFSNZ, and there is authority for the proposition in CAS jurisdiction, that the request for the B sample to be tested does not mean that there cannot be a prompt admission. On the finding that Ms Nuku was candid in her admission, the period of Ineligibility will commence from the date of the sample taking, namely 22 September 2017.


Decision

23. Ms Nuku is sanctioned by the imposition of the two-year period of Ineligibility commencing on 22 September 2017.
24. Under SADR 10.12.1, Ms Nuku may not during the 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 Signatories member organisation, or a club or other member organisation of a Signatories member organisation, or in Competitions authorised or organised by any professional league or any

International or National-level Event Organisation or any elite or National-level sporting activity funded by a Governmental agency.

25. Ms Nuku is advised that under Regulation 5.2.3 of the Regulations she is entitled to have the findings and/or sanctions in this decision referred to a Post-Hearing review body.

Dated 16 April 2018


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Barry Paterson QC
Chairman, Judicial Committee