

Background

1. The respondent, Mr Ryder, is a well known professional cricketer. He was tested at a Ford Trophy Wellington Firebirds game against Northern Knights played at the Basin Reserve on 24 March 2013. In his testing declaration he disclosed that he had taken two tablets of Tramadol in the days prior to the test.
2. The respondent's sample returned a positive test for 1-Phenylbutan-2-amine (PBA) and N, alpha-diethyl-benzeneethanamine (DEBEA). These are specified stimulants banned in competition under S.6.b of the Prohibited List 2013. They fall within the provision of the List that prohibits substances which have a similar biological effect or similar chemical structures as the stimulants specifically listed.
3. Mr Ryder was notified of the positive finding from his A sample by Drug Free Sport on 12 April 2013. A provisional suspension order was made by the Tribunal commencing on 19 April 2013.
4. On 1 May 2013 Drug Free Sport filed an application for an anti-doping violation proceeding. In his notice of defence filed on 31 May 2013 Mr Ryder admitted the violation, accepted that the Sports Anti-Doping Rules 2013 (SADR) applied to him by reason of his contractual capacity as a cricket player contracted to Cricket Wellington (and New Zealand Cricket) and admitted the violation. Mr Ryder indicated that he wished to participate in the hearing to make submissions on sanction or penalty.
5. A hearing of the Tribunal took place on 9 August 2013 to consider the appropriate sanction or penalty under the SADR in respect of the violation. At that hearing Mr Ryder was represented by Mr Simon Moore QC and Mr Andrew Scott-Howman as counsel and Drug Free Sport was represented by Mr Paul David and Mr Isaac Hikaka. New Zealand Cricket attended as an interested party and was represented by Mr Aaron Lloyd and Ms Francesca Ryff.
6. Evidence was led at the hearing from:

Jesse Ryder

Aaron Klee, his manager
Helen Poulsen, an ESR scientist
Stephen Hotter, a conditioning specialist and
Graeme Steel, Chief Executive of Drug Free Sport;

and briefs were read from Ms Farrell, who had been the acting operations manager of Drug Free Sport and Ms Goebel, director of the Australian testing laboratory.

The Issue

7. The issue before the Tribunal was the appropriate sanction to be applied under the Rules. Where there is a violation under SADR 3.1 the period of ineligibility is two years under SADR 14.2, unless the athlete can establish grounds for the reduction of that period. In the present case Mr Ryder sought to rely on SADR 14.4 to reduce the period of ineligibility.
8. Rule 14.4 provides that if the athlete can establish the applicability of the Rule then the period of ineligibility otherwise provided of two years shall be replaced, at the discretion of the Tribunal, with a sanction ranging from a reprimand and no period of ineligibility to a maximum of two years of ineligibility.
9. For Rule 14.4 to apply the athlete must prove two facts:
 - (a) How the Specified Substance entered his body; and
 - (b) That the Specified Substance was not intended to enhance his sport performance or to mask the use of a performance enhancing substance.
10. The burden of proof upon the athlete is addressed in the commentary to the Rules. In respect of (a) above, the burden of proof is the balance of probabilities (Rule 4.1.2).
11. In respect of (b) above, the athlete is required to produce corroborating evidence which establishes an absence of intent to enhance sport performance (or to mask the use of a performance enhancing substance). This must be proved to the “comfortable satisfaction of the hearing panel”.

12. The commentary to the Rule also provides that, in general, the greater the potential performance enhancing benefit, the higher the burden on the athlete to prove this lack of intent.
13. If the athlete can satisfy requirements (a) and (b) of Rule 14.4 then the question for the Tribunal is what is the appropriate period of ineligibility for the violation, given the athlete's degree of fault in connection with the violation.

Source

14. Mr Ryder's evidence was that some five days before the test was taken he had consumed two capsules of a supplement called Gaspari Detonate prior to a gym session. His evidence was that at the time he did not believe that the supplement contained any substance prohibited under the List. We will have to return to that issue.
15. Because the substances detected by the test analysis were not identified on either the labelling of the product or on internet information regarding the product, it was necessary for Mr Ryder to engage a forensic analyst, Ms Poulsen, employed by the ESR in Wellington, to undertake analysis of the product. Ms Poulsen gave evidence before the Tribunal and confirmed that her analysis of the product showed the presence of the substance described as DEBEA from which the second substance PBA is derived.
16. PBA is the metabolic breakdown product of DEBEA. The substance enters the body as DEBEA and over time the body converts it to its metabolite by the loss of an ethyl group. Both DEBEA and PBA belong to a class of compounds known to act as stimulants.
17. Neither DEBEA nor PBA is specifically listed in S.6 of the WADA List of Prohibited Substances. However, Ms Poulsen confirmed that they have a related chemical structure and may therefore have similar biological effects to a number of compounds listed in both paragraphs (a) and (b) of S.6. Accordingly they are caught by the closing words of S.6 as "other substances with a similar chemical structure or

similar biological effect” to those expressly listed as stimulants. They are considered as “Specified Substances” under the Rules.

18. The analysis of Mr Ryder’s A and B samples indicated a presence of DEBEA but an approximately threefold presence of PBA. The evidence before us from Ms Poulsen, confirmed by Ms Goebel on behalf of Drug Free Sport, was that it indicated that DEBEA had not been ingested in a near time to the test because the metabolising process to PBA must have been underway for some reasonable time. Because there has been no published testing of the metabolising rates of DEBEA neither expert was able to be precise as to how long before the test the DEBEA would have been ingested. The Tribunal is satisfied on the evidence that the analytical findings are consistent with Mr Ryder’s evidence as to when he took the two capsules.
19. The Tribunal is accordingly satisfied that the source of the prohibited substances revealed by Mr Ryder’s testing was the Gaspari Detonate which he consumed on Tuesday 19 March 2013.

Intent

20. Mr Ryder’s evidence before the Tribunal explained that his use of the Gaspari Detonate was to assist him in weightloss. We do not need to detail Mr Ryder’s evidence other than to say in summary that he expressed a sensitivity arising from public comments about his weight and, as he was in a good space at the time about his cricketing form, he had decided to make a further attempt to reduce weight. Mr Klee’s evidence confirmed Mr Ryder’s struggle with his weight, the stress it has caused him and his successes and failures over time to deal with the issue.
21. Mr Ryder already used the gym, both generally to assist his fitness but also to help control his weight. He was assisted in this and other conditioning work by Mr Hotter, a strength and conditioning specialist employed by High Performance Sport New Zealand.
22. Mr Hotter’s work with Mr Ryder has continued over approximately three years. During the season Mr Hotter said that he saw Mr Ryder most days and did a lot of one on one work with him.

23. In early 2013 a friend of Mr Ryder's, who had been very successful in losing weight associated with a gym programme, told him that he had been assisted by taking the supplement called Gaspari Detonate. We will have to return to this issue in respect of fault but in summary Mr Ryder made his own enquiries about the product, sought the assistance of Mr Hotter, and on the information Mr Ryder had collected thought that the product did not contain any substance under the Prohibited List and began to use it in association with his weekly gym sessions.
24. The question under the second head of Rule 14.4 is whether he did so with an intent to enhance his sports performance or to mask the taking of a substance intended to enhance his sports performance.
25. The Tribunal has to consider that question in respect to the particular facts of the violation, i.e. the Tribunal's acceptance that he took the substance some five days before he was tested in competition. As earlier noted, the commentary to the Rules recognises that the greater the potential performance enhancing benefits then the higher the burden on the athlete to prove his lack of intent.
26. Ms Poulsen gave some evidence as to the effect of taking the substance. Because of the lack of any published scientific work she treated herself as a guinea pig and monitored both the metabolising rate and effect on her of taking a capsule of Gaspari Detonate. Her evidence was that it did produce a stimulant effect not much different to a strong cup of coffee, and that effect passed within three or four hours.
27. On the present facts the Tribunal is more than comfortably satisfied that Mr Ryder's taking of the two capsules on 19 March 2013 was without any intent at all to enhance sports performance in the cricket game which he subsequently took part in on 24 March 2013.
28. Our clear view as to Mr Ryder's lack of intent to enhance his sports performance in competition obviates the need for the Tribunal to re-enter the controversial waters of the difference of approach which has been taken in various CAS awards when an athlete claims that he or she took a supplement not knowing that it contained a banned substance. This Tribunal has in the past preferred the approach known as

the Oliviera approach but whether that or the contrary Foggo approach is correct is not yet resolved by WADA and unnecessary for this Tribunal to discuss on the present facts.

Conclusion on Rule 14.4

29. For the above reasons the Tribunal is satisfied that Mr Ryder has discharged both requirements of Rule 14.4 and accordingly the Tribunal is required to assess whether any or what period of ineligibility should be imposed on Mr Ryder. That determination is to be made by the Tribunal in its discretion based on its assessment of Mr Ryder's fault in the circumstances of the violation.

Fault

30. The Tribunal agrees with Mr David's submission that the starting point for assessing fault must be recognition of the obligations of the athlete conferred by the regime under the Code and the SADR. This is a regime under which the basic principle is that the athlete has a personal duty to avoid prohibited substances entering his or her system. It has been recognised in various decisions to be one which imposes a duty of utmost caution on athletes to avoid ingesting prohibited substances. The notes to SADR 14.4 emphasize that fault is to be assessed by reference to the matters relevant to explain the athlete's failure to meet this expected standard of behaviour under the Code.
31. Through his counsel Mr Ryder responsibly accepted that a period of ineligibility would have to be imposed. Mr Moore QC contended that the appropriate period would be in the range of one to six months. For Drug Free Sport Mr David contended that the circumstances were such that the period of ineligibility should be within the period of six to twelve months. Both Mr Moore and Mr David properly submitted that this Tribunal, while not bound by previous decisions in a precedential manner, should endeavour to determine a period that was consistent.
32. Both Mr Moore and Mr David submitted that this Tribunal's decision in *Drug Free Sport New Zealand v Rangimaria Brightwater-Wharf* (ST 14/10, Decision 29 November 2010) was an appropriate comparator, although Mr David's position was

that the athlete in that case had a lesser degree of fault and Mr Moore's position was to the contrary. Ms Brightwater-Wharf received a six month suspension. Mr David also submitted that the CAS decision in *Kendrick v ITF* (CAS 2011/A/2518) was a similarly useful comparator. In that case the athlete received a suspension of eight months. In addition to those two cases both counsel drew the Tribunal's attention to a large number of decisions emphasizing factors in those cases which have inclined tribunals either to lower or higher periods of ineligibility than six months.

33. All, however, turns on this Tribunal's view on the particular facts of this case.
34. We have already described and accepted Mr Ryder's evidence as to his reasons for deciding to try Gaspari Detonate. As we have also said those reasons were supported by the evidence of his manager and, indeed the members of the Tribunal were generally aware of the issue which Mr Ryder was attempting to grapple with.
35. Mr Ryder's evidence was that having been encouraged to the use of Gaspari Detonate by his friend he did some internet searches to identify its composition and whether it was safe for him to take. As a professional cricketer he had been subject to anti-doping education, including attending a presentation by Mr Steel in Napier during the previous season. He was conscious of the warnings which are given by Drug Free Sport and generally in anti-doping education about the dangers of supplements.
36. Mr Ryder annexed to his evidence the internet information which he identified. It included a list of the ingredients of Gaspari Detonate. That list included Phenylethylamine HCl, Dendrobium extract, caffeine anhydrous, ginseng etc.
37. As a result of carrying out the internet searches and his uncertainty about Dendrobium, Gaspari Detonate and, for some reason which Mr Ryder is no longer certain about, clenbuterol he texted Mr Hotter "do you know if any of this is a banned substance?". Mr Hotter's response was to say that he would check and get back to Mr Ryder.
38. Mr Ryder's evidence was that he had a discussion with Mr Hotter a day or so later. In that discussion Mr Hotter told him that clenbuterol was an anabolic steroid and

was a banned substance. Mr Ryder said that Mr Hotter told him that Dendrobium was alright to use because it was not on the WADA list and that he could not find Detonate on the WADA list. Mr Ryder's evidence was that he thought that meant that it wasn't banned by WADA and he did not remember Mr Hotter saying to him that he should check it out further before using it.

39. Mr Hotter also gave evidence. He said that he checked the WADA list for the three substances through an application which he had on his iPhone. Clenbuterol came back as prohibited but the other two substances came up with "no results". Mr Hotter said that he then went to his laptop and checked the actual Prohibited List and he could not see the other two substances on that list.
40. Mr Hotter also then did a Google search, found out that Dendrobium was a flower extract, that Detonate was a product which contained Dendrobium, went through all the ingredients on the product label on the internet and checked them against the WADA app. None of the ingredients came up as prohibited and he thought that meant they did not appear to be banned but he was not sure because he had never come across the substances before.
41. He confirmed that he and Mr Ryder had a discussion the following day and in that discussion he told Mr Ryder that none of the ingredients, including Dendrobium, appeared to be a banned substance. Mr Hotter's evidence was that Mr Ryder then replied "so it should be ok" or words to that effect to which Mr Hotter agreed. However, Mr Hotter also said that he told Mr Ryder that he would want to be sure and that he should check them out for himself.
42. Mr Hotter very fairly acknowledged at the hearing that he accepted that Mr Ryder would have placed reliance on the information which Mr Hotter supplied to him because of the relationship which they had and Mr Hotter's position with High Performance Sport.
43. Mr Ryder's evidence was that after this conversation he asked his manager to place an order for Detonate and also for some protein powder. When Mr Ryder received the Detonate container he looked again at the ingredients list and also noted a

highlighted warning on the back of the container. That warning included the statement that the product may contain ingredients banned by certain organisations. That same warning was replicated on the internet site but without any highlighting and the Tribunal's appreciation is that Mr Ryder did not see the warning at the time of his internet search.

44. However, Mr Ryder acknowledged that he read the warning after receipt of the product. His evidence was that he then decided to again check the ingredients out and he specifically remembered searching for two ingredients Dendrobium and phenylethylamine because they sounded to him like the ones that the warning may have related to. Again his internet search did not draw his attention to anything which caused him to believe that Detonate contained any substances banned under the WADA list.
45. Mr Klee gave evidence that at some time after he had ordered the product for Mr Ryder he became aware of the Australian rugby league doping issue concerning supplements. He raised the issue with Mr Ryder twice because of his concern and both times Mr Ryder told him that he had checked the product out with Mr Hotter and that it was okay to use. Mr Klee's evidence was that he accepted that if it had been checked out with Mr Hotter the supplement must be okay.
46. In fact Mr Ryder was correct in his belief that the ingredients as listed both on the internet and on the label of the product were not on the Prohibited List. Unfortunately the product did contain the banned substance DEBEA (as confirmed by Ms Poulsen's analysis) which was not listed in either the internet or label schedule of ingredients.
47. Also unfortunately it is not uncommon with these types of supplements for the ingredient list to be benign but the product to contain a substance which is banned. That was the same trap which Ms Brightwater-Wharf fell into where she made enquiry both of the distributor and through the distributor the manufacturer and received reassurance. Where the ingredient list does not state the presence of the prohibited substance then its presence can only be detected by forensic testing such as that carried out by Ms Poulsen.

48. Persons associated with anti-doping issues, such as the personnel of Drug Free Sport, are acutely conscious of the risks associated with supplements. The Drug Free Sport education material emphasizes those risks. Had Mr Ryder contacted Drug Free Sport then undoubtedly Drug Free Sport would have repeated that warning in strong terms. But Drug Free Sport could not have told Mr Ryder that the product contained a banned substance.
49. The Tribunal agrees with Mr David's submission that the fact that Drug Free Sport would not have been able, in this and other similar situations, to confirm the presence of a banned substance in a product in which it was not listed does not mean that the failure to contact Drug Free Sport is not a relevant consideration in respect to the athlete's fault.
50. In the present case Mr Ryder did not turn his mind to contacting Drug Free Sport. Although Mr Hotter's evidence was that he suggested that Mr Ryder should make some further enquiries, he did not himself suggest contacting Drug Free Sport. The Tribunal has sympathy with Mr Steel's frustration that, despite Drug Free Sport's resonant messages, athletes like Ms Brightwater-Wharf and Mr Ryder who have no intention of cheating get caught out by not being sufficiently suspicious of the credibility of the supplement industry.
51. The failure to contact Drug Free Sport, having seen the warning on the label, is the most substantial contributor to an assessment of fault on the part of Mr Ryder. Ms Brightwater-Wharf also failed to contact Drug Free Sport. It was said by Mr David in submissions that this was perhaps more explicable as she took the supplement, which turned out to contain a banned substance, on the morning of her competition because she was not feeling particularly well. On the other hand it might well be said that Mr Ryder took his supplement not for the purpose of a match situation, other than it was during the cricket season. It seems to the Tribunal that these are really distinctions without a difference.
52. Neither athlete, Ms Brightwater-Wharf or Mr Ryder, intended to enhance their sports performance. Both had international experience, both had received drug education, both took supplements which were not for the purpose of enhancing

sports performance, both supplements did not list the banned ingredients and both made enquiries which were reasonable to make but which fell short of the desired enquiry of Drug Free Sport.

Decision

53. Accepting, as the Tribunal does, that it is important that there be consistency between fairly comparable fact circumstances it is the Tribunal's view that it would be inappropriate to make marginal distinctions to differentiate the Tribunal's decision in Brightwater-Wharf from the decision in the present case. Accordingly the Tribunal has determined that a period of six months ineligibility will apply. As the Tribunal is required by SADR 14.9 to credit any period of provisional suspension against the total period of ineligibility, the six months ineligibility will apply as from the date of provisional suspension which was 19 April 2013. Therefore, Mr Ryder is suspended until 19 October 2013.
54. The Tribunal advises Mr Ryder that under SADR 14.10, he may not during the period of ineligibility participate in any capacity in a competition or activity authorised or organised by New Zealand Cricket or a cricket club or other member organisation. Nor during this time can he participate in any capacity in competitions authorised or organised by any professional league or any international or national level event organisation. For the sake of clarity, we note that Mr Ryder is not allowed to participate in training with a team during this time. He also cannot participate in any similar activities in any other sport, which is a signatory to the WADA Code, while he is suspended.
55. The Tribunal records its appreciation of the assistance which it received both from Mr Moore QC and Mr David and also the helpful and frank evidence which it heard from the witnesses.

Dated: 19 August 2013

A handwritten signature in blue ink, consisting of a large, stylized initial 'A' followed by a long, horizontal, slightly wavy line.

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A R Galbraith QC
(Deputy) Chairperson