

**IN THE JAMAICA ANTI-DOPING APPEALS TRIBUNAL
AN APPEAL FROM THE DECISION OF THE JAMAICA
ANTI-DOPING DISCIPLINARY PANEL**

BETWEEN	SIMONE FORBES	APPELLANT
A N D	JAMAICA ANTI-DOPING COMMISSION (JADCO)	RESPONDENT

BEFORE:	MR. JUSTICE WESLEY JAMES (Rtd.) MRS. LISA PALMER HAMILTON MRS. YVONNE KONG DR. MARK MINOTT	- - - -	VICE CHAIRMAN MEMBER MEMBER MEMBER
----------------	---	------------------	---

APPEARANCES: MR. K. CHURCHILL NEITA Q.C. and MR. DELANO HARRISON Q.C.
for Appellant

MR. LACKSTON ROBINSON DEP. SOLICITOR GENERAL for Respondent

DATES OF HEARING – MAY 26, 2011, JUNE 16, 2011

I. The JADCO Disciplinary Panel on May 1, 2011, gave its' decision in which the Appellant was found to be in violation of Article 2.1.1 of the JADCO Anti-doping Rules, and a three month period of ineligibility was imposed from April 18, 2011. From this decision Ms Forbes has now appealed. From hereinafter, Ms. Forbes will be referred to as the Appellant.

Although this Appeal is against the period of ineligibility, the JADCO Appeals Tribunal finds it necessary to relate some of the facts upon which the JADCO Disciplinary Panel relied for its decision.

II. FACTS

1. The Appellant is a National Athlete, who represented Jamaica in netball for over 10 years.
2. Her status as an International athlete makes her subject to JADCO Anti-doping Rules. It was in compliance with these rules that a sample of urine was taken from the Appellant on March 28, 2011. The sample was tested at an accredited laboratory for WADA, in Montreal, Canada.
3. The A sample contained Clomiphene metabolites, a substance on the published WADA list of prohibited substances. The Appellant waived her right to have the B sample tested.
4. The Appellant's representative before the Disciplinary Panel established that they were not contesting the presence of the drug. Rather they sought to explain the reasons for the presence and use of the Clomiphene. The Appellant alleged that she was not responsible for "how it got there".
5. The Panel heard evidence from the Appellant, Prof. Joseph Fredericks and Dr. Errol Daley. Prof. Fredericks stated that he treated the Appellant for a medical condition, which was incapacitating on a monthly basis. The primary purpose in this instance was as a fertility drug.
6. Both Prof. Fredericks and Dr. Daley agreed that the Appellant's use of Clomiphene was not intended for performance enhancement. The Disciplinary Panel found these arguments persuasive.

III. Mr. K. Churchill Neita Q.C. submitted before the Appeals Tribunal that he was relying in part on the glowing affidavits sworn to by three persons and a letter of accomplishments by the President of the Jamaica Netball Association. They all spoke of the Appellant's exemplary conduct in Sport and Academic achievement up to the Master's level.

The Appeals Tribunal took careful note of the favourable reports on the Appellant, but also of the acknowledgement of Article 2.1.1 of the JADCO Anti-doping rules by Mr. Neita Q.C., which states:

"It is each athlete's personal duty to ensure that no Prohibited Substance enter his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1."

Mr. Neita submitted that the wording of the article as phrased was "couched in language that in Criminal Law might reasonably be perceived as grounded in a strict liability offence". However, Mr. Robinson submitted that the violation of Article 2.1.1 attracts the consequences as appropriate under Articles 10.2 and 10.4.

10.2 “The period of Ineligibility imposed for a violation of Code Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Code Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and Code Article 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:

First violation: Two (2) years – Ineligibility”

10.4 “Where an athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the athlete’s sport performance or mask the use of a performance- enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years Ineligibility.

To justify any elimination or reduction, the Athlete or other person must produce corroborating evidence in addition to his

or her word, which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The Athlete or other Person's degree of fault shall be the criteria considered in assessing any reduction of the Period of Ineligibility."

IV. Mr. Robinson therefore asked the Tribunal to consider the degree of fault, as the Appellant was admittedly complicit in the use of Clomiphene. As such, he urged the Tribunal to only interfere with the finding of the Panel if:

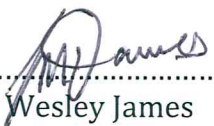
1. There is some basis that they acted without jurisdiction; or
2. It was not justified

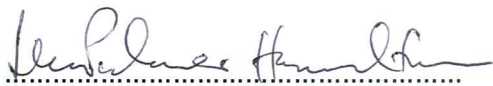
V. Mr. Neita Q.C. further submitted that even though it is a strict liability offence, the Appellant did not obtain any benefit. The strict liability offence is therefore, unfair and harsh. He further urged that the Appellant's career should not end in ignominy and we should let her reputation for integrity remain unblemished. He therefore sought to have the sentence reduced to a mere reprimand, specific to the Appellant, but with cautionary implications for all athletes.


- VI.** The Tribunal has considered the persuasive arguments of learned Queen's Counsel, Mr. Neita. However, the spirit of the WADA Rules with respect to sanctions in Article 10.4, specifically disallow the Tribunal to reduce sanctions on the strength of the athlete's glowing reputation or the offence being committed near to a particular competition or end of career plans.
- VII.** The Tribunal has agreed that it appears that the appellant did not ingest the prohibited substance with the intention of enhancing her performance. However, we cannot overlook Miss Forbes' failure to inform her team physician, Dr. Singh, or ask Prof. Fredericks about the drug's suitability for use as a National athlete. As an elite athlete, who would be tested randomly in and out of competition, and who has been so tested in the past, she has a responsibility to check the WADA list, declare all medications to the Doping Control Officer and apply for a Therapeutic Use Exemption certificate where appropriate. In the spirit of Article 10.4, the Panel is similarly not convinced that the circumstances surrounding the use of the Clomiphene were consistent with the burden of proving the use of a prohibited drug in the most exceptional circumstances.
- VIII.** We find the Appellant's failure to so conduct her affairs amounts to negligence and confirm the sanction imposed by the Anti-doping Disciplinary Panel.

IX. The Appeal is dismissed.

X. The sanction of the Anti-Doping Disciplinary Panel is therefore upheld. The Appellant is given a three (3) months period of ineligibility from future events.


Justice Wesley James
Vice Chairman


Mrs. Lisa Palmer Hamilton
Snr. Deputy DPP


Dr. Mark Minott
Sports Medicine Physician


Ms Yvonne Kong
Sports Administrator