

BETWEEN **DRUG FREE SPORT NEW ZEALAND**
Applicant

AND **KARL MURRAY**
Respondent

AND **CYCLING NEW ZEALAND**
Interested Party

**DECISION OF SPORTS TRIBUNAL
DATED 20 DECEMBER 2016**

Hearing: 2nd and 12th December 2016 in Auckland

Tribunal: Sir Bruce Robertson (Chairperson)
Dr James Farmer QC
Paula Tesoriero

Present: Isaac Hikaka and Adam McDonald, counsel for Applicant
Graeme Steel and Jude Ellis, Drug Free Sport New Zealand
Aaron Lloyd and Danielle Findlay, counsel for Respondent
Karl Murray, Respondent

Registrar: Megan Lee-Joe

Proceedings

1. On 21 April 2016, Drug Free Sport New Zealand (DFSNZ) commenced proceedings against Karl Murray by filing an application for provisional suspension as well as its substantive application for anti-doping rule violation proceedings.
2. DFSNZ alleged that Mr Murray had committed two violations of the Sports Anti-Doping Rules (SADR):
 - (a) SADR 10.12.1 – violation of prohibition on participation during a period of ineligibility; and
 - (b) SADR 2.5 – tampering or attempting to tamper with doping control by providing “fraudulent information” during an interview with DFSNZ on 30 March 2016.
3. Mr Murray was provisionally suspended without opposition by order of the Tribunal dated 28 April 2016.
4. Dealing with the substantive application became more protracted than what the Tribunal seeks to achieve. This was unavoidable in a practical sense. Both parties required sufficient time to file further evidence, deal with various interlocutory matters including jurisdictional matters and the correct interpretation of SADR 10.12.1 (as canvassed in our judgment on such preliminary matters dated 2 August 2016), and also to arrange for witnesses to be available for the hearing.
5. Counsel for DFSNZ helpfully provided an agreed bundle of documents containing witness statements and supporting evidence as well as transcripts of interviews DFSNZ conducted with Mr Murray. However, despite making an effort to do so before the hearing, the parties were unable to come up with an agreed statement of facts for the Tribunal. As a result, a full hearing day on 2 December 2016 was utilised for the cross examination of a number of witnesses for both DFSNZ and Mr Murray. The hearing was adjourned to 12 December to allow counsel time to present closing submissions on the factual position.

Background

6. In October 2013, Mr Murray competed in the Tour of New Caledonia as a professional cyclist and whilst a member of Cycling New Zealand. At the end of one of the stages he provided a sample which resulted in a positive test for the presence of prohibited substances nandrolone and its metabolite, noretiocholanolone (an anabolic steroid) and testorene. The Commission for the Fight against Doping of New Caledonia ("New Caledonia Commission") heard the matter and issued a decision dated 8 April 2014 imposing a two year period of ineligibility on Mr Murray from the date of the decision. As the New Caledonia Commission is not a signatory to the WADA Code, the ban was limited in application to events and competitions in New Caledonia.
7. DFSNZ became aware of the New Caledonia Commission decision in February 2015 and filed an application with the Tribunal to have Mr Murray's ban recognised in New Zealand. The proceedings were ultimately withdrawn following the recognition by a WADA Code signatory the International Cycling Union (UCI) of Mr Murray's ban on 31 March 2015 which automatically extended recognition of the ban to New Zealand. UCI further advised on 6 May 2015 that Mr Murray's ban applied for a period of two years from 8 April 2014, but that for the purpose of determining whether Mr Murray could be in violation of the prohibition against participation during ineligibility, only actions undertaken by Mr Murray after 31 March 2015 and until 7 April 2016 should be considered.
8. Mr Murray derives his livelihood through his two cycling related businesses, a cycle shop and a cycling coaching business, both of which were in operation before the ban. The latter business, insofar as it involved coaching of Cycling NZ members, was the focus of this proceeding.
9. In early 2016, DFSNZ commenced an investigation into whether Mr Murray had violated SADR 10.12.1 based on information which had been volunteered to DFSNZ by an outside source known to Mr Murray. Mr Murray was interviewed on two occasions by DFSNZ' investigators, the first on 14 March, and the second on 30 March. Mr Murray was accompanied at both interviews by his legal counsel. It is apparent from the transcripts of the interviews that Mr Murray's counsel consistently pressed the investigators for particulars of the allegation

that Mr Murray had coached two cyclists. The most precise response was that it was “basically coaching athletes” which “could include giving advice on Training Peaks or something similar to that” and nutrition.

10. As the evidence was received and subjected to cross examination at the hearing, it emerged that the main allegation was that Mr Murray had written training programmes for two competitive cyclists, Janet Smith (not her real name, which for reasons of her youth we do not use) and Ruby Livingstone. Janet was a world ranked schoolgirl cyclist and Ms Livingstone a national ranked cyclist who for a period also worked in Mr Murray’s cycle store. In both instances but in different ways, it was alleged that Mr Murray had used others to front his coaching.

SADR 10.12.1 Prohibition against participation during ineligibility

11. The relevant section of SADR 10.12.1 provides:

"No Athlete or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorised anti-doping education or rehabilitation programs) 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 Organisation or any elite or national-level sporting activity funded by a governmental agency."

12. The consequences of violating SADR 10.12.1 are set out in SADR 10.12.3:

"Where an Athlete or other Person who has been declared Ineligible violates the prohibition against participation during Ineligibility described in Rule 10.12.1, the results of such participation shall be Disqualified and a new period of Ineligibility equal in length to the original period of Ineligibility shall be added to the end of the original period of Ineligibility. The new period of Ineligibility may be adjusted based on the Athlete or other Person’s degree of Fault and other

circumstances of the case. The determination of whether an Athlete or other Person has violated the prohibition against participation, and whether an adjustment is appropriate, shall be referred by DFSNZ ... to the Sports Tribunal under Rule 8 This decision may be appealed under Rule 13."

13. As expressed in our earlier decision of 2 August 2016, in our view coaching which is directed to the purpose of participating in competition or activities (current or foreseeable future) authorised or organised by Cycling NZ falls within the scope of SADR 10.12.3.

SADR 2.5 Tampering, or Attempted Tampering, with any part of Doping Control

14. SADR 2.5 provides:

"Conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, intentionally interfering or attempting to interfere with a Doping Control official, providing fraudulent information to an Anti-Doping Organisation or intimidating or attempting to intimidate a potential witness."

15. "Doping Control" is defined as follows:

"Doping Control: All steps and processes from test distribution planning through to ultimate disposition of any appeal including all steps and processes in between such as provision of whereabouts information, Sample collection and handling, laboratory analysis, TUEs, results management and hearings."

16. During closing submissions, the Tribunal raised the question of whether what is alleged here could be said to relate to the Doping Control process but, on reflection, the Tribunal advised the parties that it would not itself take the point further, given particularly that no issue on this matter had been taken by either party.

Evidence and Factual Findings

17. DFSNZ opened its case against Mr Murray on the following allegations:

Mr Murray, in breach of his period of ineligibility, coached athletes subject to the SADR, and that coaching was directed to authorised competitions and activities. In particular, Mr Murray:

- (a) From late April / early May 2015 gave suggestions to Janet Smith about how she should be training for the World Championships.
- (b) From May/ early June 2015 until July 2015 wrote training plans for, and had discussions with, Janet Smith. The training programmes Mr Murray wrote were aimed at training for the World Championships.
- (c) Had discussions with Janet Smith during the World Championships.
- (d) From September 2015 until October 2015 resumed setting training programmes for Janet Smith. These programmes were lighter because of Ms Smith's injury and were training for the NZ Secondary Schools Nationals.
- (e) From October 2015 to January 2016 wrote programmes for Janet Smith and talked to her more frequently. These programmes and discussions were directed toward the NZ Track Championships.
- (f) During the NZ Track Championships discussed Janet Smith's performance with her.
- (g) Provided training programmes to Ms Livingstone, through Rachel Larner.
- (h) Provided tactical racing advice to Ms Livingstone for the NZ Road Race Championships.
- (i) Advised Ms Livingstone on using an altitude tent, and provided her with such a tent to use, for the NZ Road Race Championships.

18. The tampering allegation made by DFSNZ was in the following terms:

Mr Murray, during his interview of 4 April 2016, provided false, misleading and incorrect (and hence fraudulent) information to DFSNZ. The following information that Mr Murray provided during that interview was false, misleading and/or incorrect and hence fraudulent:

- (a) He had no phone contact with Janet Smith other than if he called to speak to her mother and Janet answered the phone.
 - (b) He had not given guidance to Ms Lerner in her coaching of Ms Livingstone.
 - (c) He had not provided Training Peaks programmes to Janet Smith or Ms Livingstone.
 - (d) He lied to Angela Jones (not her real name) when he told her he had been coaching Janet Smith.
 - (e) He had not breached any of the SADR, when he accepted that writing training programmes for specific events would be in breach of the SADR.
19. DFSNZ's first witness was Angela Jones who was the mother of a schoolboy cyclist Jack Jones (not his real name, which for reasons of his youth we do not use). Jack had been coached by Mr Murray prior to the extension of his ban in New Caledonia to New Zealand on 31 March 2015. Mrs Jones said that when they learned (at the end of February 2015) of Mr Murray's ban in New Caledonia, she and Jack met with him and Ryan Wills who was another cyclist and coach who Mr Murray had himself coached. It was agreed that Mr Wills would take over coaching for Jack but, according to Mrs Jones' testimony, Mr Murray said that he would be telling Mr Wills what Jack needed to do. Because Mr Wills did not give evidence (a matter upon which we comment further below), there was no corroboration of this evidence. That meeting was not specifically addressed by Mr Murray in his evidence. However, it would seem that, following a discussion between Mrs Jones and Carole Smith (fictitious name of Janet Smith's

mother), Mrs Jones called Mr Murray and told him that they did not want him to have any involvement with coaching Jack. No case was made against Mr Murray that suggested that he did not abide by that direction or that Jack was either directly or indirectly thereafter coached by him.

20. However, as a result of damage occurring to Jack's bike before an event in Invercargill in early October 2015, Mrs Jones approached Mr Murray to organise a loan bike for Jack, which occurred. She then ordered a new frame for Jack's bike from Mr Murray's cycle shop after clearing this through Cycling NZ. She visited the shop in connection with this purchase and a conversation occurred in which Jack's rather average performance in Invercargill was discussed. Mrs Jones said in evidence that Mr Murray expressed the opinion that Mr Wills' coaching was at fault. Mrs Jones said that they had been dissatisfied themselves with Mr Wills and she was interested to hear what Mr Murray had to say. During the discussion that ensued, the fact that Janet Smith had been successful at the World Championships was raised. She was another one of Mr Murray's former pupils who had been passed over to Mr Wills when his ban took effect in New Zealand. Mrs Jones said in evidence that at this point Mr Murray had said that Mr Wills was not coaching Janet and that he was. She said that this did not surprise her because she had had conversations previously with Mrs Smith, who had expressed dissatisfaction with Mr Wills. Mrs Jones said further that Mr Murray lodged training programmes for Janet into a second Training Peaks account that neither Mr Wills nor Cycling NZ had access to. She also testified that Mr Murray told her that he was training Ms Livingstone using Ms Larner as a front coach.
21. Mr Murray admitted that he had told Mrs Jones that he "was involved in Janet's coaching" but said in his written brief that he said that "in part because I thought it would sound believable to [Angela Jones] given my earlier involvement, but also because I was trying to make them see that they couldn't trust Ryan as a coach". He volunteered

that this was stupid but said that he owned up to the situation when he was interviewed by DFSNZ. In the interview, he said that he had told Mrs Jones that he was coaching Janet because he:

"... felt betrayed by Ryan and I, I guess I wanted, I wanted to take back what I had done with passing those, those riders over to Ryan and he had pretty much stabbed me in the back. Everything that he had told me was, was untrue and so I guess essentially I was trying to convince the [Jones'] to, that well the mother at least anyway that, that he's not suitable."

22. When, then, asked if he was trying to get Jack back to coach him, he said that he would be interested in doing so when his ban was finished. In his oral testimony, Mr Murray said that hadn't directly told Mrs Jones that he was coaching Janet but that he had certainly given her that impression by the raising of eyebrows. On cross examination, Mrs Jones denied that it was an impression only. He told me directly that he was coaching Janet, she said. Before the Tribunal, as with the DFSNZ Investigator, he agreed that he had misled Mrs Jones but said that he didn't want Mr Wills to get the credit for Janet's success and that he wanted to coach Jack once his ban was over.

23. Janet Smith's father, who we will call John Smith, gave evidence and said that his wife, Mrs Smith, had spoken to Mr Murray and he had admitted that he had told Mrs Jones that he was coaching Janet. This evidence, which is of course hearsay, raises a larger more general issue that concerned the Tribunal. The evidence was that, although Mr Smith did take a direct, personal interest in his daughter's cycling, the real parental day to day presence in that respect was Mrs Smith. We were told that Mrs Smith was not willing to be involved in assisting DFSNZ by making a statement or in being available as a witness. We therefore have given little weight to Mr Smith's evidence insofar as it implicates Mr Murray.

24. A brief of evidence was received by the Tribunal but not cross examined on from Ross Machejefski, who is a coach with Cycling NZ and responsible for Junior Championship cycling in New Zealand. His evidence was that during 2015, although he initially was satisfied that Mr Wills was coaching Janet, he later became suspicious that this might not be so. In particular, in late 2015 after the World Championships he received an email from John Smith saying that Mr Wills was no longer coaching his daughter but that he now was (despite the fact that he had no cycling experience). Mr Machejefski gave other instances that aroused his suspicions but, ultimately, we came to the view that his evidence was just that – suspicions – and we could not give it any real weight.
25. On the topic of Mr Smith becoming his daughter's coach, his evidence was that this was a front for the fact that Mr Murray was coaching her "in the background". He also testified that they paid Murray \$45 per week for coaching services but the latter said that those moneys were for the use of a loan bike which was provided by Ms Lerner to Janet. None of the evidence on either side of this payment issue was either supported or discredited by other evidence and we are therefore left in the position of not being able to be satisfied either way.
26. Janet Smith gave evidence. She had been coached by Mr Murray, with very good results, until shortly before his ban became operative in New Zealand. That led to Mr Wills becoming her coach on Mr Murray's recommendation. According to her evidence, it was Mr Wills who initiated the establishment of a second training account, the reason given being that he did not want Cycling NZ to be able to view his training methods. Within a short time, the Smiths became "disappointed" with Mr Wills, principally it would seem because he was overseas a great deal pursuing his own cycling career. Her parents then told her that they would get hold of Mr Murray, not to become her coach but to "just keep an eye on things and give me ... extra support".

27. Janet's evidence of the subsequent direct personal contact that Mr Murray had with her does not seem to us to go beyond personal support and did not amount to coaching in the normal sense of that word. She did however understand that at some point Mr Murray did begin writing training plans for her and posting them on to one of the two training accounts. She said that that understanding came from her parents and her own evidence did not, in our view, go quite as far as establishing that Mr Murray had told her that he was writing the programmes.
28. A feature of this case is that a number of people have admitted that they have lied at some point on the question of whether Mr Murray was training either Janet Smith or Ms Livingstone while subject to the ban that was established in New Zealand. Mr Murray himself says that he lied to, or at least deliberately misled, Mrs Jones when he told her that he was coaching Janet. Janet Smith said in evidence that, prompted by her father, she lied to DFSNZ on being interviewed by denying that Mr Murray had been coaching her while banned. In closing submissions, DFSNZ said that John Smith had told his daughter to lie to DFSNZ when interviewed. He was thus a party to that lie. Ms Livingstone testified that she had initially lied to DFSNZ in denying that Mr Murray had coached her while banned but said that she had felt pressured by him and by Ms Lerner who had become her coach to do so. The issue for the Tribunal therefore is at what point was each of these people lying and at what point was each of them telling the truth.
29. We have found this issue complicated by the fact that the DFSNZ Investigators who interviewed each of them did so in a rather heavy handed manner with references to the consequences that would follow if untruths (either during the investigation or when giving evidence to the Tribunal) were told. At the hearing, DFSNZ resisted the use of the term "threats" in relation to this matter. Be that as it may, it needs to be recorded that Ms Livingstone's evidence was that at her interview she was told that if Mr Murray was prosecuted and

convicted she could be prosecuted as well. She said that she felt “forced upon by Mr Jones, the principal Investigator”. Ms Larner gave evidence that Ms Livingstone had contacted her after her interview and was crying and said that she had felt bullied, that the stress was ruining her season and that she “was just about prepared to say anything they wanted to get them off her back”. When Ms Livingstone retracted her initial denial that Mr Murray had been coaching her, she was told that she would not be prosecuted.

30. Whatever term is applied to this conduct, we have real concerns about this approach to the investigation process. Quite apart from fairness issues, it has complicated our assessment of the evidence that is given by witnesses who have been through the interviewing process and who have changed their stories. We should add that we resisted a request from counsel for DFSNZ to give a warning to each witness when sworn of the consequences that would follow if their evidence to us was not true. That is not a practice followed in the Courts and it would be an unattractive practice for us to introduce.
31. The second set of coaching allegations relates to Ms Livingstone. She decided herself to be coached by Ms Larner when she learned that Mr Murray had been banned in New Caledonia. She had previously met Ms Larner, who was a Masters cyclist and sports therapist, through Mr Murray. He and Ms Larner were good friends. Ms Livingstone said that she did not see much difference in the training programmes from Ms Larner which did not surprise her because she knew that Ms Larner had previously been trained by Mr Murray. As time went on, Ms Livingstone said she became frustrated with a lack of response from Ms Larner on specific enquiries. She said that she “suspected” that it was Mr Murray who was loading training schedules into the Training Peaks account because “it was all the same stuff with variation” but never asked Ms Larner if that were so. During this period and while she was overseas competing she did speak on facetime to Mr Murray regularly but on personal matters. No evidence was given that they ever discussed training but she did say

that they discussed race tactics at a time when she had gone to work for him in his shop. She instanced one occasion when she had suggested a strategy she should follow in one race which, she said, Mr Murray subsequently criticised her for not adhering to it in the race. She also said that Mr Murray had lent her an altitude test at the time that she was working in his shop but that she had not liked it and had returned it two days later. During the course of her oral evidence, she also said that she had sent Mr Murray a photograph of her bike seat and that he had advised her to move it 5 mm forward, an allegation that Mr Murray denied. In her written brief, Ms Livingstone also said that, when working for Mr Murray in his shop, they would talk "quite regularly about my training [and] it was quite obvious to me during these conversations that Karl was still providing the coaching information through Rachel to my Training Peaks account". However, in a series of text messages that were exchanged between Ms Larner and Ms Livingstone, Ms Livingstone said "I didn't even say that yes Karl is 100% coaching me and putting everything into training peaks. Because I don't have the proof. I said I'm not looking over Karl and Rachel's shoulder. Seeing who's putting my training in."

32. Also, in the texting sequence, Ms Larner accused Ms Livingstone of lying "to protect yourself". That was not immediately denied by Ms Livingstone in her initial response and later in the texting she said: "But I think at the end of the day I had to do the right thing for myself for once. And my safety." This can be taken as confirming her evidence that she had felt "forced upon" and threatened with sanctions in the interviews that she had with DFSNZ and, inevitably, undermines the reliability of her evidence to the Tribunal.
33. Ms Larner also gave evidence and we had no reason, notwithstanding her being strenuously cross examined, to doubt her evidence. She said that she had agreed to become Ms Livingstone's coach in March 2015 and was paid by Ms Livingstone for doing so. She denied passing any of this money to Mr Murray. She said that she designed

her training except when Ms Livingstone was in Italy competing when the most of the training was dictated by the team coach. Even during this period however she tweaked Ms Livingstone's training and would have regular discussions with her about her racing and her physical and mental health. She categorically denied that Mr Murray was using her as a front for his coaching.

34. Overall, the evidence does not establish that Mr Murray was coaching Ms Livingstone while he was banned. The brief loan of the altitude test and any comment by Mr Murray on whether Ms Livingstone had followed a race strategy that she had devised, both at a time when Ms Livingstone was working for Mr Murray, and the bike seat photograph (if true) hardly constitute coaching and we otherwise prefer Ms Larner's evidence to the largely supposition and suspicion expressed by Ms Livingstone in her written briefs of evidence.
35. A related point to that of Mrs Smith not giving evidence arises in relation to the failure of DFSNZ to call Mr Wills as a witness. We would have expected to hear testimony from him as being directly relevant to the question of whether he or Mr Murray was coaching Janet Smith. When we raised the point with counsel for DFSNZ, we were advised that Mr Wills was not willing to give evidence. We pointed out that it had been open to DFSNZ to seek the issue of a subpoena with the assistance of the Tribunal. That course was not taken and we therefore infer, in accordance with legal principle, that had Mr Wills given evidence that evidence would not have assisted DFSNZ's case.
36. We now consider whether the evidence establishes to the requisite standard of proof that Mr Murray was coaching Janet Smith. It can be said immediately that the case against him by DFSNZ in this instance is stronger than was that against Ms Livingstone which we have found has not been made out. We should say also that we were not entirely convinced by Mr Murray's evidence. He certainly did himself no favours by deliberately misleading Mrs Jones. However, ultimately we

have to look at the evidence as a whole and consider whether we are satisfied that DFSNZ has made out its case.

37. In this last respect, the requisite standard of proof is neither the civil standard of balance of probabilities or the criminal standard of reasonable doubt. Rather SADR 3.1 requires us to be "comfortably satisfied" that the allegations have been made out. It is a standard that obviously falls somewhere in between the civil and criminal standards of proof. We were given a copy of an article published in the Virginia Sports and Entertainment Law Journal (Spring 2006, vol. 5:2) by Ryan Connolly entitled *Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. The Protection of Rights of Accused Athletes*. In the course of that article, the author reviews case law on the "comfortably satisfied" standard and, relevantly we think to the present case, refers to cases that support an approach that "the more serious the allegations levied against the athlete, the higher the level of satisfaction to which the elements of the offense must be proven". In this respect, reference was made to one decision of the Court of Arbitration for Sport (*B v. FINA*, CAS 98/211, CAS Digest II at 266) in which it was said that where there is an allegation which attributes dishonesty to the athlete, the "extremely high degree of seriousness" of the allegation must be kept in mind. Reference was also made to another case (*T. Montgomery*, CAS 2004/O/649) in which it was said that "strong evidence commensurate with the serious claims [made]" must be given.
38. Our view is that these decisions represent the approach that we should make to our assessment of the evidence in the present case, given the fact that the allegations made against Mr Murray, if proven, would mean that he had acted dishonestly in knowing breach of the ban against him and had further given false evidence to the Tribunal. Of particular concern in that case would be the fact that, as alleged, he had used others (Ms Larner and John Smith) as a cover for his clandestine coaching. The seriousness of the offences is also

reflected in the penalties that establish to a breach of the ban. If it is proven that Mr Murray did undertake coaching activities in breach of the ban and if, as an almost inevitable consequence, he was found to have been guilty of tampering in the sense of knowingly and intentionally misleading DFSNZ in the conduct of its investigation, he could be further banned for periods of 2 years and 8 years respectively.

39. Our conclusion is that we are not comfortably satisfied in the sense described above that DFSNZ has proven that Mr Murray coached Janet Smith while banned. While there is certainly evidence to this effect, we do not find having heard and seen all the witnesses that the evidence is of the requisite "strong" quality to establish proof of what are serious allegations. Much of it is of the nature of suspicion, hearsay or supposition. As referred to above, we are concerned that neither Mrs Smith nor Mr Wills were called by DFSNZ to give evidence and that that constitutes what counsel for Mr Murray described in closing as an obvious gap in the evidence which needed to be filled before the Tribunal could safely conclude that the allegations had been made out. Our task is to assess what actually occurred historically not what individuals may now honestly believe. We are left in the position that for the various reasons identified we cannot be comfortably satisfied as to the essential elements of the alleged offending.
40. It is common ground that if the allegations under SADR 10.12.3 (violation of the prohibition of an ineligible person from participating in any capacity in competitive sport that is regulated) are not proven, the further allegations of tampering under SADR 2.5 must also fail.

Decision

41. We accordingly dismiss all claims of breach brought by DFSNZ against Mr Murray.

DATED 20 December 2016



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James Farmer QC
Deputy Chairperson