

BETWEEN **DRUG FREE SPORT NEW ZEALAND**
Applicant

AND **KARL MURRAY**
Respondent

AND **CYCLING NEW ZEALAND**
Interested Party

**DECISION OF SPORTS TRIBUNAL
DATED 13 OCTOBER 2017**

Hearing: 2 & 9 October 2017

Tribunal: Alan Galbraith QC (Deputy Chairperson)
Ruth Aitken
Georgina Earl

Present: Isaac Hikaka and Adam McDonald, counsel for Applicant
Nick Paterson and Jude Ellis, Drug Free Sport New Zealand

Aaron Lloyd, counsel for Respondent
Karl Murray, Respondent

Registrar: Neela Clinton

1. On 5 May 2017 DFSNZ served a provisional suspension application on Mr Murray alleging an anti-doping rule violation under SADR 2.1. The allegation arose from a positive test result for Clenbuterol on an in-competition test on 18 March 2017, when Mr Murray had competed in the Tour of Northland cycle race.
2. A provisional suspension order was made on 11 May 2017. On the same date timetabling orders were made, but subsequent complications delayed the hearing of DFSNZ's substantive application until 2 & 9 October.

Relevant Provisions

3. SADR 2.1 provides that an anti-doping rule violation is constituted by the:

Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

4. *A Prohibited Substance* is defined as:

Any substance, or class of substances, so described on the Prohibited List.

5. The *Prohibited List* is the World Anti-Doping Agency 2017 List of Prohibited Substances and Methods, incorporated by reference under SADR 1.3.1.1.
6. Clenbuterol is specifically listed as a prohibited substance under the heading S1 – Anabolic Agents in the Prohibited List. It is a non-specified substance, and it is prohibited at all times (both in-competition and out-of-competition).
7. There is no need for DFSNZ to show any intent by an athlete to take a prohibited substance to establish a violation of SADR 2.1. This is made clear by SADR 2.1.1:

It is each *Athlete's* personal duty to ensure that no Prohibited Substance enters 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 Rule 2.1.

8. Proof of a violation under SADR 2.1 is satisfied if the requirements of SADR 2.1.2 are met, which provides:

Sufficient proof of an anti-doping rule violation under Rule 2.1 is established by any of the following: presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in the *Athlete's A Sample* where the *Athlete* waives analysis of the *B Sample* and the *B Sample* is not analysed; or where the *Athlete's B Sample* is analysed and the analysis of the *Athlete's B Sample* confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the *Athlete's A Sample* or where the *Athlete's B Sample* is split into two bottles and the analysis of the second bottle confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the first bottle.

9. The standard of proof is provided for in SADR 3.1 as follows:

DFSNZ has the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether *DFSNZ* has established an anti-doping rule violation to the comfortable satisfaction of the *Sports Tribunal* or *NSO Anti-Doping Tribunal*, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

Where these *Rules* place the burden of proof upon the *Athlete* or other *Person* alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

10. Where there has been a departure from testing standards SADR 3.2.3 provides: -

Departures from any other *International Standard* or other anti-doping rule or policy set forth in the *Code* or these *Rules* which did not cause an *Adverse Analytical Finding* or other anti-doping rule violation shall not invalidate such evidence or results. If the *Athlete* or other *Person* establishes a departure from another *International Standard* or other anti-doping rule or policy which could reasonably have caused an anti-doping rule violation based on *Adverse Analytical Finding* or other anti-doping rule violation, then *DFSNZ* shall have the burden to establish that such

departure did not cause the *Adverse Analytical Finding* or the factual basis for the anti-doping rule violation.

Issues

11. It was accepted that Mr Murray was a licenced athlete at the relevant time and so subject to the SADR Rules and that his urine sample when tested was positive for Clenbuterol.
12. Mr Murray's defence to the alleged rule violation is that the International Standard for Testing and Investigations, which is incorporated by reference in the SADR, was breached during the testing process in two ways:
 - (a) That he was wrongly deprived of his right to have a representative present during the sample collection process; and
 - (b) He was not given the opportunity to select a sample collection beaker and instead was provided with an unsealed collection beaker chosen by the Doping Control Officer (DCO).
13. There was a direct conflict of evidence on several issues between Mr Murray and his support person, Mr Ilich and the DCO, Ms Edwards, and the testing process chaperone, Mr Kaho. It is those conflicts which the Tribunal had to resolve.

The Evidence

14. The Tour of Northland is a cycling event open to both licenced and unlicensed athletes. When DFSNZ received a list of entrants, it identified a small number of athletes, including Mr Murray, for testing.
15. At the conclusion of the race, Mr Murray was identified and approach by Mr Kaho who told him that he was required for testing, and of his right to have a support person. Mr Murray chose to have a massage before proceeding to the testing room at a nearby motel. In the course of that, while Mr Kaho was present, he identified and nominated Mr Ilich as his representative. Mr Ilich was also asked by Mr Murray to obtain his ID and

change of clothes from the camping ground, and bring them to the testing room.

16. There was a conflict in the evidence as to what occurred when Mr Ilich obtained Mr Murray's ID and wallet and took them to the testing room. At that time Mr Murray had not yet arrived at the testing room. Mr Ilich's evidence was that Mr Kaho met him at the door, was friendly, and that as they entered the room Mr Kaho said words to the effect that he (Mr Ilich) was Mr Murray's support person. It appears from the evidence that Mr Kaho might barely have completed the sentence when Ms Edwards said words to the effect "Get him out of here, I don't want anybody coming in". Mr Ilich's evidence was that this was said in raised tones and Mr Kaho acknowledged that it was at least peremptory.
17. There is then a conflict as to what happened. Mr Ilich said that he was taken aback and offended by Ms Edwards' attitude and tone. He says that he left the room and walked away towards the camping ground. Mr Kaho's evidence was that he followed Mr Ilich outside and said words to the effect that if he, Mr Ilich, waited for a few minutes then he would be able to go back in as Mr Murray's representative. Mr Ilich denied that Mr Kaho had given this indication.
18. Whatever was or was not said, Mr Ilich was sufficiently put off that he continued back towards the camping ground, but met Mr Murray and another DFSNZ chaperone, Ms Calder, on the way. He complained to them both of Ms Edwards' rudeness and continued on his way.
19. Accordingly, when Mr Murray arrived at the testing room he was not accompanied by Mr Ilich or an alternative representative. It is not essential that an athlete about to be tested has to have a representative present, although it is essential that an athlete is notified of the entitlement to have a representative.
20. When Mr Murray arrived at the testing room, there was one other athlete present and a support person to that athlete. There was also the DCO, Ms Edwards, Mr Kaho and Ms Calder.

21. Mr Murray signed into the testing room at 12.30pm and signed out at 1.19pm. Before he gave his sample, he had a wipe down and then a period of waiting until he was ready. In Mr Murray's written evidence, confirmed in his reply evidence, he said that during this time he raised with Ms Edwards her actions in ejecting Mr Ilich. In his written evidence, he said:

"I also asked Penny why Clive could not be there as my support person. She said she could arrange for him to be picked up and brought to the motel. However, given the time that had already elapsed, and that it would have been very difficult to find him at the camp ground, I suggested that we just proceed."

In his written reply evidence, he said:

"At paragraph 50 of her statement, Ms Edwards says that I raised the issue of Clive Ilich not being able to attend as my support person while we reviewed the form after I had undertaken the test. That is incorrect. I raised the issue before the test with Ms Edwards."

22. When additional oral evidence was led by his counsel, Mr Murray suggested that this discussion may not have taken place until after his sample was taken. However, in cross-examination he agreed that it was possible that the subject was raised both before and after he gave his sample.
23. The Tribunal accepts Mr Murray's written evidence in this respect, that at least before the sample was taken he had raised the issue of having Mr Ilich as his support person. It may be that the subject was returned to later, but given Mr Ilich's complaint to him and the fact that he was proceeding to have a sample taken, it is considerably more likely that he did broach the subject at that earlier stage. However, that determination does not totally dispose of the representation issue.
24. One subject that Mr Murray did raise on more than one occasion, was the proposition that the Tour of Northland was not a licensed event and so not an event at which he should have been tested. Ms Edwards' evidence was:

"There was discussion about the In Competition and Out of Competition type of test. He had concerns about the type of test and did not agree that it was In Competition test and felt that it should be an Out of Competition test. He was trying to reason with me and was saying things to the effect that it was not a sanctioned event so it should be an Out Of Competition test. He said that I did not understand and Jude would understand what he meant. So I said he could write a comment on the form.

I asked Karl if he had any comments or concerns. Karl responded to the effect of 'yes' and wrote in the comment section about his concerns over the type of test and only testing licensed riders."

25. As the Tribunal has recorded, this matter was clarified between the parties and was not an issue before the Tribunal. Nor did DFSNZ submit that the Tribunal should draw any inference from Mr Murray's focus on the status of the event.
26. Central to this case is the direct conflict of evidence in respect to Mr Murray obtaining the beaker in which he was to provide his sample.
27. Mr Murray's written evidence was:

"Penny passed me a plastic bag with a container in it and told me this was the container for my urine sample. I noticed that neither the bag or the container was sealed. She did not give me a selection of bags or containers to choose from. I then went to the bathroom where I urinated into the container. The male Control Official waited in the doorway for me while I completed the test."

28. In his reply brief Mr Murray said:

"At paragraphs 41 and 42 of her statement, Ms Edwards indicates that I selected a beaker from either the kitchen bench or from a drawstring bag, but that she does not recall which. There was no drawstring bag, only a plastic bag off to the left of the table. I was not asked to select a beaker, Ms Edwards placed a single beaker in front of me and said "*here is your container for the test*". The beaker had plastic around it but was not sealed.

At paragraph 43 of her statement, Ms Edwards says that I had more than three secure kits to choose from. There were only two secure kits on the table to choose from."

29. Ms Edwards provided a written brief which was in part read. However, because of the conflicts it was agreed that she would give evidence in those respects orally. Her evidence in respect to the beaker was that she asked Mr Murray to choose a beaker. She said that she did not pass the beaker, and that she never handed a beaker to an athlete because that would be against the required procedure. Ms Edwards said she thought by this stage she had changed her long-standing process of putting the beakers out on a bench, to letting the athlete select beakers from a drawstring bag. She said she thought that was what had occurred on this occasion. In cross examination Ms Edwards said that she did give Mr Murray the chance to select from the sealed bags of beakers, and again confirmed that a beaker that was not in a sealed bag could not be used because, in her view, that would invalidate any testing.
30. Mr Kaho similarly gave a written brief but on areas of conflict gave oral evidence. His oral evidence was that Mr Murray chose a beaker from a drawstring bag. He said that Mr Murray picked up two or three of the beaker bags before he chose one. Ms Calder's evidence was that she did not recall seeing the beakers on the table, and thought they were probably in a drawstring bag but she was not paying close attention to Mr Murray, and did not see him select a beaker.
31. There is no challenge in respect of any of the other steps taken after Mr Murray obtained the beaker. The sampling was completed, the A and B sample bottles filled and closed by Mr Murray, and Ms Edwards double checked that the ratchets were engaged, which completed the testing process.
32. Exhibit 4 which was produced at the hearing by DFSNZ, included a doping control officer report dated 18 March 2017. That report discussed various matters relating to the testing on that date including reference to the incident with Mr Ilich. However, it was not relied on at the hearing and, in

any event, does not assist in reconciling the conflict about the selection of the beaker.

33. Evidence was also given by Ms Edwards as to her 27 years' experience contracted in a variety of roles, including DCO, to DFSNZ and to her systems in preparing for a testing mission. Mr Kaho was cross examined on his understanding of the international and DFSNZ testing guidelines. Both acknowledged their awareness of the fundamental importance of maintaining the integrity of the testing process.

Discussion

34. Quite correctly Mr Lloyd, counsel for Mr Murray, placed strong emphasis on that need to maintain the integrity of the testing process. As he said, this was not just to ensure fairness in the individual situation but to ensure that athletes generally would respect the process.
35. He also, again correctly, emphasised that to find the charge proved the Tribunal had to be comfortably satisfied. Given the difficulty in resolving a direct conflict, he emphasised aspects of the evidence of Ms Edwards and Mr Kaho which he submitted, showed inconsistent recollection or confusion about what had actually taken place.
36. He also submitted, given Ms Edwards' action in ejecting Mr Ilich from the testing room, that there was a breach of Mr Murray's entitlement to have a representative present, which should have been but was not remedied, when drawn to Ms Edwards' attention. He submitted that the disadvantage to Mr Murray, was that had Mr Ilich been present he may have observed the beaker selection process, and could or might have supported Mr Murray's explanation. Whether Mr Ilich would have or not would, of course, depend on what actually occurred.
37. This leaves the Tribunal with a direct conflict between the evidence of Mr Murray, and the evidence of Ms Edwards and Mr Kaho.
38. In his oral evidence, Mr Murray repeated that Ms Edwards had handed him a beaker, already with its black top in place in an opened plastic bag. As

Ms Edwards acknowledged, if that ever occurred it would be a gross breach of the testing procedures and, in her view, invalidate the test. Her evidence was that she would never pass a beaker to an athlete, and that Mr Murray made his own selection from a number of sealed beaker kits.

39. There is no possible reconciliation of the differing versions of what took place. Accordingly, the Tribunal has to consider whether there are objective factors that might influence a conclusion, one way or the other.
40. There is no doubt about Ms Edwards experience as a DCO, or her understanding of the required procedure. Neither is there any reason to doubt her genuineness and strength of her view, as to the fundamental importance of allowing the athlete to choose between sealed beaker kits. It is difficult therefore to contemplate how or why it should be that Ms Edwards on this particular occasion acted so totally in breach of the required protocol.
41. Mr Murray's written evidence acknowledged that there were at least two sealed kits available, so that it cannot be the situation of Ms Edwards running out of available testing equipment. Indeed, her evidence was that she had pre-packed the night before more than enough equipment to carry out four tests, although only three were in fact carried out at the time of completion of the Tour. So, in Mr Murray's evidence one has to suppose that, despite having a number of sealed beaker bags available, Ms Edwards for some inexplicable reason chose in this instance to force on Mr Murray her own selection of beaker, already with the cap on, and in an open bag.
42. Had Ms Edwards done so, her breach of the required process would have taken place in a room where Mr Kaho and Ms Calder were present together, with another athlete who was waiting to take their test. Ms Edwards' breach might well have been observed. Again, it is difficult to contemplate why Ms Edwards would have acted in that way in those circumstances.
43. As it was, Mr Kaho did give evidence of Mr Murray selecting a beaker kit. There was no suggestion in Mr Murray's evidence that Mr Kaho was not in

a position to observe whatever occurred with the beaker selection. Mr Kaho was about to accompany Mr Murray to the bathroom for the taking of the sample, so it makes sense that he was nearby at the time of selection.

44. Mr Lloyd submitted that Mr Kaho's evidence of observing Mr Murray choosing between sealed beaker kits was unreliable, and given to protect the improper process which had occurred. However, if Ms Edwards had departed from the required process in the way Mr Murray described and Mr Kaho had observed that, then his evidence would not just be unreliable it would be a lie.
45. While the Tribunal accepts, that people doing the tasks that Ms Edwards and Mr Kaho were on that day cannot be said to have absolutely no interest in justifying their actions, it is a long bow indeed to suggest that Ms Edwards for no particular reason, departed so drastically from the required process and that Mr Kaho straight out lied to protect the process. Previous to this day, neither Ms Edwards or Mr Kaho had any knowledge of Mr Murray, other than he had been nominated for testing. Nor, of course, did either of them have any idea that Mr Murray's sample would return a positive test for a prohibited substance. Mr Murray's test was, like the other two conducted that day, simply a routine test. There is, on the evidence, no explicable reason why the process would have departed from the norm.
46. For all those reasons, we accept Ms Edwards' evidence that she would never force an open beaker on an athlete and did not do so on this occasion. Mr Lloyd did emphasize to the Tribunal Mr Murray's belief that he was being put upon by DFSNZ, and that apprehension may have contributed to his view of what happened on this day. However, considering the evidence objectively, we are comfortably satisfied that the appropriate process was followed.
47. For the sake of completeness, we do express our view as to the position which would have applied had we been left in doubt as to the testing process. Had there been such a departure from testing standards then SADR 3.2.3 would apply.

48. In short, that Rule provides that if an athlete can establish a departure which could reasonably have caused the rule violation, then DFSNZ would have the burden to establish that the departure did not cause the adverse analytical finding/rule violation.
49. What that would mean in the present circumstances, is that if Mr Murray had established that he was not given a choice of sealed beaker kits, then he must establish facts which could rationally infer a possible causative link between the departure and the presence of the prohibited substance in his sample.
50. In a recent Court of Arbitration for Sport (CAS) decision *Smikle v Jamaica Anti-Doping Commission* (CAS 2015/A/3925), it was accepted that the suggested causative link must be more than merely hypothetical and at least objectively plausible. In that particular case, there was scientific evidence of the presence of the prohibited substance, HCTZ, in the water supply in the testing environment. On the particular facts, the CAS Panel was not persuaded that there was anything more than a negligible possibility that the departure from the standards caused the contamination.
51. On the facts of the present case, Mr Murray would have to show that it was plausible that the departure from the testing standards gave rise to a risk of contamination from Clenbuterol. Unlike the Jamaican case where there was scientific evidence of the presence of HCTZ in the immediate environment, there is no evidence here to suggest the presence of Clenbuterol. Had the Tribunal been left in a position of doubt about the integrity of the testing process, then the Tribunal would have been even more bereft than CAS in the *Smikle* case of a basis to reasonably conclude that there is a plausible possibility of the beaker being contaminated by Clenbuterol.

Conclusion

52. For the above reasons, the Tribunal concludes that it is comfortably satisfied that a rule violation under SADR 2.1 was committed by Mr Murray.

53. However, the facts of this case do highlight the difficulty faced by an athlete and the Tribunal when there is a direct conflict of evidence as to what transpired during the testing process. The presence of a representative can mitigate that difficulty. The opportunity of the presence of a support person/representative is provided for by the Rules and must be respected at all times by DFSNZ representatives.
54. The Tribunal is aware that testing is now being extended more widely than in the past, including for younger grades of athletes. We trust that DFSNZ will go the extra mile where that is necessary to ensure representation where less experienced and less sophisticated athletes are being subjected to testing. We recognise this may not always be practicable, but it should be the norm.
55. Our other comment relates to the acknowledgements signed by the athlete in the doping control form, that the process has been compliant with *International Standards*. Few, if any, athletes would have a comprehensive idea of what is contained in the *International Standards*, which are voluminous.
56. Where the process requires the athlete to actively do something, i.e. choose a beaker, express a sample, pour the sample into the A and B bottles etc, we would suggest that DFSNZ considers amending the doping control form to provide for an acknowledgement by the athlete that she/he has in fact undertaken those steps.
57. We appreciate that there is a limit to the list that could sensibly be signed off. However, we do suggest that it is worth considering the possibility of a relatively short list focused on the steps which an athlete must actively take, and possibly also confirm the receipt of advice to have a representative present. It would at least be more meaningful than the present sweeping acknowledgement.

Sanction

58. DFSNZ sought adjournment of any decision as to sanction to await a CAS decision. That matter arises from a DFSNZ appeal against an earlier Tribunal decision involving Mr Murray.
59. That application was opposed by Mr Lloyd.
60. The Tribunal reluctantly has concluded that imposing a sanction should be adjourned until after release of the CAS decision which, we are told, at present languishes in Lausanne. We are persuaded to do so only because we suspect that if we proceed to impose a sanction, complications may subsequently arise if the CAS decision is adverse to Mr Murray. If the CAS decision is not adverse to Mr Murray then all that will have occurred is some further delay in the Tribunal considering the appropriate sanction for this offence, a subject on which the Tribunal has not yet received submissions from the parties.

DATED 13 October 2017



**A R Galbraith QC
Deputy Chairperson**