

BETWEEN **DRUG FREE SPORT NEW ZEALAND**

Applicant

AND **JORDAN MILLS**

Respondent

AND **BASKETBALL NEW ZEALAND**

Interested Party

**DECISION OF SPORTS TRIBUNAL
8 NOVEMBER 2017**

Hearing: 6 November 2017

Tribunal: Sir Bruce Robertson (Chairperson)
Rob Hart
Georgina Earl

Present: Paul David QC, Counsel for Applicant
Nick Paterson and Jude Ellis, Drug Free Sport NZ
Jordan Mills, Respondent
Aaron Lloyd, Counsel for Respondent
Nick Mills, in support of Jordan Mills

Registrar: Neela Clinton

Proceedings

1. Drug Free Sport NZ (DFSNZ) alleged that Jordan Mills committed a violation of Rule 2.1 of the Sports Anti-Doping Rules 2017 (SADR) evidenced by the presence of a prohibited substance in a sample collected from Mr Mills, during a National Basketball League (NBL) match on 19 May 2017.
2. On 24 August 2017 without opposition Mr Mills was provisionally suspended. Mr Mills waived his right to request a B sample analysis. The substantive application for anti-doping violation proceedings was filed by DFSNZ on 1 September 2017. On 14 September Mr Mills admitted the violation and asked to be heard as to the appropriate sanction. A hearing by teleconference was scheduled for 21 September 2017.
3. Mr David filed DFSNZ's response on 19 September and noted that Mr Mills had not referred to any specific defence on sanction, and if he was seeking to reduce the mandatory two-year period of ineligibility, then an oral hearing in person would be appropriate. An oral hearing in person appeared necessary.
4. Mr Mills confirmed he was intending to raise a no significant fault defence to reduce the period of ineligibility. In these circumstances the Tribunal considered an oral hearing in person was appropriate.
5. Accordingly, the teleconference hearing on 21 September was vacated. Mr Mills instructed Auckland counsel and for reasons beyond the parties control, there were delays confirming a timetable to progress the adjourned sanctions hearing. That period is considered when determining the commencement date of the sanction.

Background

6. Mr Mills is a member of the Wellington Saints NBL basketball team.
7. Mr Mills has suffered from asthma since childhood. He was prescribed his inhaler by the family doctor, but his symptoms improved as he got older, and at 28 his asthma "is now not so much of a problem". His medical history in relation to this condition was produced as part of his affidavit and was the subject of cross-examination by DFSNZ's counsel.
8. On 19 May 2017, Mr Mills was competing in a NBL match in Wellington and was tested after the game. On his Doping Control Form, Mr Mills disclosed a number of

medications that he had taken over the past seven days, but did not include his asthma medication.

9. Mr Mills was familiar with the anti-doping testing procedure, having been tested previously. On this occasion, he was certain he had not used his inhaler during the seven-day period noted on the Doping Control Form (DCF). Mr Mills said it was very rare for him to use the inhaler during the NBL season. Therefore, he did not list the use of his asthma inhaler on the DCF. Mr Mills confirmed that he was not aware his inhaler contained a banned substance.
10. Terbutaline was found to be present in Mr Mills sample. Terbutaline is a specified substance which is prohibited at all times under class S3. Beta-2 Agonists on the 2017 Prohibited List. Terbutaline is used to treat asthma and other pulmonary illnesses, but it also could enhance an athlete's sports performance. The use of terbutaline requires a therapeutic use exemption (TUE) before it can be used by athletes. Mr Mills did not have a TUE.

Relevant Provisions

11. DFSNZ did not contend that this case involved the intentional use of a specified substance to enhance sports performance, and submitted the standard period of ineligibility of two years under SADR 10.2.2 was required. For cases involving intentional use, the standard period of ineligibility is four years.
12. The provisions of the SADR that allow for the possible elimination or reduction of the standard period of ineligibility are Rule 10.4 (no fault) and Rule 10.5.1.1 (no significant fault or negligence). This is not a case where it was suggested there was no fault under Rule 10.4.
13. Under Rule 10.5.1.1, where the Respondent can establish "No Significant Fault or Negligence" in relation to the presence of a specified substance, the period of ineligibility shall be, at a minimum, a reprimand and no period of ineligibility and at a maximum, two years of ineligibility, depending on the Respondent's degree of fault.
14. The relevant definitions in SADR are:

No Significant Fault or Negligence:

The *Athlete* or other *Person's* establishing that his or her *Fault* or negligence, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault or*

Negligence, was not significant in relationship to the Anti-Doping Rule Violation. Except in the case of a *Minor*, for any violation of Rule 2.1, the *Athlete* must also establish how the *Prohibited Substance* entered his or her system.

Fault:

Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an *Athlete* or other *Person's* degree of *Fault* include, for example, the *Athlete's* or other *Person's* experience, whether the *Athlete* or other *Person* is a *Minor*, special considerations such as impairment, the degree of risk that should have been perceived by the *Athlete* and the level of care and investigation exercised by the *Athlete* in relation to what should have been the perceived level of risk. In assessing the *Athlete's* or other *Person's* degree of *Fault*, the circumstances considered must be specific and relevant to explain the *Athlete's* or other *Person's* departure from the expected standard of behaviour. Thus, for example, the fact that an *Athlete* would lose the opportunity to earn large sums of money during a period of *Ineligibility*, or the fact that the *Athlete* only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of *Ineligibility* under Rules 10.5.1 or 10.5.2.

15. For Mr Mills to rely on Rule 10.5.1.1 he must first show how the terbutaline entered his system. Mr Mills stated his use of the asthma inhaler was infrequent, and he was unable to recall having used it within the last 7 days of the test. However, he accepted that he must have in fact used it.
16. Mr Mills said with a further opportunity to reconsider the week leading up to the anti-doping test, he may have potentially used his inhaler up to three times due to intense training sessions and concerns about his personal fitness levels. However, he noted he was unable to recall with exact certainty due to the time that has elapsed and his inhaler use though irregular, was also unexceptional.
17. DFSNZ accepted that the presence of terbutaline in Mr Mills' sample could be explained by his use of his inhaler to treat asthma symptoms.

Issues

18. The live issues before the Tribunal are therefore:
 - (a) Is the Tribunal satisfied that Mr Mills can establish "No Significant Fault or Negligence" in relation to the violation, the onus of which is on him?

- (b) If so, what period of ineligibility is appropriate having regard to Mr Mills' degree of Fault (between a reprimand / no period of ineligibility and two years of ineligibility)?
- (c) What should be the start date of any period of ineligibility?

No Significant Fault or Negligence

- 19. Under Rule 10.5.1.1, before the Tribunal can consider any reduction of the two-year period of ineligibility for cases involving a specified substance, the athlete must establish that there was no significant fault or negligence in relation to the violation.
- 20. While DFSNZ accepted Mr Mills was not trying to enhance his performance and was using the inhaler for therapeutic reasons, DFSNZ submitted that had limited direct relevance to the degree of fault under the definitions. DFSNZ stated, "if anything the relevance of the use of a medicine" should highlight to an athlete that they "should have an increased awareness of [their] risk and obligations under the Code because medications are a known source of prohibited substances."
- 21. DFSNZ accepts Mr Mills did not appreciate there was a risk, but in its view Mr Mills, an experienced athlete having played in the NBL for several seasons, who had received anti-doping education as recently as 11 March 2017, and the subject of previous anti-doping testing, should have been aware of and taken steps to address this risk. His failure, it was submitted was "very careless", and involved "serious or grave fault under the SADR regime".
- 22. Mr Mills stated he had "completed drug tests prior with no issues". In fact, he said he had played in the NBL for 9 seasons. In 2010 he had discussed with his doctor that he played in the NBL and thought that his prescribed inhaler would comply with anti-doping rules. Mr Mills stated he was not aware that he had to "take any steps to recheck my medication was okay".
- 23. Mr Mills confirmed he had attended anti-doping training, but stated he had never been advised personally about his medication or the need to confirm that banned substances may change, and to check his current medication is still compliant with anti-doping rules. Further, Mr Mills noted there was no team doctor to consult either. He had observed other athletes using inhalers and this in addition to all the other factors led him to believe he was permitted to use his inhaler occasionally if required.

Degree of Fault and Sanction

24. The first critical issue was whether Mr Mills could establish that he bore no significant fault or negligence in having tested positive for terbutaline. If he did the degree of his fault is assessed in determining an appropriate sanction. This is a fact specific exercise. It must involve a real-life assessment of the fault which is apparent with a robust and rational determination of culpability.
25. DFSNZ contended that Mr Mills could not show his fault was not significant and that no reduction of the presumptive two-year period of ineligibility should apply. If the Tribunal considered that Mr Mills met the “no significant fault” threshold, DFSNZ’s position was that the degree of fault would justify a sanction at the higher end of 16 and 24 months.
26. Mr Mills’ position was that he bore no significant fault and an appropriate sanction given his degree of fault should be no more than between four and six months.
27. The athletes’ level of fault is assessed against what a reasonable person acting in accordance with the strict obligations under SADR ought to have done to avoid breaching the rules, considering the perceived level of risk.
28. DFSNZ’s submission was that the material provided by Mr Mills to assess his level of fault was only general evidence about a consultation with his doctor in 2010, when prescribed with an inhaler, he advised his doctor that he played basketball in the NBL. DFSNZ contended Mr Mills’ information was limited, not sufficiently clear and as there was no specific evidence such as medical records produced, it was impossible to assess. DFSNZ said Mr Mills had fallen short of what is required of an athlete, “[u]sually more concrete evidence would be required to reach a conclusion that the athlete had taken some precautions before being prescribed with the medication and using it.” DFSNZ stated, it was Mr Mills’ responsibility to have checked the medication he was given, as he was an experienced athlete and had received anti-doping education.
29. DFSNZ asserted Mr Mills conduct was negligent rather than reckless, but “was more than simple or normal carelessness and showed significant disregard for his obligations.”
30. Mr Mills accepted a degree of fault. In seeking to establish that he bore no significant fault in breaching SADR, Mr Mills relied on the following mitigating circumstances:

- a) He had consulted his doctor advising his status as an athlete and it was reasonable to rely on that medical advice
 - b) He was aware asthma medication was permitted and that other athletes used inhalers, so did not trigger the need to seek further advice
 - c) He did not have access to a team doctor to discuss his medication
 - d) He was prescribed terbutaline, and while it is still prohibited, other asthma medication is now permitted up to a certain dosage. It is unclear why his doctor prescribed terbutaline instead of another asthma medication, which arguably contributed to him breaching the rules
 - e) He had attended anti-doping education, but there had never been a specific reference to asthma medication. Mr Mills recalls the sessions had focussed on recreational drugs and supplements.
 - f) He had not received an educational booklet which listed terbutaline as a banned substance, only a flyer which did not refer to asthma medication
 - g) He had no previous violations despite being tested on two other occasions.
31. The Tribunal found the determination as to whether Mr Mills established there has been no significant fault to be at the margin. Although independent material can be useful, the unchallenged testimony of a credible witness can suffice. The Tribunal had the opportunity to hear and see Mr Mills. He was calm, moderate and compelling in his evidence and the Tribunal accepts his assertions.
32. On the totality of the evidence, the Tribunal considers Mr Mills' circumstances to be a close call. The Tribunal unanimously is satisfied on balance that Mr Mills has established that there was no significant fault or negligence on his part in committing the violation.
33. The Tribunal accepts Mr Mills who has suffered asthma since childhood, advised his doctor in 2010 that he required asthma medication and that as an NBL player he was subject to anti-doping rules. Mr Mills had considered his obligations and understood the SADR requirements having obtained a TUE for another medical issue. Mr Mills may reasonably have assumed that his doctor, in assessing his eczema condition and obtaining a TUE, would have known he was using terbutaline and mentioned any problems including applying for a TUE for that also.
34. There was no suggestion that there were not good medical reasons requiring the use of terbutaline. It has been part of Mr Mills' life for 25 years and it was understandable although an inexcusable oversight which led to the breach. The integrity of the Code

requirements are not violated by characterising the totality of these circumstances as no significant fault.

35. Mr Mills had been tested previously without issue, although he had been using his inhaler. This was likely to have enforced his view that his use of the inhaler was acceptable. If Mr Mills had been aware of a 2015 SADR change allowing some asthma medication up to a certain threshold, he may have changed his medication or at least understood he required a TUE.
36. Having satisfied the requirement of no significant fault or negligence, the Tribunal must consider Mr Mills' actual degree of fault in determining the appropriate sanction.
37. What is required is an assessment of the particular relevant facts in the case against SADR provisions. As DFSNZ noted, it is a difficult task for the Tribunal when it must determine an appropriate sanction, assessing fault in different factual circumstances, to ensure all athletes are treated fairly and equally.
38. DFSNZ accepted that Mr Mills' fault was not as high as the athlete in the case of *DFSNZ v Spessot (ST 05/15)*. The Tribunal agrees Mr Mills' actions were not reckless, as in that case, where the Tribunal was unable to consider a reduction below the two-year standard period.
39. For Mr Mills' level of fault to lead to a significant reduction which would justify a sanction of only four to six months, as proposed by counsel, is untenable on the facts.
40. In assessing Mr Mills' degree of fault, the Tribunal considers that Mr Mills' actions reflected a normal degree of fault or carelessness which the majority of the Tribunal conclude justifies a sanction of 12 months. All athletes must be aware of the strict obligations imposed under SADR. The onus was on Mr Mills to have been vigilant about his asthma medication and made all proper inquiries with DFSNZ or otherwise. Mr Mills was not sufficiently careful in using his inhaler and unthinking about his position, which is not consistent with the high standards and clear obligations which lie on every athlete.
41. Mr Mills was an experienced athlete, who had attended DFSNZ education. Mr Mills' consultation with his doctor in 2010 is the only instance of him checking his asthma medication, despite having played nine seasons of NBL. He obtained a TUE for skin medication, but did not check at that time whether his asthma medication also complied. Mr Mills didn't turn his mind to his inhaler use which he used throughout his

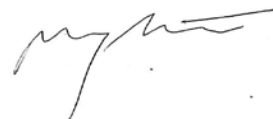
life so that its use had not occurred to him. Mr Mills understood the requirement to have the status of medication checked, but he had not been mindful that this included the use of his inhaler. Mr Mills thought his inhaler was permissible which was reinforced by having been tested on previous occasions without issue.

42. A majority of the members of the Tribunal are satisfied that the appropriate period of suspension is 12 months. Mr Mills used his inhaler for a therapeutic purpose, he was not a drug cheat but was still in breach of the high obligation placed on all sports participants to check medication complies with anti-doping rules.

Ineligibility Start Date

43. The Tribunal has a discretion to back date the commencement of the period of ineligibility to as early as the date of the sample collection which was 19 May 2017.
44. The Tribunal is unanimous that Mr Mills is entitled to credit for promptly admitting the anti-doping violation, and his cooperation throughout. The commencement date is set as 19 May 2017.

Dated: 8 November 2017



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Sir Bruce Robertson
Chairperson