

**BETWEEN**                                **DRUG FREE SPORT NEW ZEALAND**

**Applicant**

**AND**                                        **BRENDON KEENAN**

**Respondent**

**AND**                                        **ATHLETICS NEW ZEALAND**

**Interested Party**

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**DECISION OF SPORTS TRIBUNAL**  
**25 JULY 2018**

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**Tribunal**                                Dr James Farmer QC (Deputy Chairman)  
Rob Hart  
Georgina Earl

**Participants**                             Paul David QC, counsel for Applicant  
Hayden Tapper, Drug Free Sport NZ  
Brendon Keenan, Respondent  
Nick Elsmore, counsel for Respondent  
Hamish Grey, for Athletics New Zealand

**Registrar**                                Neela Clinton

## **Background**

1. Brendon Keenan is a member of Athletics New Zealand (ANZ). Mr Keenan advised he suffered from anti-immune issues and had purchased a supplement product from overseas which he felt had improved his health. While searching for a similar product he made an online order from DRS Labs. His medical history in relation to this condition was produced as part of his affidavit.
2. On 12 September 2017 an imported parcel containing Erythropoietin, commonly known as EPO, addressed to Mr Keenan was intercepted by NZ Customs and referred to Medsafe. Following an investigation conducted by Medsafe and communication with Mr Keenan, the product was destroyed. Medsafe is the authority responsible for the regulation of therapeutic products in New Zealand and investigates unlawful importation, manufacture, labelling and supply of medicines.
3. Medsafe conducted enquiries regarding Mr Keenan's transactions with DRS Labs and investigated the website. On 13 November 2017 Medsafe advised DFSNZ it had information implicating Mr Keenan who potentially breached sport anti-doping rules (SADR). It provided transaction emails between Mr Keenan and DRS Labs.
4. DFSNZ reviewed its evidence of Mr Keenan's purchase and notified him on 20 April 2018 of its information in support of the anti-doping allegations, seeking Mr Keenan's response.
5. On 10 May 2018, Mr Keenan provided a written statement, advising that he had not purchased the product to improve his athletic performance, but to address his medical condition. DFSNZ assessed Mr Keenan's response, and following a review of its investigation material, commenced anti-doping rule violation proceedings.
6. Erythropoietin is listed as a prescription medicine in the Medicines Regulations 1984 and is incorporated into the SADR 2017. It is a non specified substance which is prohibited at all times under class S2 Peptide Hormones, growth factors, related substances and mimetics on the 2017 Prohibited List.

## **Proceedings**

7. DFSNZ alleged that Mr Keenan committed a violation of Rules 2.2 and 2.6 of the SADR by the online purchase of EPO EPOTIN on 7 September 2017 from a website trading under the name DRS Labs.

8. On 18 May 2018 DFSNZ filed anti-doping rule violation proceedings against Mr Keenan. Material in support of its application included information from Medsafe's investigation and DFSNZ's investigation.
9. On 24 May 2018 without opposition Mr Keenan was provisionally suspended. On 21 June 2018 Mr Keenan admitted the violation and provided material in support.
10. As Mr Keenan admitted the attempted use of a prohibited substance by placing an online order for EPO, the Tribunal is required to determine the sanction which is to be imposed. Although Mr Keenan did not receive or use the substance under the provisions of the Code, he committed a violation in attempting to acquire the substance. Mr Keenan asked to be heard as to the appropriate sanction and a hearing was set down for 26 July 2018.
11. As erythropoietin is a non specified substance prohibited at all times, the relevant starting point is SADR 10.2.1 which provides that the period of ineligibility shall be four years. If Mr Keenan was able to show that violation was not intentional, the period of ineligibility could be reduced to two years under SADR 10.2.2.
12. On 4 July 2018 DFSNZ filed material in response to Mr Keenan's submissions and statement, including two doctors, in reply to Mr Keenan's medical information and blood test results.
13. Counsel filed a joint memorandum dated 18 July 2018 in relation to sanction. Mr Keenan accepted his conduct was in breach of the SADR and he was subject to a four year period of ineligibility. A copy of the memorandum is annexed.
14. The Tribunal has the discretion to backdate the commencement of the ineligibility period in cases of early admission of the doping offence, and Mr Keenan's cooperation with the authorities also requires some consideration. When confronted by Medsafe he promptly agreed to the product's disposal and admitted the purchase to DFSNZ. Mr Keenan has acted responsibly and cooperated and should also be entitled to have recognition for that. The Tribunal has a discretion to backdate the start date of any period of ineligibility to as early as the date the online order was placed on 7 September 2017.
15. The Tribunal having considered all available material is satisfied it is able to accept the proposed sanction without the need for a hearing and makes orders as proposed.

## Orders

16. Mr Keenan's suspension will be for a period of four years backdated to commence from 7 September 2017.
17. The results of Mr Keenan at the 2018 NZ Masters Track Championships including any medals or prizes are disqualified.
18. The results of Mr Keenan at the 2018 NZ Marathon Championships including any medals or prizes are disqualified.

Dated: 25 July 2018



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**Dr James Farmer QC**  
**Deputy Chairman**

**ANNEXURE:**

**BEFORE THE SPORTS TRIBUNAL OF NEW ZEALAND**

**ST 06/18**

**BETWEEN**                      **DRUG FREE SPORT NEW ZEALAND**  
**Applicant**

**AND**                              **BRENDON KEENAN**  
**Respondent**

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**JOINT MEMORANDUM ON AGREED SANCTION**  
**18 JULY 2018**

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1. The Applicant, DFSNZ, and Respondent, Brendon Keenan, file this joint memorandum to set out the agreement on sanctions.
2. Mr Keenan has admitted violations of possession and attempting to use erythropoietin (EPO) in breach of SADR 2.2 and 2.6. The violations were committed by purchasing a vial of EPO over the internet from a website trading, under the name of DRS Laboratories, on 7 September 2017. They are one violation for the purpose of imposing sanctions. The applicable period of ineligibility is 4 years under SADR 10.2.1 (unless the athlete proves that the violations were not intentional.)
3. After considering the material which has been filed before the Tribunal, Mr Keenan has agreed with DFSNZ that the period of ineligibility of 4 years should be imposed under SADR 10.2.1. DFSNZ accepts that it is appropriate to permit the backdating of the start date of the period of ineligibility to the date of the violation under SADR 10.11.2 because Mr Keenan admitted the violations in a timely manner.

### **Background**

4. EPO is a naturally occurring peptide hormone which results in increased red blood cell production. It is produced synthetically for medicinal purposes. EPO is prohibited at all times in and out of competition under class S2 (peptide hormones, growth factors, related substances and mimetics) of the Prohibited List 2017.
5. Mr Keenan is a member of the Lakes City Athletic Club in Rotorua. He is bound to the SADR by his membership of Athletics NZ. Mr Keenan competes in long distance running events in Masters divisions. He represented New Zealand in the 24 Hour World Championships in 2012. In June 2017 he competed in the Wellington Marathon finishing third in his M40 age group. In March 2018, he competed at the NZ Masters track championships in the 3000 metres and 5000 metres and in the 1500m in the M40 age group. He finished third in the M40 age group in the NZ Marathon Championships in May 2018.

### **DRS Website Purchase**

6. The DRS website from which Mr Keenan purchased the vial of EPO offers various peptides for sale including EPO/ EPOTI N. The offer for EPO on the site sets out a description of the product and its use and contains a statement that "the Product is prepared for LABORATORY RESEARCH USE ONLY. The product may not be used for other purposes." Mr Keenan placed 3 orders for the vial of EPO on the site. The first 2 orders were cancelled and the product not sent. On the third transaction payment was made to DRS using Bitcoin as offered on the site. The EPO was despatched to Mr Keenan but was intercepted by Customs.
  
7. The Interception was referred to Medsafe for investigation under the Medicines Act 1981. After correspondence with the Respondent, Medsafe referred the information which it held to DFSNZ. After reviewing the material and making relevant inquiries, DFSNZ filed the Form 1 application and statements in support alleging the breaches of the SADR which are now admitted.

### **Athlete's initial position - DFSNZ response**

8. In response to the allegations Mr Keenan admitted the purchase and the violations, but claimed, in summary, that he had purchased the EPO solely to address a blood condition from which he was suffering with no intention of gaining any performance enhancement. He provided blood tests and an analysis showing the blood condition - mild anaemia and thrombocytopenia. Mr Keenan sought to establish that his conduct was not intentional under SADR 10.2.3 and also that that his fault was not significant. DFSNZ filed a memorandum and statements (from Dr Gerrard, Dr Leonard and Mr Tapper) in response. In summary, DFSNZ's position was that the circumstances in which Mr Keenan sought and purchased EPO from the DRS website meant that he would not be able to establish that his conduct was not intentional under SADR 10.2.3, and that, as a result, no defence of no significant fault was available. In summary, DFSNZ material in response made the following points - EPO is a well-known performance enhancing doping agent used by

endurance athletes, a person using the internet to research EPO would immediately see its banned status, EPO would not be a treatment for Mr Keenan's blood disorder, Mr Keenan was actively competing and training at the time of his purchase of EPO, the nature of the DRS website and the transaction which Mr Keenan undertook In order to obtain the EPO indicated intentional use.

### **Agreement on Sanction**

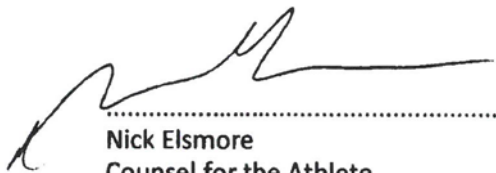
9. Mr Keenan has considered the material which is before the Tribunal, taken advice and reflected on his position. He accepts that his conduct was in breach of SADR 10.2.3, and, accordingly, he agrees to the period of ineligibility of 4 years under SADR 10.2.1.
  
- 10 . In the period since the violation on 7 September 2017 Mr Keenan has competed in the NZ Masters Track Championship in March 2018, winning silver medals in the 3000 metre and 5000 metre races, and a bronze medal in the 1500 metres in his M40 age group. He has competed in the NZ Marathon Championship and finished 3<sup>rd</sup> in his age group. The disqualification of the results obtained subsequent to the violation until the start of provisional suspension or period of ineligibility is mandatory under SADR 10 .8, unless fairness requires otherwise. The parties are agreed that the results should be disqualified under SADR 10.8.
  
11. DFSNZ acknowledges the timely and frank admissions by Mr Keenan. DFSNZ has agreed with Mr Keenan that it is appropriate for the commencement of the period of ineligibility to be backdated to the date of the violation to reflect Mr Keenan's admissions, if the Tribunal is prepared to exercise its discretion under SADR 10.11.2 in this way. Mr Keenan is entitled to credit for the period of provisional suspension (from 24 May 2018) under SADR 10.11.3. If the backdating under SADR 10.11.2 is applied this credit will be accounted for in the period of backdating.



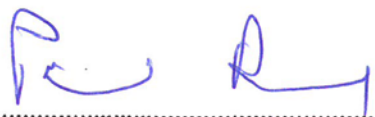
12. Counsel respectfully ask the Tribunal to approve the agreement reached on sanction by the parties, and to make orders as follows:

- (a) Brendon Keenan is subject to a period of ineligibility for 4 years under SADR 10.2 .1 starting from 7 September 2017.
- (b) The results of Mr Keenan at the 2018 NZ Masters Track Championships including any medals or prizes are disqualified.
- (c) The results of Mr Keenan at the 2018 NZ Marathon Championships including any medals or prizes are disqualified.

13. The parties ask that the hearing scheduled for 26 July 2018 be vacated.



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Nick Elsmore  
Counsel for the Athlete



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Paul David QC  
Counsel for DFSNZ