BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 12/18**

BETWEEN	**DRUG FREE SPORT NEW ZEALAND** **Applicant**
AND	**XYZ** **Respondent**
AND	**SURF LIFE SAVING NEW ZEALAND** **Interested Party**

DECISION OF SPORTS TRIBUNAL ON SANCTION
3 April 2019

Hearing	8 February 2019
Tribunal	Sir Bruce Robertson (Chairman) Alan Galbraith QC Dr Jim Farmer QC
Participants	David Bullock, counsel for Applicant Hayden Tapper, Drug Free Sport NZ XYZ, Respondent David Neild, counsel for Respondent Mike Lord, for Surf Life Saving NZ
Registrar	Mike Selwyn

Introduction

1. On 4 March 2019, the Tribunal issued its Decision on liability of the respondent in this matter, ruling that the respondent was subject to the Rules contained in SADR by virtue of his membership of his local surf life saving and golf clubs which were both affiliated NSOs that had adopted SADR. By majority decision, the Tribunal also ruled that the respondent was an "athlete" as that term is defined in SADR and that, as a consequence, he had contravened the use and possession provisions of SADR by reason of his having purchased prohibited drugs (clenbuterol and dianabol) online at a time when he was competing in club sports (swimming and golf), notwithstanding that his evidence that he had used the drugs for a short time only in an attempt to lose weight was accepted by the Tribunal. He was however what is in common parlance (and also in overseas literature and official reports) termed a "recreational" athlete. The initial violation application filed by DFSNZ did not refer to the respondent's golf playing or to his membership of a golf club but only to his membership of a surf life saving club. The golf club membership and playing only emerged later when substantive evidence was filed by DFSNZ.

2. DFSNZ filed its application for an anti-doping rule violation and also an application for provisional suspension of the respondent on 20 August 2018. On 7 September 2018, the respondent filled in and filed a handwritten Form 2, admitting the violation but indicating that he wished to be heard on sanction or penalty. He wrote, among other things:

> "I did not take the drug for sport performance at all and never intended to cheat!! I partook in a social manner and I am only a volunteer in surf lifesaving.
> … I took the drug to try to lose weight. I was approx. [redacted] kgs at the time and to think I was cheating is laughable…. I did not compete in surf lifesaving competitively – I merely helped out socially[1]…. I have not played sport for the past 20 years[2] – and will not for another 20 years!!!"

[1] In fact, the respondent did take part in a masters' life surf saving contest in October 2015 some 9 or so months after discontinuing all use of the drugs. The Tribunal declined to make any ruling as to whether in that event he had contravened the Rules (Decision para. 59(5)).

[2] He was however a regular club golf player. As referred to, that was later included by DFSNZ in its evidence and relied on by it in presenting the case against the respondent. No point was made about the accuracy of this statement in Form 2 and, given the fact that at this time the proceeding was limited to surf life saving, nothing of significance turns on the point.

3. On 28 August 2018, a provisional suspension order was made on the basis of the respondent's admission of a violation. The respondent was not represented by counsel and had not been so represented from the time he was first charged. The applications were called again at a teleconference with the Chairman on 21 September 2018. DFSNZ was represented by counsel. The respondent was on the call but was still not represented by counsel. The Minute of that conference included:

> "3. The Chairman raised issues as to whether [the respondent], an unrepresented litigant, had become bound by the Sports Anti-Doping Rules as a result of his donation and a volunteer membership of the local surf life saving club."

4. Directions were made by the Chairman requiring DFSNZ to establish that, by reason of the respondent's membership of the surf life saving club, he was subject to SADR at the time of the alleged violation (i.e. November 2014-January 2015). On 11 October 2018, DFSNZ duly filed a memorandum setting out its case for arguing that the respondent was subject to SADR. In this memorandum, reference was made for the first time to the fact that the respondent was also a member of a local golf club, which by reason of its affiliation with New Zealand Golf, had adopted SADR. Evidence was led that he had competed in club golf events on 8 September and 2 October 2018, dates which were after the date on which provisional suspension was imposed prohibiting him from competing in any sport. We see that relevant to the question of how much credit should be given to the "time served" under provisional suspension and return to that issue later in this Decision.

5. In its liability Decision of 4 March 2019, the Tribunal deferred the question of sanction or penalty and issued timetable directions for the filing of written submissions by the parties. We specifically required submissions on the question of "no significant fault or negligence" (rule 10.5.2), as it appeared to us that on the facts found this could be a relevant issue. In addition, we expected to receive submissions on delay in bringing the proceedings (rule 10.11.1) and timely admission (rule 10.11.2). Detailed submissions on all three issues were received by the parties, for which we are grateful. Having regard to the thoroughness of those submissions and the fact that at the liability hearing both sides presented preliminary sanction submissions contingent on a finding of contravention, we see no need to convene a further hearing. Neither party has requested one.

6. A further issue which has arisen and which the parties have both addressed in their written sanction submissions is an order which we made in our liability Decision that the respondent's name be suppressed. In the Decision, we said: "We think that in the circumstances of this case, which is a precedent in every sense, the respondent should have the benefit of name suppression." DFSNZ has since raised the question of our power to make such an order. In the sense that our liability Decision is an interim one only, with penalty yet to be determined, we think it right to regard that order itself as interim only and this Decision will therefore address that question and, if we find that the Tribunal does have that power, whether it is appropriate to continue the existing order.

7. Finally, the respondent has raised for consideration the propriety of a DFSNZ press release issued shortly after our liability Decision. DFSNZ has responded. We choose not to enter into this debate.

Sanction/Penalty

No significant fault or negligence

8. The argument of counsel for the respondent begins with a reference to the Tribunal's Decision in *DFSNZ v. Mills*[3] in which it was said that "an athlete's 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". This was described by DFSNZ, in its submissions, as involving both an objective and subjective element, the former describing the standard of care expected from a reasonable person in the athlete's situation and the latter describing what could have been expected from the particular athlete in view of his or her personal capacities.

9. Reference was then made on behalf of the respondent to paragraph 44 of our liability Decision in which it was said that it "would be entirely unclear to [recreational athletes] whether DFSNZ had [exercised it discretion to extend the application of the rules]". From that, it was said that a reasonable person standing in the respondent's shoes at the time he purchased the prohibited drugs would not have been aware that he was

[3] ST 06/17 (8 November 2017), para. 27.

bound by the rules and therefore would be most unlikely to have researched whether the drugs were prohibited.

10. DFSNZ referred to other authorities including those of the Court of Arbitration for Sport and emphasised the obligation on an athlete to be "particularly diligent and, thus, the full scale of the duty of care designed to prevent the athlete from ingesting these substances must apply".[4] DFSNZ submitted that whether or not a reasonable person would have thought that the respondent was bound by the rules was "the wrong starting point". The respondent in fact was so bound, it was argued, and it was his responsibility to understand what his obligations were and to take steps that he did not breach them. It was then pointed out, correctly, that the respondent in fact had done nothing to inform himself of the obligations that he had assumed once he became a member of a club that had, directly or indirectly through affiliation with a National Sporting Organisation, adopted SADR. Referring to another CAS Decision[5], DFSNZ submitted that the 10.5.2 defence was designed to give relief to athletes who take reasonable care to ensure that they are complying with the obligations that they assume by reason of membership of such a sports club. The respondent, it was said, did not do that. To find in favour of the respondent on this issue, DFSNZ said, "would be to convert a defence intended to give relief to those who take care, to a defence to protect those who chose to take no care and to remain ignorant", thus undermining the anti-doping regime.

11. In reply submissions, counsel for the respondent pointed out that the Report of the European Commission recorded that only New Zealand, the United Kingdom and Ireland have extended the definition of "athlete" to "recreational" or "low-level" athletes (so described in that Report).[6] It was pointed out that the jurisprudence emanating from CAS concerns elite professional athletes who have all the benefits of education on anti-doping. Such athletes, it was argued, "could reasonably be expected to be judged against a higher standard than someone who occasionally played golf for his local club and had received no information". The respondent, on the evidence, was somewhat more than an occasional club golfer but he had never played golf professionally or at a national level. His evidence was, however, that he had never received drug education and it was submitted that he could not reasonably have known that SADR applied to him. On the education point, the Tribunal expressly requested

[4] Citing *Cilic v. ITF* CAS 2013/A/3327 at [75].
[5] *WADA v. Hardy* CAS 2009/A/1870.
[6] Study of Doping Prevention (12 December 2014), page 8.

evidence from the two NSOs as to what steps had been taken by them over the past 5 years to draw the detail of the regime to the attention of their members at all levels. No evidence was provided by either NSO and neither appeared at the hearing to assist the Tribunal. However, SLSNZ did send an email to the Tribunal which indicated that anti-doping information is included on its website and regularly updated and forwarded to all surf clubs in New Zealand to send to their members as well as electronic newsletters that contain such information twice a year to members of clubs. In addition, however, and separately, additional information is sent to high performance athletes, coaches and physios 4 times a year, which indicates a recognition that the regime is directed, at least principally, to such athletes. We were advised by counsel for the respondent that the website of the local golf club of which the respondent is a member does not provide a link to the Rules on Golf NZ's website.

12. That submission does underline the concerns that we expressed in the Postscript to our liability Decision (paragraphs 68-73) as to the rigorous application of the contravention provisions of SADR to members of sports clubs whose only association with sporting events and SADR is by reason of that membership or at most by reason of their participation in recreational competition at club level. As was concluded in the Report of the European Commission, the issues experienced in elite and competitive sport do not necessarily translate proportionately to recreational sport.[7]

13. We have much sympathy for the position of the respondent – an amateur recreational participant in sport at local or club level – who now bears the stigma of having taken drugs for what he perceived would assist him to lose weight for health reasons and not for performance enhancement. We of course acknowledge that DFSNZ is vested with the discretion to apply the Code to every person in New Zealand who is connected with any level of sporting activity that is subject to SADR. However, we question the common sense, fairness and proportionality of the approach that is being taken and the consequences which flow from an undiscriminatory and arbitrary application of the Code to persons who no reasonable person sympathetic with the aims of the Code would think appropriate. Standards that are, rightly, applied to elite or national athletes who do receive close and targeted drug educational attention, as WADA demands, can be quite disproportionate when applied to sports club members who compete at a "low-level" or who indeed do not compete at all, where such persons, for health reasons, have taken drugs on the WADA/SADR prohibited list because they

[7] *Ibid.,* pp. 7-8.

have athlete performance-enhancing characteristics. Clearly, this is a vexed issue that the European Commission has been addressing, without yet arriving at a "proportionate" outcome. We think the position is exacerbated by the view of DFSNZ, which it claims is imposed on it by CAS Decisions, that it does not have a "prosecutorial discretion" but must enforce SADR in an unblinkered fashion. That undesirable situation is compounded by the lack of express power in the Tribunal analogous to that of Judges in the criminal courts to discharge without conviction, giving rise to the appearance of the Tribunal being a rubber stamp for DFSNZ enforcement policy.

14. We make two further points. The first is that it has been a choice by DFSNZ to extend the definition of "athlete" in SADR from international and national level sports people to sports club members below that level, whether they compete at all and to do so. This has been effected, not by expressly amending the rules to make this transparent but by an unannounced executive decision to enforce the contravention rules against such a person, asserting (for the first time in New Zealand) that membership alone of a club which has adopted SADR is enough upon which to base a contravention proceeding. DFSNZ was unable to cite to the Tribunal any similar case in any other jurisdiction where a contravention proceeding has actually been taken against a person in similar circumstances to the respondent in the present case. That may be thought to represent a view by enforcement agencies in countries which have taken the position that the term "athlete" should be regarded as extending to low-level or recreational competitors that as a matter of fairness and common sense enforcement action should not be taken against such athletes and that resources should be targeted on elite and other sports people competing at national level.

15. The second point, which builds upon the fact that we are dealing here with a situation that DFSNZ has created as a matter of its enforcement policy as applying to all levels of competitive sport and to all members (playing and non-playing) of clubs that have adopted SADR. The context in which this has been done is one in which, in reliance of CAS case law that has been developed in relation to superior athletes competing at international and national level (often professionally), DFSNZ claims that it has no prosecutorial discretion and that the Tribunal also has no discretion in appropriate cases to absolve a respondent who lacks genuine culpability. That is a position that does not accord with the jurisprudence of this country as administered by our courts and which is rooted in proportionality, culpability, fairness and common sense with a strong overlay of concern for human rights. That is compounded by the lack of any public announcement to the sporting and sports club community that is DFSNZ policy.

We have no doubt that, the matter having been raised in this case for the first time, that our liability Decision will have been a matter of considerable surprise and, to many, concern.

16. Nevertheless, we have concluded, reluctantly, that as matters presently stand and, given also the policy of DFSNZ that it has no discretion but to "prosecute" on every occasion and that the Tribunal lacks any power analogous to that of the criminal courts of "discharging without conviction", we have to find that the respondent has not made out a no significant fault or negligence defence. He is not therefore entitled to the benefit of a reduction on that ground from the 2 year ineligibility starting point.

Delay, Timely Admission and Provisional Suspension Served

17. The parties are agreed that the respondent is entitled to 6 months credit for the delay in the bringing of the proceeding. This is consistent with the previous clenbuterol Decisions of the Tribunal.

18. There is disagreement about timely admission. The respondent argues that, in terms of rule 10.11.2, a timely admission was made as at the date on which he "accepted the imposition of a sanction", which was effectively immediately after he was charged. DFSNZ, however, says that the respondent, while accepting without argument that he had used the drugs, did not promptly "admit a violation of Rule 2 of the SADR" because he advanced a defence that that rule did not, as a matter of law, apply to him. We do not find this an attractive submission. The respondent was not legally represented and it was the Tribunal which raised the legal issue which was one which went to its jurisdiction and to which DFSNZ did not itself alert the Tribunal to. As referred to above, the question of whether and to what extent and in what manner, the anti-drug regime that was developed to deal with elite athletes should apply to recreational or low-level athletes (or, if in theory it does apply, should be enforced) is a vexed one that has troubled and continues to trouble other countries and the European Commission in particular.

19. We do not accept DFSNZ's submission that the respondent should not be given credit for a timely admission. We are dealing in this case with a man who, as found by us after hearing him and after he was cross-examined, purchased and used for a short

period prohibited drugs in a genuine endeavour to combat a serious weight problem and who had no thought (or intent) that these drugs would enhance sporting performance. Over three and a half years later, he was confronted by DFSNZ with an allegation that there was a direct connection between his actions in purchasing and using the drugs and his participation in local club swimming/surf life saving and golf events. Given the lack of any similar case, the Tribunal directed full legal presentation on what was an important jurisdictional issue that had ramifications for a very large number of New Zealanders. We make no apology for doing so and regard it as having been our responsibility to clarify the policy position that DFSNZ had taken in choosing to take contravention proceedings against the respondent. None of that should be attributed to the respondent and he should not be penalised for appearing with counsel to assist the Tribunal in this task. To do so would be unconscionable in all the circumstances.

20. We allow 6 months' credit under the head.

21. We note that in the last 4 cases heard by the Tribunal relating to clenbuterol[8] 12 months backdating was allowed for delay and timely admission and we have adopted that period in the present case.

22. In relation to the provisional suspension served, we accept the submission that this should not run from 28 August 2018, when it was imposed, but from 3 October 2018, being one day after the last date on which, according to the evidence, the respondent competed in a golfing event. That occurred at a time when he was provisionally suspended.

23. In total, therefore, we impose a 2 year ineligibility period beginning 3 October 2018. After deducting 6 months for delay and 6 months for timely admission that means the period will end on 3 October 2019.

[8] *DFSNZ v. Jones* ST 05/18 (27 August 2018); *DFSNZ v. McEnteer* ST 13/18 (11 October 2018); *DFSNZ v. Hopman* ST 15/18 (15 October 2018); *DFSNZ v. Blackley* ST 14/18 (29 October 2018).

Name suppression

24. DFSNZ refers to and relies on SADR 14.3.2, 8.8.2 and 8.8.5 which *require* the Tribunal to commit decisions that an anti-doping rule violation has occurred to be publicly recorded and specifically to require publication of the name of the athlete. It contrasts this position with interim rulings which remain confidential decision until a final decision is given (what we would say is the present case at least) and rule 8.8.3 which provides that decisions where no violation is established are not to be publicly reported unless the Athlete consents. Reference was also made to rule 8.8.6 which empowers the Tribunal to redact "sensitive personal information" (not, DFSNZ says, including the athlete's name) before a decision is publicly reported and to rules 8.8.5 and 14.3.6 which provide exceptions to the general position in the case of minors. Finally, DFSNZ relies on an earlier decision of this Tribunal in *Bramley v. Athletics New Zealand*[9] in which it was held that, while medical information about the athlete could be redacted, the name of the athlete was required to be published.

25. The position taken on behalf of the respondent is that, while the Act and the Rules are silent on the existence or otherwise of the power of the Tribunal to order name suppression of an adult who has been found to have contravened SADR, the powers of the Tribunal contained in sections 38 and 39 of the Sports Anti-Doping Act 2006 are sufficient to suppress the respondent's name, particularly having regard to the fact that this can be regarded as a test case. Section 38(e) provides that the Tribunal may "generally take all steps necessary or desirable to achieve the purposes of this Act"; section 39 enables the Tribunal to "determine its own practices and procedures". DFSNZ's response to this submission is to say that the specific powers and exceptions in the case of minors in SADR are "wholly inconsistent with the implication of more extensive powers of suppression, or the derivation of a power of suppression from a general procedural power in s 39 of the Act (according to the maxim *generalia specialibus non derogant*)".

26. Counsel for the respondent has also drawn attention to the ruling of CAS in *DFSNZ v. Gemmell*[10] that redaction of the athlete's name (in the absence of an agreed position) should be addressed to the CAS Court office "as this is a matter for them to decide". He also referred to rule 14.3.2 and submitted that the obligation to publish the athlete's

[9] ST 03/11 (20 June 2011) at paras. 55-71.
[10] CAS 2014/A/2 at para. 173.

name under that rule is that of DFSNZ and not of the Tribunal. The distinction, if accepted, would mean that the Tribunal's Decisions (both as to liability and sanction) would thereafter be referred to as *DFSNZ v. XYZ.* While the respondent's name would be on the DFSNZ web site, by virtue of rule 14.3.4 that information can only be kept on the website for the longer of one month or the duration of the period of ineligibility. That would at least ameliorate though not eliminate harm to the respondent's reputation.

27. We are attracted to the respondent's position as we think it grossly unfair and unjust to him that he should in effect be the guinea pig selected by DFSNZ to test the scope of SADR in New Zealand. However, we apprehend that our power to suppress the respondent's name is limited to what is disclosed in our Decision and that we have no power to direct DFSNZ not to exercise its powers under rule 14.3.2. We do however accept the submissions advanced for the respondent that we do have the power to declare that his name not be disclosed in this Decision and we exercise that power not to do so. We are mindful of the earlier decision of this Tribunal in *Bramley* but we are not bound by our earlier legal precedents and, having considered full argument from both parties in the present case and taking account of the unusual features described above of the circumstances leading to this case, we respectfully come to a different decision in the present case. We do not accept the submissions from DFSNZ that we cannot rely on our general powers to act as an independent adjudicative tribunal in order to refuse disclosure of the respondent's name in our Decisions, noting in this respect that to do so would preserve in perpetuity his status as a sports drug offender. We note in this respect that the express power of DFSNZ to publish the respondent's name on its website is subject to a severe temporal limitation which disclosure in our Decision would not have.

28. Our Decisions, both as to liability and sanction, will hereafter continue (in the case of the liability decision) and be (in the case of the sanction decision) intituled and known as *DFSNZ v. XYZ.*

Dated: 3 April 2019

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Sir Bruce Robertson

Chairman

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Alan Galbraith QC
Deputy Chairman

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Dr James Farmer QC
Deputy Chairman