BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND

ST 03/11

BETWEEN	**DRUG FREE SPORT NEW ZEALAND**
	Applicant
AND	**ANNA BRAMLEY**
	Respondent
AND	**ATHLETICS NEW ZEALAND**
	Interested Party

DECISION OF TRIBUNAL

Dated 20 JUNE 2011

Tribunal:	Nicholas Davidson QC (Deputy Chair) Anna Richards Ron Cheatley
Hearing:	By telephone conference on 25 May 2011 and in Auckland 26 May 2011
Present:	Anna Bramley, Athlete Paul David and Graeme Steel for Drug Free Sport New Zealand Aaron Lloyd and Kieran Donnelly, counsel for Athlete Scott Newman and Rebecca Hooper for Athletics New Zealand
Registrar:	Brent Ellis

DECISION OF TRIBUNAL

A INTRODUCTION

1. Drug Free Sport New Zealand ("DFS") made application for an anti-doping Rule violation proceeding, dated 28 April 2011, alleging that Anna Bramley competed at the Athletics New Zealand ("ANZ") Track and Field Championships in Dunedin on 26 March 2011 with the Prohibited but Specified Substance Canrenone (a metabolite of spironolactone) in her system.

2. The application alleged a breach of Sports Anti-Doping Rule 3.1.

3. The athlete did not contest the analysis and waived her right to have the "B" sample analysed.

4. The Tribunal made an order on 6 May 2011 provisionally suspending Ms Bramley from **5 May 2011**.

5. A therapeutic use exemption ("TUE") was granted following an application made **after** the drug test, for six months effective from **28 April 2011**.

B EVIDENCE

6. The hearing began with a teleconference on 25 May to take the evidence of Dr Lynne Coleman who was unable to attend the full hearing in Auckland on 26 May 2011.

Explanation by athlete for not listing her use of Canrenone, or seeking a TUE

7. She was diagnosed with a medical condition in 2005 and was referred to an endocrinologist. She was prescribed spironolactone and has taken it ever since.

8. The athlete knows of her primary obligation to avoid the unauthorised use of prohibited substances, but says it had never

occurred to her to consider her use of substances that are banned because they can mask other prohibited substances.

9. Further, she regarded her condition, and the prescribed medication, as detrimental to her performance, rather than enhancing. That is why she did not list it as something she had taken, when tested in Dunedin, and was required to disclose her use of all relevant substances.

10. For the same reasons she did not apply for a Therapeutic Use Exemption ("TUE") until after the positive test.

Her sporting and medical history

11. The athlete competed in equestrian sport and achieved at a high level, including National Young Rider, National Horse of the Year four times, and represented New Zealand on two occasions. She was a *"carded athlete"* for two years, and gained a Prime Minister's scholarship.

12. She attended a seminar conducted by the predecessor of DFS in 2003, but had no recollection of that. She remembers attending other drug education seminars.

13. When she went to work at the Millennium Institute she was referred to a prospective athletics Coach.

14. Her running career began in 2008, and in 2009 she competed in track and at longer distance, gaining a fourth place at the 2010 Nationals, winning at the Auckland Championships in 2010, and competing at an International event in Christchurch.

15. She also went overseas in 2010, training and competing with a group of elite athletes from New Zealand, but it was not a National team and she was not representing New Zealand.

Medical consultations

16. After she saw an endocrinologist in 2005 she was prescribed spironolactone by her family doctor at Kumeu and the

prescription was repeated when she later consulted doctors at the Apollo Centre, after she came to work at the Millennium Institute.

17. Dr Coleman explained her role as a General Practitioner and Sports Doctor with the Apollo Medical Centre, since 2005. She saw Anna in 2008 and 2009, and again in 2010.

18. When she was first consulted in 2008 she knew of the earlier diagnosis made by other doctors, and the prescription for spironolactone. She arranged that Anna undergo blood tests to check the efficacy of the drug.

19. Spironolactone is a diuretic and has other effects relevant to the athlete's condition. Dr Coleman's evidence is that it is not a performance enhancing substance. She says that it arguably has the opposite effect.

20. Dr Coleman says had she been aware that Anna was competing at national level she would have advised her to seek a therapeutic use exemption ("TUE"). She knew she had previously been an equestrienne, and that she worked with an athletics coach. There is nothing in the medical records to show a discussion between doctor and patient regarding the possible use of a prohibited substance, or the need for a therapeutic use exemption.

21. The application for a TUE, made after the positive test, and supported by Dr Coleman, recorded her regret at not knowing the level at which the athlete was competing, as she would have been advised to obtain a TUE. This is relevant to the testing regime, discussed below.

22. On the evidence, the athlete never addressed the possibility that she was taking a banned substance, despite the fact that she was competing at National level, and in her own words she was *"a little bit complacent"*. The fact the topic was not raised by or with Dr Coleman seems to have been some sort of corroboration in her own mind, but as a matter of logic that is difficult to understand when she had not contemplated that she may have

been taking a banned substance for some years. She could not therefore have held any expectation of the doctor.

23. She had never been previously drug tested.

The testing regime

24. Dr Coleman referred to the level at which athletes compete, which links to the obligations on athletes, and the operation of the drug testing regime by DFS.

25. DFS cannot test everybody, nor representatively, at all levels of sport. Practical decisions have to be taken in terms of resources available. Mr Steel for DFS explained that there are those who are *"front and centre"* of the anti-doping controls, and the athlete was one of those who could reasonably expect to be tested. There is a lower level of competition at which athletes are not, and are not expected to be, so vigilant and that is one reason a retrospective therapeutic use exemption is available. While the athlete fell within the *"front and centre"* category of athletes who may expect to be tested, it never occurred to her that she might run foul of the anti-doping regime for a masking agent. The doctor too did not recognise that she was one of those *"front and centre"*. We did not hear from the coach.

C SANCTION

26. Under Rule 14.4 of the Sports Anti-Doping Rules 2011 an athlete may be able to reduce or eliminate the period of ineligibility if the athlete can establish how the specified substance entered the athlete's body, and that the use was not intended to enhance sporting performance, or mask the use of a performance enhancing substance. If those elements can be established a standard period of ineligibility may be replaced with, at a minimum, a reprimand and no period of ineligibility, up to a maximum of 2 years ineligibility, depending on the degree of fault of the athlete.

Submission for athlete

27. Mr Lloyd as counsel founded his submissions on the fundamental proposition that Ms Bramley had been prescribed and had been taking spironolactone since 2005. This is accepted.

28. He then addressed whether the athlete had established that the medication was not intended to enhance sporting performance or mask use of a prohibited substance. The submission was made that *"she had not turned her mind"* as to whether this was a prohibited substance for two reasons, having *"always thought of her condition and medication as being detrimental to her performance as an athlete"* and that an experienced Sports Doctor continued to prescribe spironolactone without discussion about the need to obtain a therapeutic use exemption.

29. Mr Lloyd submitted that the athlete accepted her ultimate responsibility, but her long term use of the substance, since 2005, was relevant to her not turning her mind to whether it was a prohibited substance as she always saw it as, if anything, detrimental to performance, and that when she saw an experienced sports doctor the issue was not raised. He accepts that the evidence is that the most that could be said is that there was reference in the consultation to an international sporting competition which **may** have alerted the doctor to discuss the use of a prohibited substance and the need to obtain a therapeutic use exemption. However he was careful to make the submission; *"It is not the respondent's position that this is somehow Dr Coleman's fault"*.

30. The submission was made that a reprimand with no further period of suspension was appropriate in bringing into account the period of interim suspension beginning **5 May 2011**.

31. Counsel referred to the decisions of this Tribunal in ***Drug Free Sport New Zealand v Dawn Chalmers*** (ST 13/09, decision 11

March 2010) and ***Drug Free Sport New Zealand v Tom (Zig Zag) Wallace*** (ST 15/08, decision 5 March 2009). We discuss other authorities further but these two cases identify issues of relevance.

32. In **Chalmers** a senior athlete was mistakenly advised by a doctor not to use a prescribed drug close to or around competition, when it was prohibited in all circumstances. The athlete took no other steps to clarify the advice or her responsibilities. A three months suspension was imposed in addition to two months provisional suspension. The athlete knew of her use of a prohibited substance, but not that it must never be used, and it was her responsibility to make sure she was entitled to use it.

33. It was submitted that Ms Bramley's case was less serious than **Chalmers**, because she was not put on notice as to the status of her medication as a prohibited substance, whether by advice from her doctor or otherwise (Athletics New Zealand). Further, she was not in a registered testing pool of athletes and had not been previously tested. She was able to obtain a TUE.

34. In **Wallace** an athlete was wrongly advised about the status of a prohibited substance. A warning and reprimand was held appropriate.

35. Mr Lloyd submitted that this case is closer to **Wallace** than to **Chalmers**. The Tribunal does not agree. In **Wallace** the athlete raised the issue of doping with the doctor and got the wrong answer. It was submitted that here the failure to raise the issue with Dr Coleman was not a significant aggravating factor because Ms Bramley believed her medication could not be performance enhancing, and she *"assumed"* that Dr Coleman would be aware of any issue arising from its use. Unlike **Wallace**, the Tribunal repeats that it does not accept that there was or reasonably should have been any reliance placed on Dr Coleman. It did not enter the athlete's head to ask her about whether the prescribed drug was on the Prohibited List. It was not *"on her radar"* at the time.

36. Mr David for DFS made submissions regarding the athlete's onus when seeking a reduced sanction. He accepted the substance entered her system by use of the prescribed medication as does the Tribunal.

37. The Tribunal holds on the facts that there was no intention to enhance sports performance or to mask the use of a performance enhancing substance. The foundation for use was to treat a medical condition. There is nothing to indicate any possible intent to mask. We have considered her failure to list the substance when tested but that is consistent with a lax approach to her obligations and her never considering the possibility of breach except in the context of performance enhancement.

38. The Tribunal must then address the degree of fault of the athlete, beginning with the World Anti-Doping Code (WADA Code) and the Sports Anti-Doping Rules 2011, which incorporate the WADA Code, and are the applicable Rules in this case. Both the Code and the Rules impose strict obligations on athletes. Mr David referred to this as a regime of *"utmost caution"* and submitted that *"the athlete is expected to exercise the utmost caution to avoid a positive test result"*. He referred us to Articles 2.1 and 2.2 of the Code, definitions of "no fault" and "no significant fault" and to CAS authority.

39. Articles 2.1 and 2.2 impose a duty on an athlete to ensure no prohibited substance enters their body and the Articles adopt a rule of strict liability whereby it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish this type of violation. The phrase "*utmost caution*" does not appear in either of those Articles nor in the corresponding Rules 3.1 and 3.2 of the Sports Anti-Doping Rules nor their commentaries. However the phrase does appear in the definition of *"no fault or negligence"* in the Code and Rules. This requires an athlete who wishes to show no fault to establish that (she) *"did not know or suspect or could not reasonably have known or suspected even with the exercise of utmost caution"*

that she had used a prohibited substance. The definition of *"no significant fault or negligence"* requires the athlete to establish that 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 relation to the Anti-Doping Rule violation"*. Regard may be had to the approach to *"no fault"* and *"no significant fault"* which are not directly applicable to the circumstances we are considering here, but have some instructive value, in particular when medical consultation is involved in the narrative.

40. The following passage, refers to a "*duty of utmost caution"* on the athlete, from a Court of Arbitration for Sport (CAS) advisory opinion ***FIFA and WADA*** (CAS 2005/C/976 & 986, 21 April 2006) at para 73:

> "The WADC imposes on the athlete a *duty of utmost caution* to avoid that a prohibited substance enters his or her body. Case law of CAS and of other sanctioning bodies has confirmed these duties, and identified a number of obligations which an athlete has to observe, e.g., to be aware of the actual list of prohibited substances, to closely follow the guidelines and instructions with respect to health care and nutrition of the national and international sports federations, the NOC's and the national anti-doping organisation, not to take any drugs, not to take any medication or nutritional supplements without consulting with a competent medical professional, not to accept any medication or even food from unreliable sources (including on-line orders by internet), to go to places where there is an increased risk of contamination (even unintentional) with prohibited substances (e.g. passive smoking of marijuana). Further case law is likely to continue to identify other situations where there is an increased risk of contamination and, thus, constantly specify and intensify the athlete's duty of care. The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition..."

41. An athlete cannot avoid personal responsibility by *"leaving it"* to a doctor or other medical professional. Medical consultation may be relevant in evaluating the degree of fault. We have not been asked to consider whether the doctor in some way contributed to the violation, and such is expressly not alleged, but were asked to

consider whether the fact Dr Coleman is an experienced sports doctor somehow ameliorates the degree of fault of the athlete. We have already held otherwise.

42. Mr David for DFS submitted that when assessing the degree of fault we should examine the steps which the athlete could and should have taken, to understand her obligations, and whether the substance prescribed might be prohibited. His submission was that the fault was *"significant"* and should not be treated as trivial. He put it that the athlete *"appeared to have taken no steps at all"* to avoid taking a prohibited substance, by making her own check of the Prohibited List, or in discussion with her coach or doctor.

43. For that reason he submitted a warning alone would not be appropriate and with further reference to the authorities, discussed below, he submitted a period of ineligibility between three and six months should be considered, allowing for the provisional suspension from 5 May 2011.

44. He referred to the need for a message to athletes with particular reference to ***Drug Free Sport New Zealand v Dane Boswell*** (ST 01/09, reasons for decision 24 February 2009). We discuss this below.

45. While Mr Lloyd submitted that the issue *"genuinely fell between the cracks"*, the Tribunal concludes the cracks were of the athlete's own making. Her engagement of a coach, and consultation with a sports doctor suggests the issue of her medication in a doping context would crop up, but this does not relieve the athlete, who must be well informed of her obligations, and do all that is reasonably necessary to clarify her position. This never occurred to her.

46. With this conclusion we return to some of the authorities. ***International Tennis Federation v Stefan Koubek*** (decision 18 January 2005) involved a glucocorticosteroid. The athlete had not been attentive to an ATP tour briefing regarding doping. The

doctor made a mistake. He wrongly advised that the injected substance contained no prohibited substance. He gave the player *"a mistaken assurance"*. It was argued that the athlete was entitled to accept the doctor's credentials as a sports medicine specialist, but it was held the player failed to meet the *"utmost caution test"*. This case, like others, indicates the dangers of relying on a single source of medical advice without cross-checking. The decision refers to a decision where another tennis player, Mariano Puerta, had been suspended for nine months for testing positive to clenbuterol which had been prescribed by his doctor to treat an acute asthma attack (***ATP v Mariano Puerta***, decision 6 January 2004). In **Koubek** there was very little testing of the true position between doctor and patient, and no cross-checking. The Tribunal considered that the sanction should reflect in part a message to players that a *"cavalier attitude"* to the Programme is unacceptable. Three months ineligibility was imposed.

47. ***International Tennis Federation v Laura Pous Tio*** (decision 23 December 2008) has some features similar to this case and addressed the use of a medicine (ameride) prescribed for the athlete, which contained two prohibited substances (hydrochlorothiazide and amiloride). When the International Tennis Federation (ITF) Tribunal first heard the matter the substances were not *"Specified Substances"* and the Tribunal panel banned her for the then mandatory two year period for such substances. The player appealed unsuccessfully to the Court of Arbitration for Sport (CAS) who found her fault was too great to warrant a finding of "no significant fault" but CAS recommended that as these substances were to be reclassified as "specified substances" under the 2009 WADA Code, that she apply to the ITF to reconsider the two year ban and recommended that the ITF "look favourably" upon the application. After reconsidering the matter, the ITF Tribunal reduced the period of suspension to 18 months. The Tribunal considered the athlete had not exercised any reasonable level of

care and that her fault was significant. The fact the medication was prescribed and care was taken to comply with the programme was not enough.

48. The ITF panel noted that the CAS decision, in rejecting the athlete's argument of no significant fault. The athlete did not go to a sports medicine specialist who might be familiar with the Code and Anti-Doping Rules generally, she did not advise her doctor that she was subject to strict anti-doping rules nor discuss the list of prohibited substances under the programme, nor indicate she was subject to random drug testing. The extent of her inquiry was to ask the doctor whether the medicine would enhance her performance. The CAS Panel said *" . . . while it is understandable for an athlete to trust his or her medical professional, reliance on others and on one's own ignorance as to the nature of the medication being prescribed does not satisfy the duty of care . . ."*.

49. The player had failed to declare the medication on the doping control form, and offered no explanation for the omission which the ITF found extremely troubling, and that fact alone could go against the finding that her purpose in taking the medication was not to enhance her performance. By a narrow margin the player was held not to have taken ameride with the intent of enhancing her performance. The fault was *"significant"*, indeed *"very significant"*, and the responsibility of the player is to acquaint his or herself with the anti-doping requirements, and the Decision records at para 3.13.1:

> *"b. This is a very strict responsibility on all players, which is fundamental to the fight against doping and to the pursuit of clean competition in the sport of tennis. In the words of the CAS Panel in this case, it requires Players to 'investigate to their fullest extent that the medication does not contain prohibited substances'.*
>
> *c. If this responsibility is not respected, even if out of ignorance rather than in an effort to cheat, it means that players are competing with substances in their systems that are prohibited under the Programme, and therefore the results obtained are*

tainted. If the player involved happens not to be tested after the match in question, then this will remain undetected and the results will be allowed to stand when they should have been Disqualified under the Programme."

50. A two months suspension was imposed by an Association of Tennis Professionals (ATP) anti-doping Tribunal in ***ATP v Graydon Oliver*** (decision 6 February 2004) following the use of a herbal supplement that contained the prohibited substance hydrochlorothiazide. Whether the presence of the prohibited substance in the supplement was due to contamination or some other source was unknown. The Tribunal considered the labelling of the supplement to be misleading and noted it did not list that it contained hydrochlorothiazide as an ingredient. The ingestion was held inadvertent and a two month suspension was imposed under the relevant anti-doping rule.

51. We return to the decision of this Tribunal in ***Drug Free Sport New Zealand v Dane Boswell*** (ST 01/09, reasons for decision 24 February 2009) where a two months period of ineligibility was imposed on a rower who gave an out of competition test which disclosed the stimulant probenecid. The Tribunal considered no fault and no significant fault principles and applied the principle of lex mitior given the classification as a Specified Substance after the test was taken. The explanation was of an infected hand. His regular doctor was away so the rower went to another clinic. He told the doctor he was subject to drug testing but the doctor prescribed an antibiotic and a nurse gave him a single tablet of probenecid. The rower acknowledged going to an anti-doping seminar but thought it was fairly superficial, and the masking agent probenecid was not mentioned. The Tribunal concluded that the athlete had received appropriate drug education. His onus was to tell the doctor he was an athlete subject to sports drug testing, which he did not do. Nor did he advise the doctor to refer to the new MIS New Ethicals Catalogue, so this was not a case of trivial fault. He accepted he held the onus to make an inquiry about legitimate use, and failed to do so. A finding of failure of personal responsibility was made, and a sanction of

three months ineligibility was imposed. The Tribunal considered that a period of three months suspension was appropriate for that particular violation but reduced it to a period of two months. The reduction was not because the doctor bore some of the fault nor was it related to the athlete's level of fault (but rather had to do with issues relating to the athlete having not been provisionally suspended). The Tribunal said *"an athlete who has not alerted the doctor of his obligations under the Rules cannot hide behind the doctor's actions"*.

D DECISION ON SANCTION

52. The fact a substance is prescribed for a medical condition does not diminish the athlete's strict personal responsibility. The fact a sports doctor is consulted may be relevant if discussion about legitimate use takes place. It is for the athlete to initiate that. No fault attaches to the doctor here and the athlete's counsel fairly accepted that. We do not consider the simple fact of attendance on a sports doctor is enough, in particular when the athlete never turned her mind to legitimacy of use, and never addressed the masking element of doping controls at all.

53. The athlete is not a drugs cheat but she fell well short of addressing her responsibilities, and in truth did not address them at all despite having been a carded equestrienne.

54. A period of 3 months ineligibility is appropriate beginning on 5 May 2011 when the provisional suspension was imposed, thus up to and including 5 August 2011.

E PUBLICATION OF NAME

55. Under Rule 13.3.2 of the Sports Anti-Doping Rules 2011 ("The Rules" or "SADR") the Tribunal is required to publicly report its decision, but it was submitted by Mr Lloyd that there is a discretion as to publication of name.

56. Emphasis was laid on the personal and sensitive nature of the medical information, and the submission was made that there is

no public interest in publication of name. The first issue is whether there is a discretion.

57. Rule 23 (the "definitions" section) of the SADR defines *"public report"* as *"to disseminate or distribute information to the general public or Persons beyond those Persons entitled to earlier notification in accordance with Rule 17 (Confidentiality and Public Disclosure)"*.

58. Counsel for the athlete says this does not require publication of the **name** of the athlete and if that was intended the Rules would say so. It was submitted the *"information"* is about the result of the test, and the Tribunal decision.

59. Section 39 of the Sports Anti-Doping Act 2006 ("the Act") gives the Tribunal a discretion to *"determine its own practices and procedures"* and this was said to encompass a decision to withhold publication of name.

60. Alternatives were put forward by Mr Lloyd, either publication of the name but withholding details of the medical condition and medication so the description is of *"an unnamed medication for an unnamed medical condition",* or to provide details of the medical condition and medication, but withhold publication of the name.

61. Because there is relevance, in particular to women athletes who may be prescribed the same medication, it was submitted that the preferable course is to publish full details of the medical condition and medication.

62. A description of the medical condition is personal, but need not go beyond reference to the prohibited substance and its legitimate use to sufficiently inform the public, NSOs and other athletes and their support teams of what the case involves. The Tribunal decisions should be instructive.

63. Mr David for DFS agreed that *"sensitive private information"* should be protected in a manner consistent with obligations under

the SADR. He has no objection to publication of a Decision which redacts or does not refer to sensitive medical details, and refers to this Tribunal's decision in **Chalmers** (discussed above) and to ***Bouyer v UCI and WADA*** (CAS 2004/A/709).

64. Mr David submits that there is no discretion to withhold publication of name and that the Rules must be interpreted in the context of the WADA Code, consistent with the obligations imposed under the Code.

65. He refers to a consistency in practice of this Tribunal, and of Tribunals worldwide, that names be published. This fulfils the obligation of the Anti-Doping organisation responsible for results management under the Code to report the disposition of the matter, the Sport, and the name of the athlete or the person committing the violation, the substance and method involved, and the consequences – see Article 14.2.2 of the Code.

66. The SADR must implement the Code and arguably would be unlawful if they did not, and must be interpreted consistently with the Code (SADR 20.2.3). DFS must fulfil its obligation as an anti-doping organisation and signatory to the Code to implement anti-doping Rules which conform with the Code – Article 20.5 of the Code. The SADR are legislative in form and substance reflecting New Zealand's obligation to conform with the Code as a State Party to the UNESCO Convention.

67. The Tribunal has obligations to give effect to and implement the Code under Section 3 of the Act. The Tribunal must do all that is necessary to implement SADR under Section 38(a) of the Act and in determining its own Rules and practices to implement SADR.

68. Without express power to suppress the name of a party, publication of which is submitted to be an essential part of the Decision, Mr David submitted the whole of the Decision including name should be published. He submits the publication must include the information required by Article 14.2.2 if the Code is to be implemented.

69. Under SADR 17.1 DFS will not identify the athlete in the results management process **until** the Decision of the Tribunal has been publicly reported. It was submitted that non-publication is impractical where a finding of an anti-doping Rule violation leads to disqualification, and reallocation of medals.

70. Mr David submitted that the Decision regarding publication should be consistent with the obligations discussed above but personal and medical details should exclude reference to the athlete's medical condition.

71. The Tribunal adopts that course and this Decision is limited to a description of the Prohibited (Specified) substance holding that it is required to publish the name of the athlete. This Decision follows the submission by Mr David, and thus one of the alternatives put forward by Mr Lloyd on behalf of the athlete.

E FORMAL DISPOSITION

72. Since her provisional suspension on 5 May 2011 the athlete checked with Athletics New Zealand as to where she could compete, and she has run in *"Total Sport"* organised events, which are competitive, but are not under the auspices of Athletics New Zealand. She has missed the Huntley 10km race, and she is now looking to train cross country until track resumes in or about October.

73. A period of 3 months ineligibility is imposed up to and including 5 August 2011, thus including the period of provisional suspension.

Dated this 20th day of June 2011

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Nicholas Davidson QC
Chairperson (for the Tribunal)
Anna Richards
Ron Cheatley