BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 04/18**

BETWEEN	**DRUG FREE SPORT NEW ZEALAND**
	Applicant
AND	**A MINOR**
	Respondent
AND	**NATIONAL SPORTING ORGANISATION**
	Interested Party

DECISION OF SPORTS TRIBUNAL
21 MAY 2018

Tribunal	Sir Bruce Robertson (Chairman) Rob Hart Ruth Aitken
Participants	Paul David QC, counsel for Applicant Jude Ellis, Drug Free Sport NZ Respondent Steph Bond, counsel for Respondent Representative for National Sporting Organisation
Registrar	Neela Clinton

Background

1. The respondent[1] is 16 years old and is a representative player for various sports at a national age group level. At the time of his positive test he was playing for a regional senior team in a New Zealand Championship tournament held in February 2018.

2. The respondent was tested on 18 February 2018. On the doping control form he listed he had one serve of "Kick Pre-Workout".

Proceedings

3. On 29 March 2018 Drug Free Sport New Zealand (DFSNZ) filed proceedings alleging a violation of Rule 2.1 of the Sports Anti-Doping Rules 2018 (SADR) evidenced by the presence of a prohibited substance in the sample collected on 18 February 2018.

4. The analysis of his sample confirmed the presence of the prohibited substances 1,4 dimethylpentylamine, a specified stimulant under class S6b of the Prohibited List 2018.

5. On 6 April 2018 without opposition the respondent was provisionally suspended. On 18 April 2018 a sample of the product was re-tested which confirmed the presence of the prohibited substance.

6. On 4 May 2018 the respondent filed his Form 2 admitting the violation and provided material in support. The issue for the Tribunal was to determine the penalty to be imposed for the violation.

7. The relevant starting point is SADR 10.2. As DFSNZ did not seek to establish that the respondent's conduct was intentional, the two year period of ineligibility under SADR 10.2.2 applies unless one of the defences under SADR 10.5 is established.

8. On 17 May 2018 counsel filed a joint memorandum in relation to sanction. The redacted memorandum is annexed to this decision. It was based on an agreement there was no intentional use of a specified substance to enhance sports performance and to reduce the two year sanction by establishing a defence under Rule 10.5. It was agreed that the respondent's degree of fault was not significant and fell at the lower end of the range of the defence. This enables a sanction range from a reprimand and no period of ineligibility to a maximum two years of ineligibility to be imposed.

[1] The respondent is a minor. It was agreed by the parties to publish a decision that would not identify the athlete, only the circumstances of the case that led to the violation.

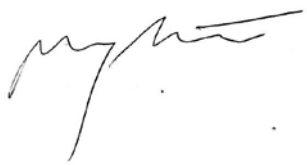
9. The Tribunal also has a discretion to backdate the start date of any period of ineligibility to as early as the date of the sample collection which was 18 February 2018.

10. 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 an order as proposed.

Orders

11. A four month period of suspension is imposed on the respondent which will end on 26 June 2018, following credit for the period of provisional suspension served and backdating for timely admission.

Dated: 21 May 2018



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Sir Bruce Robertson
Chairman

ANNEXURE

THE NEW ZEALAND SPORTS TRIBUNAL ST04/18

BETWEEN	DRUG FREE SPORT NEW ZEALAND Applicant
AND	A Minor Respondent
AND	NATIONAL SPORTS ORGANISATION Interested Party

JOINT MEMORANDUM OF COUNSEL IN RELATION TO SANCTION

17 May 2018

Counsel: Stephanie Bond
New Zealand Rugby Players Association
PO Box 109 759
Newmarket
Auckland 1149
Ph: (09) 630 3075
Email: steph.bond@nznrpa.co .nz

Counsel: Paul David QC
PO Box 4472
High Street
Auckland 1140
Ph: (09) 379 5589
Fax: (09) 379 5590
Email: paul@pauldavid.co.nz
Isaac Hikaka (Lee Salmon Long)

1. This memorandum is filed by the Applicant and Respondent to record the agreement which they have reached on the period of ineligibility which they consider appropriate for the violation of SADR 2.1 admitted by the Respondent, in the particular circumstances of this case. The parties consider that a period of ineligibility of 4 months would be appropriate. They expressly acknowledge that the Tribunal has to consider the agreed sanction and decide whether it is appropriate under the SADR.

Background

2. The respondent is 16 years old. He plays representative sport for New Zealand junior teams. He is also a member of an Ul7 Development Academy and has played age-group representative sport for Wellington. At the time of the test which returned the adverse analytical finding he was playing for a Men's Senior Team in the New Zealand National Championships. The tournament took place in February 2018.

3. The Respondent was tested on 18 February 2018. The analysis of his sample confirmed the presence of the prohibited substances 1,4 dimethylpentylamine. This is a specified stimulant prohibited under S6b of the Prohibited List 2018. The Respondent was provisionally suspended on 6 April 2018.

4. In his Form 2 the Respondent has admitted the violation under SADR 2.1 for the presence of the prohibited substance in his sample.

Circumstances of Violation

5. In his evidence the Respondent explains that he took a drink offered in a drink bottle by a team member on 15 February 2018 after one of the tournament games as his team was recovering and preparing to play the second game of the day. He thought that the drink was Powerade as it was yellowy in colour. He does not take supplements and is always very careful about what he consumes. Therefore, once he later learned that the drink was a pre-work out

drink called KICK pre-work out, he did not drink it again when offered. DFSNZ accepts that this drink is the likely source of the prohibited substance.

6. The Respondent's conduct in taking the drink without any enquiry involved a careless mistake. DFSNZ does not seek to establish that his conduct was "intentional" under SADR 10.2.3. This means that the applicable period of ineligibility is 2 years unless the Respondent can establish one of the defences under SADR 10.5. While the Form 2 does not refer specifically to defences, the Respondent relies on the no significant fault defence SADR 10.5.1.1 which is applicable to violations of SADR 2.1 involving specified substances.

7. Under the defence under SADR 10 .5.1.1 the respondent has to establish his fault was not significant in the context of the strict standard of conduct required by the SADR. The exercise of considering the athlete's degree of fault involves applying the definition of "fault" to the particular circumstances which led to the violations and examining the reasons why the athlete failed to meet the standard of conduct required by the SADR. The definition focuses on the degree of risk which should have been perceived by the athlete in the circumstances and the level of care and investigation undertaken by the athlete in relation to the level of risk which a reasonable athlete would have perceived. The age of the athlete is a relevant consideration in assessing perception of risk and conduct. If the conduct is found to involve no significant fault the sanction will be fixed by reference to the athlete's degree of fault.

The Fault in this case

8. In this case the careless mistake involved the Respondent taking a drink in competition which was offered by a more senior team member without making any inquiry as to its contents as he believed it was Powerade. The senior team member had purchased the product which was in the drink. For any athlete subject to the strict personal obligations under the SADR this conduct is careless particularly where the player is in a competition, when it is

to be expected that those competing will take particular care. A player should take the basic step of avoiding taking drinks in competition without making any inquiry as to their contents, and the exercise of proper caution in competition should involve making sure of what is in drinks which are to be consumed. However, while the SADR impose strict standards, the degree of fault has to be considered in the particular circumstances. A "one-off" mistake of this nature by a young player involves a lower degree of fault than if it was committed by a more senior player. This is primarily because a young player, even one who has the experience of elite competition and some anti-doping education, is likely to have a lower perception of risk and to be more likely to trust a more senior team member or official. It should be noted that the problems with products like Kick pre-work out are very well known and that any inquiry of DFSNZ about Kick Pre-Work out by any member of the team or its management would have produced the advice that a product advertised as containing DMHA "the strongest new stimulant on the market" had obvious risks and should not be used.

Agreement on sanction between Applicant and Respondent

9. After considering the circumstances of the case in the light of the Respondent's obligations under the SADR and the definition of fault and the range of Sports Tribunal decisions in relation to positive tests for substances contained in pre work-out stimulants and boosters, DFSNZ reached the view that, as a result of the circumstances of the violation and the Respondent's age and relative inexperience, the Respondent's fault in connection with the violation was not significant and that the degree of fault fell towards the lower end of the range of sanctions available under the defence. That range of sanctions might be broadly divided up into 3 bands reflecting low, normal and serious fault - 0-8 months, 8-16 months and 16-24 months. DFSNZ considered that the Respondent's fault in this case was in the lower band covered by the range of sanctions.

10. DFSNZ and the Respondent and his advisers have agreed that a sanction of 4 months would be appropriate in the circumstances of this case and they ask the Tribunal to consider making a decision to impose this period of ineligibility. Both parties are aware that this sanction is lower than sanctions imposed in other cases involving the use of work out boosters but consider that it is appropriate in the particular circumstances of a single careless mistake by a young player who did not source the product which was in the drink. Applying the period from 16 May 2018 produces an end date of 16 September 2018 for a 4 months' period of ineligibility.

Credit for Provisional Suspension and discretion to backdate for timely admission

11. After the period of ineligibility has been determined the provisions allowing credit for provisional suspension and for the discretion to back date the starting date for the commencement of the period of ineligibility for timely admission under SADR 10.11.2 and SADR 10.11.3.

12. The Respondent is entitled to credit against the period of ineligibility for his provisional suspension under SADR 10.11.3. That is a period from 6 April 2018 until the date of the decision. If the period of ineligibility is imposed on 16 May 2018 the period of the credit would be 40 days. The reduction of the period of ineligibility for this credit produces a period of ineligibility which would be 82 days long.

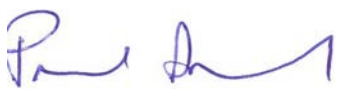
13. The Respondent has admitted the violation in his Form 2 and this is a timely admission which allows the Tribunal to exercise a discretion to start the period of ineligibility from the date of sample collection at the earliest under SADR 10.11.2. If that discretion is exercised the athlete has to serve at least half the period of ineligibility going forward from the day the sanction is imposed. The athlete would have to serve 41 days which is half the period of ineligibility imposed after credit for the period of provisional suspension starting from 16 May 2018. If the Tribunal

considered that back dating for the timely admission was applicable to the fullest extent available, the period of ineligibility would end on 26 June 2018. The Applicant and Respondent have agreed that this backdating would be appropriate if the Tribunal is minded to exercise its discretion in that way.

14. If the Tribunal accepts that the sanction put forward by the parties is appropriate in the circumstances of this case the result would be the Respondent would be subject to a period of ineligibility of 4 months which would mean that, with credit for the period of provisional suspension and back dating for timely admission, the period would end on 26 June 2018.

15. The Respondent is a minor. The mandatory publication under SADR 14.3.2 is not applicable under SADR 14.3.6. Publication is optional and is to be proportionate to the facts and circumstances. This is a matter for the Tribunal. DFSNZ and the Respondent consider that the Tribunal decision could be published in a form which removes the identity of the athlete and if necessary other factors which would identify him such as the sport played. DFSNZ considers that the decision should be published in an appropriate manner because the circumstances have general importance for athletes. The Respondent and his family are extremely concerned about the adverse effect the publication of the decision in a form which allows him to be identified may have on him.

Paul David QC



Counsel for DFSNZ

17.5.18

Stephanie Bond

Counsel for the Athlete