BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 01/2023**

BETWEEN **DRUG FREE SPORT NEW ZEALAND**

Applicant

AND [redacted]

Respondent

DECISION ON COSTS APPLICATION
19 October 2023

Tribunal Panel John Macdonald, Chair
Warwick Smith, Deputy Chair
Helen Tobin, Member

Representation David Bullock and Kate Hursthouse, counsel for Applicant
Paul David KC and Sarah Wroe, counsel for Respondent

Registrar Helen Gould

1. On 3 October 2023, the Tribunal issued a decision on an alleged anti-doping matter between Drug Free Sport New Zealand (DFSNZ) and an unnamed amateur golfer.

2. The Tribunal decision concluded that DFSNZ had discharged its burden to prove that an anti-doping rule violation had occurred, and that the athlete had a prohibited substance in her system, but the athlete established that the ingestion was unintentional.

3. The onus was then on the athlete to prove no fault or negligence or no significant fault or negligence and while she was able to establish no significant fault or negligence, she ultimately failed to establish that she bore no fault; this resulted in a sanction of an ineligibility period of six months backdated to the date of her provisional suspension and the removal of her title.

4. Neither party raised the issue of costs at the hearing held on 21 and 22 September 2023 and, as a consequence, the Tribunal took its traditional position that costs should lie where they fell. When the Tribunal released the decision and made its orders, the Tribunal effectively became functus officio.

5. On 4 October 2023, counsel for the athlete, Ms Wroe, applied to the Tribunal for leave to file submissions on the issue of costs. The request was considered and allowed by the Tribunal with no opposition from DFSNZ. Accordingly, the issue of costs will be addressed by the Tribunal.

6. Rule 29 of the Tribunal Rules provides for a discretion to award costs to 'any' party which would include DFSNZ. The Tribunal notes its own decision of *Motorcycling New Zealand v Curr ST 19/07* where it referred to the principal of the 'loser paying the winner' as not being an absolute rule and the Tribunal takes this into account when considering the arguments submitted by both parties.

7. DFSNZ points out that there is no provision in the Sport Anti-Doping Rules (SADR) for awards of cost to be made against the National Anti-Doping Organisation and the Tribunal has never been asked to consider an award of costs against DFSNZ; DFSNZ says it must be an exceptional case for the cost award to be made[1]. At [2] of the

[1] DFSNZ submissions on costs at [6].

athlete's submissions it was acknowledged that cost orders are not usually made in anti-doping cases.

8. In *Curr 01/08* the Tribunal was clear that substantial awards of cost will only be made in exceptional circumstances.[2]

9. Counsel for the athlete argues that this case has some particular considerations that are relevant to the discretion on costs. These include that the athlete had to prove a negative that she did not intentionally ingest the prohibited substance. That the athlete chose to refer to scientific evidence, while unusual, does not create an exceptional situation. After all the SADR provides the onus is always on the athlete once the presence of the substance is established.

10. The athlete submits that DFSNZ did not fulfil its obligations to act in good faith and co-operate with her, pointing to examples of delay and not fully investigating the matter and that this should be a further consideration for the Tribunal when applying its discretion.

11. The Tribunal considers that both parties could have done more to ensure the timely progress of the case. The athlete states that the hair analysis was commissioned following the filing in July of DFSNZ's opening statement which called for concrete and persuasive evidence. However, the Tribunal notes that the issue of hair analysis was raised by Mr Morrow in his statement dated 25 May 2023 and action could have been taken on this point much earlier so as to avoid the need for the original hearing date to be vacated.

12. The Tribunal acknowledges that DFSNZ may have done more to investigate whether the ingestion was intentional and indicated prior to the hearing whether that was still being pursued (had the decision been made earlier the athlete might not have needed to proceed with the hair analysis), and it may have been possible to have notified the athlete of the positive result earlier.

13. Nonetheless, as the Tribunal concluded that the athlete was unsuccessful in her attempt to establish no fault or negligence and she had a sanction imposed upon her,

[2] *Curr v Mortocycling New Zealand ST 01/08* at [56].

the proceeding was not without merit. The Tribunal is also not persuaded that DFSNZ failed to act in good faith.

14. The athlete has applied for an award of costs of some $14,538.12. This is a significant sum. The Tribunal has made only a handful of cost awards in its history, and nothing in the region requested. The Tribunal reminds itself of comments it made in *Roy v Canoe Racing New Zealand ST 05/15* that '[i]n cases where costs have been awarded the level of the award has been modest and the Tribunal has not regarded it as appropriate to apply the principles or amounts of cost that would be awarded in the Courts'.

15. The Tribunal acknowledges that the athlete, a recreational athlete who did not need to prove the source of the ingestion, went to considerable expense through this process and recognises that she had to go some distance to establish that she bore no significant fault. However, the Tribunal is not satisfied that this is an exceptional case where costs should be awarded. It is noted that the athlete has benefitted from DFSNZ's Legal Assistance Fund to the sum of $2,000.

16. Viewing the Tribunal's decision against the principle of 'the loser paying the winner' DFSNZ proved the ADRVs, in that the prohibited substance was in the athlete's system, but it failed to prove the ingestion was intentional. As for the athlete, her primary position was that she bore no fault. The Tribunal held that she had not proved that, but she had proved that there was no significant fault. When it came to sanction, the period of ineligibility imposed was at the outer range submitted to be appropriate by Mr David. That was much less than what was advocated by DFSNZ, but the athlete's result was disqualified. Opinions as to how the Tribunal's decision might be viewed from the perspective of a winner or a loser might well differ but either way the Tribunal again is not persuaded that it justifies an award of costs against DFSNZ.

ORDERS

17. The Tribunal orders that costs will lie as they fall.

Dated: 19 October 2023

John Macdonald
Chair