

BETWEEN **DRUG FREE SPORT NEW ZEALAND**
Applicant

AND **MICHAEL BUTSON**
Respondent

AND **NEW ZEALAND RUGBY LEAGUE**
Interested Party

**DECISION OF SPORTS TRIBUNAL
DATED 3 May 2017**

Tribunal: Sir Bruce Robertson (Chairperson)
Paula Tesoriero
Georgina Earl

Participants: Paul David QC, counsel for Applicant
Graeme Steel and Jude Ellis, Drug Free Sport New Zealand
Andrew McCormick, counsel for Respondent
Michael Butson, Respondent
Kevin Bailey, New Zealand Rugby League

Registrar: Matt Skinner

Proceedings

1. An application for the provisional suspension of Michael Butson was filed by Drug Free Sport New Zealand (DFSNZ) on 12 December 2016. DFSNZ alleged that Mr Butson had breached Rule 2.1 of the Sports Anti-Doping Rules 2016 (SADR) as evidenced by the presence of a prohibited substance, higenamine, in a sample taken from him out of competition on 22 September 2016.
2. Mr Butson requested an analysis of his "B" sample, which confirmed the presence of higenamine.
3. Mr Butson was provisionally suspended without opposition on 19 December 2016.
4. The matter was set down for hearing on 22 March 2017. Shortly before this the parties requested an adjournment which was granted until 19 April.
5. On 9 April, the parties requested three further weeks to prepare the matter for hearing. The Tribunal agreed and the matter was subsequently adjourned to be heard on 28 April.
6. On 27 April, a joint memorandum was provided to the Tribunal on behalf of DFSNZ and Mr Butson. The memorandum is **annexed** to this decision.

Background

7. Mr Butson is a 22 year old rugby league player who has represented his province and New Zealand at age group level. He was drafted into the Melbourne Storm junior development squad from 2011 to 2014 where he was introduced to a "very detailed supplement regime by the club" under the guidance of training and medical staff.
8. Due to family commitments, Mr Butson resigned his contract with the Melbourne Storm in 2014 but continued to play for other Australian club teams in the Australian rugby league State competitions. Mr Butson returned to New Zealand in 2016 and was selected to play for the Canterbury Bulls provincial team in the New Zealand Rugby League National Provincial Competition. Mr Butson was tested after a training session on 22 September that resulted in a positive result for higenamine.

Higenamine

9. DFSNZ accepted that the source of higenamine in Mr Butson's system was a pre-workout supplement called "The One 2.0" which he had purchased at a retail outlet in Melbourne in January 2016 on the recommendation of a family friend. Mr Butson brought the supplement with him to New Zealand. He said he took the supplement to give him an energy boost between working as a landscape labourer and rugby league training but never before games. Higenamine was not disclosed as an ingredient on the supplement container but it would appear that higenamine is derived

naturally in a number of plants including Nandina Domestica which was listed as an ingredient.

10. Higenamine is said to be a Beta-2 agonist. WADA's 2016 Prohibited List, which was the relevant list at the time of the violation, prohibits at all times "All beta-2 agonists, including all optical isomers, eg. d- and i- where relevant" under class S3 as specified substances. The 2017 Prohibited List was amended to specifically list higenamine, together with a number of other substances, as an example of a Beta-2 agonist.

SADR Provisions

11. DFSNZ did not seek to establish that Mr Butson's conduct was intentional. Accordingly, the period of ineligibility under SADR 10.2.2 of 2 years' ineligibility applied unless one of the defences under SADR 10.5 is established.
12. DFSNZ accepted that Mr Butson returned positive test due to Mr Butson taking a pre-work-out called "The One 2.0". The packaging did not list higenamine as one of the ingredients. DFSNZ accepted that the supplement was "contaminated" in terms of the definition which applies to the defence under SADR 10.5.1.2. This provision reads:

10.5.1.2 Contaminated Products

In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault."

[Comment to Rule 10.5.1.1: In assessing the Athlete's degree of Fault, it would, for example, be favourable for the Athlete if the Athlete had declared the product which was subsequently determined to be contaminated on his or her Doping Control form.]

13. "Contaminated Product" is defined as "a product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search".
14. Mr Butson also sought reliance on the defence contained in SADR 10.5.1.1 to reduce the period of ineligibility. This provision reads:

"10.5.1.1 Specified Substances

Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

15. The two defences are substantially the same in this case where the prohibited substance was a specified substance. The common requirement is that Mr Butson must establish how the substance came to be in his system and that his fault in breaching the SADR was not significant. The exercise of considering the athlete's degree of fault involves considering the conduct of the athlete in the particular circumstances which led to the athlete's violation. If the athlete can establish no significant fault or negligence, then the Tribunal should assess the athlete's degree of fault in determining the appropriate sanction.
16. In relation to SADR 10.5.1.2, the athlete must also prove the specified substance came from a "Contaminated Product".

Discussion

17. The Tribunal considered the joint memorandum of counsel in relation to sanction dated 27 April 2017. The memorandum set out the competing interests in this matter and included a proposed sanction which both parties supported.
18. The Tribunal is open to parties making joint submissions which include a suggested sanction, but it is for the tribunal to make the final decision as to the appropriate sanction having taken into account the circumstances of the case.
19. Having considered the comprehensive and reasoned memorandum, the Tribunal considered it fair, just and reasonable in the circumstances to impose suspension for a period of nine months.
20. The Tribunal also agreed it appropriate that the period of ineligibility is backdated to the date of sample collection (22 September 2016).

Orders

21. Mr Butson is suspended for a period of nine months which will conclude on 8 July 2017.

Dated 3 May 2017



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Sir Bruce Robertson
Chairperson

IN THE NEW ZEALAND SPORTS TRIBUNAL

ST18/16

BETWEEN DRUG FREE SPORT NEW ZEALAND
 Applicant

AND MICHAEL BUTSON
 Respondent

AND NEW ZEALAND RUGBY LEAGUE
 Interested Party

JOINT MEMORANDUM OF COUNSEL IN RELATION TO SANCTION

27 April 2017

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1. This memorandum is filed on behalf DFSNZ and Michael Butson to record the agreement between DFSNZ and Mr Butson under which Mr Butson has agreed to accept a sanction of 9 months' ineligibility in respect of the violation of SADR 2.1. DFSNZ and Mr Butson ask that the Tribunal makes orders imposing the sanction under the SADR in accordance with that agreement.¹
2. Mr Butson tested positive for *higenamine* after an out of competition test on 22 September 2016. *Higenamine* was a specified substance prohibited at all times in and out of competition under S3 Beta - 2 Agonists under the Prohibited List 2016. As a result of the positive test Mr Butson was provisionally suspended on 19 December 2016. After service of the application for anti-doping rule violation proceedings Mr Butson admitted the violation in his Notice of Defence filed on 3 February 2016.
3. At the time of his test Mr Butson was training for rugby league. In 2016 he had played for the Canterbury Bulls representative team in the NZRL National Provincial competition. He had returned to New Zealand in 2016 after a period of about 5 years playing rugby league in Australia including a period of about 2 years under contract at the Melbourne Storm playing in U18, U20 and NSW Cup feeder teams. He resigned his junior contract with Melbourne Storm when his daughter was born in 2014. He came back to New Zealand in April 2016 when his relationship with his partner ended. He is 22 years of age and his ambition is to secure a professional contract.
4. DFSNZ does not seek to establish that the violation was "intentional" as defined under SADR 10.2.3. Accordingly the period of ineligibility under SADR 10.2.2 of 2 years' ineligibility applies unless one of the defences under SADR 10.5 is established.

¹ While the imposition of sanctions by NADOs which have been agreed with athletes is common in some national systems under which the Code has been implemented, under New Zealand system the Tribunal is responsible for hearing alleged violations and imposing sanctions and should in DFSNZ's view make orders imposing sanctions where DFSNZ and an athlete have reached an agreement on the applicable sanction. This is consistent with the way in which CAS has made awards on appeals in doping cases at the request of the parties which record an agreement on the outcome/ sanctions where it was satisfied that the agreement was freely entered into in good faith under Swiss law.

5. Mr Butson advanced the defences under SADR 10.5.1 to reduce the period of ineligibility. The sanctions hearing was scheduled to take place before the Tribunal on 22 March 2016. However the hearing has been adjourned since 17 March 2016 at the request of Mr Butson to allow him to consider whether he wished to withdraw his admission of the violation. This situation arose because Mr Butson became aware of a decision by a UEFA Tribunal² in which a player was found not to have committed a violation where his sample had been found to contain *higenamine* because the tribunal considered that there was uncertainty as to the status and placement of *higenamine* on the Prohibited List 2016. WADA has confirmed to DFSNZ that *higenamine* was in its view correctly considered to be prohibited under the Prohibited List 2016 as a Beta-2 Agonist (as notified by the laboratory to DFSNZ). Mr Butson after considering his position with his legal advisers has confirmed that he does not wish to withdraw his admission and seek to contest the violation.
6. At the time of the positive test Mr Butson was taking a pre-work-out supplement manufactured by BPM Laboratories called "The One 2.0". This supplement was the origin of the positive test. The packaging did not list *higenamine* as one of the ingredients. While it did list *nandrina domestica* (and a search for this plant might have led to it being identified as a source of *higenamine*) it is accepted that the supplement was "contaminated" in terms of the definition which applies to the defence under SADR 10.5.1.2.
7. Under SADR 10.5.1.2 if Mr Butson can establish that his fault was not significant, the period of ineligibility will be between, at a minimum, a reprimand and no period of ineligibility and, at a maximum, 2 years of ineligibility depending on the athlete's degree of fault. The exercise of considering the athlete's degree of fault involves considering the conduct of the athlete in the particular circumstances which led to the athlete's violation.
8. Mr Butson was introduced to a detailed supplement regime when he was a contracted player at the Melbourne Storm. He was given supplements and nutritional advice by the

² Decision of UEFA Control, Ethics and Disciplinary Body in Mamadou Sakho 7 July 2016.

training and medical staff. He continued to purchase supplements after he left the Storm in 2014. He purchased the supplements he used from retail stores not over the internet.

9. Mr Butson purchased a container of the supplement "The One 2.0" in Melbourne at a retail store in January 2016. He started using it in his pre-season training in 2016. He was initially planning to play in Melbourne. However, when his relationship ended in February 2016 he returned to Kaiapoi in April 2016. He played the 2016 season for the local club. He kept the container of the supplement and continued to use it before his work-outs. He was using it in this way when his sample tested positive.
10. At the time of the test on 22 September 2016 Mr Butson disclosed the supplement that he was taking on the Doping Control Form.
11. DFSNZ has reviewed the facts and circumstances of this case. It has also considered relevant Tribunal decisions (in particular the recent decision of the Tribunal in *DFSNZ v Catoto* in which the Tribunal described the fault of the athlete who took a contaminated performance booster in competition as "normal" rather than significant and imposed a period of ineligibility of 12 months), some CAS awards, and decisions in other jurisdictions. As the Tribunal (and CAS) have observed on several occasions (and the SADR definitions of fault make clear) each case turns on its own particular circumstances.
12. Mr Butson is a relatively young player although he has a good deal of experience in rugby league. Since leaving the professional environment at the Melbourne Storm, he appears to have relied generally on the safety of supplements purchased at retail outlets. To an extent this trust in supplements may have in part resulted from Mr Butson's previous experience of a nutritional and supplement regime in a professional environment. Under that regime he was able to feel confident in the supplements he was taking. However, the risks with supplements which claim to boost performance are well known and it is reasonable to expect athletes who are proposing to take a supplement like "The One 2.0" to make proper inquiries about the supplement.

13. DFSNZ has reached the view that if Mr Catoto's fault was found to be "a normal degree of fault" and not significant fault by the Tribunal, then it is appropriate to apply a similar assessment of fault in Mr Butson's case. As the Tribunal observed in *Catoto*, Mr Butson might, like Mr Catoto, be described as "another person who was unmindful of his duty and insufficiently careful in his acquisition and use of the substance" which produced the positive test. Although *higenamine* is prohibited in and out of competition, the advertised qualities of the product Mr Butson took (and the added *higenamine*) are those of "boosters" for work-outs and training. It is reasonable for an athlete to have a somewhat lower perception of risk where he or she takes such products out of competition than if the athlete is taking them in competition.³ At the time he was taking the supplement Mr Butson's personal life was at a low ebb and this may have contributed to his failure to take proper precautions. In addition, the sense of security created by his time in a professional set-up when nutritional and supplement advice was available may also provide some explanation for his failure to take steps to check on the supplement which he brought back to New Zealand.

14. After further consideration of the facts and circumstances DFSNZ decided to propose a sanction of 9 months for the violation under SADR 2.1 for Mr Butson to consider. Mr Butson has considered this proposal with his legal representative. He has agreed to the imposition of this period of ineligibility.

15. The discretion to allow the period of ineligibility to start as early as the date of sample collection under SADR 10.11.2 is available because Mr Butson promptly admitted the violation when confronted with it. DFSNZ agrees that in the circumstances of this case the period of ineligibility imposed can be back-dated to the date of sample collection which is 22 September 2016.

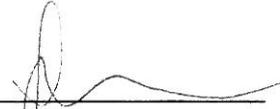
³ In *Catoto* the athlete took the prohibited substance to boost performance in competition.

16. Mr Butson has also been provisionally suspended since 19 December 2016 and is entitled to receive credit for this period of provisional suspension against the period of ineligibility imposed under SADR 10.11.3. The period of provisional suspension served as at 27 April 2017 is 4 months and 8 days.
17. Where the period of ineligibility imposed is back-dated for the prompt admission under SADR 10.11.2, Mr Butson has to serve at least one half of the period of ineligibility imposed from the date it is imposed.⁴ With credit for the provisional suspension the remaining period to be imposed is 4 months and 22 days and Mr Butson must serve half of this period going forward from the date on which the sanction is imposed.
18. DFSNZ and Mr Butson have accordingly agreed that Mr Butson will be sanctioned with a period of 9 months' ineligibility for the violation under SADR 2.1 and this period of ineligibility will come to an end on 8 July 2017. DFSNZ and Mr Butson ask the Tribunal to make orders imposing the period of ineligibility⁵ which has been agreed.



P W David QC

Counsel for DFSNZ



Andrew McCormick

Counsel for Michael Butson

27th Apr 2017

⁴ Under the NZ system the sanction will be imposed when the Tribunal makes the orders confirming the agreement.

⁵ The orders should include wording reflecting the prohibition against participation under SADR 10.12.1.