BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 15/15**

BETWEEN	**DRUG FREE SPORT NEW ZEALAND**
	Applicant
AND	**MARK SPESSOT**
	Respondent
AND	**CYCLING NEW ZEALAND**
	Interested Party

DECISION OF SPORTS TRIBUNAL
23 March 2016

Hearing:	21 March 2016 in Auckland
Tribunal:	Sir Bruce Robertson (Chairperson) Dr Jim Farmer QC Georgina Earl
Present:	Paul David QC, counsel for Applicant Graeme Steel, Drug Free Sport NZ Mark Spessot, Respondent (by telephone) Chris Patterson and Nicola Hartwell, counsel for Respondent Hughie Castle, Cycling New Zealand (by telephone)
Registrar:	Megan Lee-Joe

Proceedings

1. Drug Free Sport New Zealand (DFS) alleged that Mark Spessot committed a violation of Rule 2.1 of the Sports Anti-Doping Rules 2015 (SADR) as evidenced by the presence of two prohibited substances in a sample taken from him in competition on 19 September 2015.

2. As a non-National Level Athlete, Mr Spessot exercised his right to apply for a retroactive Therapeutic Use Exemption (TUE) following notification of the positive test. On the basis that the medical information provided by Mr Spessot's doctor did not satisfy the World Anti-Doping Agency (WADA) International Standard for TUEs, DFS's TUE Committee declined Mr Spessot's application by way of letter dated 14 December 2015, sent on 18 December 2015. In particular, the TUE Committee considered there were "insufficient clinical details for a satisfactory diagnosis [of asthma] to be established and further, no clinical reasoning was offered to support the use of two prohibited substances" nor sufficient "objective measures of deteriorating respiratory function" prior to the event in question.

3. On 23 December 2015, without opposition, Mr Spessot was provisionally suspended. The substantive application for anti-doping rule violation proceedings was filed by DFS on 13 January 2016. At this time, Mr Spessot indicated that he was considering an appeal to the Tribunal against the TUE Committee's decision not to grant a retroactive TUE. As it transpired, Mr Spessot decided not to pursue such appeal and instead admitted the anti-doping rule violation and asked to be heard as to the appropriate sanction. The prospect of an appeal, whilst involving the same factual basis as the substantive proceedings, did complicate matters procedurally and cause some delay. No fault is attributed to any party for this delay though we have taken it into account in determining the commencement date of the sanction (discussed further below).

Background

4. Mr Spessot is a veteran cyclist who has competed at cycling events at Masters and Open level for the past decade. Earlier in life, in his twenties, Mr Spessot raced at an elite level. He is a silviculture contractor by

occupation which often involves long days working away from home in remote locations as well as stringent workplace health and safety requirements.

5. Mr Spessot's evidence was that he has suffered from asthma since childhood. His extensive medical history over the past five years in relation to this condition was produced as part of his affidavit and was the subject of cross-examination by DFS's counsel.

6. On 19 September 2015, Mr Spessot competed in the Twizel to Timaru cycling race and was tested after this event. On his Doping Control Form, he disclosed a number of medications that he had taken over the past seven days including his asthma inhalers and "predazone", which was presumably a reference to prednisone.

7. Prednisone and terbutaline were found to be present in Mr Spessot's sample. Prednisone is prohibited in-competition under class S9 Glucocorticoids of the WADA 2015 Prohibited List and terbutaline is prohibited in and out of competition under class s3 Beta-2 Agonists. Both are classed as specified substances under the Prohibited List and both are used to relieve the symptoms of an acute asthma attack but also have the ability to enhance sports performance. As set out in Mr Spessot's TUE application, prednisone is administered where an asthma attack is non-responsive to previous therapeutic interventions as it is more direct and potent.

Relevant provisions

8. DFS did not contend that this case involved the intentional use of a specified substance to enhance sports performance, and accordingly sought the standard period of ineligibility of two years under SADR 10.2.2. For cases involving intentional use, the standard period of ineligibility is four years.

9. The provisions of the SADR that allow for the possible elimination or reduction of the standard period of ineligibility are Rule 10.4 (no fault)

and Rule 10.5.1.1 (no significant fault or negligence). This is not a case where it was suggested there was no fault under Rule 10.4.

10. Under Rule 10.5.1.1, where the Respondent can establish "No Significant Fault or Negligence" in relation to the presence of a specified substance, 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 Respondent's degree of fault.

11. The relevant definitions in SADR are:

> "No Significant Fault or Negligence":
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> The Athlete or other Person's establishing that his or 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 relationship to the Anti-Doping Rule Violation. Except in the case of a Minor, for any violation of Rule 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.
>
> "No Fault or Negligence":
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> The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or had been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Rule 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.
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> "Fault":
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> Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the

> circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Rules 10.5.1 or 10.5.2.

12. For Mr Spessot to rely on Rule 10.5.1.1 he must first show how the specified substances entered his system. He attested that both substances were taken on the two days prior to the event "to alleviate the symptoms of my asthma. The terbutaline entered my body through my asthma sprays and I took a tablet of oral prednisone, as recommended and prescribed by my doctor."

13. DFS accepted that the presence of prednisone and terbutaline in Mr Spessot's sample could be explained by his use of these substances in the two days prior to the event.

14. The issues before us are therefore:

    (a) Is the Tribunal satisfied that Mr Spessot can establish "No Significant Fault or Negligence" in relation to the violation, the onus of which is on him?
    (b) If so, what period of ineligibility is appropriate having regard to Mr Spessot's degree of Fault (between a reprimand / no period of ineligibility and two years of ineligibility)?
    (c) What should be the start date of any period of ineligibility?

No Significant Fault or Negligence

15. Under Rule 10.5.1.1, before the Tribunal can consider any reduction of the two year period of ineligibility for cases involving a specified substance, the athlete must establish that there was no significant fault or negligence in relation to the violation.

16. Counsel for Mr Spessot submitted that the stringent requirements under the SADR only apply to elite athletes and a lower bar should be set for

amateur athletes who lack the same level of resources, time and focus as professional athletes. Counsel contended the appropriate sanction in the circumstances was a reprimand only.

17. The following mitigating circumstances were advanced by Mr Spessot's counsel to explain his departure from his obligations under SADR:

- he has a long history of asthma (documented by his doctor's medical notes) and the substances were taken for legitimate therapeutic purposes rather than to improve sport performance;
- in relation to the use of terbutaline, his doctor prescribed this type of turbuhaler out of concern that Mr Spessot was allergic to the propellant used in other types of inhalers not on the Prohibited List and due to the unavailability in New Zealand of another type of permitted turbuhaler;
- the specific asthmatic episode he had two days prior to the event was due to an exacerbation of his condition due to extreme temperature changes in his places of work from Ranfurly to Australia in the week prior to the event. His failure to obtain a TUE was due to inadvertence and his work commitments meant he was unable to arrange a consultation with his doctor in relation to the specific episode;
- an acquaintance in Australia had entered him in the race without his knowledge and he had not intended to race given his health issues. It was a last minute decision to compete;
- although he was aware of a formal TUE process, he had never attended any educational sessions on the anti-doping regime nor received any information from DFS relating to drug testing, in particular TUE's;
- given his extensive medical history, he assumed that he would meet the requirements for a TUE under the rules if called into question;
- he is required to take the medication in order to fulfil his employment obligations under the Forestry Code of Practice and Health and Safety Act 1992. Failure to take his medication may be considered negligence in that context; and

- he fully disclosed the medications he had taken in the past seven days on the Doping Control Form at the time of testing, including prednisone and his asthma inhalers.

18. In reply, DFS maintained that the SADR applies to all athletes, whether professional or amateur, this being one of the cornerstone principles of the WADA Code on which SADR is based. The individual circumstances should instead be taken into account when making a factual assessment as to the application of the Rules in each particular case.

19. DFS submitted Mr Spessot cannot establish there was no significant fault or negligence based on what a reasonable person in his position should have done given the strictness of the anti-doping regime. Mr Spessot's knowledge of the anti-doping regime and the prohibited status of prednisone in competition was evident in that:

- he was an experienced cyclist who had ridden in many prominent cycling events in his youth and at masters level;
- in 1992, he had received a three month suspension for the presence of a prohibited substance;
- between 2013 to 2015, he held racing licences from Cycling New Zealand, the conditions of which referred to the obligation to comply with the anti-doping policies of Cycling New Zealand, the UCI Anti-Doping Regulations and the clauses of the World Anti-Doping Code; and
- his doctor's medical notes on 28 October 2014 refer to the fact that Mr Spessot had looked up oral prednisone and that he knew it was prohibited in competition and that on 20 October 2014, an alternative to prednisone was prescribed because of an upcoming competition.

20. Further, DFS asserted that Mr Spessot's assumption that he would obtain a TUE given his medical history was both misguided and irrelevant to the assessment of whether there was significant fault or negligence on the part of Mr Spessot. DFS advised that non-national level athletes such as Mr Spessot are not entitled to apply for TUE's in advance as they simply do not have the resources to process applications at this level. Non-

national level athletes are instead entitled to apply for a retroactive TUE but must meet the criteria set out in WADA's TUE International Standard. Article 4.1 of that Standard states:

> An Athlete may be granted a TUE if (and only if) he/she can show that each of the following conditions is met:
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> a. The Prohibited Substance or Prohibited Method in question is needed to treat an acute or chronic medical condition, such that the Athlete would experience a significant impairment to health if the Prohibited Substance or Prohibited Method were to be withheld.
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> b. The Therapeutic Use of the Prohibited Substance or Prohibited Method is highly unlikely to produce any additional enhancement of performance beyond what might be anticipated by a return to the Athlete's normal state of health following the treatment of the acute or chronic medical condition.
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> c. There is no reasonable Therapeutic alternative to the Use of the Prohibited Substance or Prohibited Method.
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> d. The necessity for the Use of the Prohibited Substance or Prohibited Method is not a consequence, wholly or in part, of the prior Use (without a TUE) of a substance or method which was prohibited at the time of such Use.
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> [Comment to 4.1: The WADA documents titled "Medical Information to Support the Decisions of TUECs", posted on WADA's website, should be used to assist in the application of these criteria in relation to particular medical conditions.]

21. For a recurrent but episodic condition such as asthma, DFS advised that the medical evidence required to satisfy the criteria for a TUE must relate to the specific episode which led to the ingestion of the prohibited substance. Only from that evidence could a judgment be made as to whether the medication was necessary and whether the amount prescribed would unduly enhance sport performance. The medical evidence required for a TUE may differ depending on the condition and the type of medication. The corollary is, if an athlete is intending to rely upon a retroactive TUE in relation to an episodic condition such as asthma, then they need to seek advice from a doctor, rather than self-medicate, on such occasions.

22. Mr Spessot's doctor gave him a prescription for 20 prednisone tablets on 25 May 2015 to self-administer as required to relieve asthma symptoms. His decision to take the prednisone on the two days prior to the event to relieve his asthma was understandable, but his subsequent decision to compete without having first made inquiries of DFS was, in DFS's view, inexplicable.

23. The Tribunal finds it difficult to accept that Mr Spessot's decision to enter the race with his degree of experience, and general awareness of the testing regime and prohibited status of prednisone does not amount to significant fault or negligence given the strict obligations on athletes under SADR. While the rules may have changed over time, the basic premise that athletes need to make inquiries as to whether what they have taken is prohibited has not changed. We agree with DFS that the Code applies to all athletes and not just to elite professional athletes. The onus is on the athlete under the Rules to educate himself. While the Rules are complex and stringent, if Mr Spessot had thought to make inquiry from DFS in this particular case to clarify the rules about TUE's and the meaning of "in competition", he could have avoided his predicament.

24. Having considered the totality of the circumstances in this case, we are not persuaded that Mr Spessot has established that there was no significant fault or negligence on his part in committing the violation. His actions were casual and unthinking and that is not consistent with the clear obligations on every athlete.

Degree of Fault and Sanction

25. As Mr Spessot does not satisfy the threshold of no significant fault or negligence under Rule 10.5.1.1, the standard period of ineligibility of two years must apply and we are unable to consider a reduction below this standard period.

Ineligibilty start date

26. Although Mr Spessot does not meet the high threshold to avoid the standard two year period of ineligibility, we are satisfied that there is sufficient reason in all the circumstances for that period to begin on the date of the initial sample collection. DFS, in its submissions, accepted this would be appropriate.

27. It appears Mr Spessot had not been planning to participate in the event but at a late point was persuaded to do so by his companions notwithstanding his state of health. At the time that he was tested, he immediately volunteered the substances he had taken for his asthma.

28. Responsibly, DFS raised the prospect of a retroactive TUE. There was some delay in this being sorted out. Mr Spessot was on his own, often working in remote areas and without easy communication with his doctor. Slowly it became apparent that a TUE would never be available to him. At the relevant times he had not seen a doctor but had self medicated, so was not going to be able to meet the Article 4.1 TUE International Standard requirements.

29. We accept that Mr Spessot's infraction had nothing to do with seeking to achieve advantage from the drugs in his cycling. They were taken legitimately for genuine medical reasons, but the obligation on all athletes to be drug free is given paramountcy under the Code. It was not met and the room for any reflection of his particular circumstances is very limited and can only be so in commencing the period of suspension from 19 September 2015, from which date we understand he has not competed. Mr Spessot's period of ineligibility will accordingly end on 19 September 2017. During this period, Mr Spessot may not participate in any capacity in any competition or activity organised by Cycling New Zealand (or any other sports organisation which has adopted SADR) or by a club which is a member of such organisation. He may return to train with his club members in the last two months of his period of ineligibility.

Dated: 23 March 2016

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Sir Bruce Robertson (Chairperson)