

BETWEEN **DRUG FREE SPORT NEW ZEALAND**
Applicant

AND **MENDRADO CATOTO**
Respondent

AND **NEW ZEALAND POWERLIFTING FEDERATION**
Interested Party

**DECISION OF SPORTS TRIBUNAL
DATED 19 DECEMBER 2016**

Hearing: 14 December 2016 in Auckland

Tribunal: Sir Bruce Robertson (Chairperson)
Alan Galbraith QC
Dr Lynne Coleman

Present: Paul David QC, counsel for Applicant
Graeme Steel and Jude Ellis, Drug Free Sport New Zealand
Michael Smyth, counsel for Respondent
Mendrado Catoto, Respondent
Steve Lousich, New Zealand Powerlifting Federation

Registrar: Megan Lee-Joe

Background

1. Mendrado Catoto competed at the New Zealand Powerlifting Championships on 6 August 2016 and won the gold medal for the under 74kg category. Mr Catoto was tested at this event and returned a positive sample for the presence of a prohibited substance, 1,3-dimethylpentylamine (known as methylhexaneamine).
2. Drug Free Sport New Zealand (DFS) filed an application for provisional suspension on 26 August 2016 alleging a breach of Rule 2.1 of the Sports Anti-Doping Rules 2016 (SADR). On 30 August, without opposition the Tribunal provisionally suspended Mr Catoto. The following day, DFS filed its substantive application for anti-doping rule violation proceedings. Mr Catoto is bound by SADR as he is a member of the New Zealand Powerlifting Federation which has adopted SADR as its anti-doping policy.
3. Mr Catoto admitted the violation but asked to be heard by the Tribunal as to the appropriate sanction.

Relevant SADR Provisions

4. The presence of a prohibited substance in an athlete's sample is a strict liability offence under SADR 2.1. Proving intent or fault are matters which determine the length of ineligibility under Rule 10. In respect of specified substances (such as methylhexaneamine), the prescribed sanction is four years where a violation of SADR 2.1 is proved to be intentional. If the violation is not intentional, the sanction is two years under SADR 10.2.2 unless the athlete can establish one of the grounds for eliminating or reducing the period of ineligibility.
5. DFS did not seek to establish that Mr Catoto's breach was intentional. DFS's position was that the presumptive period of two years was appropriate in the circumstances.
6. Mr Catoto sought a reduction of the two year period through the application of either SADR 10.5.1.1 or 10.5.1.2 which provide:

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.

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."

7. The prohibited substance in this case is a specified substance so both defences essentially operate in the same manner. Mr Smyth raised the contaminated product defence to support his submission that contamination needed to be considered in assessing Mr Catoto's level of fault.
8. Under the definition of No Significant Fault or Negligence, Mr Catoto needed to first establish how the prohibited substance entered his system. He also needed to establish that his Fault or negligence was not significant in relation to the violation when viewed in the totality of the circumstances and taking into account his duty to exercise utmost caution not to breach SADR.

Dust v2 - Contaminated Product

9. Initially, there was confusion as to how the methylhexaneamine had entered Mr Catoto's system. Mr Catoto maintained the source of the prohibited substance was a pre-workout supplement called Dust v2 manufactured by Blackstone Labs.
10. Mr Catoto purchased a tub of Dust v2 from a supplements retailer near a gym he attended. The supplement label did not disclose methylhexaneamine as one of its ingredients. After he received notice of the positive test, Mr Catoto conducted an online search and assumed that one of the ingredients listed on the supplement's label, N-Methyl Tyramine, was responsible for the adverse finding.
11. However, after being asked by DFS, the accredited laboratory who had analysed the sample advised that N-Methyl Tyramine has a different chemical structure to methylhexaneamine and therefore that ingredient could not have been responsible for the positive test.
12. With the parties' co-operation, a further tub of Dust v2 was purchased from the same retailer and sent to the laboratory for testing. The result confirmed that the supplement contained methylhexaneamine.
13. Following this analysis, DFS accepted that the contaminated supplement Dust v2 was the source for the prohibited substance being in Mr Catoto's system at the time of the positive test. The Tribunal accepts that Mr Catoto has established how the prohibited substance entered his system.

No significant fault or negligence

14. The key issue before the Tribunal was whether Mr Catoto could establish that he bore no significant fault or negligence in having tested positive for methylhexaneamine and if so what was the degree of his fault in determining an appropriate sanction.
15. DFS contended that Mr Catoto could not show his fault was not significant and that no reduction of the presumptive two year period of ineligibility should apply. If the Tribunal considered that Mr Catoto met the "no

significant fault" threshold, DFS' position was that the degree of fault would justify a sanction at the higher end of 16 months to two years.

16. Mr Catoto's position was that he bore no significant fault and an appropriate sanction given his degree of fault should be no more than four months.
17. The athlete's level of fault is assessed against what a reasonable person acting in accordance with the strict obligations under SADR ought to have done to avoid breaching the rules in light of the perceived level of risk. In DFS's view, the perceived level of risk given this type of product and its advertised claims ought to have been high. The claims on the packaging included "enhance athletic performance", "shredded muscle pumps", and "explosive strength and power".
18. In DFS's submission, the steps taken by Mr Catoto to discharge his duties under SADR were inadequate. Mr Catoto relied solely upon the advice of the retailer to endorse a new product he had not used before. He failed to make any form of inquiry with an independent third party such as his coach, or more importantly DFS as the relevant national anti-doping organisation. DFS's website provides specific information as to the risks of taking supplements given this has been a longstanding and well-publicised problem in the sports sector. Their clear warning is that many supplements do not accurately list prohibited substances they may actually contain.
19. If Mr Catoto had undertaken a search of the manufacturer's website, he would have discovered further claims about the product's performance enhancing properties which again should have prompted further enquiry as to whether it was a safe product to use.
20. In seeking to establish that he bore no significant fault in breaching SADR, Mr Catoto relied on the following mitigating circumstances:
 - (a) the prohibited substance was not disclosed on the product label and he had no way to realise it was a contaminated supplement
 - (b) the product was purchased from a reputable New Zealand based supplier rather than online from an overseas supplier
 - (c) he specifically told the retailer that he competed and may be drug tested and was told that the product did not contain any prohibited substances
 - (d) he has previously been drug tested while he was using a different pre-workout supplement and had not received a positive test
 - (e) he disclosed the Dust v2 supplement and the quantity taken on his Doping Control Form
 - (f) while he had a general awareness of the anti-doping regime he had not attended a DFS seminar nor was he aware of the service provided by DFS to check products
 - (g) Mr Catoto is not a high performance athlete but rather participates and competes in powerlifting more as a hobby.

Decision

21. Two fundamental factors need to be constantly kept in mind. First the determination as to whether it is established by the athlete that there has been no significant fault is a fact specific exercise. Secondly there is a need for consistency of approach particularly within NZ and more generally internationally.
22. As has become common place this hearing involved references to a stack of previous decisions from both here and abroad with support being sought from these for a particular approach to the case.
23. We have again been directed to *Cilic v International Tennis Federation CAS 2013/A/3327* and its concept of three degrees of fault which can be used in assessing the appropriate sanction. This can be of assistance in the determination so long as they do not deflect from a careful analysis of the particular circumstances.
24. Mr Catoto sought reassurance from the sales staff when purchasing the product that it was safe to use in competition and he also looked at the packaging of the supplement he was considering buying and found no reference to any prohibited substance. However he went no further in giving himself confidence that this was something he could use in competition. He needed to be more cautious and thorough. Merely relying on the word of the retailer or packaging or promotional material is not a sufficient fulfilment of the clear obligation of every athlete under the anti-doping regime.
25. He ought to have been conscious that such supplements are risky so he should have discussed the product with his coach and others on his team. It would have been prudent to speak directly with DFS and obtain their advice. His obligations were heightened as he was intending to use in competition and at a national level.
26. Having considered all the evidence, we are satisfied that Mr Catoto was not at significant fault in testing positive for methylhexanamine.
27. In our assessment of Mr Catoto's degree of fault, all those objective factors indicate a normal degree of fault. This was another person who was unmindful of his duty and insufficiently careful in his approach to the acquisition and use of this type of substance.
28. We find nothing in the personal capacity or experience which alters that assessment. He was not young or inexperienced even if not an elite athlete with substantial support.
29. The immediate disclosure that he had used Dust v2 was consistent with his asserted belief that taking this supplement was permissible, a view strengthened by the fact that he had previously been tested without issue after he had used a pre-workout supplement.

30. On the other hand that previous testing was a salient reminder that there was an anti-doping regime which applied to him and with which he had to comply. Formal anti-doping education is not essential to make athletes aware of the clear obligations which exist for all sport participants.
31. The fact that it was accepted that the supplement used had been contaminated is a factor to be weighed in assessing the level of fault. This was not a case where there was clear intimation in the packaging or promotional material which put an athlete on guard. However the possibility of contamination needs to be understood and protected against, particularly given Mr Catoto's comment that the taking of pre-workout supplements is commonplace in the sport of powerlifting.
32. Bearing in mind other recent cases in New Zealand especially since the amendment of the Code we are satisfied that the proper period of suspension is 12 months. Mr Catoto acknowledged at the hearing that his gold medal at the National Championships would be forfeited.

Ineligibility start date

33. Mr Smyth asked that we exercise our discretion under SADR 10.11.2 to start Mr Catoto's period of ineligibility from the date of sample collection, in this case, 6 August 2016. The Tribunal may exercise this discretion where the athlete has promptly admitted the anti-doping rule violation. The usual starting point is to provide credit for the period from the date of provisional suspension of the athlete to the date of the decision.
34. In this case there was only 20 odd days between the testing and the provisional suspension and without opposition the commencement date is set at 6 August 2016.

Dated 19 December 2016



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Sir Bruce Robertson
Chairperson