

BETWEEN **DRUG FREE SPORT NEW ZEALAND**
Applicant

AND **KARL MURRAY**
Respondent

AND **CYCLING NEW ZEALAND**
Interested Party

**DECISION OF SPORTS TRIBUNAL
8 MAY 2018**

Hearing 24 April 2018 (by teleconference)

Tribunal Alan Galbraith QC (Deputy Chairman)
Georgina Earl
Ruth Aitken

Parties Isaac Hikaka and Adam McDonald, counsel for Applicant
Jude Ellis, Drug Free Sport New Zealand
Aaron Lloyd, counsel for Respondent
Karl Murray, Respondent
Hughie Castle, Cycling New Zealand

Registrar Neela Clinton

1. For various reasons final disposition of this proceeding which arose out of a positive test returned by Mr Murray at the Tour of Northland on 18 March 2017 has been protracted.
2. A provisional suspension order was made on 11 May 2017 as a result of application by DFSNZ. The substantive hearing in October 2017 resulted in a determination by the Tribunal of 13 October 2017 finding that Mr Murray had committed a rule violation under Sports Anti-Doping Rules (SADR) 2.1. That violation, if standing on its own, would incur a four year penalty under the current Rules.
3. At the date of that determination there was in the background an appeal by DFSNZ to Court of Arbitration for Sport (CAS) against a differently constituted Tribunal's decision dismissing a charge against Mr Murray of breaching a ban arising out of a New Caledonia decision of 23 April 2014 for a doping violation which occurred during the 2013 Tour of New Caledonia.
4. As the outcome of that CAS appeal could affect the sanction to be imposed in respect to the New Zealand October 2017 breach, DFSNZ sought and was granted an adjournment of the determination of that sanction. In December 2017 CAS upheld the appeal by DFSNZ in respect to Mr Murray's breach of the New Caledonian ban but dismissed the appeal in respect to tampering with the evidence. The result of the CAS decision was that the New Caledonian ban of two years was re-imposed from 15 December 2017.
5. DFSNZ then sought determination by this Tribunal of the sanction to be imposed in respect to its finding of 13 October 2017 breach. DFSNZ's position was that the provisions of SADR 10.7 applied:

10.7.1 For an *Athlete* or other *Person's* second anti-doping rule violation, the period of *Ineligibility* shall be the greater of:

10.7.1.1 six months;

10.7.1.2 one-half of the period of *Ineligibility* imposed for the first anti-doping rule violation without taking into account any reduction under Rule 10.6; or

10.7.1.3 twice the period of *Ineligibility* otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, without taking into account any reduction under Rule 10.6

The period of *Ineligibility* established above may then be further reduced by the application of Rule 10.6

6. DFSNZ accepted that the CAS finding that Mr Murray had breached SADR 10.12.1 by coaching during the period of the New Caledonian ban did not itself count as a second or third violation for the purpose of SADR 10.7 but submitted that the New Caledonian violation was a first violation and the Tour of Northland March 2017 event was a second violation for that purpose.
7. If that submission was correct, then Mr Murray must receive a sanction of an eight year period of ineligibility. That is twice the four year period of ineligibility that would be imposed if it were a first violation of SADR 2.1 where the anti-doping rule violation does not involve a Specified Substance and the athlete fails to establish that the anti-doping rule violation was unintentional.
8. It was accepted by Mr Murray's counsel, Mr Lloyd, that such a consequence would be correct, but Mr Lloyd challenged on Mr Murray's behalf the DFSNZ position that the New Caledonian violation and determination could be treated as a first violation for the purpose of SADR 10.7.
9. The essence of the challenge was:
 - (a) The New Caledonian ban arose from a violation under regional anti-doping regulations which were promulgated and enforced in New Caledonia but not under the authority of a Signatory to the Code.
 - (b) While subsequently Mr Murray's regional anti-doping ban was recognised by the Union Cycliste Internationale (UCI) it was not thereby constituted a violation of the SADR.
 - (c) That the recognition provisions, Rules 15.1 and 15.2 of the SADR, either did not apply in the case of Rule 15.1 and/or, even if either or both Rules 15.1 and 15.2 applied, they only provided for recognition of the New Caledonian period of ineligibility but did not constitute a violation under SADR and in particular they did not mean that the events leading to the New Caledonian ban were to be treated as amounting to a first anti-doping violation under the SADR.

Discussion

10. A principal purpose of the Code is to "ensure harmonised, co-ordinated and effective anti-doping programmes at the international and national level with regard to detection, deterrence and prevention of doping."

11. It was submitted by DFSNZ that the failure to treat the New Caledonia violation as a first violation for the purpose of sanction would put New Zealand in breach of its international obligations:

Article 3 – Means to achieve the purpose of the Convention

In order to achieve the purpose of the Convention, States Parties undertake to:

Adopt appropriate measures at the national and international levels which are consistent with the principles of the Code;

...

Article 4 – Relationship of the Convention to the Code

1. In order to coordinate the implementation, at the national and international levels, of the fight against doping in sport, States Parties commit themselves to the principles of the Code as the basis for the measures provided for in Article 5 of this Convention. Nothing in this Convention prevents States Parties from adopting additional measures complementary to the Code.

(UNESCO International Convention against Doping in Sport, (adopted 19 October 2005, entered into force 1 February 2007), art. 3)

12. The Tribunal recognises the intent of the Code and a basic principle of interpretation, whether contractual or legislative, that context and purpose are relevant. However, if the particular provision will not fairly stand an interpretation a general purpose or intent does not allow the Tribunal to rewrite such provisions.

13. Rule 15 provides:

15.1 Subject to the right to appeal provided in Article 13, *Testing*, hearing results or other final adjudications of any *Signatory* which are consistent with the *Code* and are within that *Signatory's* authority, shall be applicable worldwide and shall be recognized and respected by all other *Signatories*.

15.2 *Signatories* shall recognize the measures taken by other bodies which have not accepted the *Code* if the rules of those bodies are otherwise consistent with the *Code*.

14. At the hearing before the Tribunal there was some debate about the meaning of the term “final adjudications” in Rule 15.1. Whether the terminology should be “final determinations” is a moot point but the intent of Rule 15.1 is clear that all Signatories must recognise decisions, described as “hearing results or other final adjudications” of any other Signatory. That is the rule which makes determinations of individual Signatories of universal effect.

15. The debate about the meaning of “final adjudications” arose before this Tribunal because of the submission that the determination by UCI to recognise the New Caledonian ban was a “final adjudication” of a Signatory and therefore applicable worldwide. The Tribunal’s understanding of the facts is that UCI did not become aware of the April 2014 New Caledonian ban until early 2015 and then in April 2015 resolved to recognise the New Caledonian decision. While it was suggested that this was recognition under Rule 15.1 it must in fact have been recognition under Rule 15.2 because the New Caledonian authorities were not Signatories to the Code.
16. At the time that the UCI recognised the New Caledonian decision DFSNZ had before the New Zealand Sports Tribunal an application to recognise the New Caledonian ban. Upon the UCI recognising that ban that application was withdrawn but DFSNZ itself then formally recognised the ban handed down by the New Caledonian authority.
17. The debate before this Tribunal regarding Rule 15.1 was whether the UCI decision could be fairly described as a “final adjudication”. This Tribunal has not been provided with details of the process by which the UCI decision was made and is not therefore in a position to make a fully informed decision as to whether the UCI process could properly be described as a final adjudication. However, the Tribunal does understand that Mr Murray was informed of the UCI decision and did not challenge it.
18. If the issue rested there and had application been made this Tribunal would likely have granted DFSNZ time to investigate and provide information as to the process and nature of the UCI decision making.
19. However, subject to one further issue, the Tribunal is satisfied that Rule 15.2 is on the facts properly applicable. Clearly the decision of the New Caledonian Tribunal is a measure taken by a body which has not accepted the Code. However, there is nothing before this Tribunal to suggest that the rules of the New Caledonian authority were not consistent with the Code. To the contrary, the New Caledonian decision was recognised by the UCI, and indeed also by the French authority and subsequently DFSNZ. As we have noted, there was no challenge to the UCI recognition, nor as we understand it, any challenge to the consequential recognition of the French and New Zealand authorities, and no suggestion before this Tribunal that the New Caledonian rules were in any material way inconsistent with the Code. Accordingly, the Tribunal accepts that Rule 15.2 has been applied and, because not time-barred, can now be applied in recognising the New Caledonian decision.

20. The additional question is whether recognition constitutes the New Caledonian violation a violation for the purpose of Rule 10.7.
21. In the Tribunal's view it does. While Mr Lloyd submitted to the Tribunal that the circumstances which have arisen here were, while not unique, at least rare, the fact is that if recognition of the effective non-Signatory doping violation decision was limited simply to penalty and not substance there would be a disparity of consequence depending on the accident of where a substantive breach occurred. That interpretation of the Rule 15 provisions of the Code would be inconsistent with the purpose of harmonisation and universal application. Nor is such a limitation required by the actual terms of Rule 15 which can fairly be interpreted to encompass recognition of the substance of the non-Signatory determination.

Conclusion

22. For those reasons the Tribunal has determined that the New Caledonian violation does constitute a first violation for the purposes of Rule 10.7. The New Zealand March 2017 violation is therefore a second violation.
23. Accordingly, as counsel accepted, the sanction to be applied is an eight year period of ineligibility but commencing from the date of the provisional suspension of 11 May 2017.

DATED this 8th day of May 2018



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A R Galbraith QC
Deputy Chairman