BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 12/18**

BETWEEN	**DRUG FREE SPORT NEW ZEALAND**
	Applicant
AND	**XYZ**
	Respondent
AND	**SURF LIFE SAVING NEW ZEALAND**
	Interested Party

DECISION OF SPORTS TRIBUNAL
4 March 2019

Hearing	8 February 2019
Tribunal	Sir Bruce Robertson (Chairman) Alan Galbraith QC Dr Jim Farmer QC
Participants	David Bullock, counsel for Applicant Hayden Tapper, Drug Free Sport NZ XYZ, Respondent David Neild, counsel for Respondent Mike Lord, for Surf Life Saving NZ
Registrar	Mike Selwyn

Background

1. This is another case arising from Medsafe NZ's Clenbuterol investigation, the Tribunal's eleventh case. Medsafe passed information from the website's database to Drug Free Sport New Zealand (DFSNZ), which investigated the names of online purchasers to see who were registered as members of New Zealand sports organisations.

2. DFSNZ's investigation indicated those who might be bound by Sports Anti-Doping Rules (SADR or the Rules) and contacted them with details of their internet purchases of clenbuterol and other anabolic steroids. This case however has had an unusual history because of the Tribunal's concern as to the degree of appreciation within the general sporting community below the level of elite and national competition of the regime, our role and the application of the Rules generally.

Initiation of proceedings and provisional suspension

3. The respondent was identified in the Medsafe investigation. DFSNZ filed anti-doping proceedings against him on 24 August 2018 alleging he breached 2014 SADR 3.2 and 3.6 and 2015 SADR 2.2 and 2.6 by purchasing and using clenbuterol and dianabol between 27 November 2014 and 15 January 2015. Dianabol and clenbuterol are prohibited substances banned at all times under S1 Anabolic Agents.

4. DFSNZ alleged that at the time of his purchases the respondent was a member of Surf Life Saving New Zealand (SLSNZ). SLSNZ advised that he was registered in 2014 and 2015 with a local surf life saving club. SLSNZ adopted SADR as its anti-doping rules and the local club was bound also by those rules.

5. The respondent, who was at the time unrepresented, was provisionally suspended without opposition on 28 August 2018. On 7 September he filed his Form 2 admitting the violation and said he took clenbuterol to help him lose weight and not to enhance his sport performance. His evidence at the hearing was that his weight had been in the range of 130 to 140 kilos and even more. He said the product did not achieve the desired results and had an adverse effect on his work and so he ultimately disposed of it. His use of the products was restricted to a two month period from the end of November 2014 to January 2015. As to his surf life saving membership, he said this had resulted from being a volunteer when he signed up his children and made a donation to the club. The respondent advised his sports participation was social and he did not compete or play competitive sport above that level. It subsequently

transpired however that in October 2015 he had participated in a National Masters Surf Life Saving Event. That would have categorised him as an "athlete" at that time within the Rules on any interpretation.

6. As is seen below, the position of DFSNZ, however, is that he was an athlete prior to this time, while competing at a level lower than that of national events when playing golf and taking part in social swimming races. It is a somewhat unsatisfactory feature of the case that the application[1] made by DFSNZ to the Tribunal did not rely on or refer to the fact that the respondent was the member of a golf club, which, by virtue of its affiliation to Golf New Zealand, which has adopted SADR, and that he competed regularly in club and inter-club events at all relevant times. However, it did lead evidence later to this effect and the respondent admitted that he was, as he put it, "more of a golfer than a swimmer". No point was taken about the form of the application and the hearing proceeded on the basis that DFSNZ was entitled to rely on those facts.

Issue of whether the respondent was bound by SADR

7. In light of these factual assertions at a teleconference on 21 September 2018 the Chairman raised the question of whether the respondent, an unrepresented litigant, had become bound by SADR as a result of what he said was his donation and volunteer membership of the local SLSNZ club. DFSNZ was requested to provide further information regarding these circumstances.

8. On 11 October 2018, DFSNZ filed a memorandum explaining that the respondent was bound by the SADR through his membership of SLSNZ. For the first time also, reference was made to the fact that he was a member of a local golf club, which club was affiliated to New Zealand Golf (NZG), a National Sporting Organisation (NSO) which had adopted the WADA Code. No application to amend the proceedings on this basis has ever been made but the case proceeded on the basis that his membership of the golf club and his participation at all relevant times in golf events at club level was a further or alternative ground for finding a contravention of the Rules.

9. It was said that club membership alone bound the respondent to SADR, irrespective of whether he competed in sporting events.

[1] There were in fact two applications which differed slightly in format, one called Form 1 and one called Form 6. Both were dated 20 August 2018 but there was no difference in substance between them.

10. A statement from Mr Mike Lord, Sport Manager of SLSNZ, said that the respondent would have registered with SLSNZ (and the local surf life saving club) and paid a membership subscription, which included an agreement to be bound by SLSNZ's regulations and policies, including its anti-doping policy. His SLSNZ membership in 2014 and 2015 allowed him to participate in various surf sports events, though he did not do so until October 2015 as referred to above. He did however compete in social swimming races.

11. Mr Hayden Tapper, Investigations and Intelligence Manager of DFSNZ, said in evidence that the respondent was bound by SADR by his SLSNZ membership and further as a member of the local golf club during the relevant period. NZG has adopted SADR as its anti-doping policy and therefore its members are bound. He produced evidence of the respondent's golf membership and his participation in a number of sports events at the time of his online purchases. At the subsequent hearing before the Tribunal, DFSNZ led evidence that the respondent, by virtue of his recorded scores in various club and inter-club events, was in the top 3% of all golfers in New Zealand. The respondent, at the hearing, said that his scores were in the low 80s. There was no evidence however that he had ever competed in golf at a national level.

Procedural steps leading to hearing

12. The respondent did not initially file material in response. After encouragement from the Tribunal he did seek legal representation to assist and support him. The Tribunal frequently is faced with unrepresented respondents and we need constantly to be vigilant that they are not disadvantaged. The pro bono help he has been afforded by Mr Neild of Chapman Tripp solicitors has been greatly appreciated.

13. At a further teleconference on 26 October 2018, the Chairman raised the nature of the Tribunal's jurisdiction and the extent of discretion (if any) in imposing sanctions for an anti-doping violation where a person is simply a registered member of a sports organisation which is subject to SADR, irrespective of whether that person has participated in a sporting event as a competitor and irrespective of the nature of that event, that is whether it is a formal sporting event recognised by an NSO or one that is purely social or recreational in nature.

14. Timetabling directions were made which included notifying NZG as an interested party. DFSNZ was asked to provide comparative information from other jurisdictions on the

consequences of sports club membership and any examples of comparable sanctions for recreational athletes.

15. On 9 November 2018, DFSNZ filed helpful and comprehensive submissions which included a number of CAS decisions, the European Commission Report on doping prevention and material on anti-doping rules from Ireland, United Kingdom, Czech Republic and Canada. Counsel for the respondent replied to DFSNZ's written submissions with written submissions of his own which in turn were further responded to by written submissions from DFSNZ. This relatively lengthy process prior to the hearing, including a further conference with the Chairman on 20 November 2018, which served not only to illuminate the issues and opposing positions taken by the parties but also facilitated the conduct of the hearing.

16. DFSNZ's initial written submissions outlined the applicable terms of SADR and the various key definitions from the Code, noting that it (DFSNZ) had exercised its discretion to expand the application of SADR to recreational level athletes by including anyone who is a member of any national sporting organisation, club, team, association or league. In New Zealand this meant, it was said, a person becomes subject to SADR by any one or more of membership, participation or agreement. As is discussed below, DFSNZ argued that the terms of the definition of "athlete", which empowered it to "apply" the rules to an athlete below international or national level "and thus to bring them within the definition of 'Athlete'", was enough to have that effect and no further action was required on its part. This is an issue upon which the Tribunal has not reached unanimous agreement.

17. As to sanctions for different levels of athletes, DFSNZ said "there is no differentiation or discretion as to sanction, and sanctions are to be applied as provided for in the NZ SADR". It continued:

> Those persons bear the consequences of violations of their obligations as prescribed in the NZ SADR. There is no discretion in the NZ SADR to differentiate sanction other than on the express grounds provided for in Part 10. Those rules are to be applied according to their terms and there is no residual discretion as to sanction and residual power to differentiate between those found to be in violation.

18. DFSNZ referred to correspondence which it had had with WADA regarding these issues, noting WADA had agreed with DFSNZ's understanding and application of the Code. We of course respect the views of WADA and recognise also that under section 16(2) of the Sports Anti-Doping Act 2006, the New Zealand SADR must implement the Code, as adopted by WADA, and in particular "to the extent that that the Code requires specified Articles of the Code to be incorporated into the rules without substantive

change". That raises the question, considered later in this Decision, as to whether the definition of "Athlete" contained in the Code is one of those specified Articles that cannot be changed substantively and, if so, whether in terms it contemplates and requires an amendment to be made to the definition in order to catch persons competing at levels below international and national events.

19. In response to the Chairman's question relating to the application of SADR to "recreational athletes", DFSNZ noted that the Code and the Rules make no such reference and therefore there is no ability to differentiate the application of the Code to different levels of athletes as "NZ SADR do not provide for any differential treatment".

20. As to comparative examples from overseas jurisdictions, DFSNZ said its position was normal in expanding the application of the Code to anyone with membership of an NSO (though, as discussed below, this was not the case in Ireland and the United Kingdom). Also, the majority of overseas jurisdictions reviewed, it was said, did not distinguish the sanctions imposed for different levels of athlete i.e. elite (international and national) or recreational. DFSNZ referred to European Commission studies which confirmed the majority of member States (Denmark and Flemish part of Belgium were the exception) applied the Code to all levels of athlete, generally by membership or participation, and there was no distinction in the sanctions imposed for elite or lower level athletes.

21. DFSNZ referred to the Canadian SADR to demonstrate the "international consistency" of its approach. It confirmed that the Rules applied on the "basis of membership, participation or agreement/authority" and said that Canada had extended its discretion similarly to New Zealand and did not differentiate between those categories as to sanctions. Accordingly, it was said, as with the New Zealand SADR, to be bound by the Rules Canada:

(a) did not require a person to participate in sports or events;
(b) did not distinguish between the levels of sport or events played;
(c) did not require a person to have expressly agreed to the Rules."

22. Similarly, Ireland (Irish SADR), United Kingdom (UK SADR) and the Czech Republic (Czech SADR) Rules were cited by DFSNZ to show an identical approach to that adopted by New Zealand in expanding the application of the Code beyond elite level athletes. As referred to above, in the case of the United Kingdom and Ireland, however, it was acknowledged by DFSNZ that this was achieved by an express amendment to the definition of "Athlete" contained in the Code. DFSNZ says that this

was “contrary to the requirements of the Code” (Submissions 7 December 2018, footnote 17). We return to this point later.

23. The situation, internationally, therefore is that in several jurisdictions, national anti-doping agencies have taken the same position as DFSNZ of simply extending their drug breach provisions beyond the level of international and national athletes by administrative fiat. By contrast, the United Kingdom and Ireland felt it necessary to achieve that result by formal amendment of the term “athlete” which then flowed through into the provisions prohibiting athletes from possessing or using drugs. We were not referred to any Decision of the Court of Arbitration for Sport that has addressed this difference of view.

Sanctions applying to recreational athletes

24. On the question of whether different and less stringent sanctions should be imposed on recreational athletes, DFSNZ advised it had difficulty finding comparative authorities. It submitted similar issues regarding the application of the Code in comparable jurisdictions have not arisen because doping control focuses on testing national and international level athletes. Therefore, while lower level athletes are bound in these jurisdictions, because they are not usually tested, jurisprudence relating to these athletes is uncommon. It added “constellations of facts like those arising from the “NZ Clenbuterol” investigation appear to be relatively uncommon internationally”. It would seem therefore that, globally, while anti-drug rules now apply in most instances to recreational sports competitors, national enforcement agencies do not in fact test such competitors and therefore enforce the rules against them. This may in part reflect a lack of resources to enforce SADRs against the tens of thousands of persons taking part in weekend or other part-time sport but more likely reflects a recognition that to do so would provoke significant resistance against such policing of low and social level sporting activities.

25. The respondent in this case might therefore be considered somewhat unlucky to have been singled out for enforcement action, given that he had not been tested and was most unlikely ever to have been tested. Rather it was the circumstance of the Medsafe investigation into those who had purchased clenbuterol online and his membership of a surf life saving club which led to his being targeted in the present action.

26. DFSNZ said the issue of differentiation has been previously raised by athletes who argue “principles of proportionality should supplement the terms of the Code”, but that

CAS "has consistently refused to recognise concepts of differentiation (typically framed as "proportionality") beyond the express terms of the Code or relevant rules." DFSNZ referred to a number of CAS decisions which repeatedly held that the Code does not provide for any distinction in sanctioning "between amateur or professional athletes, old or young athletes or individual sport or team sport" [*Doping Authority Netherlands v N* CAS 2009/A2012 at [43]].

27. Further, DFSNZ referred to the purpose of the Code which specifically states it has been drafted "giving consideration to the principles of proportionality and human rights". Therefore, it has been held there is no basis for specific enquiries as to proportionality because that has been incorporated into the Code's sanction regime. DFSNZ referred to a number of CAS decisions to this effect. There may be an issue, which this Tribunal does not have to determine in this proceeding, as to whether an independent judicial body such as this Tribunal is bound to accept that the drafters of a Code have given sufficient weight to principles of proportionality and, more particularly, human rights and whether there can never be arguments presented that a particular case may require further consideration to be given to these principles. We note that proportionality and human rights issues were raised on behalf of the respondent. This Tribunal is concerned that the case law of CAS does not allow any weight to issues of culpability and fairness to be considered, either by DFSNZ when it determines whether or not to bring a case to the Tribunal or to the Tribunal itself except under the limited "no significant fault" provision.

28. DFSNZ concluded that the respondent is an athlete bound by SADR based on his SLSNZ and NZG membership. Its position therefore is that the fact of being a member of a club that has adopted SADR either directly or through its membership of an NSO that has adopted SADR *ipso facto* gives that club member the status of an athlete irrespective of whether he or she ever competes in an event or has ever done so. By contrast, the respondent's position, as presented by his counsel, was that while such membership binds the club member to SADR, something more – namely participation as a competitor at international or national level, that is competing as an "athlete" – is required to render that person subject to a breach of the drug use and possession provisions contained in Rules 2.1-2.6.1. A club member who is not an athlete might nevertheless be found to be in breach of any of Rules 2.6.2-2.10 relating to "Athlete Support Persons" or to Persons generally. These Rules relate to conduct that assists an athlete, directly or indirectly, in possessing or using prohibited drugs. DFSNZ's response is that under SADR, as presently drafted, all club members are deemed to

be athletes, irrespective of whether they compete at national level or above or, for that matter, at all.

Further written submissions

29. On 23 November 2018, the Respondent – now represented by Mr Neild - filed submissions addressing the jurisdiction issues and in those submissions focussed on the definition of "athlete". It was accepted that the respondent was an "athlete" (as that term is defined) when he competed in the National Surf master event in October 2015 but not prior to this. Because the evidence was that he had purchased clenbuterol and dianobol between the end of November 2014 and January 2015, it was submitted that there was not a sufficient link to his later participation in a relevant event and therefore it could not be established that he had attempted to use or had possessed a prohibited substance at the time of the event. It was also argued that in respect of any other sporting event below the national level which he had participated in (golf, swimming), the respondent could not be regarded as an "athlete" without further specific amendment of the definition in the Rules of that term to expand the scope of its application and therefore the prohibition in rules 2.1 and 2.6 of SADR against athletes using or possessing prohibited drugs could not apply to him.

Relevant SADR Rules

30. It is common ground that the SADR Rules apply to NSOs (such as SLSNZ and NZG) who have agreed to the Rules and to members of clubs and teams that have agreed with an NSO to the application of the Rules. An individual might also otherwise become bound by the Rules if he or she agrees to be so bound (see Rules 1.1.4 and 1.1.5). DFSNZ and the Sports Tribunal are also of course bound by the Rules (1.1.1 and 1.1.6).

31. By virtue of his membership of the local surf life saving and golf clubs, the respondent acknowledged that he was bound by the Rules.

32. However, the issue (as presented by his counsel) is whether, by virtue of his possession and use of the prohibited drugs (clenbuterol and dianabol, which he said he had used to counter the side effects of clenbuterol), the respondent had committed

an anti-doping rule violation. In particular, the question was whether he had breached the rules[2] forbidding the use or possession "by an Athlete" of a prohibited substance.

33. The term "athlete" (including a comment contained within the Rules) is defined as follows:

> *Athlete*: Any *Person* who competes in sport at the international level (as defined by each International Federation) or the national level (as defined by each *National Anti-Doping Organisation*). An *Anti-Doping Organisation* has discretion to apply anti-doping rules to an *Athlete* who is neither an *International-Level Athlete* nor a National-Level *Athlete*, and thus to bring them within the definition of "*Athlete*." In relation to *Athletes* who are neither International-Level nor National-Level *Athletes*, an *Anti-Doping Organisation* may elect to: conduct limited *Testing* or no *Testing* at all; analyse *Sample*s for less than the full menu of *Prohibited Substance*s; require limited or no whereabouts information; or not require advance *TUEs*. However, if a Rule 2.1, 2.3 or 2.5 *Anti-Doping Rule Violation* is committed by any *Athlete* over whom an *Anti-Doping Organisation* has authority who competes below the international or national level, then the *Consequences* set forth in the *Code* (except Article 14.3.2) must be applied. For purposes of Rule 2.8 and Rule 2.9 and for purposes of anti-doping information and education, any *Person* who participates in sport under the authority of any *Signatory*, government, or other sports organisation accepting the *Code* is an *Athlete*.
>
> *[Comment: This definition makes it clear that all International- and National-Level Athletes are subject to the anti-doping rules of the Code, with the precise definitions of international- and national-level sport to be set forth in the anti-doping rules of the International Federations and National Anti-Doping Organisations, respectively. The definition also allows each National Anti-Doping Organisation, if it chooses to do so, to expand its anti-doping program beyond International- or National-Level Athletes to competitors at lower levels. Competition or to individuals who engage in fitness activities but do not compete at all.[3] Thus, a National Anti-Doping Organisation could, for example, elect to test recreational-level competitors but not require advance TUEs. But an Anti-Doping Rule Violation involving an Adverse Analytical Finding or Tampering results in all of the Consequences provided for in the Code (with the exception of Article 14.3.2). The decision on whether Consequences apply to recreational-level Athletes who engage in fitness activities but never compete is left to the National Anti-Doping Organisation. In the same manner, a Major Event Organisation holding an Event only for masters-level competitors could elect to test the competitors but not analyse Samples for the full menu of Prohibited Substances. Competitors at all levels of Competition should receive the benefit of anti-doping information and education.]*

The "athlete" issue

34. The difference between the parties in relation to whether the respondent was an athlete is partly a matter of relevant timing and partly a matter of legal argument. As noted

[2] The respondent was charged under the 2014 and 2015 versions of SADR. The current rules are 2018, promulgated on 21 November 2017. There does not appear to be any material difference in these various editions of SADR. The current prohibitions applying to athletes are 2.1, 2.2, 2.3 (evading or refusing a sample collection), 2.4 (whereabouts failures) and 2.6.1. Other prohibitions contained in Rule 2 which are not athlete-specific are 2.5 (tampering with doping control), 2.6.2 (possession of a prohibited drug by an athlete support person (coaches, managers, agents, parents of an athlete, etc.), 2.7 (trafficking in prohibited drugs), 2.9 (complicity), 2.10 (association with a person who is serving a period of ineligibility).

[3] This sentence is as contained in the WADA Code and NZ SADR. As pointed out by counsel for the respondent at the hearing, it does not make full sense. Its intent though is tolerably clear.

above, Mr Neild submitted that the respondent's November 2014-January 2015 drug purchases were not sufficiently linked, in a temporal sense, to his participation in October 2015 in the National Master's Surf Life Saving Event. Clearly at the time of that event, he was to be regarded as an athlete i.e. a person competing in sport at the national level. There was no evidence of his competing at that level in surf life saving or in any other sport in or around January 2015 but there was clear evidence that at that time he was competing regularly in club and inter-club golf events and some social swimming competitions, although in both instances below national level.

35. This gives rise to the second issue, which is a matter of legal argument, as to whether (as contemplated by the definition of "Athlete" within the Rules) DFSNZ has effectively exercised its "discretion to apply anti-doping rules to an Athlete who is neither an International-Level Athlete nor a National-Level Athlete, and thus to bring them within the definition of 'Athlete'".

36. Mr Neild's argument on the legal issue was that, although DFSNZ had a discretionary power to do so, the required mechanism to include persons competing in sport below national level was to amend the definition of "athlete" accordingly (as had happened in the United Kingdom and in Ireland). It had not done so and therefore, it was said, the respondent could not be regarded as an athlete subject to the prohibitions in SADR that apply to athletes. The DFSNZ counter argument was that the making of the Rules themselves and the inclusion of the Code definition of "athlete" without amendment was sufficient and was itself an application of the term to those competing below national level. In the case of the respondent, DFSNZ, in its written submissions, clarified that it was *not* saying that he was an athlete *because* of his *participation* in sport at a level lower than that of national (though he had done so). Rather, DFSNZ took the higher ground that it was his registration as a member of SLSNZ through his membership of local sports clubs that was sufficient to give him the status of an athlete.

37. DFSNZ submits further that it had no power to amend the definition of "athlete" (or of the substantive prohibitions) because substantive amendments to those provisions are prohibited by the WADA Code and by section 16(2) of the Sports Anti-Doping Act. Section 16(2) provides that the (New Zealand) Rules "must implement the Code and, in particular, to the extent that the code requires specific Articles of the Code to be incorporated into the rules without substantive changes … must incorporate those Articles in that manner". We note in this respect that Article 23.2.2 of the Code includes in its list of provisions in the Code that cannot be substantively changed Article

2 (anti-doping violations) and Appendix 1 (definitions). Article 2 remains in SADR unchanged, although the scope of the Article would be expanded if the concept of an "athlete" changes. But that is the case whether the latter occurs by amending the definition of who is an athlete or by applying Article 2 to a wider range of sportspersons.

38. It will be seen that Mr Neild's argument creates a bifurcation between a person being bound by the Rules by virtue of membership of a club alone but not being subject to the prohibitions on athletes unless competing at an international or national level. This would mean that a person who did not compete in sport at any level would be subject to the Rules by virtue of club membership but not subject to the provisions for testing or breach of the anti-doping prohibitions. However, as Mr Neild noted, coaches and other club members could be caught by the complicity prohibition (assisting, aiding and abetting, etc., a rule violation) which applies to any persons who are bound by the Rules[4].

39. Mr Neild examined the issue of DFSNZ's discretion to regard competitors below national level as athletes and said it had not exercised the discretion claimed or, if it had, then had not exercised within proper limits such that it should not be interpreted to include recreational athletes. He described DFSNZ's position as relying "on a very unusual, and inherently unlikely, approach to rule drafting" by including all "persons" pursuant to Rule 1.1.5.2. Our view is that DFSNZ does have a discretion to take steps to expand SADR to include recreational athletes within the drug possession and use prohibitions. The question however is what are those steps? Is it sufficient to apply the prohibitions without a rule change or must the definition of "athlete" be expanded formally?

40. Mr Neild re-stated his basic position as being that neither the Code nor the Act contemplated DFSNZ "retaining an ability within the Rules to expand the definition of athlete at its discretion", by which we understood him to mean on an ad hoc, person by person basis, without rule change. He submitted that if DFSNZ intended to adopt a policy to exercise that discretion there was a requirement on DFSNZ to clearly amend or re-state the definition of "athlete" so as to make it clear that recreational athletes were included. He submitted that DFSNZ had not made it clear within the Rule as to what it was doing and "the creation and application of a discretion within the same instrument is nonsensical".

[4] See footnote 2 above.

41. Mr Neild further submitted that DFSNZ was required to give various parties an opportunity to comment on the Rules if they were to be applied in the way now suggested. Based on the way the Rules are currently drafted, he said, it would not be apparent to those parties that DFSNZ was exercising its discretion to expand the definition of who was an athlete. He submitted that such a discretion was not consistent with the Act's requirements and would also "circumvent the requirements of the Act under which the rules are promulgated".

42. Mr Neild continued that, as it was unclear that the definition of athlete does allow DFSNZ to extend the application of Rules 2.2 and 2.6, the claimed extension should be held void and unenforceable. However, if an extension of those Rules did include local sport membership, this would compromise the respondent's right to natural justice because he was unaware he was bound under the Rules. To that, Mr Bullock for DFSNZ invoked the "ignorance of the law is no defence" proposition. While we do not see that maxim as being applicable to the present circumstances, we see the legal issue under consideration as being broadly one of interpretation and do not therefore accept that natural justice principles have any application here or that questions of invalidity arise.

43. Mr Neild also noted that the Rules contemplate the provision of anti-doping education for those subject to the Rules, which the respondent should have received if he was bound. DFSNZ led evidence generally of its educational activities, which included SLSNZ, and reiterated the responsibility of athletes to make themselves aware of the anti-doping regime. While we consider that education is of great importance in this area, we make no findings relevant to the present case. The Tribunal specifically requested information from SLSNZ and NZG as to precisely what they have done in the past 5 years to inform their total membership at every level of the reach of SADR. Neither body filed any evidence.

44. Mr Neild's next point was that an extension of the term "athlete" to persons participating in recreational sport by the exercise of discretion (as opposed to legislative amendment to the Rules) based purely on club membership would breach those persons' right to natural justice as they would be subject to sanctions unaware that they were bound by the prohibitions contained in the Rules. We think this is better framed as a submission that this would constitute an improper or unreasonable exercise of discretion rather than as a natural justice point. In any event, while we agree that laws that impose sanctions need to be clear, we do not see this as a

natural justice or improper exercise of discretion case. Mr Neild did make a valid point when he submitted:

> "A member of a club or recreational athlete looking at the Rules would immediately know by reading the jurisdiction clauses that the Rules apply to them. However there is nothing in the definition of Athlete to suggest that club members would be caught by the anti-doping rule violations that refer strictly to Athletes. Recreational sports club members might think that DFSNZ has a power to [take steps to regard them as being Athletes along with elite athletes] but it would be entirely unclear to them whether DFSNZ had done so."

45. Finally, Mr Neild disputed that the overseas jurisdiction material submitted by DFSNZ supported its approach in dealing with recreational athletes under the Rules. Mr Neild said the 2014 European Commission Study conclusion highlighted the problems and the issues raised in a case of this kind. He said the Canadian case referred to by DFSNZ (*In the matter of an anti-doping violation by Chris Wakeham* DT 15-0219; 17 June 2015) was not relevant because it did not discuss the meaning of athlete. As to the UK and Ireland case studies, he pointed out correctly that the rules had expanded the Code definition and made it clear who is an "athlete", in effect by legislative amendment.

Lack of prosecutorial discretion

46. One of the unusual aspects of the Code is that, according to DFSNZ, it has no prosecutorial discretion and the regime is one of absolute liability that bites irrespective of fault (though as referred to below with a permissible discount if lack of significant fault can be established by the athlete). The justification given for that position is that the anti-doping regime is prescriptive and it is necessary to have automatic sanctions to ensure that it is observed.

47. It is certainly unusual in New Zealand for any prosecutorial authority not to exercise discretion before proceeding with any particular case. Making a sensible, principled assessment of all the circumstances and weighing the gravity and culpability of the offending against the effects of the initiation and of the outcome of a prosecution is at the heart of all New Zealand jurisprudence.

48. Similarly, in the same vein, the Code and the Rules which we are required to apply provide the Tribunal with little discretion to assess actual culpability in the particular

circumstances of the case and, as in a criminal case in the courts, in an appropriate case "discharge without conviction". In every instance of a breach of the Rules, the Tribunal *must* impose a period of disqualification. The one area of limited discretion is where an athlete can establish a lack of fault on his or her part (the onus of which to establish is on the athlete), in which case the period of disqualification can be reduced to one year.[5]

49. Thirdly, there is no room for the Tribunal to assess a response which is fair and proportionate in the way that any sort of adjudicative Tribunal, (including the criminal courts), will do as a matter of course. As referred to above, the argument presented to us on this point in the present case was that the Rules have proportionality and respect for human rights built into them. We see that as a proposition to be debated in some future case.

50. The result of this is that hearings before us become something of a semantic exercise and not an in-depth merits assessment of the true offending which has occurred. The outcome can often be that persons who have used prohibited drugs without any intention of improving sports performance can end up being regarded, unfairly, as drug cheats, the only distinction between them and true drug cheats being that of a shorter period of ineligibility being imposed. But a period of ineligibility *must* be imposed and there are limitations on the Tribunal's ability to fix a period that more fairly and accurately reflects the degree of culpability.

51. We are the first to acknowledge the curse of drug cheats in sport, but at the level of athletic participation which comes before us, this inflexible approach is difficult to rationalise. The present case and the question of applying SADR to those who are club members and who compete socially brings this concern to the forefront. The more so because DFSNZ's submissions suggested application of SADR simply by virtue of membership alone without any competitive participation. It is difficult to believe that persons who are not participants in serious athletic competition but, in one capacity or other and for one reason or other, may have become members of a sporting club that is affiliated to an NSO that has signed up to the Code and Rules would know or understand that, by virtue of their membership of that club alone, they were legally subject to a compulsory testing regime or the possibility of a process under SADR if it

[5] There is also discretionary power to back-date the commencement starting date in cases of delay and timely admission – considered further below – but not under these headings to reduce the period of ineligibility.

somehow became known that they had purchased the "wrong" weight control pills or had the "wrong" medication prescribed by a doctor.

52. If an appreciation of that potential outcome became widespread we are certain that it would force a reconsideration of the legitimacy of the regime or otherwise bring it into disrepute. While it is unnecessary to determine the question on the present facts, the Tribunal is not persuaded that membership alone, without active participation in a competitive event, would suffice for the application of the possession and use anti-doping rules. However, in the present case, we are dealing with someone who did compete in club events and therefore we do have to come to a view as to whether the drug possession and use provisions in SADR, as it currently exists, apply to him without the need for rule amendment.

Analysis

53. We take the view that one consequence of the lack of discretion, both as to breach and as to sanction, is that the Rules should be interpreted strictly and, where there is ambiguity or uncertainty, construed in favour of the athlete. We think that this is justified by reference to one of primary statutory purposes contained in section 5 of the Sports Anti-Doping Act 2006, namely that of "protecting athletes' fundamental right to participate in doping-free sport and in this way promote health, fairness, and equality for athletes worldwide". That formulation relates to "athletes" and incorporates the requirement of "fairness". We find it difficult to accept that it is fair for a member of a club who does not take any active part as a competitor and who therefore in a common sense way would not be regarded as an athlete can be subject to doping sanctions by virtue of having taken a prohibited drug for reasons that have nothing to do with competitive effort. We note that the "Comment" that is appended to the definition of "Athlete" refers to the possibility of the term being applied to "individuals who engage in fitness activities but do not compete at all". This seems contrary to the underlying concept contained in the definition, namely that it relates to persons who "compete in sport". The Comment is not part of the definition and we doubt that it represents a valid and correct interpretation of it. At the very least, it seems to us that it would only be a gym member over whom the national organisation has "authority" – that is, someone who also belongs to, and is a competitor in, a sports club that is affiliated to an NSO which has signed up to SADR – that could come under the regime. We comment on this further in the Postscript to this Decision.

54. We rule therefore that the respondent is subject to and bound by SADR by virtue of his membership of clubs that, through their respective NSOs, have adopted SADR, but would not be subject to and so would not have committed a contravention of those parts of SADR that relate to the use and possession of prohibited drugs by athletes as alleged by virtue only of his club membership.

55. That leaves the question of whether the respondent, who did take part in recreational sport at club level at the time that he possessed and used prohibited drugs, is properly regarded as an athlete under SADR in its current form and therefore subject to the sanctions contained in the Rules.

56. On this issue, the members of the Tribunal are divided. We all agree that to bring athletes who are competing below international and national level "within the definition of 'Athlete'" would best have been done by a positive amendment to the definition of "Athlete" in the New Zealand Rules. We do not accept, as was submitted by DFSNZ, that this course was precluded and we note that both the United Kingdom and Ireland have taken this course.

57. One of our members, Dr James Farmer QC, is of the view that the "discretion to apply anti-doping rules" to a recreational athlete, rendering such an athlete liable to contravention and the sanction of disqualification from participating or being involved in any sporting event, requires such a positive amendment rather than mere ad hoc application of the rules or administrative fiat without prior announcement or change to the rules to clarify that this is the position. His view is that the Code definition of "athlete" (including the Comment on the scope and purpose of the concept of athlete) makes it plain that it is the choice of each national anti-doping organisation as to whether it "expands" its regime beyond international and national level athletes to competitors at lower levels or to individuals who engage in fitness activities but do not compete at all and, if so, how that expanded regime will be administered (for example, whether such athletes will be tested or be required to provide advance TUEs). That suggests to him that what was required by SADR was a further considered decision, in the nature of a rule-making decision, as to whether and, if so, how the regime was to be expanded to cover recreational competitors.

58. The other members of the Tribunal, however, have concluded that, having regard to the precedent of other countries (other than the United Kingdom and Ireland) regarding the current definition in the context of inclusive membership rules as being sufficient

to entitle the enforcement agency to take administrative action to apply the Rules against persons competing below the national level, the case against the respondent of contravention has been made out by DFSNZ. That therefore is the ruling of the Tribunal.

Summary of rulings

59. Our conclusions are:

(1) The respondent was subject to the Rules contained in SADR by virtue of his membership of the local surf life saving and golf clubs who were affiliated with NSOs who had adopted SADR.

(2) He could however only be found to have committed a breach of SADR (use of or attempted use of or possession of a prohibited drug) if he was an "athlete" as that term is defined in SADR.

(3) (By majority decision) DFSNZ was entitled to apply the concept of an athlete, as that term is currently defined in SADR to the respondent.

(4) By virtue of his competing in sports (swimming and golf) at a recreational or club level at a time when he was in possession and using prohibited drugs, the respondent has contravened the use or possession provisions of SADR as alleged by DFSNZ.

(5) We make no finding as to whether by competing in the Master's Surf Life Saving Championship 9 months after he had ceased using or possessing the prohibited drugs the respondent had contravened the Rules.

Penalty

60. The Tribunal was invited to determine as a preliminary matter whether the respondent was an "athlete" for the purposes of Rules 2.1 - 2.6.1 at the time of his clenbuterol purchase. If it was determined that he was an athlete at that time, Mr Neild proposed the parties could consider filing a joint memorandum on sanction. If it was determined that the respondent was not an athlete, he suggested DFSNZ may wish to consider whether they continue the proceedings. If so, then it was submitted that the respondent should be given an opportunity to file an amended Form 2 and evidence as to whether he was in breach of SADR in October 2015. The effect of the Decision that we have made is that (by majority) the respondent is and was an athlete and on that basis and by virtue of his regular competing in golf club and inter-club events at the time that he possessed and used prohibited drugs he was in

breach of SADR in the period November 2014-February 2015. As stated, we have not made any finding in relation to his competing in a surf life saving event at a much later time.

61. On the question of sanction, the mandatory starting point for the period of ineligibility that must be imposed on the respondent, it not being alleged that the contravention was intentional, is 2 years (rule 10.2.2). The respondent gave evidence that he had purchased the prohibited drugs for the sole reason of losing weight and not for enhancement of any sporting performance. He was cross-examined strongly but we have no hesitation in accepting his evidence.

62. A number of issues arise as to how the period of ineligibility is to be ultimately determined. First and without dispute, he is entitled under rule 10.11.3 to be credited as at this date with the period of suspension that he has already served under the order of provisional suspension made by the Tribunal on 28 August 2018, a period of just over 6 months.

63. Other relevant alleviating provisions relating to sanction are timely admission (rule 10.11.2) and delays in the prosecution/hearing process (10.11.1). In the normal course on the basis of precedent, the respondent would be entitled to the benefit of the timely admission and delay provisions. In previous recent cases arising out of Medsafe's clenbuterol investigation, we have allowed a combined 12 month period back-dated beyond the time of provisional suspension for timely admission and delay: *DFSNZ v. Blackley,* ST 14/18, 29 October 2018. Applied to this case, that would provide a starting point for a 2 year period of suspension to 28 August 2017 which would mean that the respondent will remain ineligible to compete in any sporting events until 28 August 2019.

64. There is however also the question of whether the respondent can establish no significant fault or negligence under rule 10.5 which, if proven, would give the Tribunal power to reduce the 2 year period of ineligibility to a shorter period though not less than 1 year. Although at the hearing, questions of sanction were raised briefly by counsel for both parties, we have not been addressed on whether rule 10.5 can be established in the present case and, if so, why. There would also be a further question of how this might relate to the 12 month back-dating period. In *Blackley's case*, which

was made with the assistance of an agreed memorandum of counsel attached to the Decision, no attempt was made to reduce the 2 year ineligibility period under rule 10.5.

65. We wish therefore to hear further from the parties on the question of sanction generally and in particular on the issue of no significant fault or negligence. We therefore direct written submissions to be filed and served by the respondent first within 7 days of this Decision, followed by DFSNZ 7 days later and a reply submission from the respondent 7 days after that. We would obviously be receptive to a joint agreed memorandum if that can be achieved.

Name suppression

66. We think that in the circumstances of this case, which is a precedent in every sense, the respondent should have the benefit of name suppression.

Assistance of counsel

67. We are grateful to Mr Bullock and Mr Neild, counsel for DFSNZ and for the respondent respectively, for the assistance that they gave at the hearing and especially for the quality of their written submissions.

Post-script

68. An issue which has come to the fore for us in this case has been with the assertion by DFSNZ that the full rigour of the Code applies to every person in New Zealand who is connected through club membership to an NSO, whether that person competes in a sports event or not and whether at a recreational or club or other level below the elite levels where the focus of the regime has previously been. We are not privy to what degree of consultation DFSNZ had with NSO's, players' associations and other interested parties before it adopted this position.

69. We would expect that most sports club members engaged in recreational sport or simply club members for social and dining reasons would be extremely surprised to find that they would be subject to prosecution (using that term loosely) by DFSNZ if they were found to have used a prohibited drug for weight-loss or cholesterol reduction or menopausal hormone replacement reasons. They would be dismayed if they were to be subjected to an unannounced urine test while enjoying an after-match drink at the club and equally dismayed if told that CAS case law and/or DFSNZ's view of SADR leaves no discretion but to prosecute and the Tribunal with no discretion but to impose

SADR sanctions without regard to differences between them and elite and professional athletes. Such persons would certainly be aware that elite athletes are subjected to the rigours of the regime – and rightly so – but none of the media publicity around that regime would have alerted them to the possibility of their finding themselves in the position that the respondent in this case finds himself.

70. The potentially vast regime arising from DFSNZ's position that the prohibitions against possession and use of listed drugs apply not only to recreational and club athletes but even to non-competitors simply by reason of club membership, coupled with the inability of the Tribunal, by virtue of case law laid down by the Court of Arbitration for Sport, means that the Tribunal is prevented from assessing and responding to actual culpability in a common sense and proportionate way, having regard to the facts and reality of a situation. The respondent in this case, who on the case made by DFSNZ would be subject to a period of ineligibility by virtue of his club membership alone, must be judged rigidly by the same rules relating to sanction as an elite athlete who has been fully educated on the regime and on the need to check all forms of medication against the prohibited list.[6] That is a matter of public interest which deserves attention and debate and careful consideration by those who are responsible for rule making and rule application. The fact that, on one view, SADR can be applied to gym members who do not compete in any sport at all – a view which we have doubted above – is a matter of particular public interest potentially affecting a very large number of people who do not engage in sport and whose only connection with sport may be that they have paid a membership to a club as a non-playing member, as is the case with some golf and yacht clubs who provide dining and social amenities as well as sporting facilities. That is not to say that there should not be regulation, for health reasons, on the use of drugs in gymnasiums but whether that can be done under an Act whose purpose relates to competitive sport is another question.

71. These concerns are compounded by the limitations that exist on this Tribunal's ability to distinguish between cases that merit a strict approach to ensure fairness and a level playing field in competitive sport and those cases where the facts and circumstances should dictate a more merit-based approach. Despite the care in appointing the Tribunal by the Governor-General on the recommendation of the Minister of Sport after

[6] This is not to say that, if club athletes competing regularly are lawfully subject to the drug use and possession rules of SADR and if that is widely publicised and appropriate education extended to them, they should not be subject to the full rigour of SADR if they choose not to observe those rules or to pay proper regard to them. We have made this point previously in *Ware* (below, footnote 7) at paras. 48-49.

consultation with Sport New Zealand, the Tribunal in this area does not have an effective adjudicative role. An observer might be forgiven for thinking that the Tribunal is little more than a rubber stamp and that it has no ability to distinguish effectively between true drug cheats and others whose actions are devoid of any moral wrongdoing or sports performance benefit and who, as in the present case, had no understanding that their using a drug for health reasons might lead to a period of being unable to participate in sport no matter at how low a level.

72. This is underlined by the so called appeal provisions which are, by virtue again of case law of the Court of Arbitration for Sport, total rehearings with no regard to findings of law or fact by the Tribunal.[7] The appointment of members of that body is not made by – and nor is there input from or consultation with - the New Zealand Government, Sport New Zealand or NSOs. There is therefore no New Zealand oversight of how New Zealand sports law is ultimately determined. This provides a marked contrast with the care that is taken to ensure that members of this Tribunal are appropriately qualified to determine disputes in the New Zealand sporting environment.

73. If the current framework, as now recognised by this Decision, is to be maintained there is a need for the public generally, and importantly recreational sporting participants to know and understand that everyone who has any sporting connection can be called to account in exactly the way that high profile elite professional athletes are and, as referred to above, that potentially this could on one view be extended to gymnasium members who do not engage in sporting endeavours other than as social members of a sports club which is affiliated to an NSO.

Dated: 4 March 2019

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Sir Bruce Robertson
Chairman

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Alan Galbraith QC
Deputy Chairman

.....
Dr James Farmer QC
Deputy Chairman

[7] We have previously commented on the undesirable features of this practice: see *DFSNZ v. Ware* ST 09/17 (21 December 2017), para. 47.