**BEFORE THE SPORTS TRIBUNAL**
**OF NEW ZEALAND** **ST 07/21**

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| **BETWEEN** | **DRUG FREE SPORT NEW ZEALAND** |
| | **Applicant** |
| **AND** | **Anon ordered by the Tribunal, (r 14.3.7)** |
| | **Respondent** |
| **AND** | **NEW ZEALAND FOOTBALL** |
| | **Interested Party** |

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**DECISION OF SPORTS TRIBUNAL**
**1 DECEMBER 2021**

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| **Hearing** | Microsoft Teams hearing 17 November 2021 |
| **Tribunal** | Nicholas Davidson QC (Deputy Chair)<br>Dr James Farmer QC (Deputy Chair)<br>Ruth Aitken<br>Pippa Hayward |
| **Participants** | David Bullock and Samara Wakefield counsel for Applicant<br>Hayden Tapper, Drug Free Sport New Zealand<br>Paul David QC, for the Respondent<br>Kevin Forde, for New Zealand Football |
| **Registrar** | Neela Clinton |

## Background

1. In early 2021, the Respondent ordered online the prohibited substance Ibutamoren under the trade name MK-677. On 19 March 2021, he registered online with New Zealand Football (NZF) and became bound by NZF's anti-doping policy which incorporates the Sports Anti-Doping Rules (SADR 2021). His registration was confirmed by his club on 23 March 2021.
2. On 26 March 2021 Medsafe advised him that an imported parcel addressed to him containing Ibutamoren capsules had been intercepted by NZ Customs. Medsafe is responsible for the regulation of therapeutic products in New Zealand and investigates unlawful importation, manufacture, labelling and supply of medicines.
3. On 8 April 2021 Medsafe contacted Drug Free Sport New Zealand (DFSNZ) to ask if the Respondent was bound by the 2021 Sports Anti-Doping Rules (SADR 2021). DFSNZ investigated his status and his purchase of Ibutamoren which is a prescription medicine incorporated into the SADR 2021, as a prohibited substance banned at all times under class S2 Peptide Hormones, Growth Factors, Related Substances and Mimetics. It was satisfied he was bound by SADR 2021 as a registered member of New Zealand Football (NZF), which has adopted SADR 2021.
4. DFSNZ notified the Respondent on 27 July 2021 that it considered he had committed an anti-doping violation and on 30 July 2021 he said that he had purchased the product and used it for the last time on 27 March 2021 when he became aware of the alleged violation. When the first parcel did not arrive (intercepted by Customs), he ordered a second batch. He admitted using the product but was unaware it was prohibited, and did not know SADR 2021 applied to him. These bare elements of his purchase and use of the prohibited substance are developed further in this decision.

## Proceedings

5. On 6 August DFSNZ filed anti-doping violation proceedings and on 16 August 2021, without opposition, the Respondent was provisionally suspended, and the Tribunal made timetabling orders.
6. On 25 August DFSNZ filed an amended Form 1 to include a second ADRV which arose from the Respondent's admissions. The ADRVs were addressed together, alleging violation of Rules 2.2 and 2.6 of SADR 2021 in that:
    (i) At some time in early 2021 and prior to 25 March 2021 the Respondent purchased 120 tablets labelled to contain Ibutamoren in breach of r 2.6 and used or attempting to use them at various times in breach of r 2.2

(ii) At some time in early 2021 and prior to 27 March 2021 he purchased a quantity of Ibutamoren tablets in breach of r 2.6 and used or attempted to use them at various time in breach of r 2.2.

7. On 1 September counsel for the Respondent, Paul David QC, advised that there was no objection to the proceedings being heard together and the timetable was extended. The Respondent filed a Form 2 admission of violation, the violations being treated as one for sanction.

8. At a teleconference on 13 September 2021 the Chair directed the parties to discuss whether an agreed position on sanction could be presented to the Tribunal for consideration, and on 7 October the parties filed a joint memorandum proposing a 13 months period of ineligibility after discussion and negotiation between DFSNZ and the Respondent through counsel, Mr David QC.

**(First) Joint Memorandum of counsel**

9. This memorandum recorded that the Respondent ordered MK-677 to assist with his gym training, while not bound by SADR, and not participating in organised sport.

10. His possession and use of MK-677 was between 23 and 27 March 2021, between his confirmed registration with NZF, and his last use of the substance. DFSNZ agrees that his violation was not intentional, so the maximum period of ineligibility is two years. He is not a cheat, and is a "recreational athlete" as the Rules contemplate. The parties agree that his degree of fault or negligence was not significant, being relatively young, participating in football for fun at a low level of competition, without any anti-doping education or information about SADR. He made some inquiries about the product before taking it, believing it legal, but not in the context of his playing sport, thus not in an anti-doping context.

11. In a statement he explained that he has a day job which requires a level of strength and fitness. He played football at high school and joined a local club when 14 but stopped playing when he left school to focus on work. In March 2021, he saw on Facebook that another club struggled to get players and decided to register for the season but did not go to any pre-season training before registering on-line. In his words, "I decided to go back and play soccer for enjoyment and to get fitter". He did not attend training sessions, and only aimed to play in the weekend. His work tired him. He played in the local second division, and enjoyed the friendships and team bonding, and his fitness improved. Playing football was in his words, "a good break after the week at work".

12. He had weight trained at school but work became his number one priority. Some of those at the gym had MK-677 Ibutamoren capsules, and he had seen Facebook

adverts but had never used it. When he asked if it was legal he was told it was "completely legal to use in New Zealand", and would build muscle by helping with recovery after training, and help him sleep. When the first order did not arrive he at first gave up on the product and thought it was lost but after contacting the company a second order arrived, about a week before he received advice that the first order had been seized. He took a capsule a day for about a week and stopped when Medsafe contacted him.

13. When he found out that use of Ibutamoren was illegal in football, he was surprised and worried. Later, when contacted by DFSNZ he learned that the sanction for violation could be up to four years ineligibility but could be reduced if he admitted the violations. The first time he became aware of the application of SADR Rules to him, and that the product was a prohibited substance, was when DFSNZ contacted him in July 2021. He had never received anti-doping education and nothing alerted him when he registered online. He gave his use of the product no thought when he registered to play with a club, as he was not weight training for football.

14. He concluded by saying he was sorry all this happened, and he would never want to cause trouble for the club, or for his family, and the process was worrying and upsetting. He concluded, "I enjoy playing soccer and would like to play soccer again as soon as I can".

**Relevant SADR Provisions**

15. SADR 10.2 provides:

> *Ineligibility* for *Presence*, *Use* or *Attempt*ed *Use*, or *Possession* of *Prohibited Substance*s or *Prohibited Method*s
> The period of *Ineligibility* imposed for a violation of Rules 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Rules 10.6, 10.7 or 10.8:
>
> 10.2.1 The period of *Ineligibility* shall be four years where:
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> 10.2.1.1 The anti-doping rule violation does not involve a *Specified Substance*, unless the *Athlete* or other *Person* can establish that the anti-doping rule violation was not intentional.
> 10.2.1.2 The anti-doping rule violation involves a *Specified Substance* and *DFSNZ* can establish that the anti-doping rule violation was intentional.
> 10.2.2 If Rule 10.2.1 does not apply, the period of *Ineligibility* shall be two years.

16. SADR 10.6.1.3 provides:

> *Protected Persons or Recreational Athletes*
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> Where the anti-doping rule violation not involving a *Substance of Abuse* is committed by a *Protected Person* or *Recreational Athlete*, and the *Protected Person* or *Recreational Athlete* 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 *Ineligibility,* depending on the *Protected Person* or *Recreational Athlete's* degree of *Fault.*

17. *No Significant Fault* or N*egligence* means:

> The *Athlete* or other *Person's* establishing that any *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 *Protected Person* or *Recreational Athlete*, for any violation of Rule 2.1, the *Athlete* must also establish how the *Prohibited Substance* entered the Athlete's system.

18. DFSNZ does not allege that the Respondent's conduct was intended to enhance his sporting performance, therefore the two-year period applies, unless one of the further defences is established.

19. The new WADA Code came into effect on 1 January 2021 and provides a framework for reduced obligations and sanctions for 'recreational athletes', allowing discretion and flexibility in sanctioning. It recognises that recreational athletes are less likely to have the same support and education about their anti-doping obligation as higher-level athletes.

20. The WADA website records under *Anti-Doping Code and International Standard Framework Development and Implementation Guide for Stakeholders*:

> 51. New Category of Athletes "Recreational Athletes" Permitted More Flexibility in the imposition of Consequences
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> Under the current Code, ADOs are not required to test lower-level athletes, but if they do and an ADRV results, then all of the consequences imposed by the Code apply. A number of stakeholders who regularly test these lower-level athletes have pointed out that: they do so as a matter of public health and imposing full Code consequences (as opposed to rehabilitation) is counter-productive to that objective; these lower-level athletes have not had the same anti-doping educational opportunities as higher-level athletes; and the consequence of mandatory Public Disclosure on the employment status of someone who participates in sport only at the recreational level is unduly harsh. A new Code definition describes these lower-level athletes as "Recreational Athletes". The determination of who is a recreational athlete is left to the NADO of the athlete's country, but must not include any athlete who in the prior 5 years has been: an international-level or national-level athlete; representing a country in an international event in an open category; or been in a Registered Testing Pool or other whereabouts pool of an IF or NADO. "Recreational Athletes" benefit from the same flexibility in sanctioning as protected persons.

21. Having regard to the above and bringing to account their perspective of the degree of fault and importance of complying with SADR the parties' agreed that

a period of 13 months ineligibility would fit, subject to the Tribunal's consideration.

**The Tribunal's response to the 'agreed' 13 months ineligibility**

22. By Minute of 22 October 2021, the Tribunal sought a further understanding of the way in which the parties reached the agreed period of ineligibility, given that Article 10.6.1.3 allows for a new range of sanction from two years ineligibility to a reprimand.

23. The Tribunal made some preliminary observations and identified *Cilic v ITF*,[1] which in a different context, and under different rules, addressed the concept of no significant fault or negligence. That case did not relate to a recreational athlete. For a "significant" degree of fault for a specified substance the range was 16-24 months, a "normal" degree of fault 8-16 months, and a "light" degree of fault 0-8 months. The Tribunal wanted to know whether this sort of reasoning was employed by the parties in advancing the 13 month period of ineligibility.

24. The Tribunal noted that recreational athletes had been sanctioned under earlier regimes, and referred to ST 19/16 (cricket), ST 14/15 (football), ST 6/15 (touch). There was no discretion in sanctioning recreational athletes under the anti-doping rules applicable at the time. The Tribunal has expressed concern about the understanding held by the general sporting community beneath elite and national level, reflected for example in ST 12/18 (surf life saving), and the lack of jurisdiction to differentiate sanction between different levels of athletes. There was little guidance from any tribunal, which was put down to the fact that lower-level athletes were not usually tested. The Tribunal expressed itself in this way:[2]

> This Tribunal was 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.

25. Sir Bruce Robertson has said that there was no room for the Tribunal to assess what it considered to be a "fair and proportionate" to breach, which the Tribunal thought was inflexible, difficult to rationalise. It was difficult to believe that those who are not participants in serious athletic competition would know by virtue of membership of a sporting club affiliated to an NSO signed up to the Code, that they would be subject to a compulsory testing regime or process under SADR. A contravention of the rules could have come about without any element of fault whatsoever.

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1 CAS 2013/A/3327.

2 *DFSNZ* v *XYZ* ST 12/18.

**Hearing**

26. A second joint memorandum dated 3 November 2021, filed by the parties in response to the Tribunal's Minute of 22 October 2021, emphasised that the process to evaluate fault involves application of the rules and relevant definitions to arrive at a sanction which reflects the circumstances of the violation and the personal characteristics of the athlete and potential application of provisions in SADR 2021 10.7, 10.8, 10.13.2 and 10.15. While the parties had reference to decisions of the Tribunal and CAS, their principal approach was to focus on applying the rules to the circumstances of the case and personal characteristics of the athlete.

27. The Tribunal referred to 'banding' of fault in its Minute, but this has not been its approach to date. Decisions of this Tribunal fell in the range of 0-24 months where there was no significant fault under rule 10.5 of the 2015 Code as referenced in the cases of *Gardiner* ST06/15, *Kepaoa* ST 10/17, *DFSNZ v Anon* ST 4/18, and now reflected in Rule 10.6 of the 2021 Code. These decisions were concerned with sanctions under a provision closely related to SADR 10.6.1.3, and the parties considered these.

28. In *FIS v Johaug,* CAS applied the bands of fault for non-specified substances under the 2015 Code for "significant degree of fault" (20-24 months), "normal" (16-20 months) and "light" (12-16 months), before moving the sanction up and down within the band for subjective elements. This was not in the context of sanctions applicable in this case, where there is no 'intention', and the range of sanctions is different. The Tribunal accepts *Johaug*[3] has no application beyond identifying a way in which banding might be incorporated in decision-making as in *Cilic*. However, the concept of banding is of interest to the Tribunal and the joint memorandum extended use of the bands by analogy said the sanction of 13 months 'agreed' would represent "normal" fault. This categorization was not used by the parties in coming to their agreed sanction.

29. Mr Forde for NZF acknowledged that when registering for football on line, as in this case, there is nothing to identify the application of the anti-doping rules for the athlete. That information would come from a reading or understanding of NZF Rules and Regulations. Mr David said that the respondent could not have found out about his obligations unless somehow alerted to them. He is young, inexperienced, and effectively learned about his obligations by "getting caught", when he was entirely frank about his purchase and use.

30. The Tribunal was interested to know more about the genesis of the Respondent's purchase and use of MK-677 and it understands there may be scant reference in

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3 *FIS v Johaug* CAS 2017/A/5015 and CAS 2017/A/5110.

gymnasia to the risks of an anti-doping violation notwithstanding the use of substances which, as in this case, fall foul of SADR.

31. Mr Bullock, for DFSNZ, submitted that banding, as in *Cilic*, may be less helpful than evaluation of the facts cross checked against other decisions, and emphasised that the parties had looked at all cases of the Tribunal, but worked from the founding principle that an athlete is expected to inform him or herself of their obligations in the context of doping. When it was put by the Tribunal that the fault could be described as "light," whether or not banding was used, Mr Bullock responded that the position reached must still be "principled" and if guidance is to be given to athletes it should be left for another case, pointing out that some athletes have taken greater care than the Respondent here, but still been caught out.

32. When asked what more the Respondent could have done, Mr Bullock said he could have gone to the NZF (or WADA) website, "to see if there is anything he should know" and while he used the substance to enhance performance in the gym, he extended his recreational activity to playing sport and he should have checked his obligations in that regard.

33. When the Tribunal asked about the substance helping increase the strength of the athlete when considering sanction, Mr Bullock submitted such was irrelevant, and Mr David agreed. The consequences of use of the substance are ignored, so they submit, so that fault has been addressed, and everyone is treated the same way with an element of "leeway for certain categories". The Tribunal for this decision accepts the submission, while reserving its position where there has been performance enhancement.

34. Mr Tapper for DFSNZ agreed that, in the words put to him, the respondent "stumbled" into this situation and the discussion which led to the agreed sanction brought to account how to help him through the situation in which he finds himself. A 13 months sanction does not reflect such concern as the Tribunal sees it.

35. The parties acknowledge the rules regarding backdating, timely admission and publication but emphasised in their joint memorandum and at the hearing that the exercise they had undertaken involved a significant amount of time and effort, looking at the range of possible sanctions. NZF's position is to commit to drug free sport at all levels of competition but it was not involved in discussions between the parties and took no position regarding the circumstances of the case.

**Decision**

36. The Tribunal fundamentally does not agree that the 13 months period of ineligibility proposed is a fair and proportionate response to the application of the new rule 10.6.1.3 on the facts of this case. As the Code now recognises, an athlete in this position is unlikely to have any appreciation of the anti-doping regime being applicable to them, nor that the use of a particular substance may infringe the anti-doping regime.

37. DFSNZ, before SADR 2021, took the position that the anti-doping regime applies to all athletes who are members of sports organisations that have agreed to or adopted SADR, or whose international federations are signatories to the Code, so that the New Zealand sporting environment is free from doping at all levels. It acknowledged that greater flexibility and sanctions may be appropriate at a 'lower level' of sport and it made submissions to WADA to that effect, on the draft 2021 Code.

38. The two-year Code review process which led to the new provision for recreational athletes saw DFSNZ express strong support for a flexible sanction regime for such athletes. It recognised the inevitable consequence of the increased focus on intelligence led investigations, which captured athletes at all levels of sport, resulting in low level athletes without education or support personnel facing the same lengthy bans as an elite competitor and it supported a sanction option which was "community-based" rather than a ban.

39. Sport New Zealand for the Code review made a submission as to "low level athletes," that the Code should clarify how anti-doping rules should be applied, and that there were policy reasons for treating such athletes differently to those at international and national level, and that the Code should be explicit about this. It asked for consideration of a discretion not to bring a case against a low-level athlete where the violation is "one off and/or relatively low level," as applies in many law enforcement settings outside sport. Further, or in the alternative, it submitted that consideration should be given to a more lenient set of sanctions, and in some instances for low level athletes a warning rather than "full prosecution" will be justified particularly where the athlete participated at such a low level that he or she never received any anti-doping education and may not even be aware the rules applied to him or her. It foresaw the issue of lower-level athletes being raised more frequently as ADOs rely more on intelligence, and less on testing.

40. While the Tribunal has expressed the clear view that some flexibility for the recreational or "low level" sportsperson might be appropriate, and that there might be prosecutorial discretion, it has addressed on-line purchase in the past and reminds itself of the perspective of Dr Farmer of the Tribunal, in ST 09/17, that given the importance of the anti-drug regime it would be undesirable if amateur or club athletes received more

favourable decisions than elite or professional athletes because the latter were exposed to a higher degree of drug education and awareness than the former given the responsibility on all athletes to observe the rules. He observed that it was incumbent on clubs and coaches to take the initiative and invoke the resources of DFSNZ to ensure the drug education programme extended to all corners of competitive sport, professional or amateur. This initiative was not taken up here for application at the very point of entry to competitive football by the Respondent. NZF to this point has done nothing to draw a registrant's attention to the anti-doping regime nor the consequences of violation. The registration process is devoid of any advice or reference to the athlete which the Tribunal considers is a disservice to all footballers, and to the sport itself.

41. The Tribunal does not differ from the agreed position as to the relevant elements for assessment of fault in this case, even before recognising the very unusual circumstances of the Rules applying to this athlete only for four days before he ceased use of the substance. The Respondent did not act "intentionally", and his fault was not significant in the overall circumstances of the violation, and his personal characteristics. They were reflected in the evidence before the Tribunal reviewed above. Factors used to assess fault were:

- The obligations on the athlete under SADR and NZF's anti-doping regulations
- Ordering and purchasing for gym training being removed from any consideration of playing football, and while not subject to SADR
- Having no information supplied to him regarding the application of SADR or NZF's anti-doping regulations when he registered for football and became bound
- Not having any anti-doping education
- His relatively young age and participation in sport at a lower level of competition
- The extent and adequacy of inquiries made by the athlete.

42. While his inquiry about the substance was cursory, it was not directed to the anti-doping rules, as he was not caught by them, nor contemplating playing competitive sport at the time. But following his registration, as a recreational athlete unaware of the anti-doping regime, he would have to find his way from registration to the relevant rules of the sport, here football, and then comprehend these, lengthy in themselves, to understand his obligations. This is an unlikely progression. There may be circumstances where the use of the substance and what is known about it by the athlete will result in a finding that further inquiry should have been made, but not in this case. This athlete was simply not aware of the Rules, and thus gave no thought to them.

43. In this instance the Respondent did indeed “stumble” into this predicament. There was no link in his mind between his use of the substance and his playing football. Although the Tribunal recognises that an incidental effect of use could have been, over time, some advantage but that did not happen here as his use ceased only a few days after his registration for football and becoming bound under the anti-doping rules.

44. His decision to play football was at a level which did not trigger any concern or contemplation that his use of this substance might constitute a violation. That was not why he ordered and used it, as that was directed to his gym activity. It may have had some performance benefit in football through strengthening and fitness, but such was incidental, and he is not in any way a cheat.

45. There is nothing the Tribunal can see on the material before it to indicate that he should have been aware that he may have been contravening the WADA Code. Had he been competing at a higher level, or seeking advancement in sport, that would be different, but he was not. He was playing football for fun, to keep fit, and nothing in the registration process alerted him to his coming within the strictures of the Code.

46. It can, of course, be said that anyone taking a substance which may have a bearing on physical performance, should somehow alert themselves to the possibility they may be subject to the anti-doping rules. That is a hard standard to apply to a recreational athlete.

47. The Tribunal recognises that every case will fall on its facts, but a case such as this must be at or towards the lower end of the range of sanctions now clearly signalled, with the reasons for this new provision so clearly marked out. The Respondent began to play football again simply for fun and exercise. He has been frank and co-operative, and dismayed by the steps that have been taken against him. He misses his football. He is exactly the sort of person to whom the new rule 10.6.1.3 is intended to apply.

48. The football season runs from January 1 to December 31, and affiliated and non-affiliated football is played in New Zealand. Here the provisional suspension took effect on 16 August 2021. We have given serious consideration to whether a reprimand should apply but in the end, and upholding what we think is a proportionate response, still reflecting the foundation principle that the athlete must make him or herself aware of their anti-doping obligations, we conclude a period of ineligibility of four months commencing from the date of provisional suspension on 16 August should apply, and that time is nearly completed. We reach this view respectful of the parties’ efforts to reach agreement about sanction, but we think too much emphasis has been placed on the principle of athlete responsibility in this setting, and not sufficient emphasis on the low level of participation, and lack of education about, or awareness of the Code.

49. We expect this decision will be given currency throughout sport which will emphasise that recreational athletes are bound by SADR but may be treated differently to those at national or higher levels. The principal distinction lies in awareness of their obligations, and the information provided to them about the anti-doping rules. If this decision is picked up by sport generally, and the importance of clear and cogent communication to all athletes is acted on, then the case for leniency in the sanctioning process will, of course, be much reduced. The Tribunal was minded to provide some indicative banding but at this stage simply recognises the Respondent's degree of fault measured in the objective and subjective way required, is at the "low" or "light" end.

50. We conclude by recording our recognition that the parties went to considerable lengths to reach an agreement as to ineligibility. Counsel and DFSNZ have a high level of experience and professionalism. We differ because SADR 10.6.1.3 is a provision which in its gestation and explanation marks the recognition that athletes at recreational level as here may be caught unaware by the Code and if so, leniency may be appropriate. This decision is not a charter for a lesser regard for the anti-doping rules and every case will fall on its own facts as to sanction.

**Orders**

51. The Respondent is suspended from all competitive sport for a period of 4 months from 16 August 2021 until 16 December 2021.

Dated: 1 December 2021

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**The Hon. Nicholas Davidson QC**
**Deputy Chair**