

ANTI-DOPING TRIBUNAL OF THE FOOTBALL FEDERATION OF AUSTRALIA

DETERMINATION IN THE MATTER OF
FFA v BAGOLY

Tribunal comprising:

John Marshall SC (Chairperson¹), Lachlan Gyles SC and Dr Ron Muratore

Dated: 21.03.2017

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A. INTRODUCTION

1. The Anti-Doping Tribunal (the **Tribunal**) is established under Part 7 of the Football Federation Australia National Anti-Doping Policy (**ADP**) and its role is to hear and determine allegations of Anti-Doping Rule Violations and impose appropriate sanctions (ADP 121). In accordance with ADP 124 the tribunal comprises the persons listed above.
2. The person the subject of the allegations, Jake Bagoly (**Bagoly**), does not put in issue that he is bound by the ADP and that the Tribunal has full jurisdiction to deal with this matter.
3. These are our written reasons under ADP 143 for the decision of the Tribunal concerning the admitted use by Bagoly of Sustanon 250 and the injection of that substance into another person playing a different sport (rugby league) at the time (2013).
4. The relevant ADP the ADP which applied from 19.12.2012 and follows the WADA Code 2009 (**WADC**).
5. For the reasons below the Tribunal imposes a sanction of a period of *Ineligibility* of 4 years to commence and expire on the dates set out in paragraph **76** below.

B. BACKGROUND

6. On 11.11.2016 the Anti-Doping Tribunal was informed of alleged Anti-Doping Rule Violations (**ADRVs**) by Bagoly. The allegations are contained in a letter dated 13.04.2016 from FFA to Bagoly

¹ As the Disciplinary and Ethics Committee Chair, Mr Marshall occupies the position of Chairperson of the Tribunal.

7. Pursuant to ADP 111, the letter dated 13.04.2016 is notice under ADP 109.
8. The allegation is of conduct in 2013. Four ADRVs are alleged. The first 2 allegations relate to conduct concerning Bagoly himself involving his *Use* or *Attempted Use* of a steroid. The second 2 allegations relate to an allegation of contravention of ADP 46 (WADC 2.8) which includes assisting in an anti-doping rule violation or any attempted such violation.
9. Apparently there was no response from Bagoly to the 13.04.2016 letter. As a consequence FFA issued a sanction by letter dated 12.10.2016. Bagoly objected to the sanction by letter dated 17.10.2016. Whether or not it was open to Bagoly to object at that late stage is not put in issue by FFA and FFA was content to proceed on the basis that Bagoly could raise whatever defensive issues he wished to at a hearing in the Tribunal.
10. It is in those circumstances that directions were made for a hearing to take place on Tuesday 20.12.2016 at 3pm (or so soon thereafter on that day as was suitable to Bagoly provided he notified an alternative time by email to Mr Tim Holden of the FFA no later than 5pm on Friday 09.12.2016). Bagoly then requested that the hearing not take place as directed. Rather Bagoly wished the hearing to take place on a Monday in February 2017 from 6pm. In circumstances where the person the subject of the allegations requests the hearing be delayed and the proposed new date did not inconvenience FFA or the Tribunal, the Tribunal was prepared to adjourn the hearing. The Tribunal then fixed the hearing for a Monday in February 2017 at 6pm. On the Saturday just before the hearing was to take place Bagoly sent an email to FFA which stated:

I'm not coming on Monday, I don't care about my ban. I've hurt my ankle so I can't play anyway.
11. In these circumstances ADP 141 applies because the person the subject of the allegations has not attended the hearing. The Tribunal may then proceed to consider the evidence before it when making a decision. Arguably Bagoly had waived his right to a hearing by the email above, however the safer course is to construe the email as merely a statement that he will not attend a hearing rather than waiving his right to have the Tribunal decide the matter on the papers.
12. In these circumstances the Tribunal has decided the matter on the papers as they stood at the time of the email. At that time FFA had complied with directions for service of evidence and submissions.

C. APPLICATION OF THE ADP

13. Bagoly provided a statement to the Australian Sports Anti-Doping Agency (**ASADA**) dated 19.09.2014 which in short terms admitted the purchase and use of Sustanon 250 in 2013. The statement also admitted injecting Sustanon 250 on several occasions into another person, who at the time was playing rugby league also 2013.
14. The purchase and use of Sustanon 250 constitutes the ADRV of *Use*. ADP 38 provides:

WADC 2.2: Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method.

[Comment to Article 2.2: It has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be established by any reliable

means. As noted in the Comment to WADC Article 3.2 (Methods of Establishing Facts and Presumptions), unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1...]

15. Where there is no positive sample indicating *Use*, the wording of the Comment to WADC 2.2 clearly permits the use of other reliable means '*such as admissions by the Athlete, witness statements, documentary evidence*' etc to establish an ADRV under WADC 2.2. Bagoly's statement is sufficient proof of the ADRV of *Use*.
16. In these circumstances the *Attempted Use* allegation falls by the wayside.
17. The further allegation of contravention of ADP 46 (WADC 2.8) which includes assisting in an anti-doping rule violation or any attempted such violation is marginally more complicated.
18. Bagoly's statement and the statement of the person he injected are sufficient proof of the primary facts. However a technical point arises as to whether the primary facts satisfy the ADRV because the person injected was not an *Athlete* in the sport of football; rather was an *Athlete* in a different sport also governed by identical provisions of the WADC. Before dealing with the technical point the Tribunal notes that it would be a bizarre outcome indeed if cross-sport administration and assistance in relation to doping conduct that is banned by a standard model set of rules promulgated by an international organisation and mandated across all sports in Australia, and therefore one which applies in both sports, should somehow escape sanction because of a technical argument based upon the use of defined terms being held strictly to their defined meaning, especially where the relevant term *Athlete* has an ordinary meaning which, if applied, would undoubtedly result in an ADRV being established.
19. The full text of the ADRV in ADP 46 follows:

WADC 2.8: Administration or *Attempted* administration to any **Athlete** *In-Competition* of any *Prohibited Method* or *Prohibited Substance*, or administration or Attempted administration to any **Athlete** *Out-of-Competition* of any *Prohibited Method* or any *Prohibited Substance* that is prohibited in *Out-of-Competition Testing*, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted anti-doping rule violation.

(highlighting and underlining added)
20. Under the ADP applicable to the FFA and Bagoly ADP 248 provides:

(13) *Athlete*: Any *Person* who participates in our sport in one or other of the classifications in rule 27;

...

(50) *Person*: A natural *Person* or an organization or other entity.
21. ADP 27 provides four classifications of *Athletes* '*competing or training in our sport*'. '*Our sport*' is the "sport of football" meaning the World Game.
22. Accordingly, it could be thought that the person injected, because he played rugby league and not the World Game of football, might not technically be an *Athlete* under the FFA ADP.
23. Several factors lead to the conclusion of the Tribunal that the technical point can be dismissed with the consequence that the ADRV is established.

24. *First*, undoubtedly the person injected was an *Athlete* as defined in the ADP applicable to rugby league and equally was an athlete within the ordinary meaning of that word. That would have the consequence that Bagoly could be charged with the exact same offence under the ADP applicable to rugby league and could be sanctioned by that sport's tribunal, which sanction would then be recognised by the FFA. Such a circuitous route cannot be the appropriate interpretation of an international model rule mandated by the Australian government to apply to both these sports in Australia. To require such a circuitous route to be employed would be a triumph of form over substance and this Tribunal would not let a capital 'A' used in the ADP be the driver for wasted cost and delay.
25. Where the definition of a word would lead to an odd result it is to be read in its 'ordinary sense': *Transport Accident Commission v Treloar* [1992] 1 VR 447 (see McGarvie and Gobbo JJ at 449-450). Difficulties with definitions in anti-doping legislation were dealt with in the case of *Anti-Doping Rule Violation Panel v XZTT* [2013] FCAFC 95; 214 FCR 40. In that case a word had a defined meaning but was given its ordinary meaning as the proper interpretation of the instrument as a whole suggested that to give the word the defined meaning in this particular provision would lead to an odd result.
26. In the context of anti-doping rules aimed at prohibiting the administration of prohibited substances a restrictive reading of the term *Athlete* in that context, as limited to persons who play the World Game of football, would lead to an odd result. Bagoly's actions should not fall outside the scope of the ADP on the basis that the person injected played in a different code of professional sport. Reading the term in its ordinary sense, *Athlete* in ADP 46 should not be limited to persons playing the World Game of football.
27. Further, it is to be recalled that doping is an important matter that affects the international sporting movement and measures taken to prevent doping are implemented by WADA and prescribed in the WADC. In order to enforce the prescribed ADRVs each sport has a contractual relationship with the athletes and support persons involved in that sport. This is done via registration contracts that require athletes and support persons, as a matter of contract, to adhere to the ADPs of their respective sports. Since 01.01.2009, virtually all ADPs have virtually all the WADA Code provisions and in substance all ADPs should and almost invariably do reflect the WADC.
28. The effect of the WADC via the web² of interlocking identical contacts³, all with mutual recognition provisions⁴ and all ultimately enforceable through arbitration by CAS (or tribunals with appeal provisions that may lead to CAS), has been to create a close replica of a law made by a sovereign parliament binding on its subjects⁵ that is enforced by a supreme court.

² The term web is used because it is more than a hub and spoke arrangement. WADA is certainly the hub of a wheel with spokes going to each *Signatory* but there is more because each spoke is joined by a contractual term requiring mutual recognition.

³ The contracts are in the form of Anti-Doping Policies which must be agreed to by *Athletes* and others: see WADC 20.3.3, 20.3.5 and 20.4.7.

⁴ WADC 15.

⁵ The subjects are virtually all athletes and sporting bodies.

29. In all of those circumstances referred to above the Tribunal concludes that the term *Athlete* in ADP 46 has its ordinary meaning and is not limited to persons playing the World Game of football.
30. *Second*, the words underlined from ADP 46 shown in paragraph **19** above (assisting an anti-doping rule violation) do not involve defined terms. That has two consequences.
- (1) First it supports the conclusion referred to above.
 - (2) Second, it demonstrates that Bagoly would still have committed the ADRV in ADP 46 by assisting an anti-doping rule violation, being the anti-doping rule violation of *Use* by the player injected in relation to the ADP applicable to rugby league.
 - (a) In other words, anti-doping rule violation in this context can be read to include an ADRV committed by a person in any other sport bound by the WADC. That is not to say that by such interpretation FFA would be seeking to extend some long arm jurisdiction over the other sport. It would be a matter for that sport whether that person was to be sanctioned in relation to that breach; Football would only be exercising jurisdiction over the person bound by its ADP. Such an interpretation would be consistent with comity and cooperation between sports bound by the WADC.
 - (b) Further, viewed only from the perspective of FFA, conduct of the kind here (injecting steroids into an athlete in another sport where that athlete, by being injected, will have committed a breach of the ADP of his/her own sport) is inimical to the sport of football, and a breach of trust by any player bound by the FIFA statutes.
31. Accordingly for all of the above reasons the Tribunal is satisfied that Bagoly did commit an ADRV under ADP 46.

D. SANCTION

(1) Factors affecting sanction

32. Having reached the stage where two ADRVs have been made out it is necessary to consider whether there are any grounds for reducing or increasing the period of ineligibility.
33. No evidence has been lead to establish exceptional circumstances that would justify eliminating or reducing the period of *Ineligibility* under WADC 10.5 (ADP 159-163) for either ADRV.
34. No evidence has been lead to establish aggravating circumstances for increasing the period of *Ineligibility* under WADC 10.6 (ADP 164) for either ADRV.

(2) Sanction imposed

35. ADP 153 (WADC 10.2) provides that the period of *Ineligibility* for the ADRV of *Use* of a prohibited substance in contravention of ADP 38 (WADC 2.2), is prima facie two (2) years as this is Bagoly's first violation.
36. ADP 156 (WADC 10.3.2) provides that the period of *Ineligibility* for an ADRV under ADP 46 (WADC 2.8), is prima facie a minimum four (4) years with a discretion to impose a sanction up to a lifetime.

37. Bagoly's statement which contains the admissions also contains the assertion that his motive was he "*wanted to get big for Schoolies week*".⁶ Given that the asserted motive was in the same statement that contained the admissions, the Tribunal accepts that it was a significant part of his overall motivation and such a motivation is not associated with cheating *in sport*. Accordingly the Tribunal does not impose a sanction greater than the minimum four years.
38. ADP 168 (WADC 10.7.4) in effect provides that multiple ADRVs committed at the same time are to be considered together as one single first violation, and the sanction to be imposed shall be based on the violation that carries the more severe sanction.
39. The Tribunal therefore imposes a period of *Ineligibility* of four (4) years.
40. It is next necessary to deal with the date that sanction should commence.

E. COMMENCEMENT DATE OF THE PERIOD OF *INELIGIBILITY* – DELAY?

(1) The normal position

41. The last step is the determination as to the commencement date of the period of *Ineligibility*.
42. Prima facie a sanction should commence on the date of the decision: ADP 174 (WADC 10.9). The reasons for this being the normal or usual position are obvious; but there are exceptions.

(2) Delays not attributable to the athlete – ADP 175 – WADC 10.9.1

43. ADP 175 provides:

WADC 10.9.1: Delays Not Attributable to the *Athlete* or other *Person*.
Where there have been substantial delays in the hearing process or other aspects of *Doping Control* not attributable to the *Athlete* or other *Person*, the body imposing the sanction may start the period of *Ineligibility* at an earlier date commencing as early as the date of *Sample* collection or the date on which another anti-doping rule violation last occurred.
44. There have been no delays in the hearing process and there have been no delays in the prosecution of the alleged ADRV by FFA. However, there have been delays in other aspects which are not attributable to Bagoly.
45. Bagoly was interviewed by ASADA on 18.09.2014 and provided a statement on 19.09.2014. FFA was not notified by ASADA of the facts until 26.02.2016, therefore effectively 18 months passed before an admitted ADRV was communicated by ASADA to the governing body with the power to sanction Bagoly and thus prevent him playing against other persons not doped with steroids. As noted in the case of Block *ats* USADA 17.03.2017 at paragraph 9.14, the early notification of ADRVs is important because many persons are affected not just the athlete in breach. Early notification allows for *Provisional Suspension* which would eliminate the involvement in sport of those engaged in doping at the earliest reasonable opportunity.
46. No explanation has been provided by ASADA for this delay. ASADA was aware of this hearing and aware of the contention by Bagoly that he would be prejudiced by

⁶ That is a week where students leaving high school celebrate in particular fashion. At the time Bagoly had left school by at least one year.

the delay. In the circumstances the Tribunal proposes to proceed on the basis that the 18 month delay is without justification.

47. The question then arises as to how to balance competing considerations between a delay which is not justified and the interests of the person sanctioned as well as the interests of the wider sporting community.
48. Whilst ASADA has an interest and indeed a very significant interest in the administration of anti-doping (that is its *raison d'etre*), the imposition of a sanction on Bagoly is not an appropriate occasion to attempt to punish or otherwise reprimand ASADA for its delay in informing FFA. Where an athlete has cheated and thereby gained an advantage relative to other athletes, it is important for that wider body of athletes that an appropriate sanction is imposed and that consideration is not advanced by a massive reduction in a sanction because of delay by ASADA.
49. Accordingly the Tribunal will not reduce the sanction by 18 months merely because of an unexplained delay of 18 months in the process.
50. The question of delay arose in the decision of *WADA v Bellchambers, AFL & ASADA (Essendon Case)* CAS 2015-A-4059 (11.01.2016). In that case there was considerable delay not attributed to the Essendon AFL players (again attributable to ASADA). The CAS Appeal Panel, which found against the players, determined that there should be a prima facie 2 year sanction but backdated that sanction from the date of its determination (11.01.2016) to the date of the earlier determination by the AFL Tribunal, which the CAS Appeal Panel overturned, namely 31.03.2015.
51. Delay also arose in relation to the parallel investigation by ASADA into Cronulla rugby league players. Ultimately the actual time served by the players who accepted the sanction was only a handful of matches.
52. The operation of the discretion to backdate a sanction can be seen to have operated very differently between the AFL players who contested their sanction and the rugby league players who did not. Whilst a different sanction might be expected where a person accepted the sanction, that factor should not count twice and lead to a considerable backdating as well as a reduction for cooperation. This Tribunal is not prepared to apply a backdating of the magnitude which benefited rugby league players.
53. In relation to the backdating by the CAS Appeal Panel in the *Essendon Case*, other factors were at play due to the high profile of particular players and the adverse publicity, stress and anxiety that existed due to the way in which that investigation was conducted and subsequent matters: see paragraph 170(3) of that Award. Those factors do not exist in this case.
54. Ultimately the exercise of the discretion will largely be influenced by particular factors in any given case, however the Tribunal does not accept that a backdating should apply merely because of unexplained delay by ASADA in the absence of any established actual prejudice (which issue is dealt with separately below).
55. FFA originally exercised its discretion and determined that there should be a backdating so that the period of *Ineligibility* should commence on 13.10.2015.⁷ FFA submits that backdating of 9 months should be ordered by the Tribunal. For

⁷ This was when it imposed the original sanction in its letter dated 12.10.2016. It seems that at that time FFA had not appreciated Bagoly had played in the 2016 season

the reason that such submission is in favour of Bagoly the Tribunal might have given effect to that but it is first necessary to consider the matters below.

(3) *Actual prejudice by reason of delay?*

56. The *first* of those matters is whether there is prejudice to Bagoly which might warrant backdating greater than the 9 months which FFA would accept. Bagoly asserted prejudice in his letter of 17.10.2016. He has not given any evidence to actually support the assertion. FFA has pointed to evidence which demonstrates that aspects of the asserted prejudice cannot be factually correct. In these circumstances the Tribunal again accepts the submission of FFA that no actual prejudice relating to delay has been suffered other than potential general prejudice of the fact that no sanction had been imposed earlier. It is not as if there is any proved fact that Bagoly acted to his detriment as a result of delay and the Tribunal is not satisfied Bagoly acted to his detriment based on some misapprehension or delay.

(4) *No backdating if athlete competing in that period*

57. The *second* matter is whether backdating can or should be given where the athlete has competed during the period when the sanction would apply if backdated. Backdating would be inconsistent with other aspects of the WADC (eg WADC 10.8 (see reference to commencement of *Ineligibility*) and also WADC 10.9.2 (“before the *Athlete* competes again”) & WADC 10.9.5) and lead to potentially absurd results (eg under WADC 10.10.1 & 10.10.2).
58. The Tribunal is aware of decisions of CAS and other tribunals applying the WADC that have backdated a sanction so as to have commenced while the *Athlete* was still competing. In none of those which the Tribunal has found has there been any analysis of this anomaly. Nor has there been any explanation of why, as a matter of backdating, an athlete should have the period of *Ineligibility* commence at a time before the *Athlete* last competed. The circumstances in a case might lead to a reduced sanction as a matter of discretion under other provisions of the WADC (eg WADC 10.5.3 & 10.5.4) but a reduction in the period is formally and substantively different to what occurs by backdating. It is absurd to say that an *Athlete* has been given a two year suspension when in fact the *Athlete* has competed for 12 months of that period – that is really a one year suspension and nothing different. In a criminal context backdating can occur in sentencing to give credit for the period when the accused was in prison awaiting trial. That has an analogue with backdating under the WADC where there is a *Provisional Suspension*.
59. In the absence of being aware of any decision that at least attempts to deal with whether there can or should be backdating during a period when an *Athlete* competed, it is the view of the Tribunal that under WADC 2009 no backdating could or should be ordered to any date prior to the last occasion the *Athlete* competed.
60. In the case of Bagoly he competed during September 2016. Accordingly no backdating should or (in the view of the Tribunal) could be ordered to any date prior to October 2016.
61. Even if the Tribunal is wrong in the view that no backdating could go prior to October 2016, it is still our opinion that no backdating should go prior to October 2016 for the reason that Bagoly played football during the 2016 season up to and including September 2016. Nevertheless backdating to 01.10.2016 can and should

be ordered in circumstances where FFA has submitted there should be backdating and originally imposed some backdating.

62. The Tribunal notes that the equivalent article in the new 2015 WADC is worded differently:

10.11.1 Delays Not Attributable to the *Athlete* or other *Person*

Where there have been substantial delays in the hearing process or other aspects of *Doping Control* not attributable to the *Athlete* or other *Person*, the body imposing the sanction may start the period of *Ineligibility* at an earlier date commencing as early as the date of *Sample* collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of *Ineligibility*, including retroactive *Ineligibility*, shall be *Disqualified*.

(underlining and highlighting added to indicate change from prior version)

63. The words underlined in new 10.11.1 especially those highlighted seem to assume a power to backdate to earlier than the last date the *Athlete* competed. Yet the inconsistencies with other articles still exist: WADC 10.8 is relevantly unchanged, 10.9.2 now 10.10.2 is relevantly unchanged and 10.9.5 now 10.11.2.3 also is relevantly unchanged. The potentially absurd results still exist: now see 10.12.1 & 10.12.3.
64. Even assuming there is such a power, why it should be exercised is another matter. But in any event this decision is under the 2009 WADC and old WADC 10.9.1; accordingly the position stated in paragraphs **60** and **61** above applies.

(5) Further comment on the delay

65. This decision is not the place to canvas arguments and reach conclusions as to what should happen where actual detriment is established. Nor is it the place to deal with unexplained delay by ASADA in informing FFA of an admitted ADRV. Nevertheless the Tribunal does observe that some of the period of delay seems to be taken up by the redundant process of the ADRV, which if it is a reason contributing to delay is itself contrary to the WADA Code and has no ongoing justification.⁸

F. PROVISIONAL SUSPENSION

66. It remains to take into account the impact of any *Provisional Suspension*.⁹
67. Significantly ADP 174 (WADC 10.9) mandates that:

⁸ The WADA Code envisions a functional difference between a relevant government and a *National Anti-Doping Organisation* established by or with the assistance of a government: see WADC 22, especially 22.6 which requires that a government is not to interfere in the operational decisions and activities of the *National Anti-Doping Organisation* in that country (cf *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* [2014] FCA 1019 at [79]-[81]). Further, prompt and timely action is a feature encouraged by the WADA Code. There is no equivalent organisation to the ADRV envisaged by the WADA Code and its processes and consequent delay are inconsistent with the WADA Code. There is no justification consistent with the WADA Code for a process which causes there to be a delay between a person making a signed admission of an ADRV to the *National Anti-Doping Organisation* and the notification of that admission to the *Anti-Doping Organisation* with the power to sanction the person.

⁹ Initially no submissions were made by FFA on this topic. Nevertheless the Tribunal is of the view that it should consider this aspect in light of the fact that its mandate is to impose appropriate sanctions (ADP 121). That is especially so where it may work in favour of Bagoly if it was to be found that he voluntarily accepted what he believed to be a ban pending a formal hearing. With a view to formalising that matter FFA and Bagoly were sent a further direction which indicated the above position and invited a statement within 2 working days as to whether FFA wished to make a submission that the Tribunal should not consider this aspect. FFA and responded as referred to in **75** below. Bagoly indicated he was injured and no longer cared.

Any period of *Provisional Suspension* (whether proposed or voluntarily accepted) shall be credited against the total period of *Ineligibility* imposed.

(underlining added)

68. The term *Provisional Suspension* is given defined meaning via the definition of *Consequences* sub-paragraph (c): “means the *Athlete* or other *Person* is barred temporarily from participating in any *Competition* prior to the final decision at a hearing conducted under Article 8 (Right to a Fair Hearing)”.
69. When the words underlined from WADC 10.9 “(whether proposed or voluntarily accepted)” are properly analysed it is apparent that a *Provisional Suspension* can be one that is not proposed but is merely voluntarily accepted.
70. In this case Bagoly asserts he believed he was suspended from the date of his admission by his written statement to ASADA. To some extent that is corroborated by the fact he did not register for the 2015 football season and there is no evidence of him having played football during that season. That he subsequently registered and played in the 2016 season is difficult to reconcile with his assertion that he believed he has been suspended pending a hearing. Nevertheless as there was no hearing mentioned to him at any stage during 2015 the Tribunal is not prepared to reject his assertion that he stood down for the 2015 season other than for the reason he states namely his belief that he was suspended.
71. In these circumstances Bagoly has in effect believed there was a formal *Provisional Suspension* in operation and that he was suspended. The fact that there was no formal *Provisional Suspension* does not mean that there was not in fact a constructive *Provisional Suspension* by reason of the quite unusual circumstances including his assertion that he understood that he had been suspended with effect from the date of his admission in his written statement to ASADA. Whilst only FFA could sanction Bagoly, there is no reason to think that Bagoly did not believe ASADA had that power and indeed many people probably believe ASADA has sanctioning power in and of its own right as distinct from when it acts as agent of a sporting body. Indeed the fact that ASADA does act as agent of other sporting bodies and as agent impose sanctions in some sports may well give rise to the perception that ASADA has the power in its own right. Further there is no reason to doubt that Bagoly might have believed ASADA at least had a power to suspend him pending formal action by FFA.
72. Accordingly the Tribunal is of the view that Bagoly voluntarily accepted what can in the probably unique circumstances of this case be regarded as a constructive *Provisional Suspension*. The 2015 football season was in substance from mid-February through September inclusive. That is a period near enough to 8 months.
73. Where there is a period of time that an *Athlete* respects a *Provisional Suspension* that period is credited against the total period of *Ineligibility*. That is different functionally and structurally to a backdating.
74. Therefore to give effect to the credit the period of *Ineligibility* is reduced by the amount of the credit rather than the commencement date backdate by the amount of the credit. In the case of Bagoly that means he gets credit for 8 months. That 8 months is in the period of *Ineligibility* that will be backdated so as to have commenced on 01.10.2016.
75. At this point the Tribunal notes following its direction as to whether FFA or Bagoly wished to make submissions on the topic of *Provisional Suspension* FFA responded and indicated that it doubted the rules relating to *Provisional Suspension* were able

to be utilised in the circumstances of this case for the reason that there is an absence of formality and Bagoly had not informed FFA or ASADA that he would not play in the 2015 season. Having reviewed the FFA submission on this point the Tribunal agrees that were the 2015 WADC be applicable rules, it would be difficult if not impossible to conclude that the facts relating to Bagoly could give rise to a constructive *Provisional Suspension*, particularly in light of the fact that the sentence quoted in paragraph **67** above from 2009 WADC 10.9 has been deleted from the 2015 WADC. It is also relevant to note that FFA agrees that the ultimate effect of the sanction should not be such as to preclude Bagoly from playing in the 2020 season as that would not give proper weight to the circumstances in favour of Bagoly. Accordingly, comforted by the fact that our decision on constructive *Provisional Sanction* can have no precedent value as it depends on a provision now deleted from the WADC and the fact that something needs to be done for the unusual circumstance that Bagoly sat out the 2015 season as well as other matters which are in his favour, the Tribunal will proceed on the basis indicated in paragraphs **67-74** above.

G. RESULT

76. The result of this determination is:

- (1) Jake Bagoly is sanctioned to a period of *Ineligibility* of four years.
- (2) The commencement date is backdated to 01.10.2016: ADP 175 (WADC 10.9.1).
- (3) There is to be given credit for 8 months being the 2015 season where Bagoly voluntarily accepted a constructive *Provisional Suspension*: ADC 174 (WADC 10.9).
- (4) After allowing for the backdating and the credit, the period of *Ineligibility* will expire at midnight on 31.01.2020.
- (5) Overall that will mean Bagoly will be able to again play from and including February 2020 which would mean he could effectively play the 2020 season. It would also mean that, by then, he will have missed 4 seasons being 2015, 2017, 2018 and 2019.

John Marshall

J E Marshall SC

Disciplinary and Ethics Committee Chair
Chairperson of the Anti-Doping Tribunal