BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 01/2023**

BETWEEN **DRUG FREE SPORT NEW ZEALAND**

Applicant

AND [redacted]

Respondent

DECISION OF TRIBUNAL
3 October 2023

Tribunal Panel	John Macdonald, Chair Warwick Smith, Deputy Chair Helen Tobin, Member
Representation	David Bullock and Kate Hursthouse, counsel for Applicant Paul David KC and Sarah Wroe, counsel for Respondent
Also present	Hayden Tapper, Drug Free Sport New Zealand [redacted] [redacted]
Interested Party	Golf New Zealand
Registrar	Helen Gould

1. [redacted] is an amateur golfer and recreational athlete, who is a member of Golf New Zealand. Golf New Zealand is a signatory to the Sports Anti-Doping Rules 2022 (SADR).

2. Drug Free Sport New Zealand (DFSNZ) alleges that [redacted] breached Rules 2.1 (Presence of a Prohibited Substance) and 2.2 (Use or Attempted Use by an Athlete of a Prohibited Substance or Prohibited Method) following analysis of a sample collected at the [redacted] in [redacted] November 2022. The sample was found to contain the prohibited substance Enobosarm (ostarine), a non-specified substance prohibited at all times under class S1 (Anabolic Agents) on the WADA 2022 Prohibited List.

3. Ostarine is a selective androgen receptor modulator (SARM) which is used to improve muscle mass and bone density.

4. [redacted], states that she does not understand how she could have returned a positive test for the prohibited substance. She also says that if the violation can be established to the comfortable satisfaction of the Tribunal, she should be found to bear no fault.

5. The Tribunal must assess, to its comfortable satisfaction, whether [redacted] committed the Anti-Doping Rule Violations (ADRVs) as alleged by DFSNZ. If she did, the Tribunal must further decide, on the balance of probabilities, whether [redacted] ingested the substance intentionally or bore any fault. The burden of proof on the balance of probabilities shall be on [redacted]. If there is any fault the Tribunal must determine the appropriate sanction.

Alleged Anti-Doping Rule Violations (ADRVs)

<u>Rules on sanction, Rule 2.1</u>

6. Rule 10.2 provides that the starting point for sanction for a breach of rule 2.1 is a period of ineligibility of four years for a first violation where the violation involves a Non-Specified Substance. Where the athlete's positive test was an in-competition test (as was the case here), the athlete is also automatically disqualified from the competition. Any medals, points or prizes that may have been awarded to the athlete are forfeited.

7. There is provision in Rule 10.2.2 for the period of ineligibility to be reduced by two years if the athlete can establish on the balance of probabilities that the prohibited substance was not taken intentionally, and for further reductions under Rule 10.6 if the athlete can prove no significant fault or negligence.

8. If the athlete can establish on the balance of probabilities that there was no fault or negligence Rule 10.5 applies and there will be no sanction.

9. Rule 10.6.3.1 makes provision that recreational athletes, who can establish on the balance of probabilities, no significant fault or negligence, can receive a sanction between a reprimand and no period of ineligibility or, at a maximum, a two-year period of ineligibility.

10. The definitions for no fault or negligence and no significant fault or negligence in the SADRs provide that recreational athletes do not have to establish the source of the prohibited substance.

Rules on sanction, Rule 2.2

11. Rule 10.2 provides that the starting point for sanction for a breach of Rule 2.2 is a period of ineligibility of four years for a first violation where the violation involves a Non-Specified Substance.

12. Rule 10.9.3 provides that for breaches of both Rules 2.1 and 2.2, where it cannot be established that the second violation occurred after the athlete had been given notice of the first violation, the two violations shall be considered together as one single first violation.

Applicant's case

13. DFSNZ filed the following documents, all to be taken as read (subject to cross-examination) for the purposes of the hearing:

    (i) Forms 1 and 6
    (ii) Notification of ADRV
    (iii) Statement of Mr Tapper
    (iv) Statement of [redacted]
    (v) Statement of Ryan Morrow

(vi) Statement of Liam Barker

(vii) Report of Dr Agon, Senior Scientist and APMU Manager at the Australian Sports Drug Testing Laboratory of the National Measurement Institute in Australia

(i) Statement of Dr Thieme, (retired) Former Director of the WADA-accredited laboratory, Institute of Doping Analysis and Sports Biochemistry in Germany

(ii) Applicant's synopsis of argument

14. DFSNZ relies on the presence of the prohibited substance (ostarine) established in both the A and B samples as evidence of the ADRVs.

15. In his closing submissions, Mr. Bullock conceded that it would be open to the Tribunal to find that [redacted] did not intentionally ingest ostarine. If the Tribunal reached that view, he submitted that the substantial remaining issue would be whether she had proved no significant fault or negligence.

Respondent's position

16. The respondent filed the following documents, all to be taken as read (subject to cross-examination) for the purposes of the hearing:

(i) Form 2

(ii) Statement of [redacted]

(iii) Statement of [redacted]

(iv) Statement of [redacted]

(v) Statement of [redacted]

(vi) Statement of [redacted]

(vii) Report of Dr de Boer, Head of Protein Chemistry Department, Central Diagnostic Laboratory, Maastricht University Medical Centre in the Netherlands

(viii) Hair analysis report from Prof. Kintz, Professor of Legal Medicine, University of Strasbourg in France

(ix) Opening statement on behalf of the respondent

17. The respondent argued that [redacted] had innocently ingested ostarine and should be found to have borne no fault.

Discussion

Were there ADRVs?

18. In his report, Dr de Boer commented that it could not be completely ruled out that there had been some level of sample contamination which produced the positive results in [redacted] sample.

19. That position, however, was not pursued by the respondent who accepted that the evidence of Mr Barker, the person responsible for taking the sample, confirmed that [redacted] had been the only person to handle the urine samples.

20. On that basis, the Tribunal is comfortably satisfied that DFSNZ has discharged its burden of proof that there had been ADRVs and that ostarine had been in [redacted] system.

Intention

21. As referred to in [15], DFSNZ acknowledged in its closing that there was no evidence to suggest that [redacted] intentionally ingested ostarine.

22. The Tribunal accepts that and finds on the balance of probabilities that [redacted] did not intentionally ingest ostarine. [redacted] denies that she intended to do so, and taking into account all of the evidence the Tribunal finds her denial credible.

The legal issues

23. In light of findings that there had been an ADRV, and that [redacted] did not intentionally ingest ostarine, the legal issues for the Tribunal to consider become whether [redacted] bore no fault or negligence or no significant fault of negligence in the ingestion of the prohibited substance, and, if she did bear some fault, what the level of sanction should be.

24. In considering these issues we do not intend to summarise all the evidence that was presented to us. Instead, we will only refer to the evidence as is necessary to resolve the issues before us.

Possible sources

25. While the SADRs provide that a recreational athlete does not need to establish the source of the prohibited substance to establish no fault or negligence or no significant fault or negligence, [redacted] has in fact raised several possibilities as to the source of the ostarine which in turn helps the Tribunal in assessing the issue of fault.

26. [redacted] suggested that sunscreen, make-up, medications and skin-to-skin contact could all have been sources of the ostarine. The scientific evidence though, as provided by experts Dr de Boer and Dr Agon, has ruled out these sources based on them being unrealistic, given that none of the identified substances contains ostarine. There is also no scientific evidence that skin-to-skin contact can transmit ostarine from one person to another. The Tribunal, therefore, discounts these suggested sources as being implausible.

27. That leaves two remaining scenarios, which are to be considered in terms of whether they could provide a plausible explanation for the unintentional ingestion of ostarine: a kiss [redacted] shared with [redacted] and the tasting of [redacted] protein powder (custard powder).

28. Before we examine these two potential sources something must be said of the general environment [redacted] was in during the golf tournament.

29. A group of young golfers, which included [redacted], were staying together in an Airbnb in Dunedin. On the last two nights of their stay two additional guests arrived one of whom (referred to in this decision as Mr X) was a body builder and described by [redacted] as a known user of steroids.

30. The kiss: Both Dr de Boer and Dr Agon agreed that kissing was a plausible mechanism by which ostarine could be transferred into another person's system. However, Dr de Boer was quite specific that such a transfer could only have occurred in this case if [redacted] had taken ostarine in tablet or pill form within an hour before kissing [redacted].

31. The difficulty for [redacted] is that, while it was hardly surprising that [redacted] denied ever taking ostarine, there was no evidence to the contrary, and there was no eyewitness account from someone who saw him take a tablet or pill on that night, let alone within an hour before kissing [redacted]. In light of that, the Tribunal acknowledges that to conclude that [redacted] did take a tablet or pill of ostarine within an hour of kissing [redacted] can be no more than speculation.

32. Therefore, while a kiss can be a plausible means of transferring a prohibited substance from one person to another, there is insufficient evidence for the Tribunal to be satisfied on the balance of probabilities that that is how the ostarine entered [redacted] system.

33. The Custard Powder: The Tribunal heard evidence from [redacted], her friend [redacted] and [redacted] that [redacted] had a tub of custard powder which sat on the kitchen bench. [redacted] said she saw [redacted] sprinkle the powder over his cereals and into his smoothies while [redacted] said that he used the powder to make custard.

34. There was no direct evidence that [redacted] had consumed any of the custard powder. [redacted] also concedes that she never checked the ingredients on the custard powder tub but the Tribunal observes that checking the ingredients on the tub of custard powder would not have alerted her to the presence of ostarine, because being an illegal substance it was unlikely to have been listed as one of the ingredients. If it was present it would have to have been by way of contamination at the point of manufacture or by someone adding ostarine to it. Again, the difficulty for [redacted] is that the custard powder was never tested.

35. It is important to note that both [redacted] and [redacted] mentioned two types of custard. The distinction is relevant. There was the custard powder, so described as protein powder, which was in the tub (a screenshot of a photo of a similar tub was produced in evidence). This was the powder on the kitchen bench, which was consumed by [redacted] but not by [redacted]. Under cross-examination [redacted] says that she did not see [redacted] sprinkle the custard powder on the pudding bowl, though she does say that she was talking and watching TV at the same time. The second type was the custard pudding, described by [redacted] as being taken from the fridge and poured from a plastic milk bottle. It is inferred that this is the made-up version of the custard powder as [redacted] described the custard powder as being mixed with milk to make it go solid and in his statement, he said that he ate the custard at night after dinner.

36. There was no evidence about the making of the custard pudding, but the evidence overall points to the pudding being already made up when [redacted] tasted it by consuming two spoonsful. [redacted] was cross-examined about whether [redacted] sprinkled custard powder on the custard pudding before she ate it to which she said no; she was further asked whether, if he had sprinkled the custard powder on to the pudding it would have been after she tried it, to which she replied 'probably'.

37. Returning to the possible scenarios, the Tribunal has already rejected the kiss as being the probable source of ingestion. That leaves the custard pudding as a potential source but that could only arise if we can first be satisfied that it was contaminated. There is, of course, no direct evidence of that because it was never tested but despite that we are being asked to draw an inference from all the surrounding circumstances that it probably was.

38. In that regard there is first the environment in the Airbnb. [redacted], a long-term user of supplements, which we know from the evidence can sometimes be contaminated, was staying there as was Mr X, a body builder and known user of steroids. We have the tub of custard powder sitting on the kitchen bench which presumably was accessible to all those staying there including Mr X. By way of background, there was also the evidence both [redacted] and Mr X spent much time in the gym, often together. We infer that the aim, at least in part, was to increase their physical size and strength. Photos of them in the gym were produced and clearly support such an inference. Added to that, ostarine is a substance that can increase bone density and muscle mass, and so is a substance that might well have appeal to [redacted] and Mr X. We also have the very low concentration of ostarine found in [redacted] system, which in the Tribunal's view would seem to be consistent with taking a small dose of ostarine, such as might be expected to be found in two spoonsful of a contaminated custard pudding.

39. Interestingly, in evidence [redacted] described a Snapchat exchange with [redacted] which, if accepted, could reflect that he was anxious to distance himself from both the custard powder and the custard pudding as he realised they could have been the source of the prohibited substance.

40. Having regard to the circumstances just discussed, the Tribunal considers that it is entirely possible that ostarine was added to the custard pudding at the house so as to cause its contamination. Indeed, while the Tribunal cannot be sure we are nonetheless

satisfied on the balance of probabilities, that is, that it is more probable than not, that the custard pudding was contaminated and that [redacted] unintentionally ingested ostarine through consuming the two spoonsful of it.

No fault or negligence

41. A finding of no fault or negligence is generally reserved for very exceptional cases, where ingestion of the banned substance has occurred notwithstanding the exercise of the utmost caution by the athlete. The Tribunal is satisfied that this case does not come within that category.

42. That is because in consuming the custard pudding [redacted] had failed to ascertain what was in it and, although she was a recreational athlete, she clearly failed to exercise a level of care or personal responsibility that would be expected of an athlete of her standing, [redacted]. The Tribunal also notes that she failed to complete an education programme that was offered to her.

43. The Tribunal is satisfied then that [redacted] has failed to establish that there was no fault on her part.

No significant fault or negligence

44. While the Tribunal has rejected the no fault submission it does accept that [redacted] has established on the balance of probabilities that there was no significant fault. We have accepted that the ingestion of the prohibited substance was unintentional, but she was at fault because she failed to ascertain what was in the custard pudding before trying it. She also failed to turn her mind to the question of whether it might have been contaminated.

45. The totality of the evidence has to be considered, viewed through the prism of common sense, and in an appropriate case the athlete's case may be bolstered by his or her credibility.[1]

46. In this case, it seems likely that it was a momentary lapse on [redacted] part that caused her to try the custard pudding. Unlike the position in the *Bozhinovski* case relied

[1] *World Anti-doping Agency* v *Swimming Australia, Sports Integrity Australia, and Jack* CAS 2020/A/7579 and CAS 2020/A/7580, at [157].

upon by DFSNZ,[2] where a young athlete appears to have ingested a significant quantity of ostarine contained in supplements purchased for him by his father, in this case [redacted] did not have the array of checking options that were available to MrBozhinovski before he used the supplements. The custard pudding obviously had no label when [redacted] sampled it, and realistically, she was unable to check whether one of its ingredients might have been a banned substance. The momentary lapse explanation is bolstered by the candour of [redacted] evidence, and by her relative youth. Weighing those considerations, the Tribunal is satisfied that [redacted] has made out her case of no significant fault or negligence.

Sanction

47. Having found that [redacted] bore some fault in the unintentional ingestion of ostarine, the Tribunal must impose a proportionate sanction. As previously stated, for a recreational athlete that must be between a reprimand at the bottom end, and a two-year ineligibility period at the top. DFSNZ submitted that the sanction should be a period of ineligibility in the range of between 18 and 24 months (that is, at the higher end of fault) while Mr David KC submitted the sanction, if the Tribunal did in fact find fault, should be between zero and six months.

48. Using the guidelines for fault set out in *Cilic*[3] the Tribunal determines that [redacted] level of fault was light. On the evidence she was in an environment at the house in Dunedin that exposed her to substances over which she had no control. However, perhaps out of naivety, it appears that that is not something that she appreciated at the time, which in turn could have contributed to tasting the custard pudding without first ascertaining what was in it.

49. In other respects, the Tribunal found [redacted] to be a truthful and credible witness who answered questions under cross-examination in a mature way, not wavering from the evidence she provided in her original statement and making appropriate concessions such as her failure to list all the mediations she took on the declaration form she signed at the time of the drug test. Significantly, [redacted] is a young athlete who was only 20 years of age at the time she returned the positive sample. She presented as being very determined to achieve her goal of one day becoming a

[2] *Bozhinovski* v *Anti-Doping Centre of the Republic of Bulgaria* CAS 2018 A/ 5580.
[3] *Marin Cilic v International Tennis Federation (ITF) 7 CAS* 2013/A/3335 International Tennis Federation (ITF) v Marin Cilic, award of 11 April 2014

professional golfer. She described a serious approach to her diet which did not involve drinking alcohol or using drugs of any kind. She had used supplements but that was some years ago. She denied ever intentionally taking banned substances. Interestingly, she provided body scan evidence which showed there had been no increase in muscle mass over a period of a year and a quarter which supports her claim. The character evidence provided by her mother, coach and close friend reinforced her credibility and confirmed our impression of [redacted]. Additionally, the Tribunal notes that while [redacted] is a [redacted] player, her level of personal responsibility must still be lower than it would be for a professional player.

50. The Tribunal determines by majority that an ineligibility period of six months is a proportionate response to the degree of her fault and facts specific to this case. This period will be backdated to the date of the provisional suspension which was 31 January 2023. This means that [redacted] is able to make an immediate return to playing golf.

51. The decision on sanction was not unanimous, as the Deputy Chair, Mr Smith, would have imposed a period of nine months' ineligibility (having regard, in particular, to the competitive nature of the event, and the fact that [redacted] had previously undergone a doping test and was therefore aware of the anti-doping regime).

[redacted]

52. [redacted], through Mr David KC, addressed the Tribunal on the matter of her losing [redacted] as per Rule 9. He submitted that it would be open to the Tribunal to take a proportionate approach and not disqualify [redacted] results. The Tribunal has some sympathy for [redacted] and recognises that this was a case of unintentional ingestion with a low level of fault. The fact remains, however, that there was an ADRV and [redacted] had the substance in her system when she competed. The terms of Rule 9 are unforgiving, and the Tribunal is obliged to rule, therefore, that [redacted] must forego [redacted].

Conclusion

53. The Tribunal finds that inadvertent ADRVs occurred, that [redacted] did not intentionally ingest ostarine and that she has proved that there was no significant fault or negligence on her part.

ORDERS

54. The Tribunal orders as follows:

1) A period of six months ineligibility is to be served from 31 January 2023.

2) [redacted] results [redacted] shall be disqualified.

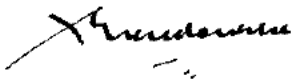
3) Costs will lie where they fall.

4) This determination should be the final determination by the Tribunal in this matter.

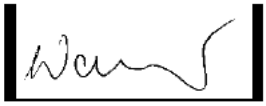
5) Taking note of rule 14.3.7, the Tribunal chooses not to publish [redacted] name or any identifying features. In addition to her being a recreational athlete, where the ingestion of a prohibited substance was unintentional and without any significant fault on her part due to it being a momentary lapse of judgement, the Tribunal considers that the fact that [redacted] was young must not be overlooked. We assume that she has not previously tested positive for a prohibited substance and it would seem to us most unlikely that she would in the future. We also bear in mind that she has already suffered the very significant consequence of being stripped of [redacted]. We are satisfied too, having seen and heard her give evidence, that this whole process, culminating in her appearance before the Tribunal, has been a very salutary and stressful experience for her. Finally, we are conscious that the period of provisional suspension that she has already served exceeds the period of ineligibility that we have ultimately found to be appropriate. Against that background the Tribunal considers that to publish her name, with the all the consequences that might well follow, would not only amount to a further burden for her but is one which we deem is not justified in all the circumstances of the case.

6) The Tribunal will publish this decision with [redacted] name suppressed and with appropriate redactions.

Dated: 3 October 2023



John Macdonald
Chair



Warwick Smith
Deputy Chair

Dr Helen Tobin
Member

BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 01/2023**

BETWEEN **DRUG FREE SPORT NEW ZEALAND**

Applicant

AND [redacted]

Respondent

DECISION ON COSTS APPLICATION
19 October 2023

Tribunal Panel John Macdonald, Chair
Warwick Smith, Deputy Chair
Helen Tobin, Member

Representation David Bullock and Kate Hursthouse, counsel for Applicant
Paul David KC and Sarah Wroe, counsel for Respondent

Registrar Helen Gould

1. On 3 October 2023, the Tribunal issued a decision on an alleged anti-doping matter between Drug Free Sport New Zealand (DFSNZ) and an unnamed amateur golfer.

2. The Tribunal decision concluded that DFSNZ had discharged its burden to prove that an anti-doping rule violation had occurred, and that the athlete had a prohibited substance in her system, but the athlete established that the ingestion was unintentional.

3. The onus was then on the athlete to prove no fault or negligence or no significant fault or negligence and while she was able to establish no significant fault or negligence, she ultimately failed to establish that she bore no fault; this resulted in a sanction of an ineligibility period of six months backdated to the date of her provisional suspension and the removal of her title.

4. Neither party raised the issue of costs at the hearing held on 21 and 22 September 2023 and, as a consequence, the Tribunal took its traditional position that costs should lie where they fell. When the Tribunal released the decision and made its orders, the Tribunal effectively became functus officio.

5. On 4 October 2023, counsel for the athlete, Ms Wroe, applied to the Tribunal for leave to file submissions on the issue of costs. The request was considered and allowed by the Tribunal with no opposition from DFSNZ. Accordingly, the issue of costs will be addressed by the Tribunal.

6. Rule 29 of the Tribunal Rules provides for a discretion to award costs to 'any' party which would include DFSNZ. The Tribunal notes its own decision of *Motorcycling New Zealand v Curr ST 19/07* where it referred to the principal of the 'loser paying the winner' as not being an absolute rule and the Tribunal takes this into account when considering the arguments submitted by both parties.

7. DFSNZ points out that there is no provision in the Sport Anti-Doping Rules (SADR) for awards of cost to be made against the National Anti-Doping Organisation and the Tribunal has never been asked to consider an award of costs against DFSNZ; DFSNZ says it must be an exceptional case for the cost award to be made[1]. At [2] of the

[1] DFSNZ submissions on costs at [6].

athlete's submissions it was acknowledged that cost orders are not usually made in anti-doping cases.

8. In *Curr 01/08* the Tribunal was clear that substantial awards of cost will only be made in exceptional circumstances.[2]

9. Counsel for the athlete argues that this case has some particular considerations that are relevant to the discretion on costs. These include that the athlete had to prove a negative that she did not intentionally ingest the prohibited substance. That the athlete chose to refer to scientific evidence, while unusual, does not create an exceptional situation. After all the SADR provides the onus is always on the athlete once the presence of the substance is established.

10. The athlete submits that DFSNZ did not fulfil its obligations to act in good faith and co-operate with her, pointing to examples of delay and not fully investigating the matter and that this should be a further consideration for the Tribunal when applying its discretion.

11. The Tribunal considers that both parties could have done more to ensure the timely progress of the case. The athlete states that the hair analysis was commissioned following the filing in July of DFSNZ's opening statement which called for concrete and persuasive evidence. However, the Tribunal notes that the issue of hair analysis was raised by Mr Morrow in his statement dated 25 May 2023 and action could have been taken on this point much earlier so as to avoid the need for the original hearing date to be vacated.

12. The Tribunal acknowledges that DFSNZ may have done more to investigate whether the ingestion was intentional and indicated prior to the hearing whether that was still being pursued (had the decision been made earlier the athlete might not have needed to proceed with the hair analysis), and it may have been possible to have notified the athlete of the positive result earlier.

13. Nonetheless, as the Tribunal concluded that the athlete was unsuccessful in her attempt to establish no fault or negligence and she had a sanction imposed upon her,

[2] *Curr v Mortocycling New Zealand ST 01/08* at [56].

the proceeding was not without merit. The Tribunal is also not persuaded that DFSNZ failed to act in good faith.

14. The athlete has applied for an award of costs of some $14,538.12. This is a significant sum. The Tribunal has made only a handful of cost awards in its history, and nothing in the region requested. The Tribunal reminds itself of comments it made in *Roy v Canoe Racing New Zealand ST 05/15* that '[i]n cases where costs have been awarded the level of the award has been modest and the Tribunal has not regarded it as appropriate to apply the principles or amounts of cost that would be awarded in the Courts'.

15. The Tribunal acknowledges that the athlete, a recreational athlete who did not need to prove the source of the ingestion, went to considerable expense through this process and recognises that she had to go some distance to establish that she bore no significant fault. However, the Tribunal is not satisfied that this is an exceptional case where costs should be awarded. It is noted that the athlete has benefitted from DFSNZ's Legal Assistance Fund to the sum of $2,000.

16. Viewing the Tribunal's decision against the principle of 'the loser paying the winner' DFSNZ proved the ADRVs, in that the prohibited substance was in the athlete's system, but it failed to prove the ingestion was intentional. As for the athlete, her primary position was that she bore no fault. The Tribunal held that she had not proved that, but she had proved that there was no significant fault. When it came to sanction, the period of ineligibility imposed was at the outer range submitted to be appropriate by Mr David. That was much less than what was advocated by DFSNZ, but the athlete's result was disqualified. Opinions as to how the Tribunal's decision might be viewed from the perspective of a winner or a loser might well differ but either way the Tribunal again is not persuaded that it justifies an award of costs against DFSNZ.

ORDERS

17. The Tribunal orders that costs will lie as they fall.

Dated: 19 October 2023

John Macdonald
Chair