

BETWEEN DRUG FREE SPORT NEW ZEALAND

Applicant

AND JOHN ELSMORE

Respondent

AND SURF LIFE SAVING NEW ZEALAND

Interested Party

**DECISION OF SPORTS TRIBUNAL
DATED 31 JULY 2020**

Decision At the request of the parties the decision was made on the papers

Tribunal Sir Bruce Robertson (Chairman)
 Georgina Earl
 Ruth Aitken

Present Harriet Bush, counsel for Applicant
 Hayden Tapper, Drug Free Sport New Zealand
 John Elsmore, Respondent

Registrar Mike Selwyn

1. John Elsmore is a member of Surf Life Saving New Zealand, and his sport has adopted the 2020 Sports Anti-Doping Rules (SADR) promulgated by Drug Free Sport New Zealand (DFSNZ) as its anti-doping policy.
2. Mr Elsmore returned a positive result for 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid (a metabolite of THC) (a specified substance prohibited in competition) from a test conducted on 14 March 2020.

Proceedings

3. On 5 June 2020, DFSNZ filed an Application for the Provisional Suspension of Mr Elsmore. On 12 June 2020, a telephone conference was convened by the Tribunal Chairman and Mr Elsmore advised that he did not oppose the application. A provisional suspension was imposed that day.
4. On 18 June 2020, substantive proceedings were filed and served. Mr Elsmore indicated he wished to be heard only on sanction.
5. On 28 July 2020, the parties filed a joint memorandum on sanction that suggested a period of ineligibility of nine months be imposed, backdated to the date of the test for Mr Elsmore's timely admission. A copy of that memorandum is annexed.
6. The Tribunal having considered all the available material is satisfied that it is able to accept the proposal and make orders accordingly. The prohibited substance was taken at a social event and Mr Elsmore had been able to establish no significant fault or negligence. The prohibited substance was also not taken to enhance his sporting performance.

Order

7. Mr Elsmore's suspension will be for a period of nine months backdated to commence from 14 March 2020. This means that Mr Elsmore is ineligible to participate in competitive sport until 14 December 2020.

Dated: 31 July 2020



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Sir Bruce Robertson
Chairman

Sports Tribunal of New Zealand

ST 03/20

between

DRUG FREE SPORT NEW ZEALAND

Applicant

and

JOHN ELSMORE

Respondent

JOINT MEMORANDUM ON SANCTION

28 July 2020

LeeSalmonLong

Barristers and Solicitors

LEVEL 16 VERO CENTRE 48 SHORTLAND STREET

PO BOX 2026 SHORTLAND STREET AUCKLAND NEW ZEALAND

TELEPHONE 64 9 912 7100

EMAIL: harriet.bush@lsl.co.nz SOLICITOR ACTING: HARRIET BUSH

JOINT MEMORANDUM ON SANCTION

MAY IT PLEASE THE COURT

1. On 18 June 2020 Drug Free Sport New Zealand filed the current proceeding alleging that Mr Elsmore had breached breach of r 2.1 of the Sports Anti-Doping Rules 2020 (presence of a prohibited substance or its metabolites or markers in an athlete's sample). The allegations arose from an adverse analytical finding from an in-competition test taken on 14 March 2020.
2. This memorandum is filed jointly by DFSNZ and Mr Elsmore in relation to sanction. For the reasons below, the parties respectfully submit that it would be open to and appropriate for the Tribunal to impose a sanction of nine months' ineligibility, back-dated to the time of the sample collection for timely-admission.

Background

3. Mr Elsmore is a member of the Lyall Bay Surf Life Saving Club. He competed in the Short and Long Course Surf Canoe events and the Surf Life Saving Nationals 2020, held in Gisborne on 14th and 15th March 2020. Mr Elsmore and his team finished 1st in the open mens' long course event.
4. DFSNZ conducted in-competition testing at the event on 14th March 2020. Mr Elsmore was one of four athletes tested. DFSNZ received notification of Mr Elsmore's adverse analytical finding on 5 June 2020. This confirmed the presence of 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid (a metabolite of THC). The mean concentration was 1516 ng/ml. This is a specified substance prohibited in competition under class S8 – Cannabinoids on the WADA Prohibited List.
5. Mr Elsmore admitted the use of substances containing THC on 9 June 2020.
6. Mr Elsmore was provisionally suspended on 12 June 2020. He filed his Form 2 admitting the violations but noting that he wished to make submissions on sanction. He noted that through an act of indiscretion at a private social event he had put himself in a position he never contemplated. He also noted that his decision was never based on performance enhancement but was simply social use.
7. Mr Elsmore subsequently provided a statement in which he stated that he uses cannabis frequently to help with stress. He used cannabis approximately five to seven days before nationals but did not use it in the days leading up to the Surf Life Saving competition, as he was trying to give his lungs a break. He also stated that he did not use cannabis for performance enhancing reasons and did not know that THC was banned in surf-life saving.

Applicable sanction

8. Under r 10.2.1.2, the period of ineligibility for presence of a specified substance is four years where DFSNZ can establish that the violation is intentional. If DFNSZ cannot establish intention, the period of ineligibility is two years.
9. DFSNZ does not seek to establish intention in this case.
10. Rule 10.5.1 allows the Tribunal to reduce the period of ineligibility where the athlete can establish no significant fault or negligence. Where no significant fault is established, the period of ineligibility can be from a reprimand to a maximum of two years ineligibility, depending upon the degree of fault. Where the ADRV involves a cannabinoid, an athlete may establish no significant fault or negligence by clearly demonstrating that the context of the use was unrelated to sports performance.¹
11. In previous cases the Tribunal has accepted evidence of recreational cannabis use in a social setting was sufficient to meet the criteria for no significant fault.² However, it has recognised there must be a meaningful response to a positive test to ensure the integrity of the regime and signal that cannabis use is unacceptable in sport.³ The level of THC recorded and circumstances of use are relevant to the appropriate length of sanction.⁴
12. The parties submit that it would be open to the Tribunal to find no significant fault based on Mr Elmore's evidence.
13. The level of THC recorded in this case (1516 ng/ml) is significantly higher than *DFSNZ v Henry*, where the Tribunal imposed a period of ineligibility of seven months for a level of 547 ng/ml.
14. Accordingly, the parties respectfully submit that the appropriate period of ineligibility is nine months.

Backdating

15. Mr Elsmore admitted the violations on 9 June 2020, four days after being informed of the adverse analytical finding. The parties respectfully submit that this amounts to a timely admission under r 10.11.2, and the period of ineligibility should be backdated to the date of sample collection.

Disposal

¹ Sports Anti-Doping Rules 2020, comment to the definition of no significant fault.
² *Drug Free Sport New Zealand v Mikara* ST 16/16; *Drug Free Sport New Zealand v Ngatoko* ST 17/16; *Drug Free Sport New Zealand v Henry* ST17/18.
³ *DFRNZ v Ngatoko* at [16].
⁴ See *DFSNZ v Henry*, at [21].

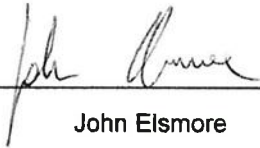
16. For these reasons, the parties respectfully submit that it would be open to, and appropriate for the Tribunal to impose a period of nine months' ineligibility, backdated to 14 March 2020 for breach of r 2.1 of the Sports Anti-Doping Rules 2020.
17. If the Tribunal considers that the agreed position is appropriate, the parties consider that the matter can be dealt with on the papers, and the teleconference on 29 June 2020 vacated.

Dated ~~27~~ July 2020

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Harriet Bush
Counsel for DFSNZ



John Elsmore
Respondent