

**BETWEEN** **DRUG FREE SPORT NEW ZEALAND**

**Applicant**

**AND** **ZANE ROBERTSON**

**Respondent**

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**DECISION OF SPORTS TRIBUNAL  
20 MARCH 2023**

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

**Tribunal** John Macdonald (Chair)  
Nicholas Davidson KC  
Ruth Aitken DNZM

**Representation** Hayden Tapper, Drug Free Sport New Zealand  
Adam McDonald, counsel for Applicant  
Michael Smyth, counsel for Respondent

**Registrar** Helen Gould

1. Zane Robertson (Mr Robertson) is a New Zealand middle- and long-distance runner based in Kenya; he is a New Zealand record holder and represented New Zealand at the Rio de Janeiro and Tokyo Olympics and at the Commonwealth Games.
2. Drug Free Sport New Zealand (DFSNZ) alleged that Mr Robertson breached Rules 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's sample) and 2.2 (Use or Attempted Use by an Athlete of a Prohibited Substance or Prohibited Method) of the Sports Anti-Doping Rules 2022 (SADR) as a result of an Adverse Analytical Finding (AAF) following his participation in the Great Race in Manchester in May 2022.
3. DFSNZ also alleged the athlete subsequently breached Rule 2.5 (Tampering, or Attempted Tampering, with any part of Doping Control by an Athlete or Other Person).
4. Mr Robertson is not contesting the breaches nor is he offering evidence to support a reduction in the period of ineligibility.
5. On 15 March 2023 counsel filed a joint memorandum in relation to sanction. A copy of the joint memorandum is **attached**.
6. Counsel have proposed a period of ineligibility of eight years is appropriate, with credit for the period of Mr Robertson's provisional sanction.
7. The sole issue for the Tribunal to determine is the appropriate level of sanction.

### *Facts*

8. Mr Robertson was tested In-competition at the Great Race in Manchester. His A sample returned an AAF for the non-specified substance EPO, which is prohibited at all times. This is the first AAF for Mr Robertson.
9. Mr Robertson was provisionally suspended, and he requested analysis of the B sample which confirmed the result of the A sample.
10. Mr Robertson accepted the presence of EPO but asserted that the prohibited substance had entered his system through no fault or negligence, or no significant fault or negligence, on his part, and therefore he wished to be heard regarding sanction.

11. Mr Robertson filed evidence to support his assertion. Specifically, Mr Robertson claimed that he had attended a Kenyan medical facility seeking a Covid 19 vaccination but was instead treated for Covid 19, which included the administration of EPO. He also claimed that he had told the attending Doctor that he was an athlete and could not be treated with a substance that was on the prohibited list. His evidence was that he had not realised it was a second Doctor who administered the medication, so he did not repeat his request not to be treated with a prohibited substance.
12. Mr Robertson supported his evidence with sworn affidavits from two Kenyan doctors, 'hospital notes', a 'hospital report' and a witness statement from a Kenyan detective corroborating his claims.
13. DFSNZ responded to Mr Robertson's evidence with expert evidence from Dr Stephen Ritchie who commented on the clinical implausibility of the medical treatment allegedly received by Mr Robertson. DFSNZ also provided a statement about investigations it had made following Mr Robertson's assertions, and a witness statement from the Legal Officer at the Anti-doping Agency of Kenya (ADAK) who had made inquiries for DFSNZ into Mr Robertson's claims.
14. ADAK's statement included an attached letter from the Vice President of the medical facility Mr Robertson claimed to have attended which stated that Mr Robertson was not administered EPO at the facility, that he had not attended the facility on the alleged date, that of the two doctors he claimed had treated him, one was a laboratory technician and the other was not employed at the facility, that the medical notes were not generated at the facility and the patient number on the notes was not Mr Robertson's.
15. DFSNZ alleged that Mr Robertson's statements and supporting documents included falsified documents and false testimony which if proven or not contested, amounts to a breach of Rule 2.5 (tampering).
16. Rule 2.5 defines tampering as '*Intentional conduct which subverts the Doping Control process*' and it includes '*falsifying documents submitted to an Anti-Doping Organisation or TUE committee or hearing panel, procuring false testimony from witnesses...*

17. In light of the additional evidence collected and filed by DFSNZ, Mr Robertson has chosen not to rely on the evidence he originally filed and no longer seeks to contest the sanction for the ADRVs.
18. In choosing not to contest the tampering breach, Mr Robertson has left the Tribunal with no other option than to conclude he has deliberately attempted to subvert the doping control process.

*Rules on sanction, Rule 2.1*

19. Rule 10.2 provides that the starting point for sanction for a breach of rule 2.1 is four years for a first violation where the violation involves a Non-Specified Substance.
20. There is provision in Rule 10.2.2 for the sanction to be reduced by two years if the athlete can demonstrate that they did not intentionally take the prohibited substance, and for further reductions under Rule 10.6 if the athlete can prove no significant fault or negligence.

*Rules on sanction, Rule 2.2*

21. Rule 10.2 provides that the starting point for sanction for a breach of Rule 2.2 is four years for a first violation where the violation involves a Non-Specified Substance.
22. 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.

*Rules on sanction, Rule 2.5*

23. Rule 10.3.1 provides that the starting point for sanction for breaches of Rule 2.5 shall be a period of ineligibility of four years.
24. Rule 10.9.3.3 provides that a breach of Rule 2.5 shall be treated as a stand-alone first violation and that the period of ineligibility shall be served consecutively, rather than concurrently, with the period of ineligibility imposed for the underlying ADRV.

## *Conclusion*

25. Mr Robertson is not contesting the breaches and does not advance any evidence that would support a reduction of the period of ineligibility for any of the breaches. Consequently, the starting point sanctions will apply.
26. These are Mr Robertson's first violations and Rule 10.9.3 applies to the accepted breaches of Rule 2.1 and Rule 2.2 which are treated as a single violation. Mr Robertson's sanction for these breaches together shall be a period of ineligibility of four years.
27. To reflect the seriousness of a tampering offence in violation of Rule 2.5, whereby an athlete has sought to subvert the doping control process, the period of ineligibility shall be added to the sanction for the underlying ADVRs, making Mr Robertson's sanction for the breach of Rule 2.5 an additional period of ineligibility of four years.
28. The scale of the breaches has left no room for latitude for the Tribunal in upholding the intent and purpose of the SADR and the Tribunal concludes that a period of ineligibility of eight years is the appropriate sanction for Mr Robertson.
29. Rule 10.13 provides that the period of ineligibility will begin on the date of this decision and that Mr Robertson shall receive credit for the period of his Provisional Suspension which began on 20 September 2022.
30. Rule 9 provides that an ADRV in individual sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that competition with all resulting consequences. Mr Robertson's result in the Great Manchester Run is that he is disqualified.
31. The Tribunal thanks Counsel for both parties for the assistance they have provided to resolve this case in a timely manner and notes the severe penalty will have a significant impact on Mr Robertson but that, in these unfortunate circumstances, there was no other option available to the Tribunal.

## ORDERS

32. The Tribunal orders as follows:

- 1) A period of ineligibility from participation in any capacity in a competition or activity organised, sanctioned, or authorised by Athletics New Zealand or by any other sporting organisation that is a signatory to the SADR, of eight years, is imposed on Mr Robertson under Rules 10.2 and 10.3.1, backdated to commence from 20 September 2022, which means he is ineligible to participate in competitive sports until 20 September 2030.
- 2) Mr Robertson's result in the Great Manchester Run is that he is disqualified.
- 3) Costs are not ordered, as none are sought, but they are reserved should DFSNZ wish to apply.
- 4) This determination should be the final determination by the Tribunal in this matter, and it may be published in the usual way.

Dated: 20 March 2023



**John Macdonald**  
Chair

Sports Tribunal of New Zealand

**ST 06/22**

between

**DRUG FREE SPORT NEW ZEALAND**

Applicant

and

**ZANE ROBERTSON**

Respondent

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**JOINT MEMORANDUM OF COUNSEL AS TO SANCTION**

15 March 2023

**LeeSalmonLong**

Barristers and Solicitors

LEVEL 16 VERO CENTRE 48 SHORTLAND STREET

PO BOX 2026 SHORTLAND STREET AUCKLAND NEW ZEALAND

TELEPHONE 64 9 912 7100 FACSIMILE 64 9 912 7109

EMAIL: [adam.mcdonald@lsl.co.nz](mailto:adam.mcdonald@lsl.co.nz) SOLICITOR ACTING: ADAM McDONALD

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## JOINT MEMORANDUM OF COUNSEL AS TO SANCTION

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1. This memorandum is filed jointly by counsel for Drug Free Sport New Zealand (**DFSNZ**) and counsel for Mr Robertson regarding alleged breaches of rr 2.1, 2.2, and 2.5 of the Sports Anti-Doping Rules 2022 (**SADRs**).
2. Mr Robertson chooses not to contest the Anti-Doping Rule Violations and, in relation to sanction, abandons any and all defences and/or potential grounds for a reduced sanction.
3. Mr Robertson accepts that the prohibited substance was in his system, being Erythropoietin (**EPO**), and he no longer seeks to rely on the evidence he has filed, or to contest sanction.
4. In light of the evidence filed in this proceeding, and Mr Robertson's position outlined above, the parties submit that it would be open to, and appropriate for, the Tribunal to impose a period of ineligibility of eight years for the alleged violations, with credit given for the period of his provisional suspension, as detailed further below.
5. Mr Robertson is a New Zealand middle and long-distance runner, based in Kenya. A New Zealand record holder, he has represented New Zealand at the Olympic Games at Rio de Janeiro and at Tokyo, and has represented New Zealand at the Commonwealth Games. He has received ongoing financial support from Athletics New Zealand.

### **Anti-doping Rule Violations alleged by DFSNZ**

6. DFSNZ alleges that the respondent, Mr Zane Robertson, breached:
  - (a) r 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample);
  - (b) r 2.2. (Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method); and
  - (c) r 2.5 (Tampering, or Attempted Tampering, with any part of Doping Control by an Athlete or Other Person).

### **Erythropoietin (EPO)**

7. EPO is used in the doping context by athletes seeking to enhance their performance in endurance sports. Use of EPO increases the body's red



blood cells, which allows for transportation of comparatively more oxygen to muscles and thus increases stamina and performance.

### **Procedural background**

8. On 22 May 2022, Mr Robertson was tested in-competition at the Great Race in Manchester, England. Mr Robertson competed in the 10K event.
9. Mr Robertson's A Sample returned an adverse analytical finding for the presence of EPO which is a non-specified substance prohibited at all times under class S2 Peptide Hormones, Growth Factors, Related Substances and Mimetics pursuant to the WADA Prohibited List 2022. Mr Robertson's B Sample was analysed at his request and the result confirmed the results of the A Sample.
10. On 20 September 2022 Mr Robertson was provisionally suspended by consent.
11. DFSNZ filed substantive proceedings on 10 October 2022 together with the statement of Hayden Tapper, dated 10 October 2022 and other materials in support.
12. Mr Robertson filed his Form 2 together with witness statements and materials in support on 21 December 2022 and 18 January 2023.
13. DFSNZ filed its reply evidence on 1 March 2023 together with an amended Form 1.

### **Mr Robertson's initial position**

14. On 21 December 2022 Mr Robertson admitted the r 2.1 and 2.2 violations but sought to be heard in relation to sanction. He asserted that the prohibited substance entered his system through no fault or negligence, or, in the alternative, no significant fault or negligence on his part.
15. Mr Robertson asserted that he had been administered EPO at a Kenyan medical facility without his knowledge:<sup>1</sup>

... whilst I admit that EPO was present in my system, I believe that there was no fault or negligence on my part (or at least no significant fault or negligence on my part) because:

(a) When I attended the hospital, I told the attending Doctor that I was an athlete and could not have anything that was prohibited. He acknowledged he understood this.

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<sup>1</sup> Witness statement of Zane Robertson, dated 21 December 2022.

(b) I asked for a COVID 19 vaccine but instead I received treatment for COVID 19 (which included EPO). Having asked for the vaccine there was no reason for me to believe that what I was being administered was not the vaccine.

(c) It was not obvious to me that the Doctor administering the treatment was not the same Doctor I had told that I was an athlete because both were wearing face masks to protect from COVID 19 infection.

(d) I believe I did everything I could to prevent EPO being administered but it occurred through the medical negligence of the hospital.

In support of his position, Mr Robertson filed his witness statement dated 21 December 2022. His statement attached appendices including materials purporting to be:

- (a) Sworn affidavits from two Kenyan doctors;
- (b) "Hospital Notes" which on their face appeared to be notes prepared regarding treatment received by Mr Robertson at a Kenyan medical facility; and
- (c) A "Hospital Report" which on its face appeared to be a report generated at a Kenyan medical facility confirming that EPO was administered to Mr Robertson at that facility.

16. Mr Robertson also filed the witness statement of a Kenyan detective, dated 18 January 2023 which corroborated Mr Robertson's claims.

#### **Drug Free Sport New Zealand's evidence in reply**

17. In response to Mr Robertson's witness statements and materials in support, DFSNZ filed:
- (a) The witness statement of Dr Stephen Ritchie dated 9 February 2023. Dr Ritchie is an expert in infectious diseases, who commented on the clinical implausibility of the medical treatment that Mr Robertson claimed to have received;
  - (b) A further statement of Hayden Tapper dated 21 February 2023, detailing, *inter alia*, steps taken to investigate the assertions made, and evidence filed, by Mr Robertson; and
  - (c) The witness statement of Bildad Rogoncho dated 22 February 2023, a Legal Officer at the Anti-Doping Agency of Kenya (**ADAK**), setting out inquiries that ADAK carried out on behalf of DFSNZ at the medical facility where Mr Robertson claimed that he was administered EPO.

18. Mr Rogoncho's statement appends a letter from the Vice President of Operations at the medical facility in question, confirming among other things that:
- (a) Mr Robertson was not administered EPO at the medical facility;
  - (b) Mr Robertson did not attend the medical facility on the date he alleged;
  - (c) The persons claimed by Mr Robertson to have treated him, did not in fact treat him. One of the persons he claimed to have administered the treatment was employed as a laboratory technician, and the other was not an employee of the medical facility; and
  - (d) The Medical Notes relied upon by Mr Robertson were not generated at the medical facility; and
  - (e) The patient number on the Medical Notes did not belong to Mr Robertson.
19. It is DFSNZ's position that the statements and supporting materials that Mr Robertson filed in support of his case included falsified documents and false testimony.
20. As a result of its enquiries, DFSNZ now proceeds on the basis that Mr Robertson has also breached SADR 2.5 (Tampering). Having considered DFSNZ's evidence, Mr Robertson now chooses not to contest the alleged ADRVs.

### **Tampering**

21. Mr Robertson has chosen not to contest the allegation that he has breached SADR 2.5, the elements of which are set out below, for completeness.
22. SADR 2.5 prohibits "*Tampering, or Attempted Tampering, with any part of Doping Control by an Athlete or Other Person*".
23. Tampering is defined as follows:<sup>2</sup>

***Tampering: Intentional conduct which subverts the Doping Control process but which would not***

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<sup>2</sup> SADR 2022, definition of Tampering, at p 68.

**otherwise be included in the definition of *Prohibited Methods*. *Tampering* shall include, without limitation, offering or accepting a bribe to perform or fail to perform an act, preventing the collection of a *Sample*, affecting or making impossible the analysis of a *Sample*, **falsifying documents submitted to an *Anti-Doping Organisation* or *TUE* committee or hearing panel, procuring false testimony from witnesses, committing any other fraudulent act upon the *Anti-Doping Organisation* or hearing body to affect *Results Management* or the imposition of *Consequences*, and any other similar intentional interference or *Attempted interference* with any aspect of *Doping Control*.** [Emphasis Added].**

24. Doping Control includes:<sup>3</sup> “[a]ll steps and processes from test distribution planning through to ultimate disposition of any appeal and the enforcement of *Consequences* including all steps and processes in between ...”.

**Appropriate Sanction for breaches of rr 2.1, 2.2, and 2.5**

25. The parties submit that the appropriate period of ineligibility for breaches of rr 2.1, 2.2, and 2.5 is eight years.

*Breaches of SADR 2.1 (Presence) and 2.2 (Use)*

26. Mr Robertson does not contest these violations. The parties submit that the appropriate sanction for breaches of rr 2.1 and 2.2 is four years.

(a) Pursuant to r 10.2 the starting point for sanction for breaches of r 2.1 or r 2.2 is four years for a first violation where the violation involves a Non-Specified Substance, such as EPO.

(b) The parties submit that there is no evidence in this matter that would support reducing the period of ineligibility, and Mr Robertson does not advance any grounds to reduce the period of ineligibility.

(c) Under r 10.9.3 Mr Robertson’s breaches of rr 2.1 and 2.2 shall be considered together as one single first violation.

*Breach of SADR 2.5 (Tampering)*

27. Mr Robertson does not contest this violation. The parties submit that the appropriate sanction for breach of r 2.5 is a further, consecutive, four year period of ineligibility.

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<sup>3</sup> SADR 2022, definition of Doping Control, at p 63.

- (a) Pursuant to r 10.3.1, the starting point for sanction for breaches of r 2.5 shall be a period of ineligibility of four years.
- (b) The parties submit that there is no evidence in this matter that would support reducing the period of ineligibility, and Mr Robertson does not advance any grounds to reduce the period of ineligibility.
- (c) Under r 10.9.3.3, where there has been a violation of Rule 2.5 in connection with the Doping Control process for an underlying asserted ADRV, the breach of Rule 2.5 shall be treated as a stand-alone first violation and the period of Ineligibility for such violation shall be served consecutively, rather than concurrently, with the period of Ineligibility imposed for the underlying anti-doping rule violation.

*Automatic disqualification of individual results*

- 28. Pursuant to r 9, an anti-doping rule violation in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting consequences, including forfeiture of any medals, points and prizes. Mr Robertson's result in the Manchester Great Run, is accordingly to be disqualified.

**Timing of sanction**

- 29. Under r 10.13, an Athlete's period of ineligibility will begin on the date of the final decision providing for the sanction. Credit is to be given for any period of provisional suspension.

**Conclusion and summary**

- 30. The parties submit that the Tribunal is able to find the alleged ADRVs to be established on the basis of the evidence provided by DFSNZ, and, if it does so find, that the appropriate sanction to be imposed on Mr Robertson is an eight year period of ineligibility from the date on which his sanction is imposed, with credit for the time served under his provisional suspension.
- 31. The parties further submit that Mr Robertson's result at the Manchester Great Run is to be disqualified.
- 32. Counsel request that the case management conference scheduled for 16 March 2023 be vacated, and appearances excused.

Dated 15 March 2023



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Adam McDonald  
Counsel for the Applicant

**Michael** Digitally signed  
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Michael Smyth  
Counsel for the Respondent