BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 03/21**

BETWEEN	**DRUG FREE SPORT NEW ZEALAND**
	Applicant
AND	**MAHDI NAMDARI**
	Respondent
AND	**NEW ZEALAND OLYMPIC WRESTLING UNION**
	Interested Party

INTERIM DECISION OF SPORTS TRIBUNAL

29 SEPTEMBER 2021

Tribunal	Dr James Farmer QC Nicholas Davidson QC
Parties	Adam McDonald, counsel for Applicant Matt Rhodes, counsel for Respondent
Registrar	Neela Clinton

Introduction

1. Drug Free Sport New Zealand [DFSNZ] has brought Anti-Doping Rule Violation Proceedings against Mr Namdari [the Respondent] for an alleged breach of rule 2.1 and r.2.2 of the Sports Anti-Doping Rules 2021 [SADR], following the Respondent's positive test for a Prohibited Substance.

2. The Respondent is currently subject to an Order of Provisional Suspension, to which he consented. Submissions as to sanction have been filed with the Tribunal by DFSNZ, it being contended that the Respondent should be subject to an ineligibility period of four years and that the Respondent has failed to establish (as claimed by him in his Notice of Defence) unintentional conduct so that he is therefore not able to claim a 2-year ineligibility reduction in terms of SADR 10.2.3. (Some evidence on that issue has been filed by the Respondent.)

3. The Respondent has responded to DFSNZ's sanction submissions by seeking a preliminary determination by the Tribunal of an issue of law which he says will guide him as to how he proceeds, and which may obviate the need for a sanction hearing. In particular, he seeks a ruling on the interpretation of rule 10.8.1 of SADR and whether under that rule DFSNZ is required, when notifying an athlete of an alleged rule violation, to specify the period of ineligibility under the rule invoked. The significance of that question is that an athlete who admits the violation and accepts the asserted ineligibility period, may become entitled to a one-year reduction from the specified period (rule 10.8.2).

4. Submissions on the issue have been filed and served by both parties. It is agreed that the Tribunal should provide its Determination on the basis of those written submissions.

Rule 10.8.1

5. Rule 10.8.1 reads:

> 10.8.1 One-Year Reduction for Certain Anti-Doping Rule Violations Based on Early Admission and Acceptance of Sanction
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> Where an Athlete or other Person, after being notified by DFSNZ of a potential anti-doping rule violation that carries an asserted period of Ineligibility of four or more years (including any period of Ineligibility asserted under Rule 10.4), admits the violation and accepts the asserted period of Ineligibility no later than 20 days after receiving notice of an anti-doping rule violation charge, the Athlete or other Person may receive a one-year reduction in the period of Ineligibility asserted by DFSNZ. Where the Athlete or other Person receives the one-year reduction in the asserted period of Ineligibility under this Rule 10.8.1, no further reduction in the asserted period of Ineligibility shall be allowed under any other Rule.

6. The implementation of a rule violation admission and acceptance of the asserted period of ineligibility by an Athlete is provided for in rule 10.8.2.

7. The Respondent invokes, as an aid to interpretation of Rule 10.8.1, footnote 59 [numbered 70 in the WADA Code]. This reads:

> Comment to Rule 10.8.1: For example, if DFSNZ alleges that an Athlete has violated Rule 2.1 for Use of an anabolic steroid and asserts the applicable period of Ineligibility is four years, then *the Athlete may unilaterally reduce* the period of Ineligibility to three years by admitting the violation and accepting the three-year period of Ineligibility within the time specified in this Article, with no further reduction allowed. This resolves the case without the need for a hearing. (Italics added.)

8. DFSNZ counters that by reference to footnote 60 of SADR [footnote 71 in the WADA Code], in support of its submission (below) that it is for the Tribunal, and not DFSNZ, to grant the one-year reduction. This reads:

> In some countries, the imposition of a period of Ineligibility is left entirely to a hearing body. In those countries, the Anti-Doping Organisation may not assert a specific period of Ineligibility for purposes of Rules 10.8.1 nor have the power to agree to a specific period of Ineligibility under Rule 10.8.2. In those circumstance, Rule 10.8.1 and Rule 10.8.2 will not be applicable but may be considered by the hearing body.

Respondent's Argument

9. The Respondent's submission, as we understand it, relies on the words "*asserted* period of ineligibility" in rule 10.8.1, pointing to the same language in footnote 59 and to the conjunctive "and" that links the allegation and the period of ineligibility. He relies on the words italicized in footnote 59 above to confer on him the option of seeking a one-year reduction, a course which could however deprive him of the opportunity to continue to seek a reduction under rule 10.2.3 on the ground of unintentional conduct.

10. The Respondent also invokes Article 7 of WADA's International Standard for Results Management [ISRM] which sets out certain requirements for a letter of charge, including "an indication of the specific consequences being sought" in the event that alleged rule violation is upheld and the provision of a deadline of not more than 20 days for the Athlete to admit the alleged violation "and to accept the proposed consequences by signing, dating and returning an acceptance of consequences form". He says that article 7 and footnote 59 are both consistent with his interpretation of rule 10.8.1.

Applicant's Argument

11. DFSNZ acknowledges "drafting difficulties" – to which the Respondent invokes the *contra preferentem* principle on the basis of a claimed contractual relationship between the parties - but submits that footnote 60 precludes DFSNZ applying rules 10.8.1 and 10.8.2 because, unlike other countries, New Zealand has entrusted the jurisdiction to determine sanction to an independent tribunal rather than leaving it with the enforcement agency.

12. DFSNZ concedes that footnotes do not have legislative effect but say that taking account of their explanatory effect is mandatory (referring in this respect to the Introduction to SADR – which states that "all provisions" of the Code are "mandatory in substance").

13. The Respondent replies to this submission by asserting that DFSNZ's "delegation of its adjudication function [to this Tribunal] does not absolve it from its obligation to comply with the Code and the ISRM". DFSNZ, the Respondent argues, "remains fully responsible for any aspect it delegates is performed in compliance with the Code".

Analysis

14. We are not attracted to the Respondent's delegation submission. The Sports Tribunal was created by statute and does not in any sense exercise delegated powers from DFSNZ, a point also made in reply by DFSNZ.

15. We nevertheless think that, despite drafting ambiguities, our obligation is to give such interpretation as will make the Rules work in a practical way. DFSNZ should state from the beginning of the process the period of ineligibility that an athlete faces so as to allow an immediate right to obtain a one-year reduction by making a timely admission. To require an Athlete to go through a sanction process would be contrary to the objective of rules 10.8.1 and 10.8.2. It is true, as DFSNZ argues, that on its interpretation the Tribunal will be able to make that reduction – but only after a process that leads up to a Tribunal sanction hearing and that may involve considerable expense, delay and uncertainty for the Athlete. We see that outcome as not conforming with the object and spirit of these rules.

16. The Respondent's reliance on the *contra preferentem* principle is consistent with this decision. However, given that it assumes a contractual relationship between DFSNZ and an athlete by virtue of the latter acknowledging that he or she, by competing and submitting to SADR – a proposition disputed by DFSNZ - we prefer to leave that issue for fuller argument on another day. The Respondent's reliance on the provisions of the ISRM is also *prima facie* consistent with this decision. DFSNZ however argued in reply that those provisions were not applicable or, alternatively, that a statement that the charge if proven carried the consequence of ineligibility was sufficient compliance. We doubt at least the latter proposition, but our decision does not depend on the application or compliance with or otherwise in either case.

17. Finally, we note also that DFSNZ has said in its submission dated 13 September that, if the Respondent is correct in his interpretation (which in substance we have ruled he is), his 20 days for opting to admit the violation expires on 15 September in that DFSNZ had, by its submission of 25 August clarified that the period of ineligibility was 4 years. This submission assumes that 20 days is not 20 working days and, given that the Respondent had been given an opportunity to make a reply submission which would go past 15 September and the Tribunal would then need time to consider and write a Determination, that is not a position we are prepared to

accept. The Tribunal advised the parties on 13 September that the time limit in the provision would be on hold until this process has been completed.

18. The fact is also that both parties have been proceeding on the basis that this was something of a test case. DFSNZ, in referring to the drafting difficulties, said explicitly that it "would be grateful for the Tribunal's guidance on this matter, as it may have an impact on operational procedure".

Ruling

19. We rule therefore that DFSNZ ought, when charging the Respondent, have advised him of his rights under rules 10.2.1 and 10.2.2. We direct further that the Respondent has 2 weeks from the date of this Determination to elect whether he wishes to admit the alleged contravention of SADR and accept a one-year reduction of the mandatory four-year period of ineligibility.

29 September 2021

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Dr James Farmer QC
Deputy Chairman

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The Hon. Nicholas Davidson QC
Deputy Chairman