

Background

1. On 16 February 2019, Lee Marshall was tested in an in-competition test at the New Zealand and Oceania Canoe Sprint Championships. The test result indicated significantly elevated levels of androsterone, testosterone and 5 β Adiol, which are all non-specified substances prohibited at all times. Mr Marshall had listed a variety of supplements and one medication (all that he had taken in the last seven days) on the Doping Control form.
2. When advised of the result, Mr Marshall wrote a lengthy letter to Drug Free Sport New Zealand (DFSNZ), setting out the background to the violation including his health concerns.

Proceedings

3. Notwithstanding, on 5 July 2019 DFSNZ filed an Application for Provisional Suspension of Mr Marshall, which was served on him that same day. The Application was accompanied by material that demonstrated that Mr Marshall had tested positive to a non-specified substance.
4. Mr Marshall elected not to have a 'B' sample tested and admitted the violation.
5. On 18 July 2019, Mr Marshall was provisionally suspended without opposition during a teleconference that also provided timetabling directions.
6. On 1 August 2019, DFSNZ filed proceedings alleging a violation of Rule 2.1 of the Sports Anti-Doping Rules 2019 (SADR) evidenced by the presence of a prohibited substance in the sample collected.
7. Mr Marshall later sent a message to the Tribunal that confirmed that he admitted the violation and would not be offering a defence other than relying on the mitigating circumstances surrounding his health that he had previously put forward in his communication with DFSNZ.
8. Subsequently, the Chairman explained to Mr Marshall the nature of the anti-doping code and its ramifications, and at the Chairman's specific request DFSNZ filed a helpful Memorandum setting out the position in detail.
9. DFSNZ accepted that the two messages received from Mr Marshall could be treated by the Tribunal as evidence, and that they did not wish to cross-examine on them.

Somewhat surprisingly, DFSNZ made no submission as to whether the material provided established or did not establish that the violation was not intentional. It has been commonplace for DFSNZ to take a position before the Tribunal, but it did not do so in this case.

10. For a period, Mr Marshall did not engage with the process, despite continuing advice that a four year suspension was mandatory unless he could demonstrate that the violation was not intentional. Eventually Mr Marshall indicated that he would participate in a hearing at which he would be able to seek to establish the violation was not intentional.

Issue

11. The sole issue for the Tribunal is to determine the penalty required under the Code.

Relevant SADR Provisions

12. SADR 10.2 provides:

Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances or Prohibited Methods

The period of *Ineligibility* imposed for a violation of Rules 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Rules 10.4, 10.5 or 10.6:

10.2.1 The period of *Ineligibility* shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a *Specified Substance*, unless the *Athlete* or other *Person* can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a *Specified Substance* and *DFSNZ* can establish that the anti-doping rule violation was intentional.

10.2.2 If Rule 10.2.1 does not apply, the period of *Ineligibility* shall be two years.

Discussion

13. In all of his written material and in the oral evidence at the hearing, Mr Marshall has outlined his personal and professional background. Nothing he has said has been challenged and having heard and seen the witness we accept his veracity. Partly as a result of military service when he was a very young man, he has been seriously

challenged. He has been consistent that the prohibited substances which he has used have had nothing to do with improving his sporting prowess.

14. None of this background provides any excuse, but it does explain why he was taking the substances and the effect they were having on his ability to operate in the community. Although it is not critical, his sporting results would suggest that he was not gaining an advantage.
15. The matter which has caused us concern is the evidence provided to the Tribunal of a discussion he was said to have had with a member of the sporting club to which they both belong. Relevantly the witness said:

“6. Lee was impatient with the other paddlers on the water as he thought they were mucking around, so he suggested to me that he and I should just start the training session, which we did.

7. At the conclusion of the training session, while he and I were paddling back to the club, he told me he felt great and that he had a muscle pump happening.

8. He explained that he had been to a doctor and had been told he had low testosterone.

9. He told me that he was taking testosterone injections for low libido, but that the testosterone was helping his paddling a great deal.

10. He told me that I should try testosterone to help my paddling”.

16. Naturally the Tribunal members questioned Mr Marshall about this material. He accepted that there was a conversation at the end of a training session. He specifically denied that he used the phrase “he had a muscle pump” or that he said “testosterone was helping his paddling a great deal”. He accepted that they spoke of his health problems and that testosterone gave him a better sense of wellbeing and a faster metabolism. He strenuously denied suggesting that his companion should try it.
17. Having heard and seen Mr Marshall we are not of the view that there is anything sinister or of critical moment in this interchange. It is clear there have been periods in his life which have been difficult and challenging and he believes that there has been a marked benefit to his general wellbeing in his use of testosterone. We refrain from any comment as to the efficacy of his belief, but it is strongly held and has clearly been

adopted and put into operation over a number of years. The tone and nature of his reporting leaves us satisfied that he has been keen to share this view. We find the interchange after a training session is in that category and does not have other probative value in the determination we have to make.

18. What is in effect self-medication has been imprudent in the extreme but it has been directed to his general health and seen as quite unrelated to his involvement in a low level of recreational sporting activity. It appears that this year he may have had some realisation that there could be a perceived connection and he therefore altered his approach.
19. When Mr Marshall was initially tested he immediately said what he was taking. In his communications since and in his evidence before us he has been consistent that he is not a drug cheat and that the drug taking has been related to his personal challenges and difficulties, and has happened for at least six years. He may be mistaken as to the utility of what he was doing but he persuades us that general wellbeing is, and has been for several years, his motivation and intention. There was a history of this approach long before he involved himself in relevant sporting activities. His credible narrative has not been challenged or tested in any way by DFSNZ. It is before us as an arguably available position.
20. By the narrowest of margins, Mr Marshall has proved on the balance of probabilities that the clearly admitted anti-doping rule violation was not intentional. However, every athlete has the responsibility to ensure that whatever they may be doing for a non-sport related reason is not at the same time a violation of the requirements of the Code.
21. Accordingly there will be a period of suspension for two years. Allowance is always made for the period of provisional suspension and Rule 10.11.2 of the Sports Anti-Doping Rules allows for backdating for timely admission. That was clearly the case with Mr Marshall.
22. For the admitted violation the period of ineligibility is two years from 16 February 2019.

Dated: 27 September 2019



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Sir Bruce Robertson
Chairman