

BETWEEN **DRUG FREE SPORT NEW ZEALAND**
Applicant

AND **STACEY MIKARA**
Respondent

AND **NEW ZEALAND RUGBY LEAGUE**
Interested Party

**DECISION OF SPORTS TRIBUNAL
DATED 17 FEBRUARY 2017**

Hearing: 16 February 2017 by telephone conference

Tribunal: Dr James Farmer QC (Deputy Chairperson)
Ron Cheatley
Rob Hart

Present: Paul David QC, counsel for Applicant
Jude Ellis, Drug Free Sport New Zealand
David Fraundorfer and Sam Fellows, counsel for
Respondent
Stacey Mikara, Respondent
Kevin Bailey, New Zealand Rugby League

Registrar: Megan Lee-Joe

Proceedings

1. On 14 November 2016, Drug Free Sport New Zealand (DFSNZ) filed an application for the provisional suspension of Stacey Mikara alleging that a sample collected from him in a national rugby league championship competition on 17 September 2016 confirmed the presence of 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid (a metabolite of cannabis) in a concentration above the WADA Decision Limit. This metabolite is a specified substance, prohibited in-competition, under class S8 Cannabinoids on the WADA 2016 Prohibited List.
2. After a number of unsuccessful attempts to contact Mr Mikara, DFSNZ engaged a process server to personally serve Mr Mikara with the provisional suspension application. This was served on 20 December 2016.
3. Notice of the provisional suspension hearing date was personally served on Mr Mikara on 14 January. Mr Mikara contacted the Tribunal Registrar on 17 January and thereafter has fully co-operated in these proceedings.
4. On 18 January, without opposition, Mr Mikara was provisionally suspended.
5. The substantive Application for Anti-Doping Rule Violation Proceedings was filed by DFSNZ on 20 January. Mr Mikara has admitted the violation but asked to be heard as to the appropriate sanction.

Background facts

6. Mr Mikara has played representative rugby league for the Southland Rams for the past six seasons. He also plays other sports including rugby union at club level.
7. Mr Mikara gave evidence that he had been smoking cannabis during the 2016 season and consistently in the week leading up to the game at which he was tested. A sample was taken from Mr Mikara following a NZ Rugby League National Competition game against the Taranaki Sharks on 17 September 2016. This tested positive for the presence of cannabis at a level of 269ng/ml. The WADA decision limit for cannabis was increased in 2012 to 180ng/ml from a previous level of 19ng/ml.
8. DFSNZ accepted Mr Mikara's account that his cannabis use was for recreational purposes in social settings as an alternative to drinking

alcohol. There was no suggestion that it was used for or had the effect of enhancing his sporting performance.

9. Mr Mikara acknowledged that he had been informed about the substances that could not be used, including cannabis, after his team qualified for the 2016 National Championship but that it had been difficult to stop his habitual cannabis use.

Submissions

10. In the intervening period, the Tribunal has issued its decision in *ST17/16 Drug Free Sport New Zealand v Travell Ngatoko* (3 February 2017) which involves very similar circumstances to the current case. Mr Ngatoko was tested (for a different team) at the same game as Mr Mikara and produced a positive reading for cannabis of 189ng/ml. Likewise Mr Ngatoko's cannabis use was solely for recreational purposes rather than for sport performance reasons. The Tribunal considered that the appropriate sanction was to suspend Mr Ngatoko for a period of six months.
11. Mr David, responsibly, did not argue that Mr Mikara's violation was intentional and accepted that on the basis of his evidence and the note relating to cannabis in the SADR definition of "no significant fault", Mr Mikara would be in a position to establish the defence of no significant fault. The Tribunal's role is then to determine a sanction ranging between a reprimand and no period of ineligibility, on the one hand, and two years, depending on Mr Mikara's degree of fault.
12. Counsel for DFSNZ and Mr Mikara were both comfortable that the factual matrix could be seen in a consistent way with the *Ngatoko* case and that a period of ineligibility of six months would be appropriate. In Mr David's submission, "*Mr Mikara's higher level and his frankness in admitting his risk taking conduct, does not in DFSNZ's view, justify an increased period of ineligibility when his case is set alongside that of Mr Ngatoko who tested positive after the same game and appears to have used cannabis in much the same way.*"
13. Mr Fraundorfer, counsel for Mr Mikara, also submitted that his client should be treated in the same manner as Mr Ngatoko and that while certain mitigating factors might objectively be considered stronger in Mr Ngatoko's case they do not appear to have been given much weight in the Tribunal's decision in *Ngatoko* in any event and so are not a distinguishing feature between the two cases.

Decision

14. The Tribunal is satisfied on the evidence and having regard to the similar position taken by both counsel on these issues, that Mr Mikara's use of cannabis was not intended to enhance his sporting performance and, further, that there was no significant fault in his having infringed the WADA limits on the use of cannabis during a period of competition. We come to that view, notwithstanding that Mr Mikara admitted that he was aware at the time of the national competition that smoking cannabis was prohibited. We note his evidence though that he was unaware at that time that cannabis could enhance sports performance.
15. This finding does entitle the Tribunal to fix a period of suspension of less than 2 years. Having regard to the principle that fairness to other competitors requires us to act consistently, we think that, as in the *Ngatoko case*, 6 months is the appropriate period of ineligibility and we so fix that accordingly.
16. That however is not the end of the matter. We are empowered under SADR 10.11.2 to backdate the starting date of ineligibility to such date as we determine appropriate in our judgment provided that this date is not earlier than that when the sample was taken (in this case 17 September 2016) and provided also that the athlete must serve at least one half of the period of ineligibility going forward from the date of this Decision (being 17 February 2017, thus making the earliest date for the start of the ineligibility period being 17 November 2016).
17. Our view is that we should exercise our discretion to backdate the start of the ineligibility period but not to the same extent as occurred in the *Ngatoko case*. We note in this respect, the following differences between the 2 cases that lead us to this view:
 - (i) The level of cannabis detected in Mr Ngatoko's urine sample at 189ng/ml was only just above the minimum prohibited level of 180ng/ml, whereas the level detected in Mr Mikara's case was a relatively high one at 269ng/ml.
 - (ii) This higher level was a reflection of Mr Mikara's extensive and continual use over a long period of cannabis. As he put it in his evidence, when acknowledging that he was aware that he could not use cannabis while playing rugby league, he was "so used to smoking cannabis [he] could not stop".

18. The submission was made on behalf of Mr Mikara that it was not the role of this Tribunal to police what is an illegal activity. We agree with that, taken alone, that proposition is probably sound. However, as this Tribunal said in the *Ngatoko case*, an athlete playing at a national level "is inevitably a role model for others in the sport and has responsibilities arising therefrom".
19. We think that in the present case, the period of ineligibility is properly backdated to the date of the provisional suspension order (18 January 2017), which means that Mr Mikara will be ineligible to participate in any competitive sport until 17 July 2017.
20. By way of postscript, we note that Mr Mikara said, in response to questioning from the Tribunal, that he had now stopped using cannabis as he was "putting league ahead of marijuana". This is encouraging and, hopefully, will provide a good example for other athletes who may be of the view that sport can accommodate the recreational use of cannabis.

Dated 17 February 2017



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Dr James Farmer QC
Deputy Chairperson