

**BEFORE THE SPORTS DISPUTES TRIBUNAL
OF NEW ZEALAND**

ST 05/10

BETWEEN DRUG FREE SPORT NEW ZEALAND

Applicant

AND BRUCE KAKE

Respondent

AND TOUCH NEW ZEALAND

Interested Party

Date of decision: 30 August 2010

DECISION OF TRIBUNAL

Hearing: By conference call on 29 June 2010

Tribunal: Tim Castle (Chairman)
Dr Lynne Coleman
Carol Quirk

Counsel: Paul David, counsel for Applicant
Graeme Steel and Jayne Kernohan, for Applicant
Respondent in person
Peter Walters, for Touch New Zealand

Registrar: Brent Ellis

Introduction

1. On 6 March 2010 Mr Kake participated in the 2010 New Zealand Touch National Championships at the Waitakere Trust's Stadium in Auckland. At the conclusion of competition on that day he was required to give a sample for drug testing. His sample detected the presence of the metabolite of the prohibited substance cannabis in his system. Mr Kake was notified accordingly by communication dated 31 March 2010. The application to the Tribunal by Drug Free Sport for anti-doping rule violation proceedings served on Mr Kake on 30 April 2010.
2. By notice of defence dated 5 May 2010 filed with the Tribunal on 10 May 2010, Mr Kake admitted the violation, recorded that he did not wish to participate in any hearing, and acknowledged that the Tribunal could impose a penalty upon him without holding a hearing and that he would be notified accordingly of any such penalty.
3. On 17 May 2010, the Chairman of the Sports Tribunal issued a Minute to the parties in the following terms:
 1. *It is noted that Mr Kake has filed a notice of defence admitting the violation and advising that he does not wish to participate in the hearing. The Tribunal could now proceed to impose a sanction in accordance with the Sports Anti-Doping Rules 2010 ("the rules"). Before doing so, it wishes to advise Mr Kake of the implications of him not attending a hearing.*
 2. *Under the rules, the minimum period of ineligibility for a first offence is two years. Thus, if the matter is determined on the basis of Mr Kake's notice of defence, he will be suspended for two years and this suspension will apply not only to Touch Rugby but to other sports that come within the provisions of the rules. The suspension will prohibit Mr Kake from participating in any capacity in those sports.*
 3. *Cannabis is a specified substance and it is possible, and likely, to have the period of ineligibility (i.e. suspension) reduced substantially if:*
 - a. *Mr Kake can establish to the comfortable satisfaction of the Tribunal how the cannabis got into his body and that he did not take it for enhancing his sports performance;*

- b. Mr Kake also produces corroborating evidence to establish the absence of any intent to enhance sports performance.*
- 4. Mr Kake will only be eligible for the reduced sanction if he gives evidence and has another witness to confirm the evidence on his behalf.*
 - 5. For this reason, Mr Kake is given a further ten (10) days from the date of this minute to determine whether he wishes to make submissions on any sanctions or penalty which might be imposed. If he wishes to do this, he will need to provide a written statement of his evidence and that of his corroborating witness within the same period.*
 - 6. If Mr Kake takes this course, a telephone conference hearing will be convened to have the witnesses confirm their evidence and be subject to any questions which may be asked.*
 - 7. It is noted that Touch New Zealand has had its attention drawn to the provisional suspension provisions of the rules but has not made an application for the provisional suspension. It is asked to advise within the same ten (10) day period:*
 - a. the reason for not making such an application;*
 - b. the dates of the Touch season and the expected participation of Mr Kake in the game of Touch during the next few months; and*
 - c. any other submissions it may wish to make as to the appropriate sanction.*
4. Provisional suspension of Mr Kake was sought by Touch New Zealand by application dated 5 June 2010. This was subsequently withdrawn. Touch New Zealand confirmed for the Tribunal that Mr Kake had been banned from playing, coaching or assisting in any way in the sport of Touch from 1 November 2010 until 31 December 2010 as a result of other disciplinary action taken against him during the Nationals.
 5. Other communications were received by and on behalf of Mr Kake to which the Tribunal will turn when dealing with submissions and evidence tendered on his behalf.

6. By notice of fixture dated 17 June 2010 the Chairman of the Tribunal directed:
1. *The substantive hearing will be by telephone conference call at 9.00 am on Tuesday, 29 June 2010. The panel will be Tim Castle (Chair), Carol Quirk and Dr Lynne Coleman.*
 2. *The Registrar will advise details of the method of connecting to the telephone conference.*
 3. *Further to the Tribunal's minute of 17 May 2010, Aku Mura has provided the email attached to this notice. Presumably that is in response to the matter referred to in the email. It does not however, comply with the requirements of the Sports Anti-Doping Rules (2010) if Mr Kake's intention is to seek a reduced penalty.*
 4. *The relevant rule requires the athlete to "produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sports performance or mask the Use of a performance-enhancing substance". One way by which Mr Kake can satisfy this requirement is to obtain a witness statement from a person who was present when he smoked the cannabis and can advise of the circumstances in which it was smoked. The Tribunal panel can then determine whether it can draw an inference from the circumstances as such that Mr Kake did not smoke the cannabis for performance enhancing purposes.*
 5. *If Mr Kake wishes to have a lesser penalty considered by the Panel, he should obtain such a statement from a witness who should then be available with Mr Kake at 9.00 am on 29 June to confirm the statements they have given and to answer questions from the panel.*
 6. *I have already ruled that the statement provided by Mr Kake on 21 May can, if he affirms the truth of the contents, at the telephone conference be taken as his statement and he may be questioned on it.*

Submissions on behalf of Mr Kake

7. At the hearing Mr Kake confirmed a written statement previously tendered which the Tribunal ruled would be taken into the record as his evidence and on which he could be questioned. In his evidence Mr Kake told the Tribunal that he had not intended to take the cannabis as a “performance enhancer”. He told us that on the Friday before the test, while he was at the National Championships, he was given the very sad news that his grandmother had passed away. That night he packed his bags, left the Nationals to meet up with his family on their way north to attend his grandmother’s tangi. Mr Kake told the Tribunal that when he left the camp and the National Championships on the Friday, he had no intention of going back to the Championships. His intention was to play a full part in the tangihanga for his grandmother. That Friday evening, away from the Nationals with his family, some alcohol was consumed and cannabis smoked. Mr Kake’s smoking of the cannabis was, he told us, for comfort purposes and for no other purpose associated with his sporting activity, especially given he had no intention of returning to the championships.
8. Mr Kake also told us that he was later that night convinced by members of his family that his grandmother would really want him to participate fully in the National Championships and that in the circumstances he should return to do so, support his team as their captain and participate fully in the competition. Mr Kake found these strong words of encouragement to be compelling. Mr Kake also stated to the Tribunal that *“he was captain of the team and they were down on players and he wanted to help out.”* Instead of travelling north he did return to the Nationals. He told the Tribunal that not only had he smoked the cannabis when he was not intending to resume competition, but also he did not take the cannabis as a performance enhancement measure. He said he did not really see how cannabis could enhance an athlete in such *“a fast paced, high intensity game”* such as Touch Rugby. *“To be honest [he said] I would have thought it would be more detrimental to [my] game than enhancing [it] in any way.”*
9. He told the Tribunal that he knew he had made a mistake; and in no way was he trying to justify the mistake; but he hoped the Tribunal would be lenient in its imposition of penalty.
10. In a separate written email received by the Tribunal, the Manager of the Counties Manakau Open Mens Touch Team, Aku Mura, recorded that Bruce Kake had come

to see him late in the day on 5 March 2010 to tell him he had received the news of his grandmother's death. Mr Mura observed Mr Kake as being very upset with the news. He informed the Tribunal:

“He was very upset when he had heard the news but still played throughout the day. On the night of returning back to camp Bruce came to me and said that he had decided to leave camp because he was feeling so upset and did not think he could continue on through the rest of the tournament and he was going to go north to his grandmother's funeral. So we both agreed for him to leave. But then the next day he had returned to camp with a new state of mind and new attitude and decided that he could finish out the rest of the tournament.”

11. Mr Kake was informed by the Registrar of the Tribunal that he could only be eligible for a reduced penalty (less than the two year suspension) if:
 - His evidence established to the comfortable satisfaction of the Tribunal how the cannabis got into his body and that he did not take it with the intention of enhancing his sports performance; and
 - He also produced corroborating evidence (ie evidence from someone else) to establish the absence of any intent on the part of the athlete to enhance sports performance.
12. Whilst Mr Kake's evidence received in writing, and confirmed by him at the teleconference, could be accepted as evidence on his behalf, he understood that it would still be necessary to secure additional evidence by way of corroboration.
13. To this end, Mr Kake's partner participated in the telephone conference on 29 June and confirmed that she had been with Mr Kake on the night he smoked cannabis with his family. She confirmed that it was smoked by him at a time when he had no intention of coming back to the National Championships to compete; that he had smoked it for comfort purposes with other members of his family who were together supporting each other as a whanau. To that extent the Tribunal was prepared to accept that there was material corroboration from someone other than Mr Kake to establish the absence of any intention on his part to enhance his performance in sport.

Submission from Drug Free Sport

14. Mr David on behalf of Drug Free Sport, submitted that the issue of the Tribunal's comfortable satisfaction was an issue for the Tribunal. He submitted that the first step for the Tribunal was to proceed on the basis of a two year suspension being required, but if the Tribunal was comfortably satisfied as to how the cannabis got into Mr Kake's body, and that he did not take it with the intention of enhancing sports performance, the range of available sanctions by way of penalty was, at the lower end, of reprimand and, at the upper end, still a suspension of two years.
15. Mr David noted that the Tribunal had been imposing suspensions in other cannabis cases of between one and two months depending on the findings as to degree of fault and the existence or non-existence of either aggravating or mitigating circumstances. It was submitted that the Tribunal could revisit and depart from its standard "tariff" if it appeared from the numbers of cases reaching the Tribunal and the circumstances of them that the message, so to speak, was not getting through to sport.
16. Mr David submitted that Mr Kake was an experienced player, a leader of a team, who knowingly and intentionally took a banned drug, then made a decision to come back to play, and hoped he would not be caught. It was submitted to us that this was one of the clearest forms of aggravating circumstance imaginable. Mr David's submission was that there was no reason why the Tribunal should not impose a suspension which was meaningful and effective. It was submitted there were no mitigating circumstances in favour of the athlete; the athlete had choices and had deliberately returned to the field of play knowing he had smoked cannabis the night before.
17. Drug Free Sport accepted that Mr Kake had produced evidence that he did not take the cannabis to improve or enhance his sport performance; and did acknowledge the frankness of Mr Kake's evidence that he realised he had made a very big mistake returning to the field of play after taking a banned drug.

Discussion

18. The Tribunal is comfortably satisfied on the evidence that Mr Kake did not smoke cannabis for performance enhancing purposes. We are satisfied on the evidence as to how the cannabis came to be in his body. Our conclusions in both respects are

drawn from Mr Kake's evidence corroborated in material respects by his witness, his partner.

19. He is entitled, accordingly, to have the benefit of the Tribunal considering a reduced period of ineligibility of less than two years in accordance with the Rules.
20. The Rules provide that the criterion to be considered in assessing any reduction of the period of ineligibility is the athlete's degree of fault. In this case, as Mr Walters of Touch New Zealand, pointed out, Mr Kake is an international athlete who has represented New Zealand; one of the highest performers in the sport and a role model. We have no doubt that Mr Kake was fully familiar with the anti-doping provisions and rules applying to his and all sport; and was well aware of the requirements of the anti-doping regime; and had been educated about those requirements. He was candid enough to accept that he knew Touch players had in the past been banned for smoking cannabis. Obviously he was not deterred by that, given he made a decision to return to the championships and participate even though he had smoked cannabis the evening before his return.
21. Whilst we accept that when he smoked the cannabis, Mr Kake had no intention of returning to the championships and was proposing to accompany his whanau to his grandmother's tangi in the north of the North Island and that does assist his cause in this case, it is not of such moment as to dictate that a period of suspension, although it may be less than the two years to which he would otherwise be eligible, should be, by that reason alone, reduced to a short period.
22. In this case, the key decision Mr Kake made, which we consider to be an aggravating circumstance, is his decision to return to the field of play and participate fully in the National Championships knowing that the evening before he had smoked cannabis. Clearly he hoped he would not be caught. This circumstance, we consider, calls for a deterrent and a meaningful period of suspension. As the Chief Executive of Drug Free Sport noted in his evidence before the Tribunal, had Mr Kake's team gone on to win at the National Championships, Mr Kake's positive test would have meant that the result would have been overturned under the Rules of Touch New Zealand, with obviously very severe circumstances for Mr Kake's team.
23. Neither this prospect nor the prospect of being tested, not the knowledge of penalties imposed on others who had played after smoking cannabis, seemed to deter Mr Kake from running the risk.

24. Because there was no provisional suspension imposed in this case, any suspension we choose to impose will be from the date of hearing. Mr Kake is not participating in the sport of Touch at this time, although he may have been participating in some of the other winter sports in which he has regularly participated. He has, of course, in any event been suspended by Touch NZ from participating in Touch from 1 November 2010 to 31 December 2010 as a result of the other disciplinary matter.
25. Mr Walters asked for any sanction of suspension imposed by the Tribunal to be imposed from 1 January 2011, to be effective (as Touch NZ have already banned him from 1 November until 31 December). However, the Tribunal does not appear to have the power under the Sports Anti-Doping Rules to be able to impose a suspension that will commence on a future date. However, the Tribunal must have the power to impose a sanction that is meaningful and effective. It appears to the Tribunal that, in the circumstances of this case, a meaningful and effective sanction would need to be one that precluded Mr Kake participating in the 2010/2011 Touch season.
26. It is our decision that Mr Kake be suspended for the entirety of the 2010/2011 Touch season. That is to say, he is suspended by this decision from 29 June 2010 up to and including the National Championships which, we were told by Touch New Zealand, are scheduled to conclude on 16 March 2011. As indicated above, this is not to be read as the Tribunal indicating that any "tariff" or bench mark of 9 months suspension is now required in cannabis cases. The appropriate sanction in every case depends on the circumstances of that particular case. In the circumstances of this particular case, the Tribunal considers that a meaningful and effective sanction is a suspension that does not expire until after the next Touch season is finished.

Decision

27. Mr Kake is, in accordance with the Rules, declared ineligible to participate in any way in any sport bound by the Rules for the period 29 June 2010 up to and including 16 March 2011 (allowing that this date includes, for suspension purposes, the Touch New Zealand National Championships). In imposing this penalty, we are mindful of the fact that Touch NZ have already suspended him from competing in Touch from 1 November 2010 to 31 December 2010 on another matter. We emphasise that this suspension has comprehensive cross-sport effect. It will apply to all and any other sports which are bound by the Rules.

28. If there is a further infringement, the Rules provide that the minimum period of ineligibility will be one year and that it may be as high as four years.

DATED 30 August 2010

A handwritten signature in black ink, appearing to read 'Tim Castle', with a large loop at the beginning and a small flourish at the end.

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Tim Castle
Chairman