

INTRODUCTION

1. On 4 March 2006, Mr Morunga was tested by Drug Free Sport NZ ("**DFS**") at the National Touch Championships in Lower Hutt. On 11 April 2006, DFS issued a determination under sections 16B and 18(1) NZ Sports Drug Agency Act 1994.
2. The determination of DFS was that the sample taken from Mr Morunga established a doping infraction. That infraction was for cannabinoids – S8 of the Prohibited List of the World Anti-Doping Agency ("**WADA**"). The determination stated:

"Doping infraction 2nd infraction for a Specified Substance"

3. Mr Morunga previously appeared before this Tribunal after a similar determination resulting from the National Touch Tournament in Christchurch in March 2005. The Tribunal in a Decision dated 2 August 2005 (STD 7/05) accepted that Mr Morunga did not smoke cannabis to enhance his performance. The Tribunal suspended Mr Morunga from all participation in the sport of Touch for a period of two months and also issued a severe warning and a strong reprimand. The Tribunal said:

"We are satisfied that he will understand he has had his 'one transgression' under current rules and if he is to avoid a 2 year ban there must not be a second offence. That message should be conveyed strongly to all athletes in the sport of Touch."

4. It is relevant to quote the following paragraphs from the Tribunal's decision of 2 August 2005:

"20. It is fashionable at this time in some circles to debate whether the use of cannabis should be prohibited at all. We do not enter into this debate. The position is that cannabis is on the WADA banned substance list which applies to this country, the applicant sport and the respondent athlete. It is incumbent upon the Tribunal to proceed on that basis to deal with an admitted doping infraction against that list. The jurisdiction of the Tribunal is limited to the imposition of penalty: we must proceed to exercise it.

...

33. Without more, it might well be that Mr Morunga's penalty should, as seems to be the most consistent practice both in New Zealand and offshore, be a reprimand and a warning for a first offence involving cannabis. One of the factors that we consider will have influenced Tribunals around the world who have imposed a reprimand and a warning for a first offence (perhaps especially in the absence of aggravating circumstances) is because for a second offence for the use of cannabis under the WADA Code, a mandatory two years suspension must be imposed. Whilst therefore in the absence of the use of the banned substance being for performance enhancing purposes athletes may have had certain latitude extended to them around the world for

a first offence of cannabis use, there is no such latitude available to a Tribunal such as ours, or any other Tribunal seized of the same jurisdiction, in the event of a second offence. There must be a two year ban upon a second offence.

34. It is vital in our view that Mr Morunga and all those participating in sport, perhaps particularly in the sport of Touch in New Zealand, understand very clearly that a second offence for use of cannabis must result in a two year ban. The prospect of a two year ban for a second transgression ought to offer a very strong deterrent both to Mr Morunga and to all other athletes.

35. As we say, were this to be the complete factual context in the light of which Mr Morunga's offending was to be seen, it might be that we would have concluded that a strong warning and a severe reprimand would be the appropriate penalty. We have considered however whether there are any aggravating circumstances here such as should warrant in this particular case a departure from that course. We have reached the conclusion that there are indeed a number of aggravating circumstances in this case, justifying a more severe penalty for Mr Morunga than even the most severely and strongly expressed warning and reprimand. The first circumstance which we find to be an aggravating one is the fact that before the March 2005 New Zealand National Tournament, Mr Morunga signed a Player Participation Agreement with Touch NZ in which he undertook in writing to abide by all the drug/doping rules, regulations, policies and protocols of Touch NZ, including those provided by the International Federation, WADA, the international Olympic Committee and the New Zealand Sports Drug Agency. By signing that agreement Mr Morunga acknowledged, understood and accepted the obligations imposed upon him by the agreement and that a positive test by him or a failure to fully comply with the drug and doping control, rules, regulations, policies and protocols may lead to penalties being imposed on him.

36. We accept the submission in this case on behalf of Touch NZ that it is an aggravating circumstance that a player would apparently be prepared to sign such an agreement (which any athlete must do before they participate in the National tournament and certainly before they undertake any representative play) but, notwithstanding, consciously breach it, and the rules by which they have agreed to comply, by using a banned substance. The player participation agreement represents, we are satisfied, an additional step taken by the sport to regulate and manage, itself, player conduct in relation to banned substances and doping policies. This sport is to be commended for this step. Athletes are required to abide by it. It must count for something.

37. A further aggravating circumstance in Mr Morunga's case arises out of previous doping and infractions by Mr Morunga's team and team members in both 2003 and 2004 which ought to have made Mr Morunga even more aware of his responsibilities in relation to the anti-doping protocols so clearly brought to his attention in the Player Participation Agreement already referred to. The evidence from Touch NZ, not disputed by Mr Morunga, was that he was a member of the Counties Manukau Men's Open Team which was stripped of its gold medals due to two doping infractions within that team in 2004. One of those doping infractions was the use of cannabis. That was not the doping infraction which led to the team being stripped of its gold medals but it did occur at the same Championships and involved another player in Mr Morunga's team. Mr Morunga told us during the hearing that he and his team members were "gutted" that the team had been stripped of its medals by reason of the very serious doping infraction in addition to the

cannabis offence. He acknowledged however that the cannabis offence had occurred and that he knew the use of cannabis was banned.

38. Added to this circumstance relating to the 2004 Championships we also had drawn to our attention by Touch NZ a decision of the disciplinary committee of Touch NZ issued in the early 2004 in respect of one of Mr Morunga's team mates who had tested positive for cannabis during the Touch New Zealand Nationals at Ongley Park Palmerston North on 6 March 2004. The athlete on that occasion was severely reprimanded. In the light of that athlete's knowledge of a doping infraction the previous year when a member of the same team had committed a doping offence resulting in both the athlete concerned being declared ineligible and his team being disqualified from its medal winning status, the athlete before the disciplinary tribunal was severely reprimanded and a period of ineligibility/suspension was imposed – from 1 November 2004 to 30 November 2004.

39. So the position in this case is that Mr Morunga over the last two years as a member of the Counties Manukau Men's Open Touch Team was well aware of the likely consequences of breaching the Player Participation Agreement and using a substance which was on the applicable banned list. Notwithstanding the experience about which Mr Morunga told us he knew relating to his team mate in the Counties Manukau Open Team. In 2004 and further notwithstanding the fact that Mr Morunga was a member of the Counties Manukau Men's Open Team which was stripped of its gold medals due to two doping infractions in 2004, he was apparently prepared to use cannabis at a time when he knew full well its use was banned and when he was still participating fully in the sport with a view to competing at the New Zealand Touch National Championships.

5. A pre-hearing telephone conference was held on 22 June 2006. Mr Morunga had provided a statement of evidence and during the hearing he affirmed that what was said in the statement was correct. He was questioned by members of the Tribunal. Both Mr Morunga and Touch agreed that the hearing could be converted into a final hearing for the purposes of the imposition of sanctions.

THE RULES WHICH APPLY

6. Mr Morunga as a member of Touch NZ ("**Touch**") is bound by Touch's anti-doping policy. This is not disputed. The relevant provisions of that policy may be summarised as:
 - (a) A person who has committed an infraction is liable for the imposition of sanctions in accordance with Article 10 of the WADA Code.
 - (b) Any awards and placings won by the athlete and/or the athlete's team since the date of the violation shall be withdrawn.

- (c) The athlete shall be ineligible from holding any position in or being involved with Touch or a Touch member organisation (Rule 10.1.4).
 - (d) The athlete will be ineligible from utilising any facilities, premises, grounds or resources of Touch or Touch member organisations for a sporting purpose for the complete period of any ineligibility, except as a spectator or supporter (Rule 10.1.5).
7. Article 10.1 of the WADA Code provides that except for Specified Substances the period of ineligibility to be imposed for a first violation is 2 years, and for a second violation, lifetime. The athlete does have the right to have that period reduced if he or she can establish no significant fault or negligence and can escape liability completely if no fault or negligence is established. These provisions are not applicable in this case.
8. Cannabis is however a Specified Substance and where an athlete can establish that the use of such a Specified Substance was not to enhance sports performance, the period of ineligibility is reduced on a second violation to 2 years (Article 10.3).
9. Two other provisions of the WADA Code are relevant in this case. First, Article 10.8 provides that the period of ineligibility shall start on the date of the hearing decision but that Article ends with the following statement:
- "Where required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the Athlete, the body imposing the sanction may start the period of ineligibility at an earlier date commencing as early as the date of sample collection."
10. The other relevant article in this case is Article 10.9 which deals with the athlete's status during the period of ineligibility. That article provides that during the period of suspension the athlete may not "participate in any capacity in a competition or activity (other than authorised anti-doping education or rehabilitation programmes) authorised or organised by any Signatory or Signatories member organisation". This provision is relevant in Mr Morunga's case as he also plays rugby league. A further provision of Article 10.9 provides that if a person is subject to a suspension for longer than 4 years, he may after completing a 4 year period, participate in local sport events in a sport other than the sport in which the athlete committed the anti-doping violation. There are one or two qualifications to this right but these are not relevant in this case.

11. NZ Rugby League is a signatory to the WADA Code. When Mr Morunga was suspended on the first violation, he was also prevented from playing rugby league during the period of that suspension.

MR MORUNGA'S EVIDENCE

12. Mr Morunga has played touch rugby since he was an 8 year old. He has represented New Zealand in the sport and was recently named to go to the forthcoming World Cup in South Africa. He is obviously a gifted player.
13. More recently, Mr Morunga has taken up rugby league. He said that an opportunity has arisen for him to "potentially play in Australia for the Sydney Roosters. I and others who support me believe that I have great potential in this code".
14. Modest game fees are paid for his rugby league games which assist Mr Morunga in the support of his partner and their 2 year old daughter. He has no other source of income apart from that received from playing rugby league. His partner does have a source of income but the loss of his rugby league fees, in his view, may place a strain on his relationship. Mr Morunga also said:

"Sport means everything to me and throughout my life it has played a guiding part in focusing my attention towards a positive lifestyle."
15. Mr Morunga lived in a neighbourhood where the use of social or recreational drugs is widespread. He lived in a group of houses where he had many friends who were all accustomed to participating in recreational drug use. Cannabis is frequently offered in social settings and often there is peer pressure to accept it. Since the second violation he has moved away from that area.
16. Mr Morunga admits smoking cannabis prior to both the national tournament in 2005 (the first violation) and the same tournament in 2006. He averred that he did not smoke cannabis in order to enhance his sporting performance and only smokes it in social settings. His experience with cannabis is that it tends to slow his reaction time.
17. After the violation was notified in April of this year, Mr Morunga sought assistance from a local doctor who recommended a rehabilitation plan. He voluntarily gave to the Tribunal an undertaking that he would adhere to this plan, which may include submitting to voluntary drug tests. A letter from Te Atea Marino Maori Alcohol and Drug Service (a division of Waitemata District Health Board) confirmed that

Mr Morunga had self-referred to its service and requested follow up support to address the effects of substance use. He is currently attending weekly counselling appointments.

SUBMISSIONS ON BEHALF OF MR MORUNGA

18. Mr Smyth, on behalf of Mr Morunga, made careful and thoughtful submissions on his behalf. He referred first to the intrinsic value of "the spirit of sport" referred to in the WADA Code and to the fact that the Code in effect emphasises the social benefits of sport. The prohibition on the use of recreational drugs under the WADA Code is at one end of the spectrum but at the other it is not possible to ignore the role sport plays in the development of young people.
19. Mr Smyth referred to the application of the WADA Code in this case and in particular submitted that the anti-doping policy of Touch goes further than the WADA Code. It not only prevents an athlete during a period of suspension from being involved in a Touch member organisation but as already noted, Rules 10.1.4 and 10.1.5 effectively prevent coaching and club involvement. It was submitted that as Mr Morunga is not a drug cheat, the application of the Touch restrictions were inappropriate in the circumstances. There is a need in this case to keep Mr Morunga involved in sport for his own development and that will not be achieved by the application of the provisions in the Touch policy.
20. Finally, it was submitted that the prime objectives of applying the WADA Code and keeping Mr Morunga in sport could be achieved in this case by way of what could be loosely called a plea bargain. The WADA period of ineligibility could be applied with a backdating to March 2006 but Touch could agree not to seek orders applying the more stringent provisions of its own anti-doping code. In this respect, Mr Smyth noted at that stage but did not then pursue a pleading point, namely that in its application to this Tribunal, the outcome sought by Touch was a "2 year ban (as per WADA policy) regarding repeat offenders". If Touch was prepared to enter into this arrangement, it could use Mr Morunga in a positive way in a drug education programme and still enable him to have a role in touch rugby which was not prevented by the sanction under the WADA Code.

TOUCH'S POSITION

21. Mr Battrick for Touch reconfirmed the position which Touch has taken in previous cases before this Tribunal, and which is noted in those portions of Mr Morunga's previous decision referred to in paragraph 4 above. It wishes to have the WADA Code strictly applied and in many respects saw this case as an opportunity to hammer home to Touch players the message about cannabis. While Mr Battrick did not object to the period of ineligibility commencing from March 2006, he was of the view that Touch would not be interested in the plea bargain suggestion. Mr Smyth then indicated that he wished to pursue his pleading point noted above.

DISCUSSION

22. The Tribunal accepts Mr Morunga's evidence in respect of the reason for taking cannabis. He did not take it to enhance his performance at the national tournament. In these circumstances it has no alternative other than to impose a 2 year period of ineligibility (i.e. suspension). The only issue is when that period should commence.
23. The Tribunal is not convinced that there are necessarily all the differences suggested between the status during ineligibility under Article 10.9 of the WADA Code and the provisions of Touch's Anti-Doping Code. The comments in the WADA Code on the articles are to be taken into account in interpreting the articles. The comment on Article 10.9 states:

"The Rules of some Anti-Doping Organisations only ban an athlete from 'competing' during a period of ineligibility. For example, an athlete in those sports could still coach during the ineligibility period. This Article adopts the position set forth in the OMADC that an athlete who is made ineligible for doping should not participate in any capacity in an authorised event or activity during the ineligibility period. This would preclude for example, practising with a national team, or acting as a coach or sport official. Sanctions in one sport will also be recognised by other sports (see Article 15.4). This article should not prohibit the person from participating in sport on a purely recreational level."

24. The provisions of Article 10 of Touch's Anti-Doping Policy are in effect provisions which have been agreed to by Mr Morunga as part of his contract with Touch. To the extent that they are mandatory, it is for Touch to enforce them. If Mr Morunga can make some arrangement with Touch that allows him to have some role which does not undermine the relevant articles of the WADA Code, then he is of course free to do so.

25. It is correct that Touch did not expressly seek orders for the application of Rules 10.1.4 and 10.1.5 of its own Anti-Doping Policy. In the Tribunal's view it was not necessary to do so. As Mr Smyth submitted there is a contractual relationship between Mr Morunga and Touch. The constitution of Touch is the basis of that contract and both parties are contractually bound to the terms of the constitution and Touch's Anti-Doping Policy which has been instituted under the terms of the constitution. Rule 10.1 provides that "any person who is determined to have committed an Anti-Doping Rule Violation will ...". Thus the provisions of Rules 10.1.4 and 10.1.5 apply once an anti-doping violation has been established. They apply in this case without the necessity of this Tribunal so ordering.
26. As noted, the only issue is when the period of ineligibility should commence. Some commentators criticise the strict liability provisions of the WADA Code as applying unfairly to recreational drug users who are not drug cheats. This is not a matter on which this Tribunal should comment as it is a provision of the widely accepted WADA Code. However, it notes that on one view the period of 2 years suspension is severe for a young promising athlete. On the other hand, it notes that this is a second violation and Mr Morunga was warned of the consequences when the sanction was imposed as a result of the first violation.
27. An allied issue is whether the provisions of Article 10.8 of the WADA Code can be applied in this case. If the Tribunal were to backdate the commencement date of the 2 year period, there may be unintended consequences in respect of Mr Morunga's participation in rugby league. Under Article 15.4 of the WADA Code any final adjudication which is consistent with the WADA Code "shall be recognised and respected by all other signatories". Thus, if the suspension period were to be backdated, it would also be backdated for Mr Morunga's participation in rugby league which is a signatory to the WADA Code. This may well adversely affect team results of the team for which he has played since the violation. In these circumstances the Tribunal is reluctant to backdate the date of commencement of the period of ineligibility.
28. If the Tribunal had come to the conclusion that there were strong grounds for backdating the commencement of the period it would have sought formal submissions from NZ Ruby League. However, it is of the view that in this case the facts do not warrant a backdating of the commencement period. The violation

occurred within 12 months of the previous violation and after Mr Morunga had been given a clear warning of the effects of a subsequent violation. Further, as noted in paragraph 37 of the previous decision (see paragraph 4 above) Mr Morunga was in a team in 2004 which was stripped of its gold medal at a tournament because others in the team had smoked cannabis. In the circumstances the Tribunal, notwithstanding the hardship which will be inflicted on Mr Morunga, is of the view that it would be sending the wrong message to backdate the period of ineligibility in this case.

DECISION

29. In accordance with Article 10.3 of the WADA Code, as adopted by Touch New Zealand's Anti-Doping Policy, Mr Morunga is ineligible to compete in Touch for a period of 2 years from the date of this decision. The provisions of Articles 10.9 and 15.4 of the WADA Code will apply to that period of ineligibility.



.....
Hon. Barry Paterson QC
Chairman

4 July 2006