BEFORE THE SPORTS DISPUTES TRIBUNAL
OF NEW ZEALAND

SDT 10/06

BETWEEN	**SOFTBALL NEW ZEALAND**
	Applicant
AND	**CURTIS AMES**
	Respondent

Date of Hearing: 4 May 2006

DECISION OF TRIBUNAL

Dated 8 May 2006

Appearances:	Dale Eagar for Applicant No appearance by the Respondent
Tribunal Members participating:	Kit Toogood QC (Deputy Chairperson) Ron Cheatley Carol Quirk
Registrar:	Brent Ellis

Introduction

1. Curtis Ames ("the player") is a softball player who was a member of the Hutt Valley team participating in the Men's Provincial Cup at Colquhoun Park, Palmerston North beginning on 7 January 2006. The competition was run under the jurisdiction of Softball New Zealand.

2. During the competition, on 10 January 2006, Mr Abbot was selected at random to provide a sample for drug testing. On 22 February 2006, the New Zealand Sports Drug Agency (the Agency) issued a determination under sections 16B and 18(1) of the New Zealand Sports Drug Agency Act 1994. It determined that he had committed a doping infraction by testing positive to cannabinoids. Cannabis is a prohibited substance banned by the World Anti-Doping Code (the WADA Code) Prohibited List 2006, and by the Anti-Doping Policy of Softball New Zealand.

3. Softball New Zealand made an application to the Tribunal alleging that the player had committed an anti-doping violation and seeking the imposition of a penalty pursuant to the Rules of the Tribunal and the Constitution and applicable Rules of Softball New Zealand.

The WADA Code

4. Under the Softball New Zealand Constitution, one of the objects is "to provide an anti-doping policy". This anti-doping policy provides that the "core aspects of the World Anti-Doping Code (the WADA Code)" apply. Once a determination has been received from the agency, Softball New Zealand forwards the matter to this Tribunal for a hearing and, if appropriate, the imposition of sanctions.

5. Under the WADA Code, the mandatory period of suspension for a first breach of the Code is a period of 2 years' ineligibility. However, cannabis is a specified substance, namely one of the substances which are particularly susceptible to unintentional Anti-Doping Rule violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents.

6. Accordingly, the provisions of Article 10.3 of the Code apply. Under that article, if an athlete can establish that the use of a specified substance "was not intended to enhance sports performance", the normal period of ineligibility of 2 years does not

apply. On a first violation, as this is, where that condition is satisfied, the range of penalties available to the Tribunal are, at a minimum, "a warning and reprimand and no period of Ineligibility from future Events and at a maximum, one (1) year's Ineligibility."

7. The athlete has the onus of satisfying the Tribunal on a balance of probability that the use of the substance was not intended to enhance sports performance: Article 3.1 of the Code.

The Tribunal's approach

8. The Tribunal's approach to cannabis violations was summarised recently in the earlier case of *Karaitiana* SDT/12/06, 28 April 2006, which arose out of a sample taken at the same tournament.

9. In this case, the Tribunal applies the following key principles from that decision:

(a) In the case of a first anti-doping violation, if the athlete can satisfy the Tribunal that there was no intention to enhance sporting performance, the Tribunal will be likely to issue a reprimand and warning, without imposing any period of ineligibility, if it is also satisfied that -

(i) the use of cannabis was unrelated to the sport;

(ii) the cannabis use by the athlete did not represent any danger to other competitors, officials or members of the public; and

(iii) there were no other circumstances (described in the cases as "aggravating circumstances") which would indicate that a reprimand and a warning would not be a sufficient remedy.

(b) The Tribunal would be likely to consider aggravating circumstances to exist, and to impose a period of ineligibility, if the athlete's attention had been drawn specifically to the need to adhere to the sport's anti-doping policy and the WADA Code and the athlete had defied such a caution by offending nevertheless. Such a warning may have been contained in an agreement

entered into in respect of a particular competition, or may have been specifically drawn to the athlete's attention by his or her sport by other means.

The proceedings

10. A pre-hearing telephone conference was conducted by the Tribunal on at 8.30am on 4 May 2006. Despite being requested to do so, Mr Ames did not participate.

11. The player is a Canadian citizen who has returned to Canada since being notified of the Agency's determination. He had been given notice of the telephone conference by the Registrar of the Tribunal, Brent Ellis, by an email message sent to an address which the player had previously used, and at 8.20am on 4 May (2.20pm on Wednesday 3 May in Alberta, Canada where it is understood the player resides) an unsuccessful attempt was made by the Registrar to contact Mr Ames on a telephone number used by him.

12. Mr Ames had previously conveyed his views on the application by a facsimile letter sent to the Registrar on 30 March 2006, together with a character reference provided by the Vice-President of the Giants Softball Club in Masterton for whom Mr Ames played while in New Zealand.

13. In the circumstances, the Tribunal was required to decide whether it could proceed to deal with the matter in the player's absence.

14. The relevant Rules of the Tribunal are these:

> **4.2 Tribunal Regulated by these Rules**
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> 4.2.1 The practice and procedure of the Tribunal in all Proceedings shall be regulated by these Rules.
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> 4.2.2 If in any Proceeding before the Tribunal any question arises as to the application of any provision of these Rules, the Tribunal may, on the application of any party or of its own motion, determine the question and give such directions as it thinks fit.
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> 4.2.3 These Rules shall be so construed as to secure the just, speedy, and inexpensive determination of any Proceeding.
>
> 4.2.4 These Rules are binding on all persons and parties involved in any Proceedings before the Tribunal.
>
> 4.2.5 On any matter not otherwise provided for in these Rules, the Tribunal shall have jurisdiction to make such orders or give such directions as it considers to be consistent with the just, speedy, and inexpensive determination of any Proceeding.

> **10.1 Regulate own procedure**
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> Subject to these Rules, the Tribunal may –
>
> (a) regulate its procedure in such manner as it thinks fit . . .
>
> **10.2 Comply with Natural Justice**
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> The Tribunal shall observe the rules of natural justice.
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> . . .
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> 11.4.3 If the Defendant fails to file his/her Statement of Defence within the time period specified in Rule 11.4.2, the Tribunal may nevertheless proceed with the hearing and/or determination.
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> . . .
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> **11.5 Pre-Hearing Conference**
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> 11.5.1 The Tribunal may hold a Pre-Hearing Conference prior to any hearing of an Anti-Doping Rule Violation Proceeding and give such directions as it considers appropriate for the just, speedy and inexpensive determination of the Proceeding, including making any determination as to whether the Tribunal has jurisdiction to hear the application.
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> **11.8 Hearing**
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> 11.8.1 The Application for Anti-Doping Rule Violation Proceedings shall usually be determined by the Tribunal following a hearing.
>
> 11.8.2 However if the Chairperson and the parties agree, the Application for Anti-Doping Rule Violation Proceedings may be determined by the Tribunal by reference only to the documents filed, without hearing from the parties or others in person.
>
> . . .
>
> 11.8.5 The procedure for the hearing shall be determined by the Tribunal as it considers appropriate according to the principles of natural justice.

15. It is also necessary to refer to the procedural rules under Softball New Zealand's Anti-Doping Policy and the WADA Code, which is incorporated into the Policy.

16. Softball New Zealand's Policy provides that any person "who is alleged to have committed an Anti-Doping Rule Violation shall have a right to a fair hearing as detailed in Article 8 of the WADA Code" (Paragraph 12.1) and that "the Tribunal may determine its own procedure that, as far as reasonably possible, gives effect to the WADA Code" (Paragraph 12.3).

17. Article 8 of the WADA Code provides that a hearing process in respect of an anti-doping rule violation shall

"respect the following principles:

- a timely hearing;
- a fair and impartial hearing body;
- the right to be represented by counsel at the . . . [player's] own expense;
- the right to be fairly and timely informed of the asserted anti-doping rule violation;
- the right to respond to the asserted anti-doping rule violation and the resulting *Consequences*;
- the right of each party to present evidence, including the right to call and question witnesses (subject to the hearing body's discretion to accept testimony by telephone or written submission) . . . and
- a timely, written, reasoned decision.

18. It is clear, therefore, that the principal objectives of the respective rules of Softball New Zealand, WADA and the Tribunal are that hearings should be conducted fairly and in a timely manner. The Tribunal's Rules provide that Anti-Doping Rule Violation proceedings may be determined without a hearing in person where an athlete has failed to file a statement of defence (Rule 11.4.3) and where the parties agree (Rule 11.8.2). However, we do not read the Rules as providing that it is only in those circumstances that such a course may be followed. To hold otherwise would be inconsistent with the requirement to interpret the Rules so "as to secure the just, speedy, and inexpensive determination of any Proceeding" (Rule 4.2.3). It would also mean that an athlete who had filed a notice of defence in any proceedings, but had failed to participate in the proceedings thereafter, could require the Tribunal and the relevant sporting organisation to deal with a matter only by way of a hearing in person which the athlete had no intention of attending.

19. In the present case, the Tribunal is satisfied that the player:

(a) has been given proper notice of the allegations made in respect of the alleged anti-doping rule violation;

(b) did not file a statement of defence in Form 6 but responded in the form of a letter dated 30 March 2006 addressed to the Registrar of the Tribunal (which

is referred to more fully below) in which he admitted the violation and provided an explanation; and

(c) was given notice of the pre-hearing telephone conference held on 4 May 2006.

20. At the pre-hearing conference, Mr Eagar did not advance any submissions on behalf of Softball New Zealand and did not provide the Tribunal with any information of which the player had not had notice. He indicated that Softball New Zealand was content for the Tribunal to decide the case on the basis of the written material provided by the parties and did not require a hearing in person.

21. In his letter to the Registrar, Mr Ames said that he was currently in Canada playing softball but hoped to return to New Zealand to play in the 2006-2007 season. It is highly improbable that he would wish to return to New Zealand for the purpose of attending a hearing into this matter.

22. It is necessary to make a further observation. Although Mr Ames participated in the procedure for dealing with this important matter up to the point of admitting the violation and providing an explanation, he appears to have decided (without notice to the Tribunal or his sporting organisation) to take no further part. An athlete who does not participate in the Tribunal's procedures will not have the opportunity to verify on oath any explanation on which they may wish to rely in order to meet the burden of satisfying the Tribunal that a sanction is warranted in terms which are less severe than the mandatory period of two years' ineligibility. This may be so in cases of athletes charged with a violation involving a specified substance such as cannabis, or where an athlete is seeking to rely on a No Significant Fault or Negligence plea to reduce the ineligibility period by up to a year. In the absence of evidence given on oath or by affirmation, the Tribunal will usually be unable to hold that the athlete has satisfied the onus of proving his or her explanation.

23. In the present case, however, we are prepared to grant an indulgence to Mr Ames by reason only of the important concessions by Softball New Zealand that he did not intend to enhance his sporting performance and that there were no aggravating factors.

24. Consistently with the interests of determining this matter in "a just, speedy and inexpensive" manner (Rules 4.2.5 and 11.2.1 quoted above), we proceed to deal with the matter solely on the basis of the papers filed by the parties.

Mr Ames's Position

25. The player admitted that he had committed an anti-doping violation in relation to cannabis. In the letter to the Registrar of the Tribunal dated 30 March 2006, he said:

> "I admit to smoking marijuana during December, 2005, prior to my attendance at the National Men's Provincial championships, held in Palmerston North from January 7 to 10, 2006. This was during celebrations over the Christmas period, for recreational purposes only and was in no way intended to enhance my performance on the softball diamond. I do not smoke marijuana or take any other illegal drugs on a regular basis.
> . . .
>
> I certainly regret my actions and hope this will not jeopardise my future in softball."

26. The Tribunal also received from the player a character reference from Russell Thompson, Vice-President of the Giants Softball Club, Masterton and assistant coach of Mr Ames's club team. Among other things, it describes Mr Ames as a dedicated and respected player who "has been a fine role model for our young players." While such character references are encouraging, the WADA Code does not allow a tribunal charged with imposing sanctions to take previous good behaviour into account except to the extent that an athlete can establish that they have not previously offended under the Code. It goes without saying that Mr Ames's breach of the anti-doping rules does not set a good example to others, and is damaging to the reputation of his sport.

Discussion of the present case

27. This is one of three cannabis cases recently before the Tribunal for determination arising from random samples taken at the Men's Provincial Cup softball competition held in Palmerston North in early January this year.

28. On the basis of Mr Ames's letter and Softball New Zealand's concessions, the Tribunal is satisfied to the required standard that:

(a) This was a first offence.

(b) Mr Abbot did not smoke cannabis for performance-enhancing purposes.

(c) The use of cannabis was unrelated to the sport, and there was no danger to other competitors, officials or spectators.

(d) There were no “aggravating factors”, as that term was described in the *Karaitiana* decision.

Decision and sanction

29. In the circumstances, the Tribunal finds that Curtis Ames committed an anti-doping infraction in that the presence of cannabinoids was found in a sample provided by him at the Men's Provincial Cup softball tournament at Colquhoun Park, Palmerston North on 10 January 2006.

30. Mr Ames is warned against the use of cannabis and reprimanded for using it in December 2005.

31. The Tribunal directs Softball New Zealand to send a copy of this decision to the appropriate softball authorities in Canada, to ensure they are aware of it and can take such steps to notify Mr Ames of it as may be appropriate.

32. The Tribunal also directs the Registrar to send a copy of this decision to Mr Ames at his last known email address, and to Mr Russell Thompson of 136 Cornwall St, Masterton with whom Mr Ames stayed while in New Zealand and who, it is understood, remains in contact with Mr Ames.

Kit Toogood QC
Deputy Chairperson (for the Tribunal)

8 May 2006