

BETWEEN **DRUG FREE SPORT NEW ZEALAND**

 Applicant

AND **XYZ**

 Respondent

**DECISION OF SPORTS TRIBUNAL
14 June 2011**

Hearing: 13 June 2011 (by telephone conference)

Tribunal: Alan Galbraith QC (Deputy Chairperson)
 Anna Richards
 Chantal Brunner

Present: XYZ, athlete
 Michael Smyth, counsel for XYZ
 Stephen Layburn, Basketball New Zealand
 Graeme Steel and Jayne Kernohan, Drug Free Sport New
 Zealand
 ABC, witness
 DEF, Managing Director of NBL team, witness

Registrar: Brent Ellis

1. A provisional suspension order was made by this Tribunal on 8 June 2011 provisionally suspending XYZ from 31 May 2011 as a result of an adverse analytical finding for a metabolite of cannabis arising out of an in-competition drug test on 16 April 2011.
2. The hearing of the substantive Application for Anti-Doping Rule Violation Proceedings by Drug Free Sport New Zealand was heard by telephone conference on Monday 13 June 2011. XYZ was represented by Michael Smyth as counsel.

Background

3. XYZ is a professional basketballer. At various times he has been contracted in Europe, Latin America and Asia. In the 2009/2010 season he was contracted in Japan. However, in the 2010/2011 season his agent did not secure him a contract.
4. As at March 2011 he had been out of contract for some time and, with finals coming up in the various leagues, he believed that any opportunity of a late call-up had gone. Accordingly in that period he was not competing, was not contracted, and was not subject to the WADA Code obligations or indeed the corresponding obligations of the Sports Anti-Doping Rules which he later became subject to when he signed up with the NBL team.
5. During the latter part of March 2011, while hanging out with friends, he smoked cannabis on a number of occasions. One friend, ABC, confirmed in evidence during the hearing by telephone conference that he saw XYZ smoke cannabis in that period and that his use was purely recreational.
6. XYZ was questioned about his use of cannabis by Mr Steel for Drug Free Sport. He said that he did not have a drug habit, would not normally smoke cannabis, and that his use was only at the particular time when he had no prospect of competing. ABC confirmed that in his experience XYZ was not normally associated with cannabis use. We accept that evidence.
7. That was the position when without prior warning his agent came up with the chance of a short term contract in New Zealand with the NBL team.

Unsurprisingly, given his long time out, XYZ accepted the contract and he arrived in New Zealand in early April, about nine days before the NBL team's first game on 16 April 2011.

8. XYZ said, in answer to questions by the Tribunal, that he was conscious of the fact that he had recently smoked cannabis but that he hoped that the elapsed time since his recreational drug use and the likelihood that he would not be immediately tested, would mean that there would not be a problem. The evidence from DEF, the managing director of the NBL team, was that XYZ had trained hard after arrival, had applied himself wholeheartedly, and that XYZ had played well in the game on 16 April. We also received a letter from GHI, with whom XYZ flatted after he arrived in Nelson, which confirmed both that XYZ knew that GHI had been tested and that, in GHI's opinion, XYZ had not engaged in cannabis use after his arrival. While GHI did not attend the telephone conference we accept that letter as being additional confirmation of DEF's view that XYZ had not engaged in cannabis use after his arrival in New Zealand.
9. After the test on 16 April XYZ immediately told his coach that there was a possibility that he would fail the test because of his cannabis use back in the US. As a result of this voluntary statement the NBL team terminated his contract and XYZ returned to the US a few days later. Had he not made this voluntary statement it was likely that he would have continued to play a number of games for the NBL team before the adverse results of the test had become known. Accordingly XYZ, through his honesty, forfeited that opportunity and the income which he would have received during that period.
10. The Tribunal is also satisfied that, although XYZ did take a risk in coming to New Zealand to compete not very long after his use of cannabis, that he is an honest and responsible person and conscious of his obligations in the sport. DEF's evidence spoke of his openness and Mr Steel for Drug Free Sport confirmed that in his view XYZ's dealing with Drug Free Sport, in the unfortunate circumstances that have arisen, had been open and positive. These are factors which the Tribunal must give weight to in considering an appropriate penalty.

Penalty

11. In 2010 the Tribunal adopted a starting point for a period of ineligibility in cannabis cases of four months. This was because of the Tribunal's concern that in a number of sports there seemed to be a lack of appreciation of the obligations of observance of the Code, at least in respect to cannabis use. However, the Tribunal must and will always consider any aggravating or mitigating factors to either extend or reduce the period of ineligibility.
12. The three mitigating factors which XYZ can properly point to are:
 - (a) That his use of cannabis in March 2011 was not in breach of the Code as he was not contracted at that time. As well, we accept the evidence that he is not a habitual cannabis user.
 - (b) His honesty in voluntarily disclosing to the NBL team's coach that he might fail the drug test and his explanation of the reason why, and his subsequent openness and co-operation with Drug Free Sport New Zealand;
 - (c) The significant adverse impact on him of his voluntary disclosure which led to the immediate cessation of his contract with the NBL team.
13. On the other side of the balance there is the fact that XYZ did take the risk of playing for the NBL team when he was aware that there could be a problem because of his use of cannabis two or three weeks earlier. The Tribunal has some sympathy for the position which he found himself, given that he had been out of contract for such a period of time, but, as XYZ himself acknowledged, it was something which was on his conscience.
14. The other factor which the Tribunal has taken into account is that July/August is the window for new contracts for the forthcoming seasons in Europe and Asia. XYZ explained to the Tribunal that he would be intending to take part in some basketball camps in July which would provide video footage that his agent could use to try and secure a

contract. He was hopeful that he could renew his professional career but concerned that should any suspension run significantly into July that this would prejudice his chances.

15. This latter factor does put XYZ's case in a different category from the normal run of cannabis cases. Usually the result of a suspension is simply that an athlete is unable to compete for a period but can recommence competing as soon as the period of suspension is over. In XYZ's case it may mean that he loses the prospect of obtaining a contract for the coming season so that the consequence of the suspension would in fact be for a significantly longer period than the actual period of suspension itself.
16. It would be usual for a period of suspension to be imposed from the date when the provisional suspension order was first made. Rule 14.9.2 of the Sports Anti-Doping Rules allows for a period of ineligibility to commence as early as the sample collection date when there has been a timely admission by the athlete. That Rule still requires the athlete to serve at least one half of the period of ineligibility going forward from that date. However, there is no minimum period of ineligibility in respect to cannabis and the facts here are not only of a timely admission after proceedings have commenced, which is what the Rule applies to, but an admission immediately following the testing process. The Rule does, however, support the view that an early acceptance of responsibility is a factor appropriate to be taken into account.
17. Given the mitigating factors referred to above, and particularly the voluntary admission made by XYZ immediately after the test with the consequences that followed, the Tribunal is prepared, in fixing the further period of suspension, to take into account the effect of XYZ's voluntary admission and effective suspension from 17 April 2011.
18. In the circumstances, and taking account of all of the mitigating factors, the Tribunal imposes a further four week period of suspension from 13 June 2011 to 11 July 2011, resulting effectively in a total period of suspension of 12 weeks.

Dated: 14 June 2011

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A R Galbraith QC
(Deputy) Chairperson