

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

SDT 15/05

BETWEEN **Touch New Zealand**

Applicant

AND **Nui Bartlett**

Respondent

Date and Place of Hearing: 25 January 2006 by teleconference

Representation: Mr Simon Battrick, National Development Manager, Touch
NZ Inc for applicant
Mr Nui Bartlett, Respondent, with Mr Marsh in support

**DECISION OF TRIBUNAL
GIVEN ON 31 JANUARY 2006**

Tribunal: Nicholas Davidson QC (Deputy-Chair - Presiding),
Adrienne Greenwood, Carol Quirk

Registrar: Brent Ellis

Introduction

1. The Applicant in this case is Touch New Zealand Inc. ("*Touch NZ*"). The Respondent is Nui Bartlett, the athlete from whom the New Zealand Sports Drug Agency ("*the Agency*") obtained a sample on 29 October 2005 at QEII Stadium, Christchurch.

The doping infraction

2. By letter dated 5 December 2005 the Agency advised Touch NZ that Mr Bartlett had committed a doping infraction as provided under s16B and 18(1) of the New Zealand Sports Drug Agency Act 1994 ("*the Act*"). The sample provided at the sample collection station at the All Nations Touch Tournament, QEII Stadium, Christchurch, on 29 October 2005, contained cannabis, which is banned under the World Anti-Doping Code 2005 Prohibited List, International Standard, under S8-cannabinoids. The Agency recognises the substance as banned according to its "*schedule*" it maintains pursuant to s6(1)(a) of the Act. Sample collection and analysis procedures were carried out as required by the Sports Drug (Urine Testing) Regulations 1994. The Board of the Agency issued a Notice of Determination that Mr Bartlett had committed a doping infraction, and entered that in the Sports Drug Register.
3. Mr Bartlett did not challenge that determination, but filed a defence dated 17 January 2006, admitting the violation as alleged and setting out points in mitigation.
4. A pre-hearing teleconference was set for Wednesday 25 January 2006, but at the request of Mr Bartlett and his representative, Mr Marsh, and with the support of Mr Battrick for Touch NZ, the Tribunal agreed to treat the teleconference as the full hearing.

The facts

5. Mr Bartlett filed a Statement of Defence, recording:

"I Nui Bartlett am a contracted player for the Hawkes Bay Magpies NPC team. The night before attending the All Nations Touch tournament in Christchurch I celebrated winning the NPC second division final.

I became so intoxicated I have no recollection of the nights happening. The morning after the celebrations I was so unwell I missed the plane and had to pay for another ticket on a later flight.

I have always willingly signed the competitors consent form to be drug tested, and I was surprised I tested positive. Over the past two years I have been drug tested and have tested negative every time.

I know cannabis is a banned substance and it does not enhance the performance of any athlete in any code.

I would like to sincerely apologise to Touch New Zealand, NZ Open Men management/players, Hawkes Bay Touch, Hawkes Bay Rugby, and my whanau for the embarrassment cause because of my behavior.

I know the importance of being fit, healthy and being drug free especially for myself and when representing my province and my country.”

6. With Mr Marsh he expanded on these issues at the hearing to submit that:

- His degree of intoxication, then use of cannabis (however that occurred) has resulted in arrangements to see a drug and alcohol counsellor. (As an automatic consequence.)
- Rugby has responded to the reported infraction by applying the same temporary suspension.
- The immediate suspension from Touch and Rugby since 6 December 2005 has resulted in his missing tournaments, and consequences as follows:
 - Attending the Whakatane Touch Tournament
 - Representing Hawkes Bay, Queenstown Sevens National Tournament
 - Probable selection for New Zealand Sevens Training Squad
 - Possible selection for New Zealand Sevens Team
 - Possible New Zealand Sevens contract
 - Representing Hawkes Bay Maori Sevens (Maori Sevens Nationals)
 - Possible loss of income from NPC contract (following meeting with Hawkes Bay Rugby Football Union)
 - Unable to play club Touch since December 6th 2005
 - Unable to play club 7's

- Unable to compete in National Touch Series in Christchurch and two further rounds.
- This was an isolated event. He says he has not previously used cannabis during the playing season and has never tested positive.
- He signed the player participation agreement required by Touch NZ, and understood his obligations to stay drug free. He has signed at least two agreements in this regard.
- He recognises the significance of the breach to Touch, which does so much to promote a drug free culture, and that it would be quite inappropriate for him to compete in the National Tournament between 28 February 2006 – 4 March 2006, which we were told automatically rules out his selection for the national team this year. (The Tribunal had some reservations whether this is a certain result but recognises that selection is jeopardised.)

Hawkes Bay Football Union Inc.

7. The Union, through Mr Stevenson, Rugby Manager, wrote to the Tribunal on 18 January 2006 to advise that Mr Bartlett is a contracted semi-professional NPC player for the Hawkes Bay Rugby Football Union. This Union takes a firm line on the use of illegal or any performance enhancing drugs, and he put this incident down to the “*exuberance of youth*” after a long and successful NPC campaign.
8. He recorded the response of the National Sevens coach to the interim suspension being one of disappointment, because Mr Bartlett was under consideration for the national team.
9. He referred to procedural delays in the Christmas/New Year holiday period which meant the temporary suspension carried effect longer than usual.
10. He made the comment that Touch NZ has an issue with cannabis use, as set out below, and suspensions have followed, but made the observation that Touch is an amateur game which does not affect the livelihood of the player.
11. Whatever this Tribunal determines, Mr Bartlett still faces a disciplinary hearing before the Hawkes Bay Union, relevant to his contract. He referred to the alcohol and drug abuse counsellor assigned to Mr Bartlett.

12. He asked for urgency in the process, and some leniency contending that the interim suspension, the threat of losing a Sevens contract, and a further disciplinary hearing all hanging over him are severe consequences. He described Mr Bartlett as being “*very promising*” in his rugby career.

Touch NZ submission before the Tribunal

13. Mr Battrick for Touch NZ wrote to the Tribunal, and addressed its position at the hearing. He explained that Touch NZ has “*increasingly come under pressure in the battle against drugs*”, and particularly last season with three doping violations occurring in the 2004/2005 season and the current case in the 2005/2006 season.
14. Mr Battrick described the commendable efforts within Touch to combat misuse of drugs, including drug education seminars, player participation agreements relevant to doping violations, provision of information through contracts, updating of the Testing Pool register, updating the Touch NZ Anti-Doping policy, additional contract testing at Touch NZ national tournaments as well as Northern/Central and Southern regionals and international competitions, and close participation with the Agency regarding the high level of doping infractions in Touch.
15. Mr Battrick expressed some understanding with regard to the submissions made by Mr Bartlett and the Hawkes Bay Rugby Union, but submitted that a “*zero tolerance*” attitude must be taken in Touch, emphasising the concern that sanctions imposed to date do not seem to have acted as an effective deterrent. The concern of the Touch NZ Board extends to enquiring whether additional penalties or other deterrents may be applied within the sport. Touch NZ recognises the debate about cannabis within the Code as a banned substance, but it remains on the list, and it considers itself bound to advocate a strong stance. The submission was that harsher penalties should apply to send a clear message to athletes not only within Touch but other sports, notwithstanding any “*social acceptance*” in some areas.
16. Mr Battrick referred to Mr Bartlett having signed a copy of the Touch NZ Player Participation agreement for the March 2005 National Championships. He is an incumbent member of the Touch NZ Men’s Open National team, of long standing, received Agency material, and signed the player contract that he would abide the Touch NZ Anti-Doping policy. He referred to two other recent cases of doping infractions within the Men’s Open team and the stance of the team towards drug

misuse. He said Mr Bartlett should be recognised as a semi-professional athlete in rugby, and should have been highly conscious of his obligations and the effect of breach.

17. Mr Battrick's specific submission was that the Tribunal should issue a warning and reprimand and a suspension for one month to have effect during the Touch NZ National Championships (28 February 2006 – 4 March 2006). If that seemed disproportionate then he submitted that the suspension should apply for the Championships. He said this would be particularly telling and send a clear message, as it would mean that Mr Bartlett could not be selected in a New Zealand team and would be unavailable for provincial honours.

Other cases

18. The Tribunal has dealt with cannabis use within Touch. Recent decisions are **Touch NZ v Soloman** (SDT 08/05), and **Touch NZ v Morunga** (SDT 07/05) delivered on 2 August 2005. Cannabis remains on the WADA Anti-Doping list because it is held to be injurious to health and its use contrary to the spirit of sport. It is usually not performance enhancing, and would not be in this context. Those decisions drew on **Boxing New Zealand v Mene** (SDT 13/04, 7 March 2005) and **Touch New Zealand v Koro** (SDT 04/05, 26 May 2005). In **Mene** the Tribunal reviewed penalties for cannabis violations imposed in Australia, the United Kingdom and Canada. It noted that the most consistent sanctions were in Canada, where a warning and reprimand were usually imposed for first offences. In **Koro** the Tribunal considered the approach in the USA, where the general practice seems to be a reprimand and warning for a first offence. **Mene** and **Koro** resulted in warnings and reprimands for first violations, consistent with USA and Canadian practice. **Soloman** and **Morunga** resulted in suspensions of one and two months respectively.
19. However, even in jurisdictions where the usual approach is a warning and/or reprimand, there have been lengthy suspensions. See for example the case of Amanda **Hubbard** in the USA Weightlifting National Championships, where a three month period of ineligibility was imposed. There is no cast iron rule, and the penalties have ranged from warnings and reprimands through to lengthy periods of suspension/ineligibility.

20. The Tribunal stated in **Mene** that where there is no relationship between the sporting activity and the cannabis use, and if it is not performance enhancing and does not represent a danger of any kind, and there are no aggravating circumstances, then a reprimand and/or warning will likely apply. That is our starting point. **Koro** approved the approach in **Mene**. The Tribunal in **Koro** identified the signing of the Touch NZ Player Participation Agreement as a possible aggravating circumstance. This was not established in **Koro**, but was in the cases of **Morunga** and **Soloman**.
21. In the case of an Anti-Doping Rule violation by **Collier** (written decision 13 December 2005), a Judicial Committee of the New Zealand Rugby Football Union (Inc.) ("**NZRU**") , which was chaired by a member of the New Zealand Sports Disputes Tribunal, dealt with a violation under the NZRU Doping Regulations. The player admitted use of cannabis having succumbed to peer pressure.
22. The Committee referred to International Rugby Board ("**IRB**") decisions including **Vadym, Larguet, and Ho**. **Larguet** had tested positive after a Rugby World Cup 2005 Sevens qualifying tournament, and the Judicial Committee held that "*without truly mitigating circumstances*" something more than a reprimand was required. The player was suspended for two months. **Ho** tested positive for cannabinoids at another Sevens qualifying tournament in September 2004. In that case, despite the player's contrition, he was suspended for three months. In the case of **Vadym**, following a European Nations Cup match in March 2005, it was held that there were no mitigating circumstances, and he was suspended for six months. In that case the player said he had used an unidentified "*medication*" which he thought was the source of the cannabinoid.
23. The IRB Committee had thus adopted a view that a reprimand and warning was an inadequate sanction for rugby players if the cannabis was consumed in a social setting with no intent to enhance performance in sport. The NZRU Committee noted that those who readily admitted the circumstances of their infraction received a significantly lower penalty.
24. The NZRU Committee was also concerned to try to achieve some measure of consistency between Tribunals which have the duty of imposing sanctions for breaches of the WADA Code. It referred to the cases of **Delasau** and **Marsh**, where reprimands and warnings were accompanied by costs orders. The players were first offenders and the cannabis use was purely recreational. The NZRU

Judicial Committee referred to the approach of this Tribunal, which has the responsibility to impose sanctions in anti-doping cases over most competitive sports in this country, and stated that a “*fairly consistent*” approach has applied across all sports of a reprimand and warning and occasionally an order for payment of costs where the cannabis use is unrelated to the sporting activity, if there are no aggravating circumstances (**Mene**).

25. These statements of principle reflect the practice in other jurisdictions, that where aggravating circumstances are identified, suspensions may follow. In **Collier**, the Judicial Committee learned of the frustrations of team management in trying to encourage members of the team to act as role models in rejecting the use of cannabis. The Judicial Committee decided that the appropriate penalty was a reprimand and warning, and the player was ordered to make a contribution to the costs of the NZRU. The Committee made the point that the reprimand and warning is the first step on the road to a mandatory two years’ suspension for a second offence, and in **Collier** the player was subject to an automatic provisional suspension and was ineligible for selection for two NPC matches. The Judicial Committee adverted to the possibility that should reprimands and warnings prove to be insufficient to deter players from using cannabis, then a more punitive approach may be called for in future.

Mitigation

26. Mr Bartlett has accepted the finding, admitted his breach, and tendered his apology in very clear terms.
27. We do not see any force in the submission that Mr Bartlett was so intoxicated that the cannabis use occurred unknowingly. Any athlete putting him/herself in the position of such incomprehension takes the risk of such offending. The Tribunal also notes that, by virtue of Article 2.1 of the World Anti-Doping Code, anti-doping offences are essentially “*strict liability*” offences that do not require proof that the defendant *knowingly* used the prohibited substance. It could not, in this Tribunal’s view, constitute a mitigating circumstance. The fact that the drinking was associated with a celebrated Second Division title does not advance the matter any further.
28. Mr Bartlett has already been subject to an automatic suspension of some eight weeks, and this has impacted on him. Mr Bartlett’s future is a little uncertain

across the two codes, other than the probability that if he does not compete at the National Touch Championship, he will be ineligible for national team selection. His status in Sevens is obviously affected, as detailed above. The Tribunal is unable to bring to account in any certain way all these possibilities, but they cannot be discounted as effects.

29. The cross-code effect is derived from WADA. National Sporting Organisations with anti-doping policies complying with the World Anti-Doping Code have the responsibility to recognise sanctions imposed by other sports. The WADA Code provides:

“10.9 Status during ineligibility

No Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorised anti-doping education or rehabilitation programs) authorized or organized by any Signatory or Signatory’s member organization. In addition, for any anti-doping rule violation not involving specified substances described in Article 10.3, some or all sport-related financial support or other sport-related benefits received by such Person will be withheld by Signatories, Signatories’ member organizations and governments. A Person subject to a period of Ineligibility longer than four years may, after completing four years of the period of Ineligibility, participate in local sport events in a sport other than the sport in which the Person committed the anti-doping rule violation, but only so long as the local sport event is not at a level that could otherwise qualify such Person directly or indirectly to compete in (or accumulate points toward) a national championship or International Event.”

30. Article 15.4 provides:

“15.4 - Mutual Recognition

Subject to the right to appeal provided in Article 13, the Testing, therapeutic use exemption and hearing results or other final adjudications of any Signatory which are consistent with the Code and are within that Signatory’s authority, shall be recognized and respected by all other Signatories. Signatories may recognize the same actions of other bodies which have not accepted the Code if the rules of those bodies are otherwise consistent with the Code. “

31. In the course of the hearing, another factor was developed. Mr Bartlett made much of the effect of the interim suspension which has applied for some 8 weeks. Added to this was his voluntary statement that he would not participate in the Touch National Tournament, in recognition that such would be entirely inappropriate. This will probably have the effect that he will not be selected for the national team this year, which may affect his ability to participate in the 2007 World Cup. So a combination of the temporary suspension to date, which falls on him both in Touch and in Rugby, together with his missing the National Tournament, constitutes a significant penalty.

32. The Tribunal was troubled by this, as it was by the notion advanced for Touch that the suspension to date might lift with the delivery of this Decision, followed by a period in which he might participate in sport, then a period of suspension be imposed to cover the Nationals, either for one month or one week. The impact of a suspension turns of course on the date it is imposed.
33. The Tribunal thus has to bring to account the clear mitigating circumstances, in particular contrition, acknowledgement, and the impact on him during the period of temporary suspension, and the “*offered*” non-participation in the National Championships. It also recognises his promise in the game, and the cross code effect in Rugby.

Aggravating circumstances

34. The Tribunal takes as an aggravating circumstance that the breach occurred immediately following a final in rugby, and just before an All Nations tournament in Touch. Mr Bartlett is experienced, and has signed on more than one occasion the contractual undertaking not to use drugs. He is very conscious of the Touch NZ stance.
35. There are the matters raised by Touch NZ. This sport seems to be troubled by cannabis use, and it seems that penalties imposed in recent times have not succeeded in driving out its use. Mr Bartlett and other Touch players must be acutely aware that consumption of cannabis is in breach and is the antithesis of the drug free culture promoted and insisted on by Touch.

Penalty

36. A suspension is warranted, given the aggravating circumstances. We have considered whether a self imposed non-participation at the National Championship will suffice, having regard to the impact on Mr Bartlett. We are conscious that such “*offers*”, if they became common in this context, could be open to abuse. We are also conscious, in particular, for the need for some deterrence in Touch, and to recognise that Mr Bartlett is close to the top of both Touch and the Sevens game.
37. Unless circumstances dictate, the Tribunal is not at all disposed towards a penalty which applies at a future date to attach to a particular game or tournament. It is also unsatisfactory if a temporary suspension is followed by a period of

participation, then a suspension. It may be that the effect of an immediate suspension would be of no consequence whatsoever, for instance where a playing season had concluded. In that case a deferred suspension might be appropriate. But that is not the case here. It is only because Mr Bartlett has said he will not participate in the National Tournament that this can be brought to account in weighing the appropriate penalty.

38. The Tribunal has concluded that an appropriate penalty would be one month's suspension to reflect the aggravating features identified. The lengthy temporary suspension and the cross code effect leads it to soften that penalty by one week, which results in an order that Mr Bartlett is ineligible to participate in Touch (and consequently in Rugby) until 21 February 2006. This is augmented by the fact that Mr Bartlett of his own volition will not participate in the Touch National Championships. Mr Bartlett is also warned and reprimanded.
39. It is hoped that by the considerations contained in this Decision, and the penalty, it will be clear that the Tribunal has recognised the force of the submission by Touch NZ while paying full regard to the circumstances of the athlete.
40. Further infractions within the sport may well be met with more serious penalties.

Formal Orders

41. Mr Bartlett is suspended for three weeks from all participation in the sport of Touch, with the concomitant effect in Rugby, until 21 February 2006.
42. Mr Bartlett is also warned and reprimanded.
43. Each party will bear their own costs.



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NRW Davidson, QC (Deputy Chair)
31 January 2006