

INTRODUCTION

1. Clifton Bush Junior, during the season just completed, played for the Hawks franchise in the respondent's ("BBNZ") national league. He was tested by Drug Free Sport after a semi final at the North Shore Events Centre on 24 June 2007. On 23 August 2007, Drug Free Sport issued a determination under the NZ Sports Drug Agency Act 1994 determining that as a result of the test, Mr Bush had committed a doping infraction, namely cannabinoids – Class S8 of the WADA prohibited list.
2. The Sports Anti-Doping Act 2006 came into force on 1 July 2007 and it is necessary to determine this matter under the previous statutory provisions as the violation occurred prior to that date.
3. Mr Bush admitted the anti-doping rule violation but requested the right to participate in the proceeding to make submissions on any penalty which might be imposed on him.
4. A telephone conference was convened on 5 October 2007. In view of the attitude which Mr Bush took, and with the agreement of both Mr Bush and Mr Chapman representing BBNZ, that conference was constituted as the hearing for the purposes of imposing a sanction.

MR BUSH'S POSITION

5. Prior to the hearing, Mr Bush had provided a statement in the following terms:

"I wish to state that my doping incident had in no way any sports enhancing purpose, however this was a foolish mistake on my behalf during a low/depressing time in my life for which I chose the wrong way to deal with such issues during a one-off recreational incident. I wish that the Tribunal will take into account this information prior to your decision or penalty made in regards."
6. During the conference, Mr Bush, after being sworn to tell the truth, elaborated on his statement. He said he was depressed because it was the anniversary of his father's death (it was the fifth anniversary). He maintained that he had made a foolish mistake and taking of cannabis was out of character. He said he smoked the cannabis two to three weeks prior to the test. He had never tested positive previously. Mr Bush is from the United States of America and acknowledged that he had been exposed to cannabis during his earlier years.

BBNZ'S POSITION AND RULES

7. Mr Chapman did not make submissions but said that BBNZ was prepared to abide by the decision of the Tribunal.
8. BBNZ's anti-doping code ("the doping code"), at 24 June 2007, was adopted in April 2003. The sanctions under the doping code do not conform with some of the provisions of the WADA code and the doping code is outdated. It is understood that BBNZ has since adopted a new code to comply with the Sports Anti-Doping Act 2006 now in force.
9. Under the doping code, Mr Bush has committed a doping offence. The doping code provides for sanctions. On one construction of the code, Mr Bush faces a minimum of two years' suspension for the offence. As noted, the doping code does not adopt the WADA code in many respects. A suspension under Rule 7.1 of the code is from competing in any events and competitions conducted by or under the auspices of BBNZ. There are other sanctions which can also be applied. In the case of ephedrine, phenylpropanolamine, pseudoephedrine, caffeine, strychnine, or related substances, the suspension is for a period of "three months or less for the first doping offence". If the substance does not fall within the classes referred to above, the suspension is for "a minimum of two years for a first doping offence".
10. If the WADA code had applied, cannabis is a specified substance and the suspension, if the athlete can establish that the cannabis was not taken for performance enhancing purposes is, at a minimum, a warning and reprimand and no period of ineligibility from future events, and at a maximum one year's ineligibility.

DISCUSSION

11. The Tribunal's position on cannabis offending has been established over recent cases. It is usual to impose a period of ineligibility of between one and two months.
12. The Tribunal has become accustomed to being told by athletes testing positive for cannabis that it was a one-off situation. While not making a finding on the point, it is rather sceptical of the statement that smoking

cannabis is out of character. It does, however, accept that it was not taken for performance enhancing purposes.

13. Apart from the outdated provisions of the doping code, there are two other factors in this case. First, Mr Bush has retired. A sanction of suspension is likely to be ineffective. Secondly, Mr Bush only played in BBNZ's national league. Its season is from 1 March to the end of June. If Mr Bush had not retired and a short sanction of two months were to be applied from today's date, it would be ineffective because the playing season has finished.
14. On one construction of the doping code, the imposition of a two year period of suspension is mandatory. This is because cannabis is not referred to in the list of drugs specified in Rule 7.1 of the doping code. This would be a very harsh sanction in the case of an athlete who intends to play again next season. It is, in the view of the Tribunal, possible to give a purposive interpretation to the doping code. One of the purposes of the doping code is to support the initiatives of WADA. The WADA Code is now widely adopted by most national sporting organisations within this country. It has, presumably, been adopted by BBNZ as from 1 July 2006. Under the WADA Code, cannabis, being a specified substance, is subject to the minimum and maximum penalties set out in paragraph 10 above. If Mr Bush had infringed one week later, it is probable that he would be sanctioned under the WADA Code provisions.
15. The class of drugs to which a maximum suspension of three months is applicable (see paragraph 9 above) are similar to many of the drugs that are specified substances within the WADA Code. They are drugs where a lesser sanction may be imposed if the athlete establishes that the drug was not taken for performance enhancing purposes. The Tribunal interprets Rule 7.1, which refers to a maximum suspension of three months, to have the same purpose as the specified substance exception under the WADA Code. In the circumstances, it interprets the words "related substances" in Rule 7.1 as referring to other substances which fall within a similar category of drugs to those defined as specified substances in the prohibited list under the WADA Code. The intent is that the two year minimum suspension should not necessarily apply to a drug which was not taken for performance enhancing purposes. In the circumstances, the Tribunal intends to treat cannabis as a "related substance".

16. Notwithstanding Mr Bush's retirement, it considers it appropriate in the circumstances to impose a suspension from competing in any events and competitions conducted by or under the auspices of BBNZ for a period of two months from the date hereof. It will give other basketballers notice of the Tribunal's position in such matters. As the doping code, and not the WADA Code, applies, the suspension does not apply to other sports.

DECISION

Mr Bush is suspended from competing in any event and competitions conducted by or under the auspices of BBNZ for a period of two months from the date of this decision.



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Hon B J Paterson QC
Chairman