

Introduction

1. Justin Karaitiana (“the player”) is a softball player who represented Hutt Valley 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 Karaitiana 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 2005, 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.
4. At a telephone conference conducted by the Tribunal on 11 April 2006, the parties indicated that they did not require a formal hearing of evidence and submissions. Both Softball New Zealand and the player said were content for the Tribunal to deal with the matter solely on the basis of the papers filed and the information confirmed during the telephone conference. We proceed to do so.

Mr Karaitiana's Position

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

“I did smoke marijuana at a New Year's Eve party before attending the National Provincial Softball Championships at Colquhoun Park, Palmerston North which started on January 7.

This was after I had a little too much to drink and was by no means an attempt to enhance my performance on the softball diamond. I do not normally smoke marijuana or take any other illegal drugs on a regular basis ... I sincerely apologise to all concerned for my actions and ask that you allow me to continue playing softball.”

6. The Tribunal also received a character reference from Mr Mark Quinn on behalf of the Wairarapa Giants Premier Men's Softball Organisation, for whom Mr Karaitiana plays. The reference says:

"I have known Justin as a softball player for the past 5 years and during this time he has been an upstanding individual both on and off the softball field. He is well known throughout the Masterton community and well respected amongst his peers. As a softball player he is a great team leader and a fierce competitor to play against. Justin is not the type of individual who would take performance enhancing substances and any indiscretion he may have been apart [sic] of was an isolated incident. I certainly hope Justin's future softball career will not be placed in jeopardy due to this one minor indiscretion."

Softball New Zealand's Position

7. This is one of three cannabis cases currently before the Tribunal for determination and it follows closely on the first cannabis case which Softball New Zealand was required to bring to the Tribunal: *Neemia*, SDT 08/06, 7 April 2006.
8. As in the *Neemia* case, Mr Eagar did not advance any particular position on behalf of Softball New Zealand and noted that the national body was looking to the Tribunal for guidance in these matters. He accepted that the cannabis would not have been performance-enhancing in Mr Karaitiana's case, and did not suggest the presence of cannabis in the player's system would have represented a danger to other competitors, officials or spectators. It does not appear that Mr Karaitiana signed a player participation agreement before the competition in which he provided a positive sample.
9. It was also accepted by Softball New Zealand that this was the player's first anti-doping violation.
10. Mr Eagar did say, however, that his sporting organisation was very concerned at the damage done to the sport by senior players being found to have breached the Anti-Doping Code through the use of cannabis and that the Board of Softball New Zealand would soon be considering the matter more formally.

The WADA Code

11. 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 NZ forwards the matter to this Tribunal for a hearing and, if appropriate, the imposition of sanctions.

12. 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.
13. 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."
14. 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

15. In the last 18 months, the Tribunal has considered several cannabis violations and has discussed, in its decisions, the approach taken by similar tribunals in other jurisdictions.
16. The Tribunal's basic approach to cannabis (as noted in cases such as *Boxing New Zealand Inc. v Mene* SDT 13/04 of 7 March 2005 and *Touch New Zealand v Koro* STD 04/05 of 26 May 2005) has been to issue a warning and reprimand for a first offence.
17. However, there have been cases where periods of ineligibility have been imposed: see *Touch New Zealand v Soloman* STD 08/05 of 2 August 2005; *Touch New Zealand v Morunga* STD 07/05 of 2 August 2005; and *Touch New Zealand v Bartlett* STD 15/05 of 31 January 2006. In these cases, the three players concerned had signed a player's participation agreement, prior to participating in a tournament, in which they undertook to observe the provisions of the anti-doping Code. In these

three cases, also, Touch New Zealand made representations seeking terms of suspension in support of its policy to make its sport drug-free.

18. In *Bartlett*, the Tribunal took account of the fact that a national sporting organisation had suspended the athlete pending the determination of this Tribunal. In such circumstances, an interim suspension may reduce or even eliminate what would otherwise be the appropriate period of suspension to be imposed on the athlete by the Tribunal.
19. In summary, the following principles may be obtained from the previous cannabis cases dealt with by the Tribunal, particularly those which have been before the Tribunal more recently:
 - (a) Because cannabis is a specified substance under the WADA Code, the Tribunal may impose a less severe penalty than the mandatory period of two years' ineligibility if the athlete proves on a balance of probability (i.e. that it is more probable than not) that the cannabis was not used for the purpose of enhancing the athlete's performance.
 - (b) 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.
 - (c) 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.

- (d) Where the Tribunal finds that aggravating circumstances do exist, and that a period of suspension may be appropriate, the Tribunal will take into account any period of actual suspension from competition imposed on a provisional basis by a sporting organisation, or self-imposed by the athlete, by reducing or eliminating accordingly any period of ineligibility which would otherwise be imposed. To illustrate this principle by example, in a case where an athlete had offended in relation to cannabis despite signing a participation agreement specifically referring to the need to comply with the Code, the Tribunal might consider a period of ineligibility to be appropriate. If the athlete had been genuinely suspended from competition by the sport for, say, three weeks pending the Tribunal's decision in the matter, the Tribunal would deduct that three week period of provisional suspension from the period of ineligibility it would otherwise have imposed. In determining whether there has been an actual or genuine provisional suspension from competition, the Tribunal will consider whether the athlete has missed taking part in some competition or sporting activity in which they would otherwise have participated.
20. Some additional observations should be made. First, athletes should be aware that experience has shown that, depending on the circumstances in which it finds way into an athlete's system, cannabis may remain detectable in the system for as long as several weeks, or even months. As the present case shows, the use of cannabis some time before competition nevertheless places an athlete at risk of committing a violation.
21. Second, what has been said above about the appropriate penalties applies only to first offenders. An athlete who breaches the anti-doping rules after having received a reprimand and warning for cannabis misuse runs the serious risk of a ban from competitive sport for a period of two years to life, depending on the nature of the second violation.
22. Third, although it is the ultimate responsibility of athletes to ensure compliance with the WADA Code and the Prohibited List, sports organisations whose athletes are subject to the Code also have a responsibility to educate athletes as to the terms of the Code (including the List) and its serious implications. To put that obligation into its present context, any sport which wishes to mark its disapproval of a doping

infraction involving the use of cannabis should do so by giving its athletes fair warning of its anti-doping requirements.¹

Discussion of the present case

23. Applying the summarised principles to the present case, the Tribunal is satisfied to the required standard that:
- (a) This was a first offence.
 - (b) Mr Karaitiana 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 are no aggravating factors such as to render a reprimand and warning inappropriate.

Decision and sanction

24. In the circumstances, the Tribunal finds that Justin Karaitiana 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.
25. Mr Karaitiana is warned against the use of cannabis and reprimanded for using it in January 2006.



Kit Toogood QC
Deputy Chairperson (for the Tribunal)

28 April 2006

¹ Paragraphs 11 to 22 inclusive of this decision (and only those paragraphs), which were circulated to the Chairperson and the other members of the Tribunal in draft, have been endorsed by the Chairperson and other members as accurately reflecting the views of the Tribunal as a whole.