BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND

ST 11/09

BETWEEN	**DRUG FREE SPORT NEW ZEALAND**
	Applicant
AND	**VINCE WHARE**
	Respondent

DECISION OF TRIBUNAL

Dated 1 MARCH 2010

Tribunal:	Nicholas Davidson QC (Deputy Chairperson) Anna Richards Tim Castle
Hearing:	By telephone conference on 3 February 2010
Present:	Vince Whare in person Findy Newton partner in support of Mr Whare Ian Hunt counsel for Mr Whare Kevin Bailey for New Zealand Rugby League Inc Paul David counsel for Drug Free Sport New Zealand Jayne Kernohan for Drug Free Sport New Zealand
Registrar:	Brent Ellis

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DECISION OF TRIBUNAL

A Introduction

1. Vince Whare underwent an in-competition drug test on 13 September 2009. He tested positive for the Prohibited Substance cannabis, and New Zealand Rugby League ("NZRL") sought provisional suspension, which was imposed on 20 October 2009.

2. Drug Free Sport New Zealand ("DFS") made an application for an Anti-Doping Rule Violation Proceeding, received on 2 November 2009.

3. This is Mr Whare's third **admitted** breach of the NZRL's applicable anti-doping rules. His earlier breaches are referred to in decisions of the Tribunal under numbers **SDT 14/04** and **SDT 19/06**.

B The violation (or "breach")

4. The uncontested evidence includes the report of analysis made for DFS by the Australian Government National Measurement Institute, which recorded the presence of a metabolite of cannabis at a level of 470ng/mL.

C Notice of defence

5. Mr Whare admitted the violation but submitted that the **minimum** period of ineligibility of eight years for a third violation was the appropriate sanction, based on his contention that his use of cannabis was not intended to enhance sporting performance and that his degree of fault warranted such minimum sanction.

D The Relevant Rules

6. The relevant anti-doping rules at the time of the violation were the Sports Anti-Doping Rules 2009 ("SADR") which were adopted by NZRL as its anti-doping rules and policy. These Rules are based on the World Anti-Doping Code 2009 (WADA Code).

7. Cannabis is a *"Specified Substance"* under these Rules.

8. SADR 14.7.3 states:

> *"A third Anti-Doping Rule Violation will always result in a lifetime period of ineligibility, except if the third violation fulfils the condition for elimination or reduction of the period of ineligibility under Rule 14.4. . . . in these particular cases, the period of ineligibility should be from eight (8) years to life ban."*

9. SADR 14.4. states:

> ***"14.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances***
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> *Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Rule 14.2 shall be replaced with the following:*
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> *First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.*
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> *To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance-enhancing substance. The Athlete's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.*
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> *[Comment to Rule 14 .4: Specified Substances are not necessarily less serious agents for purposes of sports doping than other Prohibited Substances (for example, a stimulant that is listed as a Specified Substance could be very effective to an Athlete in competition); for that reason, an Athlete who does not meet the criteria under this Article would receive a two-year period of Ineligibility and could receive up to a four-year period of Ineligibility*

under Rule 14.6. However, there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation. This Article applies only in those cases where the hearing panel is comfortably satisfied by the objective circumstances of the case that the Athlete in taking or possessing a Prohibited Substance did not intend to enhance his or her sport performance. Examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent would include: the fact that the nature of the Specified Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete's open Use or disclosure of his or her Use of the Specified Substance; and a contemporaneous medical records file substantiating the non sport-related prescription for the Specified Substance. Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance. While the absence of intent to enhance sport performance must be established to the comfortable satisfaction of the hearing panel, the Athlete may establish how the Specified Substance entered the body by a balance of probability. In assessing the Athlete's or other Person's degree of fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article. It is anticipated that the period of Ineligibility will be eliminated entirely in only the most exceptional cases.]"

10. The Rules require the athlete to (here) prove how the cannabis came to be in his/her system and that the use of cannabis was not intended to enhance sports performance **and** to produce corroborative evidence **before** the degree of fault can be considered to determine sanction, which **must** fall between an 8 year suspension and a lifetime ban for a third violation.

E The evidence

11. We address the evidence relevant to use, and the athlete's intention, before turning to the "*degree of fault*".

Written statement

12. Mr Whare made a written statement to the Tribunal dated 26 January 2010 which stated that his use of cannabis was for recreational use only and that it was never intended to enhance his performance.

13. He said that despite his passion for rugby league he was "*unable to curb an addiction to cannabis, despite my trying on many occasions without success"*.

14. He put his breaches in context, that his achievements in rugby league over the past 20 years were "*undermined by my off field antics over the past five years, (and) for that I am deeply remorseful to all involved"*.

15. This written statement was notable for its lack of detail about the particular circumstances of use, and any corroboration. Mr Hunt as counsel did all he could to adduce further evidence and the Tribunal pressed Mr Whare to do so in the hearing. We reflect this later in this Decision.

The previous breaches

16. As they are factually (and legally) relevant the Tribunal refers to the previous breaches. **ST 14/04 Decision 17 February 2005** addressed an admitted doping infraction involving cannabis following testing on 22 October 2004. Mr Whare had consumed cannabis, with alcohol, at the end of the rugby league season. He had been provisionally suspended. His contributions to the community, and his status as a hard working man with financial commitment to his family were brought to account, and his genuine remorse.

17. *"Specified substances"* such as cannabis, which are less likely to be abused as doping agents, were subject to a more lenient regime than other substances under NZRL's anti-doping rules (which incorporated the then current WADA Code) in force at the time of Mr Whare's first violation. The Tribunal, in its decision in relation to Mr Whare's first violation, did not consider that cannabis could enhance performance in rugby league, nor endanger other athletes, and applied the principles referred to in **Stewart SDT 11/04**. Mr Whare was reprimanded and fined.

18. Under **SDT 19/06** Mr Whare's second breach involving cannabis was recorded, following testing on 20 August 2006. The explanation offered was that he had been through trying personal circumstances. There was no evidence of an intention to enhance performance, nor that cannabis would do so in rugby league. Because Mr Whare did not attempt to invoke Article 10.5 of the Code to claim no, or no significant, fault or negligence, a two year period of ineligibility automatically resulted. That suspension ended in 2008.

The use of cannabis giving rise to the violation

19. It took some prompting by the Tribunal and Mr Hunt's encouragement to yield any further evidence from Mr Whare. He was supported by his partner when he described his use of cannabis which he says led to this breach. He said that he had a *"few puffs"* in a social setting, about 10 days before testing. He explained that the consequences of earlier breaches, and in particular the two year suspension, had led to a dramatic impact in his life, at a personal, sporting, and employment level. His relationship was jeopardised, his employment was terminated (although we do not know the extent this correlates to the previous suspension), and he moved away from Christchurch. He fell into company in which cannabis use was prevalent, and it was only the active intervention of his Club, and provincial rugby league support, that brought him back to the game, and allowed him to reach 100 games for his province.

Nevertheless he says the carry-over of his contacts, outside rugby league circles, led to this breach.

20. The level of the cannabis in his specimen, 470ng/mL seems inconsistent with the simple use of cannabis he described to the Tribunal, but consistent with a regular user as Ms Kernohan of DFS observed.

21. Despite the lack of correlation between the described use of cannabis, and the level of cannabis determined by testing, the Tribunal accepts that Mr Whare has established the first leg of Rule 14.4. The evidence is of cannabis use on a reasonably frequent social basis, most recently about 10 days before the test. All this leg of the Rule requires is proof of how the substance entered his body.

Evidence that use of cannabis was not intended to enhance sport performance, and corroboration of that

22. The second leg of SADR 14.4 requires the Tribunal to be satisfied *"to its comfortable satisfaction"* that the use of cannabis was not intended to enhance sports performance. The athlete must produce corroborating evidence in addition to his or her word.

23. Mr David for DFS filed a submission and spoke to it at the hearing, to say that while DFS could accept that the use of cannabis was unlikely to be performance enhancing in a rugby league context, corroboration was still required to prove the absence of intent to enhance sport performance.

24. The Tribunal has addressed the question of corroboration on a number of occasions referred to by Mr Hunt, including **DFSNZ v Playle ST 06/09, DFSNZ v Neemia ST 02/09, DFSNZ v Cameron ST 03/09**.

25. Mr Hunt submitted that unless cannabis **is** a substance capable of being used to enhance sports performance (or to mask), "*it is moot as to the extent to which any corroborating evidence should be required of an athlete . . .*"

26. The difficulty with this submission is that the Rules are explicit as to the need for such evidence. Mr Hunt referred to a June 2009 decision of a Judicial Committee of the International Rugby Board in **IRB v Irakli Chvihivivadze (Georgia)**. The Judicial Committee reminded itself that while the use of cannabis was not intended to enhance sports performance there must still be corroborating evidence given the explicit provisions of the Code. The Committee referred to Article 10.4 of the Code as follows (from Mr Hunt's submission):

> *[24] While we are prepared to accept that the player smoked marijuana under pressure and that his use of marijuana was not intended to enhance sports performance, we cannot consider a reduced sanction in the absence of corroborating evidence. This requirement marks the departure from the previous version of the Code, which did not require corroborating evidence of absence of intent to enhance sports performance or mask the Use of a performance enhancing substance.*
>
> ***Corroborating evidence***
>
> *[27] Although as a matter of the English law of evidence, corroborating evidence can come from the Player himself, Regulation 21.22.3 requires that it must be evidence that is in addition to the Player's own word. In other words, it is no longer sufficient for a Player to say "I didn't intend to enhance my sport performance when I smoked cannabis".*
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> *[28] In this case, counsel for the Board conceded that factors which it would be open to us to consider would include the amount of Carboxy – THC found in the Player's system and the proximity of the Player's stated consumption to the date of testing. In our view, however, a Tribunal can also consider the overall context of the events related by the Player in assessing whether there is corroborating evidence of the Player's account. Corroborating evidence does not have to be evidence of what was in the Player's head at the time (such evidence will rarely, if ever, exist), but is evidence of other surrounding circumstances that are consistent with, or supportive of, what the Player says his intent was.*

…

[30] . . . Having regard to the Comment to Article 10.4 of the Code, we would also note that the substance involved – cannabis – is widely used in recreational settings and that its potential performance-enhancing benefits for rugby union players are not great."

27. This well expressed perspective has a strong practical ring to it which serves the purpose of the Code, and the Rules. The circumstances which surround the use of cannabis can be brought to account. As the Commentary to Rule 14.4 states it is more likely that specified substances as opposed to other Prohibited Substances *"could be susceptible to a credible, non-doping explanation"*. The Commentary goes on to refer to the *"objective circumstances of the case"*, and these include the nature of the specified substance and whether that would have been beneficial to the athlete. The burden on the athlete increases the more the likely potential of performance enhancing benefits.

28. The Tribunal, with the evidential support of DFS has held that there is no evidence that cannabis has been used for performance enhancing or masking purposes, at least in any case before it. The decisions in **ST 10/08 DFSNZ v Lambert and SDT 04/05 Touch New Zealand v Koro**, refer. It was accepted by Mr David for DFS that cannabis was highly unlikely to enhance sports performance in rugby league.

29. We also bring to account the evidence of how the cannabis came to be present in his system, the corroborating evidence of his partner and the evidence adduced before the Tribunal in the earlier decisions.

30. Although Mr Whare was very slow to adduce evidence required under Rule 14.4 there is sufficient here for us to conclude that the athlete has met the required proof of the circumstances of use, and lack of intent, with corroboration. We may therefore consider a sanction less than a lifetime ban.

F The *"degree of fault"*

31. This issue, discussed in the Commentary to SADR 14.4, has most exercised the Tribunal. Mr Whare has breached the applicable rules on three occasions, and on this third occasion after the clear warnings arising from the previous breaches. His assertion of *"addiction"* was not supported by any evidence, indeed the contrary. Yet the Tribunal is dealing with a non performance enhancing, social use, of cannabis. Mr Hunt described this as *"the elephant in the room"*. Is it relevant to the *"degree of fault"*? We note SADR 14.7.3, dealing with third anti-doping violations, does not refer to the *"degree of fault"*, and nor does the body of SADR 14.4. It comes from the Commentary.

Precedent

32. The Tribunal has not been able to locate, nor has it been told of a decision which might guide it in this case. It thus has to establish the principles which it considers relevant to the degree of fault.

The alleged *"addiction"*

33. The Tribunal cannot treat the asserted *"addiction"* as demonstrating a lesser degree of *"fault"*. To consider that would require medical evidence. Mr Whare's evidence is to the contrary, of his using cannabis when it is available, not that he *"goes looking for it"*. Whether addiction would reduce the degree of fault is thus not determined by us (see the reference to **Neemia** below).

The third time use

34. This Tribunal has cautioned athletes subject to the jurisdiction of this Tribunal, over the years, about the use of cannabis. Some sports have been prominent in the number of cases that have come before the Tribunal. This has lead to a shift in the principles attending sanction for the use of cannabis, and warnings that, certainly in some sports, further infringements may attract greater sanction.

35. This aspect directly concerns Mr Whare, who has had the specific warnings from his earlier breaches, and within his sport. Here the circumstances are in essence similar across the three breaches. While explained differently, this is essentially recreational use, with an element of psychological stress associated with the second breach. He has not taken heed of warnings earlier given him. This must be reflected in sanction. It is in essence repeated offending in breach of Rules the upholding of which is fundamental to the proper conduct of sport.

Is the fact that cannabis is not (in this case) performance enhancing relevant to the *"degree of fault"*?

36. Here lies the issue central to the *"degree of fault"* in this case.

37. Mr Hunt submitted that the Commentary to Rule 14.4 indicates that the **extent** to which the substance concerned has a *"doping component"* is by implication relevant to the degree of fault. Mr Hunt refers to the Commentary, that Specified Substances *"could be susceptible to credible, non-doping explanation"*, and the burden on the athlete to prove lack of intent to enhance sport performance increases with the potential of the substance to enhance performance. So he submitted that cannabis (and some other substances) are recognised by the Commentary as in a different league, more susceptible to a *"non doping explanation"* and this recognition should extend to sanction, *"commensurate with the extent of any possible sports performance enhancement the substance might create along with consideration as to fault"*.

38. In other words, Mr Hunt submits the *"degree of fault"* is not confined to considerations which constitute an **excuse** or explanation offered but should include recognition of the **nature** of the Prohibited Substance. This is a useful analysis, given that Mr Whare has no excuse for his breach other than habitual social use. Mr Hunt submitted that use of cannabis is not as serious as use of another substance which may have sports performance implications, but was not intended to do so.

39. The support of Mr Whare's Club officials extends to comment that the use of cannabis is prevalent in society and sport but is not in their view a performance enhancing drug, nor risky or dangerous to those playing the game. It is recognised it is harmful to health, but so too is alcohol and other non-performance enhancing drugs. The real point of this submission however is akin to that by Mr Hunt. Put in the words of the President and Senior Secretary of Mr Whare's Club *"It does seem incongruous to us that somebody using cannabis can, even with a third offence such as Vince has committed, be facing a lifetime ban, putting him on a par with those drug cheats who use drugs that really do have performance enhancing properties and so from that perspective, we would urge the Tribunal to impose the minimum period of suspension that it apparently has to."*

40. With this introduction we examine further the competing arguments.

41. The Commentary to SADR 14.4 states *". . . the circumstances considered must be specific and relevant to explain the Athlete's or Other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the athlete only has a short time left in his or her career . . . would not be relevant factors to be considered in reducing the period of Ineligibility under this Article"*.

42. This directs us to the **reason** given for third time breach, to **explain** the use.

43. At a factual level, Mr Whare says he is a regular user, but does *"not go looking for it"*. This was hard to square with his written assertion that he *is "addicted"* and that despite his own efforts he has not been able to address that addiction. When asked about those efforts he said that he had gone *"cold turkey"*. Thus he says little more than that he is a user of cannabis, in a social setting and took the risk of testing positive. This does nothing to assist his cause in reducing the degree of fault. It is not as if he was unlucky

to test positive by the long retention period for cannabis. Thus we are left with the simple explanation that he is a social cannabis user and took the risk of breaching the Rules.

44. This was reflected in Mr David's submission. He was careful not to be drawn on a submission as to the extent to which, if at all, the lifetime suspension might be reduced, but referred to an internal comment by Mr Steel, the Chief Executive of DFS, that something in excess of the minimum might apply.

45. Addressing the issue as one of proper construction of the Rules Mr David referred to the wording of SADR 14.7.3 and says it points to a life ban in the *"clearest terms"* in the expression *"will always result in a lifetime period of ineligibility",* (as was stated in the 2007 version of the SADR) but subject to whatever lesser sanction is available under Rule 14.4.

46. He submits that once the threshold issue of lack of intent is passed the degree of fault is simply to be assessed **against the circumstances in which the breach occurred**. He draws on the approach to fault under the Rules. An athlete may for example establish *"no significant fault"* for the use under SADR 14.5.2 under *"degree of fault"*. Mr David points to the fact that even if an athlete can show **no** significant fault in relation to a third violation the minimum period of ineligibility remains eight years. Here he says there is significant fault, a deliberate breach of the Rules, knowing of the risk, and thus an unqualified degree of fault.

47. Rule 14.5 is applicable to any Prohibited Substance. The Rule does not create defences, but applies only to sanction. The Commentary to Rule 14.5 records that these provisions are meant to have impact only where the circumstances are *"truly exceptional"*. The illustrations given are of an athlete taking all due care but being sabotaged by a competitor. Another illustration is a mislabelled or contaminated vitamin or nutritional supplement. SADR 14.4 relates to Specified Substances and is directed to substances which may allow a credible non-doping explanation. We consider there is thus

a clear differentiation in the application of the separate parts of Rule 14.5, and Rule 14.4.

48. Mr David submitted an "excuse" is relevant to the degree of fault, but the nature of the substance is not relevant. He submitted that whether this was cannabis or any other specified substance, Mr Whare by his own admission took the chance that he would not be tested in forthcoming competition and there is an undiminished degree of fault, which the Tribunal has to reflect. *"Degree of fault"* thus, in Mr David's submission, focuses on the circumstances of use, such as how the substance came to be in the bodily system, and what knowledge and appreciation of a breach that entailed.

49. Mr David referred to SADR 3.1.1 and the personal responsibility of athletes in relation to the use of prohibited substances and says this points to culpability for the breach as relevant.

50. If accepted, Mr David's reasoning would shut the door on a reduced suspension in this case and indeed on any case which relied only on the non-performance enhancing characteristic of the particular prohibited substance.

51. Faced with the logic of Mr David's argument Mr Hunt says that given that this was social cannabis use, which will not enhance sporting performance, it would be wrong if we were not to bring to account the nature of the substance and the purpose of its use, as that goes to qualify the **seriousness** of the breach, which he submits is relevant to the degree of fault. It is not just relevant to the **intent** to enhance sports performance. He submits this social and performance disconnected use much diminishes the degree of fault.

52. Following the hearing Mr David added a reference to SADR 14.7.1 in respect of a second anti-doping violation using the table set out in Rule 14.7.1. The Commentary demonstrates how a second violation may result in a period of ineligibility within a range, and then the *"degree of fault"* should be the criterion considered in assessing that ineligibility.

53. The Tribunal considered this Rule for a second breach in **DFSNZ v Neemia ST 02/09**, and while accepting the consequences of a minimum period of suspension as not inconsequential, the Tribunal reminded itself that the issue was the degree of fault and not the consequences of violation. It brought to account that the athlete was an international sportsman who is expected to set an example, and that he had been previously warned by the Tribunal when hearing his first violation of mandatory suspension of two years, (under the anti-doping rules in force at that time) if he should commit a second violation. Under the SADR 2009, applying at the time of the second violation, the minimum period for a second violation was one year. The circumstances of use were similar, two or three nights before a National final, and in the circumstances of blatant breach the minimum period of one year's ineligibility was considered inappropriate by the Tribunal.

54. The Tribunal focused on the circumstances of use, and did not regard use of cannabis for pain or sleep relief as mitigating. This is really the point made by Mr David. Cannabis as such is not submitted to be a relevant consideration, yet the Tribunal there felt able in its discretion to apply a sanction less than the maximum, greater than the minimum. The wording of the Rule with regard to a third time breach is more emphatic. Nevertheless a range still exists under the Rules in respect of a third breach, for Specified Substances.

G Conclusion regarding what is relevant to the degree of fault

55. The Tribunal recognises the strength of arguments well marshalled by both counsel. Mr David's submission has force, because it turns on there being three wilful breaches, inexcusable, and that there is no room to treat the degree of fault as diluted in the face of such deliberate flouting of the Rules, whatever the substance. By this reasoning, despite the fact this is not a performance enhancing substance this breach will equate with the three time drug cheat. It is in essence a rigorous, but Mr David would say logical, application of the SADR (and WADA Code) to reflect the knowing breach.

56. On the other hand, ignoring the **nature** of the substance and the circumstances of use will not sit easily with any Tribunal or Court exercising a disciplinary function unless that is clearly precluded. However we determine this point, we do not overlook the rigours of the WADA Code and the Rules applicable here. These are demonstrated by the range of sanction available to this Tribunal, a minimum of eight years to a lifetime ban.

57. A third time breach carries a severe sanction, irrespective of any leniency this Tribunal is able to afford. There must however be some relativity. In some cases, where there is a sports enhancement or masking element, there will simply be no room to move, and a lifetime ban will result. The justice of that can hardly be debated. In a case such as this where there is no such element, (potential sport enhancement) not just a lack of intent, the potentially significant reduction to an 8 year ban is available.

58. We conclude that assessment of *"fault"* should include the explanation offered in order to put the actual use in context, not just focus entirely on the intent and knowledge associated with the use. As a matter of principle, when interpreting rules or provisions of statutory or equivalent force, context is very important. The context here is social use with no performance enhancing factor associated with the specified substance. We do not think that this approach to the application of the Rules strains the *"degree of fault"* as it looks at the explanation, the reason given for the use. The Commentary requires us to consider what is specific and relevant to use of a specified substance to explain the departure from the expected standards of behaviour in assessing the degree of fault.

59. A crucial element in the balance must be that of deterrence in upholding the Rules, but the Rules do contemplate a reduction to an eight year ban. That sanction in itself must be a deterrent of considerable consequence. If it does not end a player's career, it substantially affects it. A true drug cheat seeks to take unlawful advantage, and is readily distinguishable.

The personal attributes of the athlete

60. The testimonials for Mr Whare from his Club and representative coach, reflect something of the character which the Tribunal detected in the hearings when he came before us. He is a self-deprecating straightforward man, shy, and a contributor to his Club on and off the field. He is described as an amiable individual *"who will do anything for anybody, especially for his peers"*. Younger players look up to him despite his breaches. He is described as *"an excellent father, partner and a friend to anybody who knows him well . . ."* There is a very real concern held for him if the suspension has the finality of a life ban, and there is strong support for his rehabilitation. Even the impact of an eight year ban is seen as severe in Mr Whare's case.

61. Mr Stuart as one of the Canterbury Bull's coaching staff describes Mr Whare's work etiquette on and off the field as *"second to none"*, and he is one of the first to visit children suffering from cancer in hospital to whom he relates extremely well.

62. All these factors speak affirmatively for someone who but for his repeated breaches, and the discredit that brings to his sport and himself, has fine personal qualities. It is not surprising that we apprehend his regret and distress at what this means for his family, himself, his teams, and his Club.

H Sanction

63. We have decided that, in the circumstances of this case, with specificity and relevance to the degree of fault as we consider the Rules may be properly interpreted and applied, we should not impose the maximum penalty but something more than the minimum, reflective of all these considerations. This athlete still has much to offer his sport whether as a player or a participant in some other way against that he has wilfully flouted the rules, yet again. A period of **ten years suspension** seems to reflect all these considerations personal to the athlete, and the particular substance and its social use.

I Comment

64. The message from this Decision can hardly be lost on athletes. At the age of 32 this athlete's playing days will be substantially lost, certainly at representative level, but his skills are such that he may return to the Code after this period of suspension. During suspension he is lost to the sport and any other sport subject to the Code and these Rules, in any capacity. That is a significant element of sanction in itself. He may return to coaching or some other form of participation after the 10 year suspension.

65. There must be a degree of proportionality in comparison with other cases, and in respect of a particular breach. The Tribunal considers this is achieved by the sanction imposed.

66. This case has given rise to issues which are of importance to this athlete and his sport and to the interpretation and application of anti-doping protocols in sport. We have sought to construe the wording of the applicable rules in a purposive way, to reflect what we consider to be their intended application, in a manner which is consistent and fair. This has not been an easy decision to reach given the impact our decision will have on this athlete and wider ramifications in the application of the Code, and Rules. We have been much assisted by counsel and other participants including Ms Kernohan of DFS, and Mr Bailey of NZRL.

J Formal disposition

67. Mr Whare is suspended from all participation in rugby league for a period of 10 years from the date of the provisional suspension. **The suspension will terminate on 20 October 2019**. He has a right of appeal.

Dated this 1st day of March 2010

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Nicholas Davidson QC
Deputy Chairperson (for the Tribunal)

Anna Richards

Tim Castle