

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

SDT 08/05

Anti-doping violation application

BETWEEN **TOUCH NEW ZEALAND INC**
Applicant

A N D **MATIU SOLOMAN**
Respondent

Representation: Mr Simon Battrick, National Development Manager, Touch
New Zealand Inc

The respondent in person; supported by Mr Lewis Te Kani

Date of Decision: 2 August 2005

DECISION OF TRIBUNAL

Tribunal: Tim Castle (Presiding Member)
Farah Palmer
Adrienne Greenwood

Registrar: Mr Brent Ellis

Introduction

1. The applicant in this case is Touch New Zealand Inc (“Touch NZ”), the national sports organisation which brings the application before the Tribunal in accordance with the applicable anti-doping rule violation proceedings procedure. Mr Simon Battrick, National Development Manager, represented Touch NZ throughout the proceedings before the Tribunal.
2. The respondent to these proceedings is Matiu Soloman the athlete from whom the New Zealand Sports Drug Agency (“NZSDA”) obtained a sample at the National Touch Tournament at QEII Park, Christchurch on Wednesday 2 March 2005. At the hearing Mr Soloman was assisted by his uncle Mr Lewis Te Kani.
3. By consent the hearing was conducted by way of telephone link up.

The doping infraction

4. By letter dated 21 April 2005, the NZSDA advised Touch NZ that Mr Soloman had committed a doping infraction as provided for under for s.16B and s.18(1) of the New Zealand Sports Drug Agency Act 1994 (“the Act”). The sample provided by Mr Soloman at the sample collection station at the National Touch Championships on 2 March 2005 contained a metabolite of cannabis which is banned under the World Anti Doping (“WADA”) Code 2005 Prohibited List – International Standards: s.8 – Cannabinoids.
5. The NZSDA recognises the substance as being banned according to its schedule maintained pursuant to s.6(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 NZSDA determined that Mr Soloman had committed a doping infringement and Touch NZ was notified accordingly.
6. Mr Soloman does not challenge the determination of the Board of NZSDA and in his notice of defence dated 30 May 2005, filed with the Tribunal, he admitted the Anti Doping Rule Violation as alleged by Touch NZ in its application.

The facts

7. The positive test for the presence of cannabinoids determined by the NZSDA was not, as earlier stated, resisted or appealed against by Mr Soloman. He accepted the finding. He told the Tribunal that he smoked marijuana on one occasion before the Championships in order to alleviate significant and continuous stresses in his life, the full details of which he provided in written form to the Tribunal and confirmed orally during the telephone hearing. Mr Soloman's statements were endorsed in submissions made on Mr Soloman's behalf by his uncle Mr Lewis Te Kani.
8. The causes of pressure and stress in Mr Soloman's life provided the foundation for his plea in mitigation eloquently advanced on his behalf by his uncle. At 24 years of age, Mr Soloman, is completing a university degree (double major) at Waikato University. He is also undertaking the responsibilities of the oldest male child in his family, which by and large has been a solo-parent family. It was explained to us that Mr Soloman has for the last five years approximately, taken on a leadership role within the family and in particular acts as a mentor and supporter of his younger brother and young sister who recently gave birth. Mr Soloman has also been required to manage the complex relationships within the family, which have become more complex since the birth of his nephew. This has not been an easy task, yet he has, according to the submissions made to us, not disputed by Touch NZ, acquitted these tasks and responsibilities with great maturity and success whilst at the same time maintaining his discipline and commitment to his degree studies and to his serious participation at a high level in the sport of Touch.
9. In his evidence and submissions, both in writing and orally supported by submissions on his behalf by Mr Te Kani, Mr Soloman apologised unconditionally for his error of judgment in using marijuana in the lead up period to the Touch NZ National Tournament earlier this year. To his credit he admitted at the first opportunity that he had taken the banned substance and that he would not seek to make any excuse for doing so, but rather proffer an explanation on a number of matters which would put his use of cannabis into context.
10. Mr Soloman informed us that he deeply regretted his error, confirmed his remorse and provided an unconditional guarantee that he would never

again take any substance that would compromise his ability to participate in touch football. He said he realises that there are better ways to alleviate stress than the method he had employed on this occasion. He told us, and we accept, that he recognises the embarrassment that the sport will suffer because of his doping offence, and likewise the effect this would have on his team mates.

11. Mr Te Kani and Mr Soloman confirmed that Mr Soloman had spoken to his kuia and kaumatua, together with his whānau and they had accepted his word that he would never transgress again in this way. The importance of this covenant with his family was stressed to us.
12. Mr Soloman told us that he would accept whatever penalty the Tribunal imposed and promised that he would learn from this experience. He told us that he considered the experience would enable him to grow as a man and become a better ambassador for the sport, should the sport wish to use him in this way. He confirmed that he was driven to excellence in his sport and that he sought to participate fully at all levels – club, regional and for New Zealand. He is a former New Zealand representative and based on the information before the Tribunal there is no reason why he should not be able to participate fully in the sport, including, again, at the highest level.
13. It was particularly important for the Tribunal that Mr Soloman stressed that he had not used cannabis for any performance enhancement purpose. We accept that evidence. It is also clear on the facts of this case that Mr Soloman's use of the cannabis was unrelated to his sport or to his performance in it.
14. Presented to the Tribunal in this case was a copy of what is described by Touch NZ as a Player Participation Agreement which all athletes involved in Touch NZ tournaments are required to sign before being allowed to participate in those tournaments. That participation agreement includes a statement that the athlete acknowledges and understands that Touch NZ prohibits the practice of doping and that he/she is required to abide by the drug/doping rules, regulations policies and protocols of Touch NZ, including those of WADA. A copy of such a Player Participation Agreement signed by Mr Soloman was adduced before the Tribunal. In that agreement Mr Soloman confirmed that he had read and understood the agreement and he agreed to meet the requirements set out in it.

15. Mr Soloman acknowledged in his Player Participation Agreement that he understands that a positive test result or failure to comply with the drug and doping rules, regulations, policies and protocols of Touch NZ and WADA, may lead to penalties being imposed. Mr Soloman said that when he signed this agreement he realised that it provided a clear message of the risks any athlete would be exposed to if he or she breached the acknowledgments or agreements made by them in that signed document. Mr Soloman accepted that his actions were in breach of this agreement. Again he offered his unconditional apology and expression of deep regret with the accompanying explanations of the pressures which had led him to use marijuana recreationally in the period before the New Zealand international touch tournament.

Touch NZ position before the Tribunal

16. Both in written material and in clearly expressed submissions Mr Battrick for Touch NZ identified considerable frustrations for Touch NZ in dealing with what he described as high frequency of cannabis use in that sport. Mr Battrick voiced concern over what he felt was an unhelpful message being sent to sport in New Zealand, and in particular, Touch, by decisions of the Tribunal in relation to cannabis, which in more recent times had primarily resulted in penalties of a reprimand and a warning only.
17. Whilst Mr Battrick confirmed that Touch NZ was sympathetic with Mr Soloman's situation and did not wish to make any individual, and particularly not Mr Soloman, a "scapegoat" for doping infractions in relation to cannabis, the sport, he said, had a "bigger picture" to manage. He explained to the Tribunal that the "bigger picture" for Touch NZ is the increasing difficulty the sport has in having athletes abide by all anti-doping protocols, both national and international, particularly in relation to cannabis.
18. Mr Battrick specifically drew the Tribunal's attention to the Player Participation Agreement signed by Mr Soloman and expressed on behalf of the sport concern that one of its athletes would knowingly sign such an agreement but still proceed to use a banned substance at a time when any testing, as occurred here at the New Zealand National tournament, would undoubtedly reveal its presence. This was, Mr Battrick said, of particular concern because Touch NZ had confidence in Mr Soloman's ability to continue to make progress in the sport; and, because of his

particular personality and character, the sport also had confidence that Mr Soloman could become a future ambassador and leader within the sport and they would be able to utilise his experiences and use him as a role model and mentor within the sport. This was indeed high praise.

19. Notwithstanding this endorsement of Mr Soloman's character and the genuineness of his explanations, apology and remorse, Mr Battrick felt that for the good of Touch NZ management of this issue, a penalty more harsh than just a reprimand and warning was called for in this case. He pointed particularly to the signing by Mr Soloman of the player participation agreement.
20. Mr Battrick also pointed out to the Tribunal that if a doping violation by an athlete is considered significant by Touch NZ then the team for which that athlete is playing can be required to return any medals won at relevant competitions, placings can be revoked and an athlete may be required by the sport to stand down for up to two years. Mr Battrick said that the sport was looking for a deterrent in Mr Soloman's case and that a suspension from play imposed by the Tribunal would go a long way to assisting the sport in managing the difficulties outlined. It was submitted that although Mr Soloman's violation was not of the significant or severe category, a deterrent was appropriate in the circumstances.

Mr Soloman's reply

21. It is appropriate to record the reply from Mr Soloman, so well expressed on his behalf by Mr Te Kani, to these submissions of Touch NZ. Mr Te Kani submitted that Mr Soloman's offence was at the "lower end of the scale", and was a first offence; that accordingly any penalty imposed must be proportionate to the offending. Mr Te Kani pointed out that not only had Mr Soloman confirmed his acceptance of his error and the need for him to make amends before the Tribunal but he had also done that before his family. Mr Te Kani reminded us that in those circumstances the covenant into which Mr Soloman had entered with his family was very significant and likely to be highly influential because it reflected his commitment to his family not to err again and instead to continue to exercise his responsibilities without transgression. Mr Te Kani confirmed that the family had accepted Mr Soloman's promises and undertakings and would continue to support him in his discharge of those responsibilities.

The Tribunal's decision

22. This case is yet another which in recent times has come before the Tribunal involving the use of cannabis by an athlete. A recent national print media article reported the frustrations of the NZSDA about the cost imposed upon that Agency having to test for what it described as usually non-performance enhancing substances, like cannabis. Cannabis is on the WADA anti-doping list primarily because it meets two of the internationally agreed criteria for inclusion on such a list, namely:
- That it was injurious to health; and
 - That it was contrary to the spirit of sport.
23. The third of the criteria for inclusion of substances on the WADA banned list is that they are performance enhancing. Cannabis is not on the WADA anti-doping list for that reason. But because it meets the other two criteria for inclusion it was added in 2003 to the WADA banned list. The same recent media attention to the NZSDA frustration also included reference to the fact that the Agency was nevertheless receiving full cooperation from one of the national sporting organisations, namely Touch NZ. The applicant in this case was said to be particularly affected by the situation involving cannabis. Touch NZ was to be commended, according to the Executive Director of the NZSDA, for its attempts to clamp down on cannabis use within the sport.
24. This is just part of the background to the doping offence by Mr Soloman in this case and we record those details as adding to the wider context of in the case and adding also to the complexities and potentially conflicting considerations with which this Tribunal must grapple in order to reach a conclusion suitable for this case and appropriate to Mr Soloman's offending.
25. It is fashionable at this time in some circles to debate whether the use of cannabis should be prohibited at all. We do not enter into this debate. The position is that cannabis is on the WADA banned substance list which applies to this country, the applicant sport and the respondent athlete. It is incumbent upon the Tribunal to proceed on that basis to deal with an admitted doping infraction against that list. The jurisdiction of the Tribunal is limited to the imposition of penalty: we must proceed to exercise it.

26. Within the last six months this Tribunal has delivered decisions in the cases of ***Boxing New Zealand v. Mene*** STD 13/04, 7 March 2005 and ***Touch New Zealand v. Koro*** STD 04/05, 26 May 2005. Both of those decisions provide useful touchstones to the way in which we should approach this case. As was recorded in ***Touch NZ v. Koro*** the New Zealand Sports Disputes Tribunal reviewed in ***Boxing New Zealand v. Mene*** the practice in Australia, United Kingdom and Canada in respect of cases in which doping violations have involved the use of cannabis, and reviewed the penalties generally applied in those countries. In ***Koro*** the Tribunal considered also the practice in the USA where the general practice appears to have been to issue a reprimand and warning for a first offence. In both ***Mene*** and ***Koro*** the New Zealand Tribunal imposed a warning and reprimand for first violations as consistent with the practice of the countries such as Canada and the USA
27. In some countries such as Australia a period of ineligibility or suspension has been imposed. On 16 June 2005 in a USA case involving athlete, Amanda Hubbard, who tested positive for metabolites of cannabis at the United States Weightlifting National Championships in Cleveland Ohio on 6 May 2005, the athlete accepted a three month period of ineligibility. As part of her sanction she agreed to participate in an anti-doping educational programme upon the completion of which she received a three month period of deferment, allowing for a return to competition. The athlete was disqualified from the championships and required to forfeit her third place in the Women's 58kg event..
28. In all these countries however there have been exceptions to the norm. This is not unexpected. Each case is dependent on its own facts. In April 2005, for instance, US snowboarder Kiana Putman accepted a 10 month suspension for testing positive for marijuana.
29. In ***Mene*** the Tribunal stated:

“Against this background we consider that where the cannabis use is unrelated to the sporting activity, is not taken for the purposes of enhancing the athletes performance, represents no danger to other competitors, officials or members of public, and there are no aggravating circumstances, a reprimand and warning is likely to be the appropriate penalty.”

30. This approach was applied with approval in **Koro**. The Tribunal in that case, however, allowed for the fact that an aggravating circumstance as described in **Mene** may include the execution by an athlete of the Touch NZ Player Participation Agreement with the effect that something more than a reprimand and warning might be appropriate. In **Koro's** case the Tribunal was not satisfied that Mr Koro had in fact signed such an agreement. In this case of course Mr Soloman did sign the player participation agreement.
31. So the question for us is: what penalty is appropriate in this case?
32. We are satisfied there are a number of compelling, mitigating circumstances relating to Mr Soloman's admitted use of the banned substance cannabis. Those mitigating circumstances reflect the comprehensive evidence and submissions of Mr Soloman and those on his behalf of his uncle Mr Te Kani:
- Mr Soloman candidly admitted his doping infraction;
 - Mr Soloman's use of the cannabis was unrelated to his sporting activity;
 - It was not taken with the intention of enhancing his performance;
 - His use of the cannabis represented no danger to other competitors, officials or members of the public;
 - His use of the cannabis was explained in terms which the Tribunal accepted. As outlined, they reflected a number of burdens and pressures from which he was suffering arising out of study and family responsibilities and pressures, some release from which, or alleviation of which led to Mr Soloman's use of cannabis on this occasion;
 - Upon receipt of advice of the NZSDA's determination following the testing at the New Zealand National Touch Tournament, Mr Soloman accepted the finding, admitted his offending, tendered an unconditional apology, regret and remorse and undertook both before his wider whānau and, equally importantly, before this Tribunal a guarantee that he would not transgress again in this way; and that instead he would use the experience as one from

which he would be better equipped to take responsibilities as an ambassador and needed mentor within the sport of Touch. Mr Battrick, National Development Manager of the sport, unhesitatingly confirmed that Mr Soloman was well equipped to undertake such a role

33. For all of these factors Mr Soloman is to be given due credit and allowance made in respect of penalty. We also have regard to the fact that Mr Soloman is currently under suspension from participating in the sport in accordance with a decision to suspend him by Touch NZ when the NZSDA notification was received by the sport. The suspension by the sport continues to this time having been in place since 26 April 2005; and it continues until this decision is delivered.
34. Without more, it might well be that Mr Soloman's penalty should, as seems to be the most consistent practice both in New Zealand and offshore, be a reprimand and a warning for a first offence involving cannabis. We are of the view that one of the factors that will have influenced Tribunals around the world which have imposed a reprimand and a warning for a first offence (perhaps especially in the absence of aggravating circumstances) is because for a second offence for the use of cannabis under the WADA Code, a mandatory two years suspension must be imposed. Whilst therefore in the absence of the use of the banned substance being for performance enhancing purposes athletes may have had certain latitude extended to them around the world for a first offence of cannabis use, there is no such latitude available to a Tribunal such as ours, or any other Tribunal internationally seized of the same jurisdiction, in the event of a second offence. There must be a two year ban upon a second offence.
35. It is absolutely crucial obviously that Mr Soloman and all those participating in sport, perhaps particularly in the sport of Touch in New Zealand, understand very clearly that a second offence for use of cannabis must result in a two year ban. Even in the absence of the undertakings provided to the Tribunal and to his family by Mr Soloman, the prospect of a two year ban for a second transgression ought to offer a very strong deterrent both to him and to all other athletes.
36. As we say, were this to be the complete factual context in the light of which Mr Soloman's offending was to be seen, it might be that we would

have concluded that a strong warning and a severe reprimand would be the appropriate penalty. We have considered however whether there are any aggravating circumstances in here such as should warrant in this particular case a departure from that course. We have reached the conclusion that there is indeed an aggravating circumstance in this case, justifying a more severe penalty for Mr Soloman than even the most severely and strongly expressed warning and reprimand. The circumstance which we find to be an aggravating one is the fact that before the March 2005 New Zealand National Tournament, Mr Soloman signed a Player Participation Agreement with Touch NZ in which he undertook in writing to abide by all the drug/doping rules, regulations, policies and protocols of Touch NZ, including those provided by the International Federation, WADA, the International Olympic Committee and the New Zealand Sports Drug Agency. By signing that agreement Mr Soloman acknowledged, understood and accepted the obligations imposed upon him by the agreement and that a positive test by him or a failure to fully comply with the drug and doping control, rules, regulations, policies and protocols may lead to penalties being imposed on him.

37. We accept the submission in this case on behalf of Touch NZ that it is an aggravating circumstance that a player would apparently be prepared to sign such an agreement (which any athlete must do before they participate in the National tournament and certainly before they undertake any representative play) but, notwithstanding, consciously breach it, and the rules by which they have agreed to comply, by using a banned substance. The player participation agreement represents, we are satisfied, an additional step taken by the sport to regulate and manage, itself, player conduct in relation to banned substances and doping policies. This sport is to be commended for this step. Athletes are required to abide by it. It must count for something.
38. We have come to the conclusion that a period of ineligibility or suspension must be additionally imposed on Mr Soloman. In his written submissions, Mr Soloman urged upon the Tribunal that if a suspension was considered by the Tribunal to be appropriate, it not be for a period longer than two months from 1 November 2005. We note that the New Zealand club touch season begins for all intents and purposes on 1 November each year. Mr Battrick for Touch NZ confirmed this at the hearing. Having regard to the aggravating circumstances of Mr Soloman's breach of the

player participation agreement as outlined, but balancing that aggravating circumstance against the very persuasive mitigating circumstances also outlined, we have reached the conclusion that Mr Soloman should be suspended from all participation in the sport of Touch for a period of one calendar month from 1 November 2005 in addition to:

- A severe warning; and
- A strong reprimand.

39. Mr Soloman will understand that accordingly the penalty of this Tribunal is to be that he be severely warned, strongly reprimanded and formally suspended from all play, participation and involvement in the sport of Touch for one calendar month beginning 1 November 2005. We are satisfied that he will understand he has had his “one transgression” under current rules and if he is to avoid a two year ban there must not be a second offence. That message should be conveyed strongly to all athletes in the sport of Touch.

DATED 2 August 2005.

SIGNED for and on behalf of the Tribunal:

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T J Castle
Presiding Member