

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

STD 08/06

BETWEEN SOFTBALL NEW ZEALAND

Applicant

AND A NEEMIA

Respondent

Date of Hearing: Tuesday, 4 April 2005

DECISION OF TRIBUNAL

Dated 7 April 2006

Appearances: A Neemia in person
 D Eagar for Applicant

Tribunal Members participating: Barry Paterson QC (Chairman)
 Adrienne Greenwood
 Carol Quirk

Registrar: Brent Ellis

Introduction

1. Mr Neemia is a softball player who represented Wellington in the Men's National League Final in Wellington on 18 December 2005. He was in the Black Sox in 2002 and more recently has been a member of the Samoan representative team. He is due to play for that team in an international fixture in Japan next month.
2. A sample was taken from Mr Neemia after the men's final at Haitaitai Park, Wellington on 18 December 2005. On 3 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.
3. The circumstances surrounding the positive test were a little unusual. Mr Neemia gave two samples at the test. A second sample was requested because of the high "PH" reading of the first test. Both samples were analysed. The first test produced a positive result, but the second test did not.
4. In a letter to Mr Neemia before the determination was made, the Executive Director of the Agency commenting on the two different results stated that:

"It is likely that this is due to the level being very close to the reporting threshold. However we have asked the laboratory to clarify the reason why this may have occurred."
5. The Tribunal understands that no clarification has been advised to either Softball New Zealand or Mr Neemia. It was Mr Neemia's evidence before the Tribunal that after the two tests had been taken, a third test would have been taken if the tester had had another collection bottle.
6. Mr Neemia admitted the anti-doping rule violation and initially advised he did not wish to participate in the hearing. However, when he was advised of the consequences of this decision and in particular the mandatory suspension of 2 years which would have applied if he had not participated, he elected to participate. He provided the Tribunal with a statement and with the agreement of both Mr Neemia and Mr Eagar, a hearing was held by conference call on 4 April 2006. Mr Neemia had previously supplied a

statement to the Tribunal and after affirming that he would tell the truth, he was questioned on that statement by members of the Tribunal.

Mr Neemia's Position

7. Mr Neemia stated that he attended a "stag party" on the Saturday night and admitted to being intoxicated. He admitted that others at the party were smoking cannabis but he does not recall whether he actively smoked the cannabis or not. He acknowledges that he has smoked cannabis "on rare occasions as I am exposed to a lot" but says he does not take drugs habitually.
8. A concerning feature of this case is that Mr Neemia has been involved at a high level of softball for the past 5 years and is fully aware that drug testing is expected at many tournaments and would be happening after the final. He had been previously tested in January 2005 where he was required to provide a sample and returned a negative result.
9. In Mr Neemia's own words:

"I have never believed any form of drugs should be taken to enhance a player's ability and I have never done, nor will I ever do so. My personal conviction is that it is unfair to all the athletes who work hard to succeed without the aid of any performance enhancing substance. I do not make a habit of smoking cannabis at any time, and genuinely believe that it would impair rather than enhance my skills and overall performance."
10. In an earlier statement, Mr Neemia had suggested that as the two results contradicted each other, he believed he did not smoke it the night before the final but was exposed to it passively as it was being used by others in the confined space they were in.

Softball New Zealand's Position

11. This is the first cannabis case which has confronted Softball New Zealand. Mr Eagar did not make any submissions on behalf of the national body and noted that he was looking to the Tribunal for a guide in these matters. He accepted that the cannabis would not have been performance enhancing in Mr Neemia's case nor would it have been a danger to other competitors or spectators. However, as Mr Neemia was a catcher, he suggested that if there was any danger at all, it was to Mr Neemia himself. His reactions could have been slowed by the cannabis.

The WADA Code

12. 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)” applies. 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.
13. Under the WADA Code the minimum period of suspension for a first violation is a period of 2 years’ ineligibility. However, cannabis is a specified substance and 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 Mr Neemia’s case is, the minimum sanction is “a warning and reprimand and no period of ineligibility from future events” and the maximum sanction is a 1 year ineligibility period.
14. The onus of satisfying the Tribunal that the use of the substance was not intended to enhance sports performance rests with the athlete on a balance of probability basis.
15. In the last 18 months, the Tribunal has considered several cannabis violations. Its basic approach to cannabis as noted in *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, was stated in *Mene* in the following terms:

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

The sanction in both *Mene* and *Koro* was a warning and reprimand.

16. There have been three cases subsequent to *Koro* where terms of suspension have been applied. In all three cases (*Touch New Zealand v Soloman* STD 08/05 of 1 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) an aggravating circumstance was found. It was that the three players concerned had prior to participating in a tournament signed a player’s participation agreement where they

undertook not to take drugs. In these three cases, Touch New Zealand made representations seeking terms of suspension in support of its policy to make its sport drug-free.

17. The other cannabis case decided by the Tribunal since *Koro* was *New Zealand Rugby League v Roberts* STD 13/05 of 28 November 2005. In that case, aggravating circumstances were not found and the sanction imposed was a reprimand and a warning.
18. To complete the picture it is noted that a factor which is not present in this case may be relevant. If a national sporting organisation has suspended the athlete pending the hearing of this Tribunal, that suspension may reduce or even eliminate the appropriate period of suspension to be imposed on the athlete.

Discussion

19. Mr Neemia's case has caused the Tribunal some concern. While it cannot discount the possibility that the cannabis entered his system passively, it is of the view that it is more likely than not that Mr Neemia did smoke cannabis the night before the men's final. He was a player who had been involved at a high level of softball for 5 years and was aware that drug testing was expected in many tournaments and would be happening in this case. However, in fairness to him it is noted that cannabis was not on the prohibited list when he first became involved at a high level. Nevertheless, Mr Neemia would have a greater knowledge of the likelihood of drug testing and prohibited substances than would many players who get tested. If there had been evidence that Mr Neemia had signed a player's participation agreement or if Softball New Zealand had made submissions that there were aggravating circumstances in this case, and those submissions had been accepted, it is likely that the Tribunal would have imposed a term of ineligibility (i.e. suspension) on Mr Neemia.
20. In the circumstances of this case, the Tribunal has decided to give the benefit of the doubt to Mr Neemia and not to suspend him. The case is unusual in that two tests taken at almost the same time produced both a positive and a negative result. There is no evidence of a participation agreement having been signed. Softball NZ has not made submissions that Mr Neemia be suspended.

21. The Tribunal is satisfied that Mr Neemia did not smoke cannabis for performance enhancing purposes. While there may be some disagreement as to whether cannabis is performance enhancing in some sports, the Tribunal accepts that it is not performance enhancing in the case of a catcher at a National final.
22. In the circumstances the sanction will be a warning and reprimand in accordance with Article 10.3 of the WADA Code. Mr Neemia should note that if he were to offend again he faces an automatic period of suspension of 2 years.

Sanction

23. Mr Neemia is warned against the use of cannabis and reprimanded for using it in December 2005.

A handwritten signature in blue ink, appearing to read 'Barry Paterson', is written over a light blue rectangular background.

**Hon Barry Paterson QC
Chairman**

4 April 2006