

BETWEEN **BASKETBALL NEW ZEALAND INCORPORATED**

 Applicant

AND **KAREEM JOHNSON**

 Respondent

DECISION OF TRIBUNAL

7 December 2007

Date of Hearing: **26 November 2007**

Appearances: Kareem Johnson in person
 Michael Smyth, Counsel for Respondent
 Grant Chapman for Applicant
 Jeremy Bayliss, Hawks Franchise Owner, by invitation

Tribunal Members Participating:

Hon Barry Paterson QC, Chairman
Tim Castle
Carol Quirk

Registrar: Brent Ellis

INTRODUCTION

1. Kareem Johnson is a professional basketball player from the USA. For the last two seasons he has played for the Hawks in the New Zealand National Basketball League.
2. After playing for the Hawks in the League semi-final at the North Shore Events Centre on 24 June 2007, he was tested by Drug Free Sport. On 23 August 2007, Drug Free Sport issued a determination under the provisions of the New Zealand Sports Drug Agency Act 1994 determining that Kareem had committed a doping infraction. The sample collected from him on 24 June 2007 contained cannabis.
3. The respondent (“BBNZ”), in accordance with its anti-doping policy, brought an anti-doping rule violation proceeding before the Tribunal. As the violation was committed before 1 July 2007, the provisions of the Sports Anti-Doping Act 2006 do not apply. It is necessary to determine this matter under BBNZ’s anti-doping policy as it was on 24 June 2007.
4. Kareem admitted the violation but gave notice that he wished to participate in the hearing determining the sanction. A telephone conference convened on 26 November 2007 was, with the consent of all parties, converted to a hearing for the purposes of imposing a sanction. Kareem, who is currently playing in Bolivia, participated in the conference and gave evidence after affirming that he would tell the truth.

THE ANTI-DOPING CODE

5. BBNZ’s anti-doping code (the code) at 24 June 2007 did not incorporate the provisions of the WADA code. It had been adopted in April 2003. Reference to this position was noted in the Tribunal’s recent decision in *Basketball New Zealand Incorporated v Clifton Bush*, ST 15/07 of 10 October 2007. The Tribunal understands that BBNZ has now adopted a new code which complies with the Sports Anti-Doping Act 2006.
6. The sanctions available to the Tribunal are far more restrictive under the BBNZ code than would be case if the provisions of the WADA code applied. The minimum penalty for a doping offence which involves a prohibited substance (and “prohibited substance” has the same meaning as it has under the WADA code) is a period of two years for a first doping offence. The two years applies to a ban from selection

to represent New Zealand, a ban from competing in any events and competition conducted by or under the auspices of BBNZ, funding from BBNZ and various other activities which are not relevant in this case. There is, however, an exception to the two year ban provision in respect of a particular class of drugs. If applicable, the ban on a first doping offence is for three months or less. Those drugs do not specifically list cannabis/cannabinoids.

7. The problem which this poses in this particular case was first encountered in the *Bush* case. On one construction of the code, Kareem faces a mandatory ban of two years. Even though this ban does not apply world-wide, the Tribunal in *Bush* determined that a two-year period of suspension was an excessively harsh sanction, in the case of an athlete who did not smoke cannabis for performance enhancing purposes. The panel of the Tribunal in this case agrees with the *Bush* decision and gives the relevant rule of the code a purposive interpretation. At the end of the definition of drugs in the clause in respect of which a lesser sanction applies are the words “or related substances”. This Tribunal is of the view that one of the purposes of the lesser sanction was to apply in those cases where the drugs were not taken for performance enhancing purposes. The nature of the drugs identified indicates that purpose.
8. If the WADA code had applied in this case, and if the Tribunal determined that cannabis was not smoked for performance enhancing purposes, the maximum penalty would have been a period of ineligibility of a maximum of not more than one year and the minimum penalty a reprimand or warning. This Tribunal therefore interprets Rule 7.1 of the code as having the same purpose as the WADA code which allows it to interpret the words “related substances” as substances similar to the category of drugs defined as specified substances in the Prohibited List of the WADA code. It therefore has determined to follow the reasoning in *Bush* and to treat the maximum penalty available as the three-month ban, as it has determined that the cannabis in this case was not smoked for performance enhancing purposes.

KAREEM’S POSITION

9. Kareem earns his income by playing basketball professionally. His evidence was that he smoked the cannabis on a night out on 17 June, approximately one week before the semi-final. He says that the smoking was a momentary lapse and that he

is not a regular cannabis user. He says that he now regrets his action and apologised to the Hawks Franchise, BBNZ and the Tribunal for his actions.

10. Kareem gave evidence that he did not take the drug for performance enhancing purposes. The Tribunal accepts this evidence.
11. Kareem also made an offer to help other athletes under a drug education programme. He was aware that cannabis was a prohibited substance. He had in his possession, the Drug Free Sport Wallet Guide which stated cannabis was a prohibited substance.
12. Kareem has played in New Zealand for three years and has applied or is about to apply for New Zealand citizenship. He would like to return to New Zealand to play here next year, having been playing in this country for the last three years.
13. Mr Bayliss indicated that the Hawks would like to contract Kareem to play here again next year but have not entered into negotiations with him pending the resolution of this matter. If Kareem were to be banned from playing for a period, this would be relevant to the Hawk's decision on whether to offer Kareem a contract. The season starts on 1 March and ends on 30 June. There are 18 national league games over a period of 13 weeks. A ban of long length would make it uneconomic for a franchise to contract such a player. There are, also to be considered, pre-season matches which commence from mid-February and there are usually five such matches in the Hawkes Bay area.

DISCUSSION

14. The Tribunal has over the last 12 months or so given several decisions on cannabis and has imposed sanctions under the WADA code of between one month and two months' ineligibility. The sanction imposed on Kareem should fall within this range unless there are exceptional circumstances. The fact that Kareem is a professional sportsman is not a reason for departing from such a sanction, particularly as he was well aware that by smoking cannabis, he was smoking a prohibited substance.
15. Mr Smyth, on Kareem's behalf, submitted that this was not one of the more serious cases and because Kareem said it was a one-off incident, had expressed contrition and was prepared to assist in educating athletes, any ban should be minimal and, in fact, this matter could be disposed of by a reprimand and a warning. A further submission was that because the Tribunal has been imposing penalties of between

one and two months in cases where the maximum period of ineligibility is 12 months, a proportionate adjustment in the case of a maximum ban of three months would give a ban of less than one month. Mr Smyth also pointed out the greater effect that such a ban would have on Kareem because he is a professional basketballer.

16. Although the Tribunal accepts that the cannabis was not smoked for performance enhancement purposes, it does not place any weight on the evidence that this was a one-off incident. While it may have been, most of the athletes who come before the Tribunal on cannabis violations, suggest that smoking cannabis is out of character and is a one-off incident. The Tribunal does not lightly accept this evidence or submission.
17. The fact that Kareem is a professional athlete does not in itself influence the Tribunal. However, the Tribunal does have regard to the fact that in the case of a person who comes to New Zealand to play in a league which occupies three months, a ban of two months is effectively a season's ban, whereas a similar ban for a six-month season is far less severe.
18. In view of Kareem's offer to conduct drug educational courses, the possibility of a suspended sentence was discussed with Mr Smyth. If the Tribunal were to impose the suspended sentence subject to conditions, Kareem consents to it. In addition, the Hawk's franchise and BBNZ indicated that they would support and assist in a drug education programme to be led by Kareem.
19. Another factor in this case is the attitude of FIBA to the suspension. Although this Tribunal can only impose a ban on playing in New Zealand, BBNZ is obliged to provide a copy of our decision to FIBA. It may be that FIBA will apply a similar ban to Kareem playing overseas.
20. The Tribunal has discussed the issue of Kareem's offer to participate in an education programme on drug use with Drug Free Sport which has indicated that Drug Free Sport is interested in using athletes for drug education. However, before it would be prepared to do so, it would wish to interview the athlete, assess his suitability for such a programme, and satisfy itself that the athlete was totally committed to such a programme. Such a programme would have to comply with Drug Free Sport's requirements.

21. Kareem has offered to assist in a drug education programme but at this time the Tribunal cannot assess his suitability. It is, however, prepared in the circumstances, to suspend the ban which it proposes to impose subject to Kareem satisfying Drug Free Sport that he is a suitable person for such a programme and agreeing a programme which is suitable both to Drug Free Sport and to this Tribunal. The Tribunal sees an athlete's participation in such a programme as important in reducing the incidence of cannabis in sport. This may be a case where a suitable programme can be developed.
22. Having regard to the harshness of a two month period of suspension in the case of an athlete who is playing in a season of no more than three months, the Tribunal had determined that the appropriate ban in this case should be a period to preclude Kareem playing in the pre-season matches and the first three matches of the season. Such a period falls within the one-month to two-month period and takes into account the harshness which can arise where the athlete's season is very short. The Tribunal sees this as a significant portion of the season. On the other hand, an aggravating factor in this case is that Kareem is an experienced sportsman who is well aware that cannabis was a prohibited substance.

DECISION

23. Kareem is banned, for a period commencing on 15 February 2008 and terminating on 21 March 2008, from competing in any events and competitions conducted by or under the auspices of BBNZ. The other sanctions which apply in accordance with the provisions of Rule 6.1(b) to (e) of the code are also imposed.
24. However, the Tribunal will suspend the ban if agreement is reached between Kareem, BBNZ, the Hawk's franchise and Drug Free Sport on a suitable drug education programme in which Kareem will participate for a period of not less than one month. This programme will need to be substantially completed by 21 March 2008. To obtain the suspension of the Tribunal's ban, Kareem will need to satisfy Drug Free Sport of both his suitability for and commitment to such a programme and that it be of benefit to Drug Free Sport.

Dated: 7 December 2007

A handwritten signature in black ink, appearing to read 'B J Paterson', written in a cursive style.

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Hon B J Paterson QC
Chairman