

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

SDT 07/05

Anti-doping violation application

BETWEEN **TOUCH NEW ZEALAND INC**
Applicant

A N D **WILLIE MORUNGA**
Respondent

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

The respondent in person

Date of Decision: 2 August 2005

DECISION OF TRIBUNAL

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

Registrar: Mr Brent Ellis

Introduction and background

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 Willie Morunga the athlete from whom the New Zealand Sports Drug Agency (“NZSDA”) obtained a sample at the National Touch Tournament at QEII Stadium, Christchurch on 5 March 2005. Mr Morunga appeared for himself at the hearing
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 Morunga 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 Morunga at the sample collection station at the National Touch Championships on 5 March 2005 contained a metabolite of cannabis which is banned under the World Anti Doping (“WADA”) Code 2005 Prohibited List – International Standards: Class C8 – 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 Morunga had committed a doping infringement and Touch NZ was notified accordingly.
6. Mr Morunga does not challenge the determination of the Board of NZSDA and in his notice of defence dated received by the Tribunal on 13 June 2005 he admitted to the Anti Doping Rule Violation as alleged by Touch NZ in its application.

The facts

7. A positive test for the presence of Cannabinoids determined by the NZSDA was not, as earlier stated, resisted or appealed against by Mr Morunga. He accepted the finding. He explained his position in writing in his statement of defence, the detail of which he confirmed by evidence at the hearing as follows:

“Prior to the Nationals, I William Morunga did not plan on going to the nationals. I admit that two weeks before the nationals, while at a party with friends, I did have cannabis but in no way was it to enhance my performance. I am very sorry for giving Touch New Zealand and my province at the time North Harbour a bad name.

I have played touch since I was a little kid about 7 or 8 and this is the first time something like this has happened to me. Touch is a game that requires quick thinking, quick reflexes, precision and timing so I think anyone under the influence of cannabis would be greatly disadvantaged. So once again I say in no way did I hope to enhance my performance. I know the importance of having a clean and drug free sport. So once again I would like to apologise for my actions and to Touch New Zealand and North Harbour.”

8. In answer to a number of questions from Tribunal members Mr Morunga told the Tribunal:
- That he had had “a puff of a joint” at the party but that he was not a regular user of cannabis. He confirmed that he did not use the substance to enhance his performance and he insists that the drug does not help performance in his sport. Other than what he said in writing, and during the hearing he offered no further explanation for his use of the banned substance.
 - He understood what his obligations were under a Player Participation Agreement signed by him as required by Touch NZ but he thought it really only relevant to the use of performance enhancing drugs such as, he said, anabolic steroids. He accepted in discussion with Tribunal members that the Player Participation Agreement is clearly not limited to any particular banned substances – it is applicable to all banned substances.
 - Mr Morunga told us he was embarrassed and very worried not for himself but about the black mark his offence would have for Touch NZ and, his new province (at least at the 2005 National Championship), North Harbour and his team. He accepted he had a responsibility to

behave to high standards. He told the Tribunal that he wanted to continue to compete to the highest level in touch and that was why he was appearing before the Tribunal – because he was “.....*still here fighting for myself*”.

9. 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 Morunga was adduced before the Tribunal. In that agreement Mr Morunga confirmed that he had read and understood the agreement and he agreed to meet the requirements set out in it.
10. Mr Morunga 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 or WADA etc, may lead to penalties being imposed. Mr Morunga 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 Morunga accepted that his actions were in breach of this agreement.

Touch NZ position before the Tribunal

11. 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.
12. Mr Battrick explained to the Tribunal that the “big picture” which Touch NZ is required to manage 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.

13. Mr Battrick specifically drew the Tribunal's attention to the Player Participation Agreement signed by Mr Morunga 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.
14. Notwithstanding Mr Morunga's character and the explanations and apology, Mr Battrick felt that for the good of the management of this issue by Touch NZ a penalty more harsh than just a reprimand and warning was called for in this case. He pointed particularly to the signing by Mr Morunga of the player participation agreement.
15. 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. In 2004, the Counties Manukau Mens Open Touch team (of which Mr Morunga was a member) suffered the penalty of having its medals stripped from it for a doping offence (by another member of that team) considered to be in the significant category. Mr Battrick said that the sport was looking for a deterrent in Mr Morunga'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 Morunga's violation was not of the significant or severe category, a deterrent was appropriate in the circumstances.

The Tribunal's decision

16. This case is yet another which in recent times has come before the Tribunal involving the use of cannabis by an athlete. One of those cases is ***Touch NZ v. Soloman STD 08/05***, to which we refer again in this decision. As in our decision in that case, so also in this decision, delivered on the same day, we refer in some detail to these other cases so that the context in which the Tribunal is adjudicating on issues of penalty in these kinds of cases can be readily understood.

17. 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 its use is contrary to the spirit of sport.
18. 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.
19. This is just part of the background to the doping offence by Mr Morunga in this case and we record those details as adding to the wider context of 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 Morunga's offending.
20. 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.
21. 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 countries identified, such as Canada and the USA.

22. 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..
23. 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 cannabis.
24. In some countries a period of ineligibility or suspension has also been imposed: witness the 16 June 2005 USA case involving an 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.

25. However, 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.”

26. 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 Morunga did sign the player participation agreement.

27. We are satisfied there are some mitigating circumstances relating to Mr Morunga’s admitted use of the banned substance cannabis:

- Upon receipt of advice of the NZSDA’s determination following the testing at the New Zealand National Touch Tournament, Mr Morunga accepted the finding, admitted his offending and tendered an unconditional apology.
- Mr Morunga’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;

28. Mr Morunga’s use of the cannabis shortly before the New Zealand National Championships came about simply because he had the opportunity to use it at a party with friends. He took that opportunity. It is no function of this Tribunal to pronounce on the moral issues arising: we do not do so. This case can be seen in a different category from some of the others with which the Tribunal has been dealing including the decision in **Touch NZ v. Solomon** STD 08/05 also delivered 1 August 2005, in that no particular considerations prevailed on Mr Morunga causing him to take advantage of the opportunity which presented itself. Nothing by way

of explanation or context for the use of his cannabis in the lead up to the New Zealand National Tournament was offered by Mr Morunga to the Tribunal. Whilst the factors we have set out above do mitigate to some extent in Mr Morunga's favour they do not permit any particular or significant reliance because no explanation is proffered as to the reasons for the use beyond quite simply that, whilst in the company of friends, he had an opportunity to use cannabis, and he elected not to resist doing so.

29. In his evidence before the Tribunal at hearing Mr Morunga did indicate that because of certain difficulties within the Counties Manukau team there was, in the lead up to the New Zealand National Tournament, a prospect that Counties Manukau would not enter a team in the men's open competition at the New Zealand National Tournament. This statement has an accompanying inference, we suppose, that at the time Mr Morunga had the opportunity to use the cannabis there was then some doubt as to whether he and the Counties Manukau team would be participating in the Tournament. In fact as it happened no Counties Manukau team was entered in the men's open section for the Tournament but a number of those athletes – including Mr Morunga who may have been in that team, had it been entered - were able to switch to North Harbour and participate in the New Zealand National Tournament for that province/region. The inference from all of this is that at the time of Mr Morunga's use of the cannabis he had no certainty of participating in the New Zealand National Tournament. Accordingly the implication is that the prospect of his participation in the Tournament did not weigh with him when the opportunity to use the cannabis arose.
30. We have determined that this factor should not weigh with us in a way which particularly favours Mr Morunga. It is our understanding that in the weeks and months leading up to the National Championships Mr Morunga was participating fully at the elite (men's open) level in Touch with every intention that he would seek to represent Counties Manukau region at the New Zealand Tournament. Mr Morunga is a New Zealand representative and obviously highly skilled in the game. He would have expected to have been participating in the New Zealand National Tournament and no doubt would wish to continue with his New Zealand representative career. The fact that there was some doubt about the entry of the Counties Manukau team did not deter him from his continuing commitment to the

game of Touch with a view to participating in the New Zealand National Championships and to seek higher honours.

31. So weighing these matters, as we must, we do not consider the uncertainty about Mr Morunga's participation in the New Zealand National Tournament to provide any greater mitigation as to penalty than the factors listed above already provide to Mr Morunga.
32. For all of the mitigating factors Mr Morunga is to be given due credit and allowance made in respect of penalty. We also have regard to the fact that Mr Morunga 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.
33. Without more, it might well be that Mr Morunga'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. One of the factors that we consider will have influenced Tribunals around the world who 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 or 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 seized of the same jurisdiction, in the event of a second offence. There must be a two year ban upon a second offence.
34. It is vital in our view that Mr Morunga 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. The prospect of a two year ban for a second transgression ought to offer a very strong deterrent both to Mr Morunga and to all other athletes.
35. As we say, were this to be the complete factual context in the light of which Mr Morunga'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 here such as should warrant in this particular case a departure from that course. We have reached the conclusion that there are indeed a number of aggravating circumstances in this case, justifying a more severe penalty for Mr Morunga than even the most severely and strongly expressed warning and reprimand. The first circumstance which we find to be an aggravating one is the fact that before the March 2005 New Zealand National Tournament, Mr Morunga 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 Morunga 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.

36. 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.
37. A further aggravating circumstance in Mr Morunga's case arises out of previous doping and infractions by Mr Morunga's team and team members in both 2003 and 2004 which ought to have made Mr Morunga even more aware of his responsibilities in relation to the anti-doping protocols so clearly brought to his attention in the Player Participation Agreement already referred to. The evidence from Touch NZ, not disputed by Mr Morunga, was that he was a member of the Counties Manukau Men's Open Team which was stripped of its gold medals due to

two doping infractions within that team in 2004. One of those doping infractions was the use of cannabis. That was not the doping infraction which led to the team being stripped of its gold medals but it did occur at the same Championships and involved another player in Mr Morunga's team. Mr Morunga told us during the hearing that he and his team members were "gutted" that the team had been stripped of its medals by reason of the very serious doping infraction in addition to the cannabis offence. He acknowledged however that the cannabis offence had occurred and that he knew the use of cannabis was banned.

38. Added to this circumstance relating to the 2004 Championships we also had drawn to our attention by Touch NZ a decision of the disciplinary committee of Touch NZ issued in early 2004 in respect of one of Mr Morunga's team mates who had tested positive for cannabis during the Touch New Zealand Nationals at Ongley Park Palmerston North on 6 March 2004. The athlete on that occasion was severely reprimanded. In the light of that athlete's knowledge of a doping infraction the previous year when a member of the same team had committed a doping offence resulting in both the athlete concerned being declared ineligible and his team being disqualified from its medal winning status, the athlete before the disciplinary tribunal was severely reprimanded and a period of ineligibility/suspension was imposed - from 1 November 2004 to 30 November 2004.
39. So the position in this case is that Mr Morunga over the last two years as a member of the Counties Manukau Men's Open Touch Team was well aware of the likely consequences of breaching the Player Participation Agreement and using a substance which was on the applicable banned list. Notwithstanding the experience about which Mr Morunga told us he knew relating to his team mate in the Counties Manukau Open Team, in 2004 and further notwithstanding the fact that Mr Morunga was a member of the Counties Manukau Men's Open Team which was stripped of its gold medals due to two doping infractions in 2004, he was apparently prepared to use cannabis at a time when he knew full well its use was banned and when he was still participating fully in the sport with a view to competing at the New Zealand Touch National Championships.
40. We say immediately that Mr Morunga can not be penalised because others committed offences at earlier times. The penalty applicable to his

case must be one which is exactly that – applicable to his case. But he does not come before the Tribunal able to say he did not know or think about the consequences of his actions. It is the case here where, in addition to the Player Participation Agreement, Mr Morunga, we are satisfied, knew full well what had happened to others who had elected for whatever reason to use banned substances close to or at the time of the New Zealand National Championships for which they had tested positive and from which both they, and at least on one occasion Mr Morunga's whole team, suffered. We consider it to be a further aggravating circumstance therefore that Mr Morunga was apparently prepared to have no regard to these factors.

41. We have come to the conclusion that a period of ineligibility or suspension must be imposed on Mr Morunga. 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.
42. The representative "season" for Touch however starts earlier, we were told by Mr Battrick. We were told that Mr Morunga as a New Zealand representative was certainly regarded as a prospective New Zealand team member for an International Tournament in October this year. This Tournament is scheduled to take place before the domestic season, proper, starts in New Zealand. We would be concerned if notwithstanding Mr Morunga's positive test for cannabis, his consequential breach of the Player Participation Agreement both in the knowledge of what had occurred previously to his team members and his team as a result of the use of banned substances, Mr Morunga would nevertheless be considered for representation of New Zealand at the International Tournament in October of this year.
43. We can understand why Touch NZ may well want someone of Mr Morunga's skills to be available for the national team but this can not be a factor which weighs with us. Given the circumstances, we proceed to determine what period of suspension or ineligibility is appropriate to this case. We have set out the factors which mitigate in his favour. We have also set out what those factors which we consider to be aggravating circumstances.
44. We have reached a conclusion that Mr Morunga should be suspended from all participation in the sport of Touch for a period of 2 calendar

months beginning 1 October 2005 and ending 30 November 2005 in addition to:

- A severe warning; and
- A strong reprimand

45. Mr Morunga 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 two calendar months beginning 1 October 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