

INTERNATIONAL RUGBY BOARD

IN THE MATTER of the Regulations
Relating to the Game

A N D

IN THE MATTER of an alleged anti doping
rule violation by
TALIGATULI MOALA
contrary to IRB
Regulation 21

BEFORE A BOARD JUDICIAL COMMITTEE APPOINTED PURSUANT TO REGULATION 21.20 AND 21.21 CONSISTING OF

Judicial Committee

Mr Tim Gresson (New Zealand, Chairman)
Mr Gregor Nicholson (Scotland)
Dr Ismail Jakoet (South Africa)

Appearances and Attendances

For the Board

Susan Ahern (Counsel for the International Rugby Board)
Tim Ricketts (Anti-Doping Manager)

For the Samoan Rugby Union

Peter Schuster (Chief Executive Officer)
Dr Ben Matalavea (Manu Samoa Physician) (27 October 2008)
Matthew Vaea (SRU High Performance Rugby Services Manager)

The Player

Taligatuli Moala
Leilani Tuala-Warren (Counsel for the Player)

In Attendance

Evile Telea (Player)
Ryan Schuster (Team Manager) (30 October 2008)
Fepulaei Patu (Head Coach) (30 October 2008)

Hearing

18 September 2008 and 22, 27 and 30 October 2008 (BST)

DECISION OF THE BOARD JUDICIAL COMMITTEE

1. Following the final match played on 23rd May 2008 between Upolu Samoa and Tautai Tonga in the IRB Pacific Rugby Cup Tournament 2008 Taligatuli Moala ("the player") during in-competition testing, provided a urine sample which subsequently tested positive for the substance Salbutamol.
2. Salbutamol is classified under S.3 of the World Anti-Doping Agency's (WADA) 2008 List of Prohibited Substances which is incorporated in the IRB Regulation 21 (refer Schedule 2). Salbutamol is from the Beta-2 agonist class of drug. It is well known it is prohibited because of its abuse as a stimulant and as an anabolic agent at very high doses, which could enhance performance and endanger the health of the player.
3. Section 3 provides that as an exception Salbutamol is not prohibited when administered by inhalation, is taken pursuant to a Therapeutic Use Exemption and the concentration level is less than 1000 ng/ml. Again it is well known that the exception ensures asthma sufferers can take Salbutamol as a medication. In this case, it was common ground the exception did not apply because the Salbutamol was taken orally by the player, he did not have a therapeutic use exemption and his "A" sample subsequently tested positive at a concentration level of 4129 ng/ml. Moreover, there was no suggestion the player suffered from asthma.
4. Following receipt of the analysis of the A sample and after preliminary review conducted in accordance with IRB Regulation 21.20.1 (which confirmed that an anti-doping violation may have been committed), the player was provisionally suspended on 7th July 2008.
5. By letter dated 21st July 2008, the player advised the IRB that he did not wish to have his "B" sample analysed and that he wished to exercise his right to a hearing before the Board Judicial Committee ("BJC").
6. The hearing was convened by way of telephone conferences on 18th September and 22nd, 27th and 30th October 2008, following which counsel for the player and the IRB were permitted to file supplementary material, including submissions.

7. At the hearing, the evidence included sworn affidavits¹ and oral evidence. Some of the witnesses were examined by Mrs Tuala-Warren, cross-examined by Mrs Ahern, questioned by members of the BJC and re-examined by Mrs Tuala-Warren. In addition, letters in support² were produced by Mrs Tuala-Warren to the BJC. Notwithstanding the volume of evidence adduced, as in the recent case IRB v Salanoa³ the BJC consider for reasons which will become apparent, it is only necessary to refer to factual matters which are relevant to the sanction issues in this case, namely whether the player in stating he had mistakenly taken orally in total four Salbutamol tablets during the evening and morning prior to the afternoon match could establish how the prohibited substance entered his system and if so, because of exceptional circumstances there was an absence of significant fault or negligence on his part.
8. In reaching its decision, the BJC records it was assisted by the written submissions by counsel for the player. For the record the BJC did not require submissions in reply from counsel for the IRB.

Factual Background

9. Essentially, the player's account was as follows.
10. He is aged 28 years. He represented Upolu Samoa in the IRB Pacific Rugby Club ("PRC") 2007 and 2008 Tournaments. He was selected to play for Manu Samoa in 2008. Since 2007, he has also been a member of the SRU High Performance Scholarship Scheme.
11. During training on the Monday before the final match scheduled to be played on the 23rd May 2008 the player sustained a hamstring injury. Thereafter, he was unable to train. He received treatment which included massage, acupuncture and medication (Panadol and Brufen) given to him by the Team Physiotherapist, Megan Lupe. He stated that following a fitness test on 22nd May because the pain was "*unbearable*" he initially asked the Team

¹ Sworn affidavits by the player, Evile Telea and Ryan Schuster were produced

² Counsel produced letters in support from Fepuleai Patu (Upolu Samoa 2008 Head Coach), Papalitele Fatialofa (Upolu Samoa Forwards Coach), Ryan Schuster (Upolu Samoa Team Manager), Megan Lupe (Manu Samoa Physiotherapist), Sina Retzlaff-Lima (Player Representative)

³ IRB v Salanoa, decision dated 21 October 2008.

Physiotherapist and then, the Team Manager for Voltaren. He was “*desperate*” for pain relief. Because each of the team officials indicated they had run out of Voltaren the Manager referred the player to Mr Evile Telea, a qualified pharmacist and player in the Upolo Samoa team. The player stated that the Team Management (Physiotherapist, Manager and Coach) were very anxious for him to play in the final match of the Tournament.

12. Thereafter, the player approached his team mate. Because Mr Telea was in the shower he advised the player to look in his bag which contained five medications, namely Amoxil, Brufen, Panadol, Voltaren and Salbutamol. The Voltaren and Salbutamol tablets were not labelled. Mr Telea stated the Salbutamol tablets were orange in colour and the Voltaren was “almost orange” and had a line in the middle. Mr Telea provided no instruction as to the exact tablets which should be taken and Mr Telea accepted the player would have had no idea how to differentiate between the two types of tablets. Without checking, the player then took four tablets. He ingested two that evening and two the following morning. He was “100% sure” they were Voltaren tablets. However, he stated that in hindsight, given the positive test result, he must have ingested Salbutamol tablets by mistake.
13. After taking the tablets he variously stated there was a “*slight*”, subsequently modified to a “50%” improvement to the level of pain. When specifically questioned in relation to the effects of the Salbutamol, the player stated he experienced no symptoms. As he said, “*he did not feel funny at all*”. The player played in the final for approximately 50 minutes when because of his hamstring injury he had to be replaced.
14. The player acknowledged that in 2007 and 2008 he had signed player consent forms thereby agreeing “*inter alia*” to comply with the IRB Anti-Doping Regulations. However, he believed the primary purpose of drug testing was for substances such as marijuana and cocaine. He confirmed that he attended a workshop held in November 2006 on anti-doping awareness. The BJC was provided with a copy of the power-point presentation at that workshop. It comprehensively summarised the relevant features of the IRB anti-doping programme including specific references to “*asthma medication (inhalers only)*”, the obligations on players and the

principle of strict liability including a statement ("*ignorance is no excuse*"). The BJC was told the presentation was translated into Samoan.

15. The BJC also received evidence from Messrs Telea, Ryan Schuster and Patu. In general terms their evidence related to factual matters that had been mentioned by the player. Some of this evidence will be discussed in more detail later.

Anti-Doping Rule Violation

16. The IRB alleges that the player committed an anti-doping rule violation contrary to Regulation 21.2.1(a) which provides it is each player's personal duty to ensure that no Prohibited Substances enter his body. Players are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Sample. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Player's part be demonstrated in order to establish an anti-doping violation under Regulation 21.2.1.
17. Pursuant to Regulation 21.3.1 the Board has the burden of establishing an anti-doping rule violation to the comfortable satisfaction of the BJC.
18. The player accepts, and does not in any way challenge, the analytical findings of the laboratory. Accordingly, the BJC finds that the Board has established to the required standard the anti-doping rule violation; that is the presence of the prohibited substance (Salbutamol) in the player's bodily sample.

Sanction - Principles

19. In relation to sanction, the player, several of his witnesses in support and his counsel, made pleas for a reduction in the mandatory period of ineligibility on the basis that the Salbutamol was taken honestly, but mistakenly, for medical reasons. Essentially, the BJC was requested to not impose the mandatory sanction of two years ineligibility but a reduced sanction of ineligibility.
20. As both counsel acknowledged in imposing the appropriate sanction the BJC is required to apply the appropriate provisions of Regulation 21 (which are based on the World Anti Doping Code). In this regard the twin principles of personal responsibility and strict liability are at the heart of the Regulations.

21. Regulation 21.6 which addresses the principle of personal responsibility provides:

"21.6.1 It is each Player's responsibility to ensure that no Prohibited Substance is found to be present in his body and that Prohibited Methods are not used. It is also the personal responsibility of each Player to ensure that he does not commit any other anti-doping violation.

21.6.2 It is the sole responsibility of each Player and Person to acquaint himself with all of the provisions of these Anti-Doping Regulations including the Guidelines. It is also each Player's sole responsibility to notify Player Support Personnel, including, but not limited to, their doctors of their obligations not to use Prohibited Substances and Prohibited Methods and to ensure that any medical treatment received by them does not violate any of the provisions of these Regulations."

22. These principles have been discussed in a number of decisions. In the case of ITF v Beck⁴ the Tribunal emphasised:

"It is a fundamental principle of the WADA Code that this is a strict liability offence for which no intent on the part of the player needs to be proved. This is an essential principle of the anti-doping regime, necessary to make the controls effective ..."

23. In relation to the principle of strict liability, the sanction for the presence of a prohibited substance including Salbutamol, is a mandatory sanction of two years for a first offence (Regulation 21.22.1). However, the mandatory sanction is subject to the player establishing that there were exceptional circumstances which warranted the period of ineligibility either being eliminated or reduced. Regulation 21.22.4 provides:

"(a) If the Player establishes in an individual case involving an anti-doping rule violation under Regulation 21.2.1 (presence of Prohibited Substance or its Metabolites or Markers) or Use of a Prohibited

⁴ 13 February 2006 at para.7 – see the ITF website at http://www.itftennis.com/shared/media/library/pdf/original/IO_18801_original.pdf

Substance or Prohibited Method under Regulation 21.2.2 that he bears No Fault or Negligence for the violation, the otherwise applicable period of ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in a Player's specimen in violation of Regulation 21.2.1 (presence of a Prohibited Substance), the Player must also establish how the Prohibited Substance entered his system in order to have the period of ineligibility eliminated. In the event this Regulation is applied and the period of ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of ineligibility for multiple violations under Regulation 21.22.1, 21.22.2 and 21.22.5.

(b) This Regulation 21.22.4 applies only to anti-doping rule violations involving Use of a Prohibited Substance or Prohibited Method under Regulation 21.2.2, failing to submit to Sample collection under Regulation 21.2.3, or administration of a Prohibited Substance or Prohibited Method under Regulation 21.2.8. If a Player or Person establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of ineligibility may be reduced, but the reduced period of ineligibility may not be less than one-half of the minimum period of ineligibility otherwise applicable. If the otherwise applicable period of ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in a Player's Specimen in violation of Regulation 21.2.1 (presence of Prohibited Substance), the Player must also establish how the Prohibited substance entered his or her system in order to have the period of ineligibility reduced.

24. Thus, under paragraph (a), if a player can establish that he "bears no fault or negligence for the violation" the period of ineligibility can be eliminated. Under paragraph (b) where there is no significant fault or negligence on the part of the player then the period of ineligibility may be reduced to a period of not less than one half of the minimum period of ineligibility. The standard of proof required shall be on a balance of probabilities (refer Regulation 21.3.1).

25. Both these provisions require the player to prove (again on a balance of probabilities (Regulation 21.3.1)) how the prohibited substance entered his system before consideration of the fault or negligence issues.
26. As mentioned, counsel for the player did not submit that this was a case involving no fault or negligence, but, because the Salbutamol tablets were mistakenly ingested this was a case of no significant fault or negligence.
27. The term "no significant fault or negligence" is defined in Regulation 21 as meaning:

*"The Player's establishing that his fault or negligence, when viewed in the totality of the circumstance and taking into account the criteria for No Fault or Negligence, was not significant in relationship to an anti-doping rule violation."
(refer A)*

28. A footnote to the corresponding provision of the WADA Code⁵ makes it clear that only in truly exceptional cases and not in the vast majority of cases will these provisions operate to eliminate or reduce a sanction. This was emphasised in the case of International Tennis Federation and Roy Mariano Hood (8 February 2006). The independent Anti-Doping Tribunal stated at paragraph 18:

"No fault or negligence requires the player to show the utmost caution, that is that he had taken all the necessary precautions within

⁵ The commentary to Article 10.5 of the WADA Code provides:

To illustrate the operation of Article 10.5, an example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances:

- (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination);*
- (b) the administration of a prohibited substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any prohibited substance); and*
- (c) sabotage of the Athlete's food or drink by a spouse, coach or other person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) if the Athlete clearly established that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements)."*

his power to ensure that a doping offence could not be committed. It is not a standard of negligence, in the sense of requiring only reasonable care to have been taken. On the other hand the standard of the paradigm must not be set at such a level that it is practically unattainable or unrealistic. If the player fails to meet that very high standard he may be regarded as having borne some fault, but it may not be "significant". That word in its context connotes a lack of serious or substantial moral fault or blameworthiness, so that the rigorous application of these very strict anti-doping rules is tempered in the case of an excusable and understandable failure to have foreseen or prevented the doping offence where the conduct of the player was not particularly culpable, but failed to meet the standard of utmost caution. In either case, no fault or no significant fault, the circumstances have to be truly exceptional. Again these exceptions have to be restrictively applied to prevent the principle of strict liability being eroded, so that the exception becomes the norm." (Emphasis added)

29. Reference is also made to the cases of IRB v Keyter⁶, IRB v Shimenga⁷ and IRB v Hanks⁸, where it has been held that it is only in truly exceptional cases can these provisions operate to eliminate or reduce a sanction.

Submissions

30. In her submissions, Mrs Tuala-Warren submitted that the player in all the circumstances had exercised the utmost care. She argued initially the player approached the Physiotherapist and Team Manager for Voltaren to relieve the considerable pain he was experiencing, following which he was referred to Mr Telea. She submitted that the lack of supplies by Team Management contributed to the honest mistake he made when he took four tablets from Mr Telea's unmarked bag. She submitted that for these reasons this was a

⁶ See IRB v Keyter at para.6 – see <http://www.irb.com/NR/rdonlyres/E577D70D-E8C1-4E74-9D5A-32333CB4D529/0/CASKEYTERFinalAward.pdf>.

⁷ See Shimenga (July 2005 at para.32) on the IRB website <http://www.irb.com/NR/rdonlyres/88032BAFC522-4711-BD37-F1CDE1838DDF/0/050724Shimenga.PDF>

⁸ See Hanks (April 2006 at para.37) on the IRB website <http://www.irb.com/NR/rdonlyres/AD6ED0D5-2DEA-44D8-A92E-CA2E78772AA5/0/060413GMUSAFinasterideFinalDecision.pdf>

truly exceptional case warranting a reduction in the sanction of ineligibility.

Evaluation

31. In its consideration of the issue as to how the Salbutamol entered the player's system, the BJC found the player's account less than convincing.
32. Firstly, as noted, other than stating there was pain relief (varying from slight to approximately 50%) the player stated he experienced no other symptoms after ingesting the Salbutamol tablets. The recorded Salbutamol level in his sample was 4129 ng/ml which was over three times in excess of the Adverse Analytical Finding threshold level (1000 ng/ml) prescribed by WADA. The player confirmed he was not accustomed to taking Salbutamol. The BJC finds it surprising that the player could mistakenly ingest this amount of Salbutamol and not experience adverse symptoms such as a pounding heart beat or tremors. Indeed, Mr Telea, confirmed that he would have expected the player to experience at least some symptoms.
33. Further, the BJC found it difficult to reconcile the accounts of the player on the one hand and the Team's Head Coach on the other. The player stated that following the fitness test on the Thursday evening he advised the Team Physiotherapist and Manager he was in considerable pain. On the other hand the Head Coach had no knowledge that this was the case. Essentially, the Coach stated that the player (who played in the front row) was an important member of his team and he wanted him to be fit for the match. But, there is no evidence to suggest he placed the player under any pressure to play despite being troubled by the hamstring injury. Nor, is there any suggestion of relevant information on the player's fitness being withheld by the Physiotherapist from the Head Coach who confirmed that he expected to be advised of any fitness issues in respect of his players. It appears there were no further communications, (including the player passing a fitness test on the Thursday morning) to the Head Coach on the player's fitness after Wednesday. The BJC concludes there was no need to up-date the Head Coach because essentially the player was fit to play and is of the view he has exaggerated the extent of pain he was suffering from his hamstring injury to justify why, according to him, he mistakenly took the Salbutamol.

34. There were also inherent conflicts in the player's account. For example, whilst being questioned by Mrs Ahern and members of the BJC he gave conflicting accounts as to whether of his own volition he had approached Mr Telea or was advised by the Team Manager to do so.
35. For these reasons, together with his acknowledgement that because he was familiar with Voltaren he was 100% sure he ingested four Voltaren tablets, the BJC is not satisfied that the player has proved on a balance of probabilities that he honestly and mistakenly ingested the Salbutamol in the circumstances he has described.
36. Further, even if the player had discharged the burden of proof of establishing how the illegal substance was ingested, on an objective analysis of the circumstances the BJC would not have been satisfied that the player had proved there was no significant fault or negligence on his part. Allowing for the player's language difficulties in his understanding of anti-doping issues, in helping himself to unlabelled medication from Mr Telea's bag which contained five different types of medication, including other unlabelled medication, and then not reverting to Mr Telea to check he had taken the correct medication, in the BJC's view amounted to very casual conduct on his part falling well short of the threshold requirement of "*utmost caution*", that is, he had taken all the necessary precautions within his power to ensure a doping offence could not be committed.
37. In discussing the principle of personal responsibility, in the case of Salanoa⁹ the BJC stated at paragraph 37:
- "... the personal responsibility of players (is) to ensure at all times they do not take any prohibited substance. Indeed, it is their duty to ensure this does not occur (refer Regulation 21.2.1(1)). Players cannot absolve themselves from their duty of taking personal responsibility for their actions by attempting to pass their responsibilities onto others for their anti-doping violations."*
38. Recently, the SRU has issued a press release headed "*Anti-Doping: High Priority on Samoa Rugby Calendar*". The article refers to the SRU's anti-

⁹ IRB v Salanoa, decision dated 21 October 2008

doping programme applying not only to elite players but players at all levels. In relation to the personal responsibility of players it contains the following entirely appropriate comments from Doctor Matalavea (a Physician who has worked intermittently with the SRU over a period of twelve years):

“Matalavea strongly advocates for players and management to give Anti-doping the same focus and attention as they do to honing their rugby talent and skills. “The players need to apply the same care and attention to details as they would to their kicking skills, scrummaging techniques, shining their boots, cleaning their sprigs – everything core to being an elite player.””

39. Irrespective of whether or not the player intended to take the banned substance because Regulation 21 and the WADA Code impose strict liability regimes, intent on the part of the player does not need to be established. The issue is whether on an objective analysis the player has discharged the burden of establishing that there was no significant fault or negligence in carrying out his personal duty of ensuring he did ingest a banned substance.
40. It will only be in truly exceptional cases when on an objective assessment of all the circumstances it can be concluded the player has exercised the utmost caution, that a player will have proved there was no significant fault or negligence on his part. Taking into account the totality of the circumstances of this case the BJC would not have been satisfied that the threshold of establishing no significant fault or negligence has been reached.
41. It follows that because the player has not proved this was a case of mistaken ingestion and an absence of significant fault or negligence on his part, the BJC is not empowered to impose a sanction which is less than the mandatory sanction of a period of ineligibility of two years.

Decision

42. For the reasons outlined, the sanction imposed for this anti-doping rule violation is a period of ineligibility of two years commencing from 7th July 2008 (the date upon which the player's provisional suspension commenced) and concluding (but not inclusive of) 7th July 2010.

Costs

43. The BJC provisionally considers that there should be no orders for costs but if either of the parties wishes us to exercise our discretion in relation to costs pursuant to Regulation 21.21.9, written submissions should be provided to the BJC via Mr Ricketts by 17.00 Dublin time on 30th November 2008, with any responding written submissions to be provided no later than 17.00 Dublin time on 12th December 2008.

Review

44. This decision is final, subject to referral to a Post Hearing Review Body (Regulation 21.24.1) and an appeal to the Court of Arbitration for Sport (Regulation 21.27). In this regard attention is also directed to Regulation 21.24.2 which sets out the process for referral to a Post Hearing Review Body, including the time limit within which the process must be initiated.

17 November 2008

"T M Gresson"

Tim Gresson (for and on behalf of the Board Judicial Committee)
Dr Ismail Jakoet
Gregor Nicholson