BEFORE THE SPORTS DISPUTE TRIBUNAL OF NEW ZEALAND

SDT/09/04

BETWEEN	**NEW ZEALAND RUGBY LEAGUE**
	Applicant
A N D	**LAWRENCE ERIHE**
	Respondent

DECISION OF NEW ZEALAND SPORTS DISPUTES TRIBUNAL

4 April 2005

Nicholas Davidson, Q.C.
(Deputy Chair)
Dr. Farah Palmer
Timothy Castle

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Introduction

1. This Decision has been delayed while the Tribunal reflected on significant legal and factual issues, relevant to this and other cases. The factual issues closed in February 2005.

2. The New Zealand Sports Drug Agency ("*the Agency*") advised Lawrence Erihe of a determination that he had committed a doping infraction. The presence of a banned substance, namely Ephedrine, had been confirmed in a sample reported by the Australian Government National Measurement Institute dated 26 August 2004. The sample collection and analysis procedures were carried out as required by the Sports Drug (Urine Testing) Regulations 1994.

3. Pursuant to NZRL Anti-Doping By-Law Rule 19 the New Zealand Rugby League Inc ("*NZRL*") advised the Tribunal of a reported doping violation by Mr Erihe, by letter of 3 September 2004.

4. Ephedrine is banned under the World Anti-Doping Agency ("*WADA*") Code 2004 Prohibited List under "*S1. Stimulants*", and according to the Schedule maintained pursuant to Section 6(1)(a) of the New Zealand Sports Drug Agency Act 1994.

5. Mr Erihe was suspended from participation in rugby league from 3 September 2004, pending the outcome of this hearing. Sanctions sought by NZRL were those under rules 11-15 of the NZRL Anti-Doping By-Laws (see below).

6. For the reasons which follow, the determination of this Tribunal is that Mr Erihe shall be suspended for participation in the game of Rugby League for a period of two years commencing 3 September 2004.

Mr Erihe's initial response

7. Mr Erihe first responded to say:

> "*I **do not admit** to the drug allegations and I cannot provide a statement of defence as the time allocation for the case has passed and due to work commitments. I give permission for the Tribunal to go ahead with the proceeding towards the case.*" (emphasis added)

The Tribunal's process

8. It seemed that Mr Erihe believed he had a defence and the Tribunal issued a Note (No. 1) dated 9 November 2004, advising Mr Erihe that he had a right of appeal to a District Court **against the determination**, and Mr Erihe should otherwise file a defence with the Tribunal. He was urged to take advice.

Teleconference – 19 November 2004

9. On 19 November 2004 a teleconference involving the Chair, Mr Bailey (for NZRL), Dr Palmer of the Tribunal, Mr Erihe, and his Team Manager (Mr Law) was arranged through the Registrar, Mr Ellis.

10. Mr Erihe did not challenge the determination as such. He said that he took prescribed medication, as military Rules require. He said that he had been cautious about taking medication and asked medical personnel to take care when prescribing. He first identified Orthoxicol as a possible source of Ephedrine.

11. The Tribunal asked for material earlier sent to the Agency, and information about any other substances which Mr Erihe may have used, such as body building or dietary supplements.

The Tribunal's enquiries about Ephedrine, and the possible source

12. Because Mr Erihe first indicated that Orthoxicol was the possible source of Ephedrine, the Tribunal made inquiries of the Agency. Ephedrine has legitimate use as a prescription medicine, and is a "*specified substance*" under the WADA Code, which substances are recognised as warranting more lenient sanction in some circumstances (see below).

13. The Agency advised the Tribunal that Orthoxicol contained **pseudo-ephedrine**, now permitted for use in sport, but not **Ephedrine** if purchased in New Zealand. The Agency could not speak for Orthoxicol purchased overseas, but considered that if it contained Ephedrine it would state so on the label. The chemical structure of the two drugs is slightly different and the laboratory had been asked "*to double check the finding and they have confirmed that it was definitely Ephedrine*". If someone tests positive for Ephedrine it will not be derived from Orthoxicol. This advice was copied to Mr Erihe for comment.

14. The Agency also advised that there are no **medications** available in New Zealand which contain Ephedrine – only **supplements**. This advice was also made available to Mr Erihe for comment.

Further attempt to identify source of Ephedrine if Orthoxicol not the source

15. A Tribunal Note of 25 November 2004 recorded that Orthoxicol (purchased in New Zealand) would not produce a positive test for Ephedrine. Mr Erihe was asked to consider his position with his team manager, Mr Law, and his medical advisors, and was urged to get expert assistance.

16. On 26 November 2004, Mr Law (Mr Erihe's coach) sent a letter from the doctor who treated Mr Erihe, a letter from the Practice Nurse, and a

product description from Horleys Protein Foods for Horleys "*Replace*" Powder.

17. Mr Law said that he had obtained copies of all Agency guides, and distributed those to the New Zealand Defence Force Sports Council, and to local medical facilities, along with individual players in the team. E-mails had been sent to all defence and army sports code representatives regarding the risks of using drugs in sport, and advising that an athlete may be tested at any time.

18. Mr Law said none of these cautions would alter or influence medication prescribed for therapeutic reasons. A soldier must take that prescribed, or could be charged with offences under the Armed Forces Act or under the Armed Forces Manual of Discipline. "*The end result in this case is that the soldier is damned if he does and damned if he does not* [take the prescribed medicine]."

19. Mr Law endorsed Mr Erihe as striving hard to achieve his goals including participation in rugby league. He is a bombardier and shows leadership potential, sound judgment, and high moral and ethical standards. Mr Law expressed **his** opinion that Mr Erihe at no time knowingly took any performance enhancing drugs, or any drugs to screen or hide such drugs.

20. Nurse Florence Wilkey advised the Tribunal by letter of 23 November 2004 that she saw Bombardier Erihe on 20 July 2004. He displayed cold symptoms, and informed her that he had to be careful of the medication he took as he played for a rugby league team which was subject to drug testing. This was noted on his file.

21. By letter of 24 November 2004 Dr Fountain as Medical Officer advised that Mr Erihe had been prescribed 24 tablets of Orthoxicol cold and flu tablets on 20 May 2003 for a viral infection, and again on 8 September 2004 for viral symptoms.

22. Mr Law advised the Registrar by email of 29 November 2004 that he had been in contact with a defence force pharmacist, and was to see him on 30 November, then advise what Mr Erihe had been prescribed (other than Orthoxicol).

23. By letter of 30 November 2004 Mr Erihe advised the Tribunal that the only substances he had taken were cold and flu medications in the form of Orthoxicol, Otrivine (Xylometazoline), Brufen (Ibuprofen), Difflam and Broncelix. He said:

> *"I do not have a clue what Ephedrine is or how to get it. I have never knowingly taken any banned substance. My manager has sent other paperwork and it is hoped all this sees a speedy and favourable result."*

24. The Tribunal read Mr Erihe's explanation for the presence of Ephedrine given to the Agency. This recorded an ongoing medical condition, prescription of drugs, and on and off use of medications over the past year. Mr Erihe and Mr Law had spoken to army medical personnel, and were advised that pseudo ephedrine "*contains the drug Ephedrine. ...* ***Mr Erihe has at no time taken any other drugs*** [than those described above]". Pseudo-ephedrine does not contain Ephedrine on the evidence before the Tribunal.

25. The Tribunal records the advice sent on 2 December 2004 by Mr Erihe:

> *"As I said before, I have not taken anything else besides the prescribed medication from my medical treatment centre, which is noted in the documentation Mr Law has sent you.*
>
> *I wish this matter to be over and respect what ever decision the sports tribunal comes up with.*
>
> *I would like to thank the committee, Mr Bailey, Mr Law and yourself for your time and patience.*
>
> *I'll be waiting for your reply"*

26. The Tribunal was reluctant to hold a hearing by teleconference, given the indication that none of the medications, and supplements (see below), appeared to account for Ephedrine. He insisted that he had not knowingly taken Ephedrine in any form, so the Tribunal had to consider that explanation against the facts known to it.

The Hearing on 20 December 2004

27. A hearing was convened in the Wellington District Court on Monday 20 December 2004. Mr Bailey attended for NZRL, and Mr Cottier, trainer, and Mr Law appeared in support of Mr Erihe. Mr Erihe had been advised of all material held by the Tribunal.

28. Mr Steel of NZSDA was asked to attend the hearing by teleconference. He agreed, with the caveat that he is not a chemist, and that he might not be able to provide much technical chemical advice.

29. The position adopted on the papers by Mr Erihe was repeated. Under oath, and supported in his assertion by both Mr Cottier and Mr Law, Mr Erihe said he had not knowingly taken any banned substance, in particular Ephedrine. He could offer no explanation for the Ephedrine in his system, and accepted that the process undertaken by the Tribunal had not revealed the source.

30. Mr Cottier described the circumstances in which a supplement named "*Growling Dog*" was supplied to the team. Mr Bryce Wakely, employed by NZRL, but not acting in that capacity, had supplied two boxes of Growling Dog which is designed, he said, to provide some "*get up and go*". He was advised by Mr Wakely that the Auckland Warriors had used Growling Dog. It was simply a gesture on Mr Wakely's part to provide it. The supplement was drunk by Mr Erihe and most if not all members of the team. It was labelled as Growling Dog.

31. This was a "*spur of the moment*" thing so far as Mr Cottier was concerned, and he did not see any problem with its use as it came from Mr Wakely, and he knew of its use in the game. He had asked Mr Wakely if it was "*legal*" and he was told there were no "*side effects*". Mr Cottier emphasised that normally he would have checked thoroughly any supplement that was being used, but given the source, and the reassurance he received, he believed that the product was safe to use. Mr Cottier emphasised that the players are reminded to take great care about what they take, including keeping their water bottles secure. "*Horleys Replace*" had been used by the team throughout the season, usually three hours before a game.

32. Mr Law said that the two cartons of Growling Dog provided by Mr Wakely were used in their entirety. Mr Bailey said that Mr Wakely had come to him after the positive test, and mentioned that he had provided the Growling Dog supplement, and gave a bottle to Mr Bailey which remained in NZRL safe keeping. Mr Bailey said that Mr Wakely had not acted in an official NZRL capacity. However, he was aware of earlier use of Growling Dog by the Auckland Warriors, and another team. When asked if there was any difference in the composition of batches produced as Growling Dog, Mr Bailey said he did not know.

33. Mr Wakely said he obtained the two cartons from Musashi. He said it had been used since 1995, and by some teams in the Bartercard Cup. It became available to him through a colleague associated with Musashi in the Penrose distribution centre.

34. He described it as an "*energy drink*". He did not know exactly what is in it, but remembers it was given to a "*medical*" person and that it was "*cleared*". No positive tests resulted from the many people who have used Growling Dog. The other player tested in this game returned a negative test.

35. Mr Erihe said he had taken Broncelix before he left Palmerston North, and then Orthoxicol. He then took Growling Dog before the match. He was sick throughout the game, vomiting and suffering flu symptoms.

36. Mr Erihe was invited to offer any other explanation he could think of for the positive test. He said that he rarely goes out to "*pubs*", so that would not account for the test result. (The connection was not obvious).

Further enquiry contemplated by Tribunal

37. At the conclusion of the hearing, and given the information provided about Growling Dog, the Tribunal was concerned whether it could have been the source of the Ephedrine, although that appeared unlikely given the advice earlier received from the Agency, and the fact that a second player was tested, who on the evidence **may** have taken Growling Dog, and returned a negative test. The Tribunal did not place weight on this as the other player did not confirm his use of Growling Dog.

38. Given the use of Broncelix and Orthoxicol, and Growling Dog, the Tribunal considered sending the supplement sample held by Mr Bailey, provided to him by Mr Wakely, together with the medications still held by Mr Erihe, to the IOC accredited testing laboratory in Sydney with a request for comment as to whether the substances in isolation or in combination could result in an Ephedrine finding.

39. Reflecting on this course, the Tribunal noted that the Growling Dog label did not disclose Ephedrine, and it decided against making further enquiries, given the onus on Mr Erihe to account for the Ephedrine (see below). The Tribunal issued a Note (No. 3) of 21 January 2005 in which it advised Mr Erihe that any enquiries would have to be made by him, providing him time to do so, and reminding him of the onus on him to advance reasons which may allow relief from the applicable sanctions.

The further explanation

40. Mr Erihe's response, dated 26 January 2005, came as a surprise. He said that he had discussed the position with some of the 2004 team members, and could **now** recall that some members, including him;

> *"shared a drink bottle of supplement mix, The brand or origin is unknown, and the player who provided the supplement now resides in Australia and is uncontactable.*
>
> *I'm getting in contact with another player to find out whether he knows the brand or origin of the supplement.*
>
> *My apologies for not recalling this sooner, but the discussion i had with my team members has jogged my memory of that nights events."*

41. This was a completely new explanation.

42. Mr Erihe was invited to put his position more formally. He would need to send the Tribunal submissions and any other material he wished to raise, including statements from other people. Mr Erihe then responded to say:

> "*I think for all parties' sake, I will not be submitting any written statement, submissions or evidence to the Tribunal as the matter has gone on too long and I am happy for the Tribunal to make a decision regards the case".*

The reconvened Hearing by teleconference on 4 February 2005

43. The Hearing resumed on 4 February 2005. Mr Bailey, Mr Erihe, and Mr Law attended. Mr Erihe was first asked to confirm that he did not wish to make any further enquiries regarding the substances identified by him at the hearing in December, and he confirmed that he did not. There was no criticism made of the Tribunal's stance in this regard, that he should elect his course.

44. Secondly, he confirmed that he did not intend to submit any new written statement, submissions or evidence.

45. The Tribunal reminded Mr Erihe of his obligation to tell the truth, although he was not placed under oath, and he was taken through the explanations which he had offered since the hearing, as a possible source of the Ephedrine. He said that he did not personally recall the circumstances, but some team mates had reminded him that immediately before the game he had drunk from a water bottle. He could not assert that this water bottle belonged to any particular person, but based on the indication given him by his team mates, it may have belonged to someone in the team who was known to take supplements. In particular, it was suggested that that person may take a supplement known as "*Turbocharge*" or a similar name. Mr Erihe did not say he noticed anything unusual about the drink, and indicated, not that he remembered it, that his practice is to have a drink before he goes on the field. Mr Law confirmed that Mr Erihe does take fluid before he goes on the field.

46. Mr Erihe said that the person from whose bottle he may have drunk had gone to Australia and he had tried to contact him. That had been unsuccessful and he did not want to make further enquiries.

47. He was reminded that the Tribunal had sought to find an explanation to support his statement that he had not knowingly taken any prohibited substance, and that under the WADA Rules, to seek a reduction in sanction he carried the onus. He could take further time if he wished. He elected otherwise.

48. A review of the evidence, and the onus and standard of proof which lies on the Anti-Doping organisation and the athlete respectively is considered below.

New Zealand Rugby League Anti Doping By Law

49. Clauses 11-15 of the By-Law provide that every person who commits a doping violation is liable for sanction "*involving a period of ineligibility, as required by the WADA Code*" (Clause 11).

50. Clause 12 provides:

> *"In **addition** to any period of ineligibility, every person who is found to have committed a doping violation will be*
>
> *(a) Ineligible to receive direct or indirect funding or assistance from NZRL and SPARC for the complete period of ineligibility; and*
>
> *(b) Ineligible from holding any position within NZRL or being involved in any other way within NZRL for the complete period of ineligibility; and*
>
> *(c) Ineligible from using any facilities, premises, grounds or resources of NZRL for a sporting purpose for the complete period of ineligibility, except as allowed by Rules 14 and 15 and other than as a spectator or supporter"* (emphasis added)

51. Clauses 13, 14 and 15 provide for withdrawal of awards and placings etc. this being an action by NZRL, and allows participation in doping education programmes or counselling, and participation in out-of-competition testing to facilitate reinstatement after the period of ineligibility expires.

52. Clause 20 provides that the Tribunal may determine its own procedure which, as far as reasonably possible, gives effect to the "*WADA Code*". By Clause 21 the Tribunal "*will accept as a proven fact*" a positive test result determined by a test conducted by the Agency in accordance with section 16 of the Act.

53. By Clause 22 "*the Tribunal will, **in reference to the WADA code**, determine whether a doping violation took place, and if so, impose the appropriate sanction"* (emphasis added).

WADA – Introductory discussion

54. The WADA 2004 Prohibited List - International Standard (Second Edition) effective from 26 March 2004, prohibits the use, in competition, of certain stimulants as well as other substances with similar chemical structure or similar pharmacological effects. Included in that list is Ephedrine, which is prohibited when its concentration in urine is greater than 10 micrograms per millilitre. The relevant reference is S1 of the WADA Code 2004 Prohibited List.

WADA – "Prohibited Substances"

55. Article 10.2 of the Code provides that "***except for the specified substances identified in article 10.3***" (emphasis added) the period of ineligibility for a violation of Article 2.1 (presence of a **prohibited substance** or its metabolite or markers) shall be, in the case of a first violation, two years' ineligibility.

56. The proviso is that the athlete "*shall have the opportunity in each case, **before a period of ineligibility is imposed**, to establish the basis for eliminating or reducing the sanction as provided in Article 10.5*". (emphasis added)

57. Article 10.5 is directed to "*Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances*". Article 10.5 is in two parts.

Article 10.5.1 – "no fault or negligence"

58. Article 10.5.1 allows for "*no fault or negligence*", so that if the athlete can establish that he or she bears **no fault or negligence**, the applicable period of ineligibility shall be **eliminated**. However, to take advantage of this the athlete "*must also establish **how** the Prohibited Substance*

entered his or her system in order to have the period of Ineligibility eliminated". (emphasis added)

Article 10.5.2 – "no *significant* fault or negligence"

59. Article 10.5.2 provides another standard, "***no significant fault or negligence***" and relates to the same Anti-Doping Rule violations as 10.5.1 (and other Articles). The period of ineligibility may be reduced to "*not…less than one half of the minimum period of ineligibility otherwise applicable*". Again, the athlete must establish **how** the prohibited substance entered his or her system in order to have the period of ineligibility reduced.

60. The Commentary to the WADA Code Article 10.5.2 (which is an aid to interpretation) provides that it has been recognised that there must be some opportunity in the course of the hearing process to consider the "*unique facts and circumstances of each particular case in imposing sanctions*". However: "*Article 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases*".

61. The commentary says that "*no fault or negligence*" could be found if an athlete could prove that "*despite all due care, he or she was sabotaged by a competitor*", but that sanction should not be completely eliminated under this heading of "*no fault or negligence*" if the positive test came from a mislabelled or contaminated vitamin or nutritional supplement, because athletes are responsible for what they ingest under Article 2.1.1., and have been warned against the possibility of supplement contamination.

62. Another example is given whereby a prohibited substance is administered by a personal physician or trainer without disclosure to the athlete. Because athletes are responsible for their choice of medical personnel, and for advising such personnel that they cannot be given

any prohibited substance, that is not a "*no fault or negligence*" situation.

63. The Commentary says that sabotage of an athlete's food or drink by a spouse, coach or other person within the athlete's group of associates would not constitute "*no fault or negligence*", because athletes are responsible for what they ingest and the conduct of those persons to whom they allow access to their food and drink.

64. These examples suggest a reduced sanction could result, based on "*no* ***significant*** *fault or negligence*" (emphasis added), depending on the facts. These examples cannot bind Tribunals but are an aid to application of the Code.

65. The commentary says a reduction in sanction may be appropriate;

> *"if the Athlete clearly establishes 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."*

66. It is clear from the commentary, and Article 2.1.1., that WADA contemplates an eye firmly fixed on the degree of responsibility cast on the athlete, for substances ingested, the persons they engage to assist them, and even the activities of people within their close circle. Article 2.1.1. provides

> *"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence, or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.1.".*

67. This is thus an application of the strict liability principle. The commentary to Article 2.1.1. records that:

> *"The strict liability rule …* [allowing the] … *possibility that the sanctions may be modified on specified criteria, provides a reasonable balance between effective anti-doping enforcement for the benefit of all "clean" Athletes and fairness in the exceptional circumstances where a Prohibited Substance entered an Athlete's system through no fault or negligence on the Athlete's part".*

WADA – "Specified substances" – including Ephedrine

68. Article 10.2 immediately identifies that the period of ineligibility for a violation of Articles 2.1., 2.2 (use or attempted use) and 2.6 do not apply in the case of "*specified substances*".

69. Ephedrine is a "*specified substance*" under Article 10.3, which provides:

> *"Where an Athlete can establish that* ***the*** *Use of* ***such*** *a specified substance* ***was not intended to enhance sport performance****, the period of Ineligibility found in Article 10.2* ***shall be replaced*** *with the following:*
>
> ***First violation****: at a minimum, a warning and reprimand, and no period of Ineligibility for future events, and at a maximum one (1) year's Ineligibility.*
>
> *Second violation: two (2) years' ineligibility*
>
> *Third violation: lifetime Ineligibility.*
>
> *However, the Athlete or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing (in the case of a second or third violation) this sanction as provided in Article 10.5." (emphasis added)*

70. The WADA website records:

> *"Furthermore, the Code also addresses violations involving certain specified substances included in the 2004 Prohibited List (for ex.* ***ephedrine****, cannabinoids, etc).* ***These are substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents****. Where an athlete can establish, again according to the relevant standard of proof, that the use of such a specified substance was not intended to enhance sport performance, the period of*

> *ineligibility will be reduced within the boundaries defined in the Code." (emphasis added).*

71. "*Use*" is defined under the Code as "*the application, ingestion, injection or consumption by any means whatsoever of any Prohibited Substance*".

72. If Article 10.3 applies, the period of two years' ineligibility **shall be replaced** in the case of a first violation with "*at a minimum, a warning or reprimand and no period of ineligibility for future events, and at a maximum, one (1) year's ineligibility*".

The application of Article 10.3

73. To qualify for a lesser sanction Mr Erihe has to come under Article 10.3. The Tribunal has closely considered three elements of this Article.

Issue 1 - The relevance of the proviso to Article 10.3

74. For any Anti-Doping violation involving a prohibited substance, athletes have the opportunity to establish the basis to eliminate or reduce the periods of ineligibility under Article 10.5, as discussed above. In respect of **specified substances** (such as Ephedrine) the Tribunal has concluded that the provisions of Article 10.5 have no direct application, as the proviso makes it quite clear that those provisions are relevant only "*in the case of a second or third violation*". The Commentary is quite clear when it says "*Reduction of a sanction under Article 10.5.2 applies only to a second or third violation because the sanction for a first violation already builds in sufficient discretion to allow consideration of the Person's degree of fault*". This does not mean the Tribunal will not bring to account similar considerations to those applicable under Article 10.5, rather that the Article will not be applied in its strict terms.

Issue 2 - Whether Article 10.3 is applicable only in circumstances contemplated in the first part of the Article

75. This issue arises because of the particular circumstances of the case. The structure of Article 10.3 is based on there being certain "*specified substances*" which "*because of their general availability in medicinal products*" may be treated differently. The Article contemplates the result of the inadvertent use of a cold medicine containing a prohibited stimulant.

76. In the usual course, the Tribunal would expect that in order to successfully establish the lack of an intention to enhance sport performance by the use of a specified substance, the athlete would identify a credible reason for its presence.

77. For a significant part of the process Mr Erihe pointed to his use of medications, which were all considered, but do not provide an explanation for the presence of Ephedrine. The Tribunal has concluded that even though there is no connection between the presence of Ephedrine and Mr Erihe's use of medication, Article 10.3 **may** still apply because it would take more specific reference than wording such as "*general availability in medicinal products*" to insist on a connection between such, and (in this case) the presence of Ephedrine. The Article could easily have said there **must** be that connection, but it does not do so. Interpretation of provisions which carry such sanctions must be in favour of the athlete where there is doubt.

Issue 3 - Whether (in this case) Mr Erihe can establish that the use of Ephedrine was not intended to enhance sport performance.

78. It follows that Article 10.3 is available to Mr Erihe for possible application, even though the type of circumstance which is contemplated (e.g. accidental violation through medicinal product) is not established. If it were, the question of whether he intended to

enhance his performance would be more directly addressed. This question becomes the key issue.

79. Mr Erihe says he did not seek to enhance his performance, and pointed to the dietary supplements or medicinal products used by him, and the possibility of an "*unknown substance*" (possibly a "*supplement mix*") he may have taken when he drank from a water container, as suggested by his team mates, from whom no evidence was produced.

80. Mr Erihe was advised by the Tribunal that in order to reduce the stipulated two year suspension for a first violation, he must establish that he did not intend to enhance his sports performance **in the circumstances** in which he took a substance containing Ephedrine.

81. Article 3 of the Code provides the following:

> *"The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.* ***Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability****."* (emphasis added)

82. Given the opportunity for leniency in the case of violations involving specified substances, it makes it that much less likely that a competitor would want to conceal the source. If it were an unintentional violation then establishing the source (e.g. cough medicine) would go a long way to show there was no intention to enhance performance. In this case Mr Erihe is left unable to provide a sufficient explanation as to where the Ephedrine came from. The Tribunal was taken down a track of

medications, supplements, and then a late and vague reference to an unknown substance.

83. The possibility that he drank from a bottle which may have contained a supplement, which may have contained Ephedrine, was speculative in the extreme. He had the opportunity to pursue this possible explanation, but chose not to do so. He seemed to consider there was a reputational issue affecting another player, and for that reason the Tribunal does not refer to the name of the player whose water bottle he suggests may have been used. It must be noted that **he** does not recall drinking from a bottle, but his **team mates** have told him that he may have or did. But even if that were established, it by no means forms the link between that act, and the finding of Ephedrine.

84. The critical issue is thus whether Mr Erihe can take advantage of the more lenient sanctions under Article 10.3 by showing, on the balance of probabilities, that his "*Use*" (derived from ingestion of Ephedrine) was not intended to enhance sport performance.

85. The Tribunal had brought to account all of the following matters, in no order of importance, in reaching its view in this regard.

- The onus is on Mr Erihe, and the standard of proof is the balance of probabilities. This is less than the "*comfortable satisfaction*" standard of proof which rests upon those who seek to establish a violation. Mr Erihe has to establish that it is "*more probable than not*", that he did not intend to enhance sport performance.

- When an athlete is tested, it is reasonable to assume that he or she is alert to the substances taken which may give rise to a positive test should that result. Even if there has been no appreciation of possible violation, it is likely there would be some immediate reference to any ingestion which could influence the result of a test.

- There is evidence, confirmed by medical personnel, that Mr Erihe asked for caution in prescription of medication.

- Mr Erihe is well thought of by those who supported him in this process.

- The first explanation, that the Ephedrine came from or may have come from the medications prescribed was not borne out.

- Mr Erihe at the hearing said he could not account for the Ephedrine, but referred to the use of supplements, details of which were provided at the hearing, and this was followed up to the extent described above. The supplements referred to did not account for the Ephedrine.

- At a late stage, after the formal hearing, Mr Erihe raised another possible explanation, discussed fully above, which was so vague and uncertain that the Tribunal could not conclude that he did take a substance from a container belonging to some unnamed person. Mr Erihe chose not to follow this up when he was given the clear opportunity to do so.

- The Tribunal had the opportunity to see and hear Mr Erihe in Wellington, and to hear him in teleconference. He was adamant that he does not know the source of the Ephedrine, but gave evidence that he did not intend to enhance sport performance, by whatever means the substance entered his system.

86. The Tribunal has given all this the most careful consideration. It is very difficult to consider the proposition that there was no intention to enhance sport performance when Mr Erihe produced no credible evidence of how the substance came to be in his system. The Tribunal does not preclude a finding that the absence of any credible explanation for the presence of the specified substance may itself be adequately

explained, although in normal circumstances a credible explanation will be available to an athlete required to discharge the onus under Article 10.3.

87. In the end, the Tribunal has determined this issue against the obligation held by Mr Erihe to establish that he did not intend to enhance his sport performance. He has not discharged that onus. On the balance of probabilities the Tribunal is not satisfied with the explanation he has provided. The possible explanations he offered did not bear fruit. He raised a very belated possible explanation, which he chose to take no further. His approach overall did not reflect that of someone carrying the onus in a way the Code provides, but in the end it is the assembly of considerations set out above which founds the Tribunal's decision.

Ruling

88. Because the WADA Code stipulates two years' ineligibility for a first offence save for circumstances which allow a reduced period, Mr Erihe is suspended for participation in the game of rugby league for a period of two years, commencing from the time of his suspension on 3 September 2004.

Further Comment – Supplements

89. Supplements did not feature in the violation. However, the way supplements were used here does call for comment.

90. Under the heading "*What else should athletes know about supplements?"* the WADA website sets out the following:

> "*Most supplement manufacturers make claims about their products that are not backed by valid scientific research and they rarely advise the consumer about potential adverse effects. The supplement industry is a money-making venture and athletes should get proper help to distinguish marketing strategies from reality. If*

> *athletes make the decision to use a supplement they are advised to use products from companies who have developed a good reputation and use good manufacturing practices, such as major multinational pharmaceutical companies. Athletes can contact the manufacturers for more information or preferably should ask their physician to do this on their behalf. As general warnings:*
>
> - *Supplements which advertise "muscle building" or "fat burning" capabilities are the most likely to contain a prohibited substances,* [sic] *either an anabolic agent or a stimulant.*
> - *The terms "herbal" and "natural" do not necessarily mean that the product is "safe".*
> - *Examples of prohibited substances that may be in dietary supplements are:*
>   - *"DHEA"*
>   - *androstenedione/diol (and variations including "19" and "nor")*
>   - *ma huang*◦
>   - *ephedrine*
>   - *amphetamine(s) (also contained in "street drugs" such as ecstasy)*
> - *Pure vitamins and minerals are not prohibited on their own but athletes are advised to use reputable brands and avoid those combined with other substances.*
> - *Black market or unlabelled products are a particular concern; athletes should not use anything which has an unknown source even if it comes from a coach or fellow athlete*
> - *While purchasing supplements through the Internet, athletes should avoid companies which do not indicate business locations other than post office boxes or only indicate contact information which would prevent someone from locating them, such as an email address.*
>
> ***Note:*** *Even if an athlete adheres to all these warnings, there is no guarantee that taking a supplement will not result in a positive doping test."*

91. As the WADA documentation points out the terms "*herbal*" and "*natural*" do not necessarily mean that the product is "*safe*". Examples of prohibited substances which may be found in dietary supplements include Ephedrine and Ma Huang. In one of the most recent Ephedrine cases dealt with by the Court of Arbitration for Sport (22 December

2000 ***H v. International Federation of Motor Cycling***) the athlete used a product "*Thermogen*" to support his efforts in losing weight. Thermogen, according to its label, is a dietary supplement. The label suggests it can be used to support weight loss. On analysis Thermogen was found to consist mainly of caffeine and the herbal substance Ma Huang. Ma Huang is an extract of a Chinese *ephedra* plant. The active substance in Ma Huang is thus Ephedrine – a banned substance. The case is an example of an athlete who admitted that he could easily have consulted a doctor or pharmacist about the content of Thermogen instead of trusting the advice of his fitness trainer from whom he had received the substance.

92. The risks of a dietary supplement containing a banned substance can never be disregarded or discounted. The utmost care is required. Sports are required to communicate this with their athletes. NSO's must be protective of their athlete base. But athletes are responsible for any substance that may be found in their bodies. It does not matter how the substance got there. Whilst athletes are responsible for what they ingest, it is reasonable to expect that sports administrators are equally alive to the risks and have strategies in place to manage them. These are observations only and there is no suggestion that the supplements mentioned contained Ephedrine. The use of any such without enquiry warrants these comments.

Nicholas Davidson, Q.C. (Deputy Chairperson)

Timothy Castle

Dr. Farah Palmer