

INTERNATIONAL RUGBY BOARD

IN THE MATTER OF REGULATIONS RELATING TO THE GAME

AND IN THE MATTER OF AN ALLEGED DOPING OFFENCE BY **GARY JAMES HEWITT** CONTRARY TO REGULATION 21

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

Judicial Committee:

Gregor Nicholson (Scotland)

Dr. Barry O'Driscoll (Ireland)

Graeme Mew (Canada – Chair)

Appearances and Attendances:

For the Board:

Tim Ricketts (Anti-Doping Manager)

Darren Bailey (Counsel)

For the Player:

Gary Hewitt (Player)

Bryn Willaims (President, Zimbabwe Rugby Football Union)

Dr. Nicholas Munyonga (Medical Adviser, Zimbabwe Olympic Committee)

DECISION OF THE JUDICIAL COMMITTEE

1. Gary Hewitt (the “Player”), a member of the Zimbabwe national men’s rugby team, suffers from “severe” asthma, the effects of which are relieved by regular salbutamol (ventolin) inhalations.
2. Salbutamol is a compound that is classified as a beta-2 agonist and, as such, it is a “Prohibited Substance” under Regulation 21 of the Regulations Relating to the Game (the “Regulations”) and under the World Anti-Doping Code administered by the World Anti-Doping Agency (“WADA”). The presence of salbutamol in a bodily sample provided by a player in a concentration exceeding 100ng/ml constitutes an anti-doping violation unless the player has first delivered to the relevant Anti-Doping Organisation an

abbreviated therapeutic use exemption (“Abbreviated TUE”) application including a medical notification justifying the therapeutic necessity for the use of salbutamol.

3. Anti-doping violations involving the presence of a Prohibited Substance carry a penalty, for a first violation, of two years’ ineligibility to participate in rugby. However, in the case of certain “specified substances”, of which salbutamol is one, if the player can establish that the use of the substance was not intended to enhance sport performance, the penalty for a first offence is, at a minimum, a warning and reprimand and no period of ineligibility from future events, and at a maximum, one year’s ineligibility.

4. On 25 September 2004 following the semi-final of the Top 10 cup competition of the Confederation Africaine de Rugby (“CAR”) between Namibia and Zimbabwe in Windhoek, the Player provided a urine sample as part of the doping control procedures for the match. After analysis, the sample was found to contain salbutamol in a concentration exceeding 100ng/ml.

5. The International Rugby Board (the “Board”) wrote to the Player’s national Union, the Zimbabwe Rugby Union (the “Union”), on 15 October 2004 enquiring whether an Abbreviated TUE was on file permitting the use of salbutamol by the Player. On 1 November the President of the Zimbabwe Rugby Union responded by enclosing a letter from the Player’s physician, Dr. Hurcombe, confirming the Player’s use of salbutamol, but failing to answer the TUE question. In the absence of any further information being furnished concerning the filing of a TUE, it was presumed that none had, in fact, been filed.

6. A preliminary review of the case was then undertaken pursuant to Regulation 21.20.1., which noted that:

- A Doping Control form had been completed by the Doping Control Officer and signed by him and by the player on which the Player confirmed his use of a salbutamol inhaler

- the “A” sample of the specimen the Player had provided had resulted in an Adverse Analytical Finding for the presence of salbutamol in a concentration exceeding 100ng/ml,
- there had been no valid TUE on file at the time he provided the sample; and
- as a result, an anti-doping rule violation may have been committed.

7. The Player and his Union were notified of the outcome of the preliminary review by letters dated 9 November 2004. The Player was given the option of having the “B” sample of his specimen analysed. He was also notified that pursuant to Regulation 21.19.1 he was provisionally suspended pending the outcome of the case.

8. The Union confirmed that the Player’s suspension took effect on 15 November 2004.

9. The Player wrote to the Board on 16 November admitting his use of salbutamol as prescribed by his doctor for asthma, and waiving his right to have the “B” sample tested.

10. A Judicial Committee was thereafter appointed and the Player was informed that a hearing would take place and that he had the right to participate in the proceedings by being present by way of a conference call and/or making written submissions. The Player elected to participate by telephone conference call. At the hearing on 9 December, the Player, Bryn Williams (the President of the Zimbabwe Union) and Dr. Nicholas Munyonga (Medical Adviser, Zimbabwe Olympic Committee) were present during the conference call, as were representatives of the Board.

11. The record before the Judicial committee included:

- a) Doping Control Form completed by the Player on 25 September 2004
- b) The correspondence between the Board and the Player
- c) The correspondence between the Board and Zimbabwe Rugby

- d) The Analytical Report of the South African Doping Control Laboratory at the University of the Free State dated 5 October 2004
- e) Undated letter to whom it may concern from Dr. A.O. Hurcombe
- f) Preliminary review undertaken by Dr. Ismail Jakoet dated 4 November 2004.

12. At the outset of the hearing it was agreed by the parties and duly recorded that an anti-doping violation had occurred and that the Player had no record of previous violations. The issues that therefore fell to be decided by the panel were:

- a) Whether the Player could establish that his use of salbutamol, a specified substance under Regulation 21.22.2, was not intended to enhance sport performance;
- b) Sanctions

During the course of the hearing the Player, Mr. Williams and Dr. Munyonga were each questioned by counsel for the Board and by the panel. Submissions were also made by and on behalf of the Player and the Board. Following the conclusion of the hearing, the panel retired to consider its decision.

13. It should be stated at the outset that the Judicial Committee regards the Player's conduct as a serious breach of the Regulations. It is a fundamental principle of anti-doping rules in rugby and other sports that participants in sport bear personal responsibility to:

- ensure that Prohibited Substances are not found in their bodies
- be acquainted with anti-doping regulations
- ensure that medical treatment which they receive does not violate anti-doping regulations

14. Ignorance of the Regulations or inadvertent failure to complete TUEs are not valid defences to allegations of anti-doping rule violations.

Intention To Enhance Sport Performance

15. As already noted, whereas ordinarily the period of ineligibility for a first offence involving the presence of a Prohibited Substance is two years, certain “specified substances”, including salbutamol, are governed by Regulation 21.22.2, which provides as follows:

Imposition of Ineligibility for Specified Substances

21.22.2 The Prohibited List may identify specified 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 a Player can establish that the Use of such a specified substance was not intended to enhance sport performance, the period of Ineligibility found in Regulation 21.22.1 shall be replaced with the following:

First violation: At a minimum, a warning and reprimand and no period of Ineligibility from future Events, and at a maximum, one (1) year's Ineligibility.

Second violation: Two (2) years' Ineligibility.

Third violation: Lifetime Ineligibility.

However, the Player 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 Regulation 21.22.4.

16. The Player asserts a 10 year history of asthma, which has been treated with regular salbutamol inhalations under the supervision of his physician, Dr. Hurcombe. In addition to playing rugby, the Player has also been a competitive swimmer, competing internationally as well as domestically. The Player stated that Dr. Hurcombe administered breathing tests when he first prescribed the use of a Ventolin inhaler by the Player.

17. The Player contended that his use of Ventolin (salbutamol) was entirely therapeutic with no intention to enhance sport performance. In this regard, the Player wrote:

“..I have used Ventolin inhalers openly for a number of years for therapeutic reasons (prescribed by my doctor) when required. After our arrival in Windhoek I developed a bad cough which was possibly brought on by the very hot dry semi

desert conditions in that area and therefore was struggling with my chest during pre match training sessions and had to resort to using my inhaler more often. During our warm up session just before kickoff I used my inhaler as I always do and felt that I was in need of it. During the game I was struggling a bit with my breathing so at half time I had to use my inhaler again but was eventually substituted 20 minutes before the end of the match as I was still struggling.”

18. The panel accepts that the Player is a genuine asthmatic and that his use of salbutamol was entirely for therapeutic purposes. We are therefore satisfied, in all of the circumstances, that the Player did not intend to enhance sport performance. Having so concluded, we then considered the appropriate sanction under Regulation 21.22.2.

Sanction

19. Both the Player and Mr. Williams professed ignorance that salbutamol was a prohibited substance or the conditions under which its use can be legitimised through an Abbreviated TUE application. The Player wrote:

“... I swam for Zimbabwe for a period of about 5 years as a junior and during that period I had to resort to using the inhaler from time to time the same as our gold and silver medallist winner Kirsty Coventry at this years Olympics. As a senior I then started playing representative rugby for my country in both the fifteen man game and the seven aside game and have done so for approximately the last six years. During this entire period I have used my inhaler openly as prescribed by my doctor. During my time of representative swimming and rugby our Zimbabwe controlling boards appear to have been oblivious of the correct requirements needed before participation in international tournaments ie the TUE form being completed and submitted In Zimbabwe the sportsmen are ignorant of these requirements as it is the various controlling boards [*sic*] responsibility to ensure that correct procedures are followed when a player is using a permissible drug for medical reasons but required clearance prior to the tournament.”

20. Despite his background and experience in rugby, the Player, who is now 24 years old, has not previously been drug tested. However, notwithstanding his professed ignorance of anti-doping procedures, he has previously played in Rugby World Cup qualifying tournaments for both seven and fifteen a-side as well as the World Series Sevens in Dubai and George in 2003. He has signed a form on at least one occasion acknowledging that he has read the applicable anti-doping regulations (although he claimed that, contrary to what he indicated by his signature, he had not, in fact, actually reviewed the anti-doping regulations). Other members of his team were drug tested in George. Furthermore, the Player's father is one of the top swimming coaches in Zimbabwe (although apparently unaware of the TUE process) and Kirsty Coventry, a Zimbabwean Olympic swimming medallist and asthmatic, who filed an Abbreviated TUE before competing in the Olympic Games in Athens, is a family friend.

21. Mr. Williams confirmed that, until the current matter came to the Zimbabwe Union's attention, the Union had not received or disseminated information to its players about anti-doping measures, had no domestic anti-doping rules or programme and, in particular, had not encouraged any players to file TUEs. We received no evidence as to whether Dr. Hurcombe was aware of the TUE programme. Dr. Munyonga, while aware of the TUE process, did not realise that the WADA rules applied to rugby.

22. Quite apart from the Player's conduct, clearly not enough has been done by Zimbabwe Rugby to inform itself, its officials, players and team doctors, about the Board's anti-doping regulations. While the Player's ignorance of his personal responsibilities is not an acceptable excuse, the Union's acts and omissions also contributed to the Player's violation. Mr. Williams described recent events as a "shock" and an "eye-opener" and committed his Union to taking effective action to ensure conformity with the IRB Anti-Doping regulations. In this regard, we were advised that steps are now being taken to have players complete TUEs and that Dr. Munyonga has agreed to lead some educational workshops for the Zimbabwe Union.

23. Despite the Union's shortcomings, however, the Player bears the ultimate responsibility. In assessing his conduct, we considered the case of *Robert Dedig*, recently

decided by this panel. In that matter, which also included the therapeutic use of salbutamol by a player, we determined that no further period of suspension was warranted beyond the period of provisional suspension (a matter of days in that case) the player had served. For the reasons which follow, we believe that the present case warrants a different outcome from the *Dedig* matter.

24. Despite the Player's co-operation with the Board throughout this process, his amateur status and his ready acknowledgement of the validity of the urine sample analysis, it is our view that the Player should not be able to shelter behind his naivety or, perhaps, even indifference to doping issues. The Player, who is 24, has competed in rugby tournaments with very pro-active anti-doping programmes and had signed documents acknowledging that he has been provided with tournament rules (which would have included anti-doping rules) and has been given the opportunity to read those rules. The Player also acknowledged his awareness of athletes being banned for steroid use. As an athlete in swimming and rugby it is, to us, simply not credible for the Player to say he had no awareness that his salbutamol use might offend anti-doping regulations. While we have no other reason to doubt the Player's veracity, he would appear to have ignored what was going on around him and has been very lax in his attitude regarding his responsibilities as an International player.

25. In our view, the appropriate sanction in all of the circumstances is a three month period of ineligibility commencing on 15 November 2004 (when the provisional suspension took effect) and continuing until and including 14 February 2005. The Player should also be aware that there would likely be severe consequences for him in the event of any further anti-doping rule violation.

26. It is to be hoped that the Player and his Union will, in fact, endeavour to ensure that a proper anti-doping education programme is now implemented by the Union.

27. If the Board wishes us to exercise our discretion in relation to costs pursuant to Regulation 21.21.9, written submissions should be provided to the Judicial Committee and to the Player by 17:00 Dublin time on 7 January 2005, with any written submissions by the Player in response to be provided to the Board (which shall be responsible for forwarding such submissions on to the Judicial Committee) by no later than 17:00 Dublin time on 20 January 2005.

22 December 2004

Graeme Mew

Gregor Nicholson

Barry O'Driscoll