

INTERNATIONAL RUGBY BOARD

IN THE MATTER of the 2007 Under 19 World
Championship Anti-Doping
Programme and the
Regulations Relating to the
Game

AND

IN THE MATTER of an alleged doping offence by
TITI ESAU JUNIOR (Samoa)
contrary to Regulation 21

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

Judicial Committee

Tim Gresson (New Zealand – Chairman)
Dr Barry O’Driscoll (Ireland)
Gregor Nicholson (Scotland)

Appearances and Attendances

For the Board

Susan Ahern
Tim Ricketts (Anti-Doping Manager)

For Samoan Rugby Union

Sua Peter Schuster (Acting CEO)
Dr Ben Matalavea (Team Physician, Manu Samoa Rugby Team)

The Player

Titi Esau Junior
Harry Schuster (Counsel for the Player)

In Attendance

Titi Esau (Player’s Father)
Karene Esau (Player’s Mother)

Hearing

28th June 2007 (by way of telephone conference) and thereafter by written
submissions

DECISION OF JUDICIAL COMMITTEE

Background

1. Following the Samoa vs Wales match at the IRB Under 19 World Championships 2007 played at Belfast on the 9th April 2007 Titi Esau Junior

("the player") provided a urine sample which subsequently tested positive for the substance Furosemide.

2. Furosemide is classified as a diuretic under s.5 of the World Anti-Doping Agency's (WADA) List of Prohibited Substances and Methods. The WADA Prohibited List is incorporated in IRB Regulation 21 as Schedule 2. It is well known that diuretics can be used as masking agents to allow illegal substances (for example anabolic steroids) to be flushed out of the bodily system. The IRB had no record on file for a therapeutic exemption for use by the player of the prohibited substance.
3. At the player's request the B sample was subsequently analysed by the Deutsche Sporthochschule Koln Institut fur Biochemie (the WADA accredited laboratory which also analysed the player's A sample) on 3rd May 2007. The analysis resulted in the same finding as that provided by the A sample.
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 rule violation may have been committed) the player was provisionally suspended on 16th April 2007.
5. Following receipt of the analysis of the B sample, the player was informed of his right to a hearing before a Board Judicial Committee ("BJC"). On 28th May 2007 the player requested that a BJC be appointed to hear his case.
6. The hearing was convened by way of telephone conference on the 28th June 2007 following which both the IRB, and the SRU on the player's behalf, were permitted to file supplementary material.

Factual Background

7. The player is nineteen years old and is a student at St Joseph's College, Apia. In his sworn affidavit he deposed that during the week prior to the departure of the Samoan Under 19 team for the World Championships, after unsuccessfully using a local plant remedy known as Aloe Vera, he was treated for an infected leg in hospital where he was prescribed antibiotics and Panadol. He stated he took no other drugs, including Furosemide.
8. Prior to the match against Wales, he was given two Panadol/Panadeine tablets and Voltaren tablets which he declared in writing in the Doping Control Form at the time of the taking of his urine sample.
9. In his request for leniency, the player stated:
"That as stated in my affidavit dated 27 April 2007, I reaffirm my declaration that I absolutely and categorically did not knowingly take this drug nor do I recall taking this drug or any other drugs aside from the medicine that was administered to me by the doctor at the hospital, when I was admitted for 3 days before coming to Ireland, and the medicine that was given to me by our physiotherapy Ms Epenesa Pouesi whilst we were in Ireland. That although I reaffirm my affidavit as noted in paragraph 4 above, I take full responsibility for the fact that I had tested positive for the drug furosemide." (Request for leniency for sanctions, paragraphs 4 and 5).
10. During the hearing on the 28th June 2007 the player re-iterated that he accepted responsibility for the substance that was found in his body and disavowed any

suggestion that it could have been unknowingly ingested whilst he was a patient at the hospital or thereafter whilst he was on medication.

11. The player's parents in their sworn affidavit evidence confirmed the treatment provided to their son prior to his departure for Belfast. Understandably, they were unable to explain how the Furosemide entered their son's system.
12. Dr Ben Matalavea, Team Physician, Manu Samoa, confirmed that the player was fit and healthy and on physical examination there were no symptoms of having ingested anabolic steroids. He had been unable to explain why he had tested positive, stating that although there was a culture of traditional medicine in Samoa, to his knowledge there was not a culture of illegal drug-taking in sport in Samoa. Dr Matalavea also commented on the approach to the taking of medicines in Samoa. He stated that there have been reported cases of self-diagnosed patients without prescriptions receiving prescription only medicine directly from pharmacies. Understandably, Dr Matalavea was unable to explain how Furosemide entered the player's system but posited "...at the possibility that it may have been given to Titi by a family member or friend with the best intentions to 'reduce' the swelling in his leg" (refer penultimate paragraph supplementary statement).
13. Although the player had not been subjected to previous doping control testing, he was generally aware of his responsibilities in terms of illegal substances entering his body whilst actively participating in rugby. He had signed the player consent and agreement form thereby agreeing to comply with the tournament anti-doping programme.

Anti-Doping Rule Violation

14. It is alleged that the player committed an anti-doping rule violation contrary to Regulation 21.2.1 which provides that the presence of a prohibited substance or its metabolites or makers in a player's bodily sample, constitutes an anti-doping rule violation. Under Regulation 21.3.1 the Board has the burden of establishing an anti-doping rule violation to the comfortable satisfaction of the BJC.
15. 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 on a balance of probabilities the anti-doping rule violation; that is the presence of the prohibited substance (Furosemide) in the player's bodily sample.

Sanction

16. In relation to sanction, both the player and the SRU on behalf of the player made strong pleas for leniency. In its final submissions the SRU submitted "*The legal arguments against Titi are strong nevertheless Samoa Rugby Union maintains it does not suspect or find that Titi is a player who cheats or is involved in trying to enhance his performance through drugs.*" Essentially the Union again requested the BJC to adopt a merciful approach and impose a lenient sanction for the player's anti-doping infraction.
17. However, this submission overlooks the regulatory framework, that in imposing the appropriate sanction, the BJC is required to apply the provisions of Regulation 21 (which are based on the WADA Code). As Mrs Ahern correctly submitted, the twin principles of personal responsibility and strict liability are at the heart of the Regulations.

18. 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."*

19. In relation to the principle of strict liability, the sanction for the presence of a prohibited substance including Furosemide 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 the basis for eliminating or reducing the period of ineligibility based on exceptional circumstances as set out in Regulation 21.22.4 which 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 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.*

20. Thus, under paragraph (a), if a player can establish he "*bears no fault or negligence for the violation*" and can establish how the prohibited substance entered his system, 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. Again, importantly this provision requires the player to establish how the prohibited substance entered his system.
21. It can be seen that both categories of exceptional circumstances require proof (on a balance of probabilities) by the player of how the prohibited substance (in this case Furosemide) entered his system before consideration of the fault or negligence threshold issues.
22. In this regard the BJC accepts the IRB's submission that the evidential material placed before the BJC by the player does not prove on a balance of probabilities how the Furosemide entered his system. Indeed, the player acknowledged that he was unable to provide any explanation as to how he came to have the Furosemide in his system and it should be noted that the initial hearing on 28 June was adjourned after it was explained to the player and his representatives that before the BJC could consider a possible reduction in the mandatory sanction he (the player) needed to establish how the prohibited substance entered his system. The player was given until 11th 2007 July to produce further evidence but no further evidence was tendered to the BJC. Further, Dr Matalavea's subsequent speculation that possibly the Furosemide may have been given to the player by a family member or friend does not establish, on a balance of probabilities, how it was ingested. As Mrs Ahern has noted, that hypothesis has not been suggested by the player or anyone else. Accordingly, notwithstanding the strong pleas for leniency, and the strongly expressed opinion on the player's behalf that it was unlikely he had taken a steroid which subsequently he had attempted to "mask", given that the player has been unable to discharge the burden placed upon him by the Regulations to establish how the prohibited substance entered his system, the BJC is not empowered to impose a sanction which is less than the mandatory minimum sanction of a period of ineligibility of two years.

Decision

23. For the reasons outlined, the sanction imposed for this anti-doping rule violation is a period of ineligibility of two years commencing from the 16th April 2007 (the date upon which the player's provisional suspension commenced) and concluding (but inclusive of) the 16th April 2009.

Costs

24. 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 the 8th September 2007, with any responding written submissions to be provided by no later than 17.00 Dublin time on the 21st September 2007.

Review

25. 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.

20th August 2007

T M Gresson (for an on behalf of the Board Judicial Committee)
Dr Barry O'Driscoll
Gregor Nicholson

96091/17 - Decision