

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
MULIUFI SALANOA
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)
Matthew Vaea (SRU High Performance Rugby Services Manager)

The Player

Muliufi Salanoa
Leilani Tuala-Warren (Counsel for the Player)

In Attendance

Evile Telea (Player)
Sina Retzlaff-Lima (Player's Agent)
Karen Sutton (SRU Injury Manager)

Hearing

18 September 2008 and 29 September 2008 (BST)

DECISION OF THE BOARD JUDICIAL COMMITTEE

1. Following the match played on 10th May 2008 between Upolu Samoa and Savai'i in the IRB Pacific Rugby Cup Tournament 2008 Muliufi Salanoa ("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 IRB Regulation 21 (refer Schedule 2). 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. 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 2777 ng/ml.
3. 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.
4. 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").
5. The hearing was convened by way of telephone conferences on 18th and 29th September 2008, following which counsel for the player and the IRB were permitted to file supplementary material, including submissions.
6. At the hearing the evidence included sworn affidavits¹ and oral evidence. Several of the witnesses were examined by Mrs Tuala-Warren, cross-examined by Mrs Ahern, questioned by members of the BJC and re-

¹ Sworn affidavits by the player, Evile Telea and Rosita Solanoa were produced

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, the BJC consider for reasons which will become apparent, it is only necessary to refer to factual matters which are relevant to the central issue in this case, namely whether the player in stating he had taken orally two Salbutamol tablets during the morning prior to the afternoon match could establish that because of exceptional circumstances there was an absence of significant fault or negligence on his part.

7. In reaching its decision, the BJC records it was assisted by the written submissions of both counsel.

Factual Background

8. The player is aged 28 years, has previously represented Manu Samoa at Rugby World Cup 2007 (RWC 2007) and at the 2006-2007 IRB Pacific Nations Cup ("PNC"). For three years he has also participated at the IRB Pacific Rugby Club ("PRC") Tournaments. He commenced playing rugby when he was 15 years of age. Since 2006, he has also been a member of the SRU High Performance Scholarship Scheme.
9. During the morning of 10th May 2008 before the match played between Upolu Samoa (which he was scheduled to captain for the first time) and Savai'i, due to "*anxiety and nervousness*" (his words), he experienced shortness of breath. As a child, he had suffered from asthma but he had not experienced shortness of breath since he was 12 and because of this was unable to produce any medical documentary material verifying that he previously suffered from asthma. He did not have a current TUE for asthma.
10. Because of his condition and without a medical prescription, the player then obtained from Evile Telea (a team mate and, the BJC was told, a qualified pharmacist) two tablets which were immediately taken orally in the latter's presence. When tested, the player informed the testing officer that he had taken an unknown tab(lets) for asthma. Mr Telea confirmed he gave the

² Counsel produced letters in support from Fepuleal Patu (Upolu Samoa 2008 Head Coach), Taufusi Salesa (Upolu Samoa Assistant Coach), Papaliitele Fatialofa (Upolu Samoa Forwards Coach), Ryan Schuster (Upolu Samoa Team Manager)

player two Salbutamol (also known as Ventolin) tablets and they were taken in his presence. Mr Telea confirmed he carried medication including antibiotics and salbutamol. He was not aware it was a banned substance and was not in the habit of dispensing tablets but, in this instance, the player was "*desperate for help*" (his words). The player acknowledged, his responsibility as captain caused him to panic and he has not experienced shortness of breath since the 10th May 2008.

11. The player acknowledged that during his career prior to the 10th May 2008 he had been previously tested on two occasions and that he was personally responsible for all medication that he ingested. On this occasion, he took the two tablets to ensure he could play in the match. He acknowledged he signed player consent forms thereby agreeing "*inter alia*" to comply with the IRB Anti-Doping Regulations. He had signed similar forms prior to Rugby World Cup 2007 and previous tournaments. In total, he had signed seven consent forms. He stated he did not fully understand anti-doping in sport because the forms he signed were written in English, were not explained to him and he had received little or no anti-doping education having not attended the anti-doping workshops held by the SRU for high performance players held in 2007 and 2008. Indeed, he stated he believed when he signed the player consent forms they were in respect of the allowances paid by the SRU but the BJC notes the consent forms contained no references to allowances. He believed the primary purpose of drug testing was for substances such as marijuana and cocaine and did not appreciate the tablets which were given to him by Mr Telea were banned.
12. Following the hearing, the SRU's former High Performance Manager (Mr Peter Horne) confirmed that the player 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. The SRU has held further anti-doping seminars in 2007 and 2008. They were also conducted by Mr Horne. Mr Vaea, the current SRU High Performance Manager believed the player may have

attended the 2008 seminar but in spite of High Performance Scholars being required to attend there is some uncertainty as to whether in fact this occurred.

13. Doctor Ben Matalavea, a Physician, has been involved with the SRU for twelve years. He confirmed that because of the availability of prescription medicine over the counter in Samoa, players have been strongly advised that no medicines should be taken without the approval of a qualified doctor or team management. Further, in this respect Mr Matthew Vaea and Mr Peter Schuster, Chief Executive Officer of the SRU, stated that although Samoan representative teams' management do not include doctors, all players are made aware of the protocol whereby doctors can be made available through team management. Specifically, Mr Vaea stated that the player was aware that he was expected to obtain medical treatment by contacting the team physiotherapist or manager.
14. Doctor Matalavea was also the Team Doctor at RWC 2007 and he confirmed that each player in the squad had been advised of the IRB's anti-doping programme.
15. The BJC received evidence from additional witnesses (including Sina Retzlaff-Lima (player agent), Mrs Karen Sutton, (a New Zealand based physiotherapist but employed as the Injury Manager for the SRU) who in general terms referred to the lack of anti-doping education and policy written in the Samoan language, the lack of medical personnel and other resources in Samoa.
16. The BJC accepts that compared to more developed unions that in general terms the SRU may not have all the equivalent resources. However, given "inter alia" the player's experience (including RWC 2007), his participation in the 2006 anti-doping workshop, his signing of seven player consent forms, and his awareness of the requirement to channel any request for medical assistance through team management, the BJC is satisfied that in terms of his general awareness he was aware of the perils of taking banned substances in rugby.

Anti-Doping Rule Violation

17. 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.
18. 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.
19. 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

20. 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 the Salbutamol was taken for medical reasons and in any event because the player lacked an understanding of the IRB's anti-doping regime he did not intend to commit the infraction. Essentially, the BJC was requested to not impose the mandatory sanction of two years ineligibility but a reduced sanction of ineligibility for one year.
21. 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.
22. 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."*

23. These principles have been discussed in a number of decisions. In the case of ITF v Beck³ 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 ..."

24. 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 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

³ 13 February 2006 at para.7 – see the ITF website at

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.

25. Thus, under paragraph (a), if a player can establish 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.
26. Both these provisions require the player to establish how the prohibited substance entered his system and in this respect the BJC is satisfied that the player has discharged that burden by establishing, on a balance of probabilities (refer Regulation 21.3.1) that the prohibited substance entered his system as a result of taking two Salbutamol tablets.

27. Regulation 21.22.1 provides that before a period of ineligibility is imposed, the player shall have the opportunity of establishing the basis for eliminating or reducing the sanction as provided in Regulation 21.22.4. Again, the standard of proof required shall be on a balance of probabilities (refer Regulation 21.3.1).
28. As mentioned, counsel for the player did not submit that this was a case involving no fault or negligence, but was a case of no significant fault or negligence.
29. 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)
30. A footnote to the corresponding provision of the WADA Code⁴ 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

⁴ 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).”*

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 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)

31. Further, Mrs Ahern referred the BJC to previous cases namely, IRB v Keyter⁵, IRB v Shimenga⁶ and IRB v Hanks⁷, where it has been held that it is only in truly exceptional cases can these provisions operate to eliminate or reduce a sanction.

Submissions

32. In submitting this was a truly exceptional case justifying a reduction in the period of ineligibility from two years to one year, Mrs Tuala-Warren pointed to a number of factors including:

⁵ See IRB v Keyter at para.6 – see <http://www.irb.com/NR/rdonlyres/E577D70D-E8C1-4E74-9D5A-32333CB4D529/0/CASKEYTERFinalAward.pdf>.

⁶ See Shimenga (July 2005 at para.32) on the IRB website <http://www.irb.com/NR/rdonlyres/88032BAFC522-4711-BD37-F1CDE1838DDF/0/050724Shimenga.PDF>

⁷ 4 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>

- The availability of prescription drugs over the counter in Samoa. In this case they were readily provided by a member of his team.
- In Samoa, anti-doping educational material is in English which given players' limited understanding of that language is not appropriate.
- The lack of medical personnel for Samoan representative teams (including teams participating at PRC level) has resulted in players seeking medical advice from team mates.
- The lack of monetary resources for anti-doping educational seminars and workshops in Samoa. It was suggested the SRU had failed to properly educate its players of the dangers of taking illegal drugs and specifically, the player was unaware he could apply for a TUE.
- The player's honest belief that because of shortness of breath he was permitted to take the two tablets and given the unavailability of a team doctor most players would approach Mr Telea for advice and medication.
- The tablets were not taken to enhance performance. No competitive advantage was obtained. By obtaining the tablets from a team mate with medical knowledge the player exercised the "*utmost caution*" in the circumstances. Further it was suggested the level of caution applicable to the player should not be at the same level expected of a player from a major union.

33. In reply, Mrs Ahern submitted the player failed to prove on a balance of probabilities that there was any basis for reducing the mandatory sanction. Thus, given the anti-doping violation, the BJC had no alternative but to impose the mandatory sanction of two years suspension. She pointed to several factors including:

- The player's experience as a top level player and recipient of a SRU High Performance Scholarship for three years.
- On at least seven previous occasions the player has signed player consent forms whereby he had declared "*inter alia*" he was bound by the IRB Anti-Doping Programme.
- He had been drug tested on previous occasions.
- The player attended the 2006 High Performance Anti-Doping Workshop.
- The detailed anti-doping education programmed conducted by the SRU for high performance players.

- The player's participation at RWC 2007 during which Doctor Matalavea made all team members aware of the IRB anti-doping programme including application for TUEs.
- The player in participating in the PRC tournament had signed an agreement with the SRU whereby he agreed to comply with all terms and conditions of the IRB
- In relation to the taking the two tablets on 10th May 2008 the player had no documented medical condition for asthma and no TUE. Further, the previous "shortness of breath" symptoms were caused by his anxiety and nervousness before the match and he failed to follow the protocol to obtain medical assistance.

34. In summarising the position of the IRB Mrs Ahern submitted:

"It is difficult to comprehend that given the Players' long participation in IRB tournaments and exposure to anti-doping testing that the Player did not (a) know what he was signing or (b) enquire as to the specific content of what he was agreeing to or (c) enquire as to why he was subject to doping control or (d) not have any knowledge of drugs in sport or (e) did not know that in taking the salbutamol tablets from a team mate on the morning of a Match he was likely to cause damage to his health and/or that he was taking a prohibited substance. It is also clear that the SRU did provide doping education to its national team players and that the Player did attend a seminar in November 2006.

In relation to the particular incident on 10 May 2008 which resulted in the Player's AAF, there are a number of concerning factors, each of which individually demonstrates the lack of care exercised by the Player with regard to his adherence to the anti-doping rules of the IRB / PRC tournament and for his own health and wellbeing, but which collectively demonstrate overwhelmingly that the Player did not exercise care and that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was significant in relation to the anti-doping rule violation."

Evaluation

35. The BJC accepts the IRB's submissions there is no justification for a reduction in the period of ineligibility. Notwithstanding the player's glowing character references, the BJC is satisfied that on this occasion there was a serious error of judgment on his part. The BJC does not accept the player was unaware of the IRB and the SRU's anti-doping measures and instead of adhering to the prescribed protocol he chose to take two unknown tablets from a team mate for his shortness of breath which he acknowledged was caused by anxiety and nervousness on the morning of the match and which had not occurred since he was a child aged 12. Essentially, as he candidly acknowledged he was determined to play in the match and in taking the tablets he failed to exercise sufficient care to ensure that his team mate had not provided him with a prohibited substance which because of the strength of the tablets potentially could have been adversely affected his health.
36. Further, the BJC was not persuaded by the submission that in terms of the application of IRB anti-doping programme when compared to the most developed unions different considerations apply to Samoa. Without exception, the IRB's anti-doping programme is of universal application. In any event Samoan players, together with players from other Pacific nations for many years have played rugby at a high international level including all four previous RWC tournaments. As Mrs Ahern submitted, Samoan rugby is not "isolated" and for three years that union has benefited from the IRB's High Performance Scheme which included comprehensive anti-doping education for high performance players.
37. Ultimately, this is a further case which highlights the personal responsibility of players 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. Following the hearing the IRB provided the BJC with a Press Release headed "*Anti-Doping: High Priority on Samoa Rugby Calendar*" issued by the SRU. The article refers to the SRU's anti-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 appropriate comments from Doctor Matalavea:

“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.””

38. Further, 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.
39. It will only be in truly exceptional cases when on an objective assessment of all the circumstances 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 is not satisfied the threshold of establishing no significant fault or negligence has been reached. It follows, the player has not established the mandatory sanction should be reduced.

Decision

40. 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 provisions suspension commenced) and concluding (but not inclusive of) 7th July 2010.

Costs

41. 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 October 2008, with any responding written submissions to be provided by no later than 17.00 Dublin time on 12th November 2008.

Review

42. 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.

21 October 2008



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