

INTERNATIONAL RUGBY BOARD

IN THE MATTER OF REGULATIONS RELATING TO THE GAME

AND IN THE MATTER OF AN ALLEGED DOPING OFFENCE BY **JOJI TU'IPULOTU (TONGA)** CONTRARY TO REGULATION 21

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

Judicial Committee:

Dr. Barry O'Driscoll (Ireland)
Gregor Nicholson (Scotland)
Graeme Mew (Canada – Chair)

Appearances:

For the International Rugby Board:

Ben Rutherford (Counsel)

For the Player

'Aminiasi Kefu (Counsel)

Attendances:

Joji Tu'ipulotu (the Player)

Tim Ricketts (Anti-Doping Manager, International Rugby Board)

Also Present:

John McKee (Tonga Rugby Union Technical Advisor)
Molisoni Otukolo (Tonga Rugby Union Rugby Services Coordinator)
Filimone Lile (witness).

Heard: 1 November 2010 at 22:00 (GMT) by way of telephone conference

Written Submissions:

Submissions for IRB:	28 July 2010
Submissions for Player:	31 July 2010
Response Submissions for IRB:	12 August 2010

REASONS FOR DECISION OF THE BOARD JUDICIAL COMMITTEE

Introduction

1. Less than a week before playing in an IRB tournament, the Player went to a party and used cannabis. He knew that the use of cannabis is prohibited in rugby

and that he could be tested for cannabis and other substances, but thought that he would not get caught. He did not consider the consequences of his actions until he sobered up. Even then, he elected to play in matches when he knew that the consequences of his cannabis use may not have been eliminated from his system.

2. The Player was participating in the Pacific Rugby Cup as a member of the Tau'uta Reds team. The Player signed a participation agreement for the tournament, which incorporated the IRB's anti-doping regulations as part of the tournament rules. Following a match in Fiji between the Tau'uta Reds and the Fijian Barbarians, the Player was selected for doping control.

3. The Player's sample was tested by the WADA accredited laboratory at the University of the Free State in Bloemfontein and, as noted, when analysed showed the presence of metabolites of cannabis in a concentration of 36 ng/ml.

4. A preliminary review of the case was undertaken by Dr. Ismail Jakoet in accordance with IRB regulation 21.20 on 7 June 2010. On 11 June 2010, the Player was notified, via the Tonga Rugby Union (the "Union"), that he may have committed an anti-doping rule violation. The Player was provisionally suspended on the date that the Player received notification, which was 18 June 2010. The Player remained suspended at the time of the hearing before the Board Judicial Committee ("BJC").

5. On 18 June 2010 the Union wrote to the Board's anti-doping manager in the following terms:

"Mr. Tuipulotu made admission to the anti-doping violation and requested that I write to you to advise accordingly."

6. This BJC was appointed to consider the Player's case and, in particular, to determine the appropriate sanction for the Player's admitted anti-doping rule violation.

7. The hearing in this matter was originally scheduled to take place in early August. It was adjourned at the request of the Player until 1 November 2010 (Dublin time).

8. On 18 November 2010 the BJC released a short decision that that the Player should serve a term of Ineligibility for five (5) months, with reasons to follow. The BJC's reasons are set out below.

Anti-Doping Rule Violation Established

9. At the outset of the hearing, the Player confirmed his admission of the presence of cannabis metabolite 11-nor-delta 9-tetrahydrocannabinol-9-carboxylic acid at a concentration of 36 ng/ml which is greater than the permitted threshold

level of 15 ng/ml. Accordingly, we are satisfied that the Player has committed an anti-doping rule violation contrary to regulation 21.2.1¹.

Evidence

10. The BJC had before it a record which included the Doping Control Form, a Player Consent Form (2010 IRB Pacific Rugby Cup), the Sample Analysis Report, the Preliminary Review report and certain correspondence between the Board and the Union.

11. A written submission of position, including a statement of the Player's anticipated evidence, was filed by counsel for the Player on 31 July 2010. Character references were provided by two representatives of the Player's club (Tupou College Oldboys) and by an individual who had coached the Player while he was at college. There was also a statement by Filimone Lile, who was with the Player when he smoked cannabis.

12. Mr. Lile and the Player gave oral testimony at the hearing.

The Player

13. The Player is 25 years old. He got married in June 2010. He is unemployed. He was described by his counsel as "a below average achiever in his education". The Player has been playing competitive rugby since he was approximately 12 years old. He has played rugby in Tonga, Fiji and New Zealand. He has at times derived income from playing rugby. It was asserted on his behalf that he has the potential to play international representative rugby.

Circumstances Giving Rise to Anti-Doping Rule Violation

14. On Saturday 1 May 2010 the Player had participated in a practice game for the forthcoming Pacific Rugby Cup. After the game he went out drinking with some friends. The drinking went late into the night. The Player and his group were drinking at a friend's house. There were between four and six other people drinking, one of whom was Filimone Lile. The Player acknowledges that he became intoxicated. Some of the group were smoking cannabis. The cannabis was passed around. The Player claims that he had no more than three puffs. Although the information provided in the Player's written submissions indicated that he had inhaled "the cannabis joint about 3 times throughout the night – once at the friend's house, once outside a nightclub and once at a friend's house", at the hearing he claimed that the three puffs were taken over a five minute period at his friend's house.

15. At the hearing, the Player said that he was initially resistant to smoking cannabis but was pressured by his friends to do so. This evidence was not reflected in the written submissions that had been filed on the Player's behalf.

¹ The presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample.

16. The Player claims that this was the first time that he had consumed cannabis. He knew that the use of cannabis was prohibited, but was drunk and did not think about the consequences.

17. The Player had previously played in a Pacific Cup tournament and had been warned by his coaches not to consume cannabis. He did not think about the consequences of his actions until he was sober.

18. At the hearing, and in contrast to references to “joints” in the written submissions, the cannabis leaves were burned in a can which was passed around and inhaled.

19. Indeed, there were a number of inconsistencies between the evidence given by the Player at the hearing and the contents of the written submissions made on his behalf.

20. The Player said that while he does smoke tobacco, he had not noticed the different smell of the cannabis. He does not, however, deny that he knew what substance he was inhaling. He smoked the cannabis in order to socialise. He had no thought of using cannabis to improve his athletic performance.

21. The Player expressed remorse. He said that he felt very guilty about what he had done. He knew that he had caused shame to his family, his club and the Union.

Corroboration

22. Filimone Lile, a friend of the Player’s, was with him on the evening of 1 May 2010. He confirmed that he and the Player had gone to a friend’s house where they were drinking. A can containing burning marijuana leaves was passed around. Mr. Lile saw the Player inhale the marijuana. He claims to have never seen the Player consume marijuana before and says that the Player did so that evening in order to socialise.

Sanctions

23. Under Regulation 21.2.1, the *“presence of a Prohibited Substance or its Metabolites or Markers in a Player’s bodily Sample”* constitutes an anti-doping rule violation. The violation occurs whether or not the Player intentionally or unintentionally used the Prohibited Substance or was negligent or otherwise at fault.

24. Regulation 21.6 addresses the principle of personal responsibility and provides:

21.6 Roles and Personal Responsibility

21.6.1 It is each Player’s responsibility to ensure that;

- (a) no Prohibited Substance is found to be present in his body and that Prohibited Methods are not used;
- (b) he does not commit any other anti-doping rule violation;
- (c) he is available for Sample collection; and
- (d) he informs Player Support Personnel, including, but not limited to, their doctors of their obligation not to use Prohibited Substances and Prohibited Methods and to take responsibility to ensure that any medical treatment received by them does not violate any of the provisions of these Regulations.

Further, Regulation 21.6.3 confirms that *“It is the sole responsibility of each Player, Player Support Personnel and Person to acquaint themselves and comply with all of the provisions of these Anti-Doping Regulations including the Guidelines”*.

25. Cannabis is one of the category of Prohibited Substances which the IRB Regulations and the Code recognise as “Specified Substances”².

26. Sanctions are provided for in Regulation 21.22. Ordinarily the period of Ineligibility for Prohibited Substances for a first time offence is two (2) years (Regulation 21.22.1)³. However, this is subject to conditions for the eliminating or reducing the period of Ineligibility (Regulation 21.22.3 and 21.22.4) or conditions for increasing the period of Ineligibility (Regulation 21.22.9).

27. Regulation 21.22.3 addresses the elimination or reduction of the period of Ineligibility for Specified Substances (including Cannabinoids) under specific circumstances in the following terms:

Where a Player or other Person can establish how a Specified Substance entered his body or came into his Possession and that such Specified Substance was not intended to enhance the Player’s sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Regulation 21.22.1 shall be replaced with the following:

² Regulation 21.4.5 provides:

For purposes of the application of Regulation 21.22 (Sanctions on Individuals), all Prohibited Substances shall be “Specified Substances” except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List. Prohibited Methods shall not be Specified Substances.

³ Regulation 21.22.1 provides:

The period of Ineligibility imposed for a violation of Regulation 21.2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Regulation 21.2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and Regulation 21.2.6 (Possession of Prohibited Substances and Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Regulation 21.22.3 and 21.22.4, or the conditions for increasing the period of Ineligibility, as provided in Regulation 21.22.9, are met:

First violation: Two (2) years' Ineligibility.

First violation: At a minimum, a reprimand and no period of Ineligibility from the Game, and at a maximum, two (2) years of Ineligibility.

To justify any elimination or reduction, the Player or other Person must produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the hearing panel the absence of intent to enhance sport performance or mask the Use of a performance enhancing substance. The Player's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

Discussion

28. In order to take the benefit of Regulation 21.22.3, the Player must (a) establish to the satisfaction of the BJC on the balance of probabilities how the cannabis entered his body; and (b) establish to the comfortable satisfaction of the BJC that his individual Use of cannabis was not intended to enhance his sport performance or mask the Use of a performance-enhancing substance.⁴ Furthermore, in order to justify any reduction or elimination of the sanction, the Player, as a mandatory condition, must also produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the BJC the absence of an intent to enhance sports performance or mask the Use of a performance enhancing substance.

Cause of Anti-Doping Rule Violation

29. We are satisfied that, on a balance of probabilities, the Player's anti-doping rule violation resulted from him smoking cannabis marijuana on 1 May 2010.

Lack of Intent to Enhance Sport Performance

30. We accept the Player's evidence that his use of cannabis was recreational and not intended to enhance sport performance. The Player's evidence in this regard was corroborated by the evidence of Mr. Lile. Furthermore, the overall context of the events recounted by the Player and Mr. Lile suggest that the cannabis was consumed during an alcohol fuelled evening in which the Player may have felt under some peer pressure from the other individuals attending the party.

⁴ The nature of the burdens the Player must satisfy are set out in the Comments to Article 10.4 of the WADA Code which is available at www.wada-ama.org. The Comment also elaborates in relation to the type of circumstances which in combination might lead a hearing panel to be comfortably satisfied of no-performance-enhancing intent, for example "the fact that the nature of the Specified Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete's open Use or disclosure of his or her Use of the Specified Substance; and a contemporaneous medical records file substantiating the non sport- related prescription for the Specified Substance..."

Degree of Fault

31. Although the social use of cannabis is commonplace in many countries (but nonetheless illegal in most, including Tonga), the fact remains that the world sport community has determined that its use is inconsistent with the spirit of sport⁵. Accordingly when a participant in sport knowingly uses cannabis there will rarely, if ever, be circumstances where the sanction does not include a period of Ineligibility⁶.

32. Ultimately, the BJC does not consider that the mitigating factors submitted on the Player's behalf should be accorded a great deal of weight. This is a case where an experienced player, knowing that it was wrong for him to do so, voluntarily smoked cannabis in a social setting. Having done so, rather than withdraw, he played in two matches and thereby ran the risk that he would be subject to in-competition testing. The possibility that the Player was subjected to peer pressure really only emerged as a factor at the hearing itself and has the appearance of being self-serving.

33. We were directed by counsel for the IRB to a number of other cases which were said to be comparable including, in particular, the matters of *IRB v. Chvihivivadze* (2 June 2009) and *IRB v. Van Staveren* (17 February 2010). Both of these decisions involved cannabis. Van Staveren, a senior, experienced player who, like the Player in the present case, knowingly consumed cannabis in a social setting, received a sanction of six months Ineligibility. Chvihivivadze was a young player who found himself in an unfriendly environment in which he felt pressured to smoke cannabis by others who were present. Chvihivivadze received a four month sanction.

34. In our view, the degree of fault of the Player, and the circumstances, warrant a five month sanction. The Player had sufficient experience and seniority to have known better.

⁵ The prefatory comments to the *World Anti-Doping Code* (2009) describe the fundamental rationale for the Code in these terms:

Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as "the spirit of sport"; it is the essence of Olympism; it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is characterized by the following values:

- Ethics, fair play and honesty
- Health
- Excellence in performance
- Character and education
- Fun and joy
- Teamwork
- Dedication and commitment
- Respect for rules and laws
- Respect for self and other participants
- Courage
- Community and solidarity

Doping is fundamentally contrary to the spirit of sport.

⁶ Part of the Comment to Article 10.4 of the WADA Code states: "It is anticipated that the period of Ineligibility will be eliminated entirely in only the most exceptional cases."

35. The fact that a five month period of Ineligibility may have financial consequences for the Player is not a valid factor in determining the appropriate period of Ineligibility. Indeed, it is important to emphasise that the sanctioning regime for anti-doping rule violations is a universal one and applies equally to professional and amateur players of the Game.

36. The period of Ineligibility should be regarded as having commenced on the date of the Player's provisional suspension, namely 18 June 2010. The period of Ineligibility expired on 18 November 2010. The BJC released a brief decision, with reasons to follow, on 18 November 2010.

Appeal Rights

37. This decision is final, subject to referral to a Post Hearing Review Body (Regulation 21.24) and, if applicable, an appeal to the Court of Arbitration for Sport (Regulation 21.27). In this regard, attention is directed to Regulation 21.24.2, which sets out the process for referral to a Post Hearing Review Body, including the time within which the process must be initiated.

Costs

38. If the Board wishes us to exercise our discretion in relation to costs pursuant to Regulation 21.21.10, written submissions should be submitted to the BJC via Mr. Ricketts by 17:00 GMT on Friday 10 December 2010, with any responding submissions from the Player to be provided by 17:00 GMT on Friday 17 December 2010.

2 December 2010

A handwritten signature in black ink, appearing to read 'Graeme Mew' with a stylized flourish at the end.

Graeme Mew, Chairman