

INTERNATIONAL RUGBY BOARD

IN THE MATTER of the Regulations
Relating to the Game

A N D

IN THE MATTER of an alleged doping
offence by RYOHEI
YAMANAKA 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 Ismail Jakoet	(South Africa)	
Dr David Gerrard	(New Zealand)	

Appearances and Attendances

For the Board

Susan Ahern	(Counsel for the International Rugby Board)
Tim Ricketts	(Anti-Doping Manager)

The Player

Ryohei Yamanaka

Japanese Rugby Union

Mr Hideki Hakoda	(Deputy Secretary General JRFU)
Dr Takao Akama	(Chairman of JRFU Anti-Doping Committee)
Mr Shuhei Kukuchi	(Player's legal representative)

Ms Fumi Kuboke	(Interpreter)
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Hearing

21 July 2011

DECISION OF THE BOARD JUDICIAL COMMITTEE

Introduction

1. On 9th April 2011, Ryohei Yamanaka (the "Player") provided a urine sample during an Out of Competition Test¹ conducted by the Japan Anti-Doping Agency (JADA) on behalf of the International Rugby Board (IRB). Subsequently, the sample returned an adverse analytical finding for the substance Methyltestosterone and/or Methandriol (the "substance"). The substance is classified as an anabolic androgenic steroid under Section 1a Exogenous Anabolic Androgenic Steroids on the WADA List of Prohibited Substances and Methods 2011 (the "WADA Prohibited List") which is incorporated into IRB Regulation 21 (Anti-Doping) as Schedule 2.

2. On 2nd May 2011 a preliminary review was conducted by Mr Gregor Nicholson (Scotland) in accordance with IRB Regulation 21.20.1. It was noted there was no record of the player holding a valid Therapeutic Use Exemption (TUE) for the use of the substance and Mr Nicholson was satisfied there was sufficient evidence for him to conclude an anti-doping rule violation may have been committed in contravention of IRB Regulation 21.2.1. Pursuant to Regulation 20.2.2 the Player was notified on 5th May that an anti-doping rule violation may have been committed by him and he was provisionally suspended by JADA on 28th April 2011. Subsequently the Player confirmed he wished to have his "B" sample analysed, which occurred on 24th May 2011. On 27th May 2011 the Player was notified the B sample analysis confirmed the results of the A sample analysis.

3. Prior to the hearing the Player provided a written statement. At the hearing he was questioned by Mrs Ahern and members of the BJC. This was followed by Mrs Ahern presenting submissions on behalf of the IRB. In reply, the Player sought leave to call a further witness, his barber. Potentially he could provide corroborating evidence but as the BJC accepts the Player's evidence as to his use of the cream which contained the prohibited substance it does not consider it is necessary to receive further evidence from the barber.

¹ The Player is a member of the IRB Testing Pool for the purposes of Out-of-Competition-Testing in accordance with Regulation 21.10 (Player Whereabouts Requirements for Out of Competition Testing). The Player was notified by the IRB in writing of his inclusion in the IRB Testing Pool for the first two quarters of 2011. On 8th December 2010 and 1st April 2011 the Player acknowledged in writing that "*inter alia*" he had received the notices of his inclusion in the IRB Testing Pool. The IRB Player Whereabouts letters emphasised the importance of the IRB's Out of Competition Testing Programme and the consequences of non compliance.

The Player's Case

4. The Player is an experienced rugby player having represented Japan at High School level during the School Team's tour of Australia in 2006, at the IRB JWC and during 2009 and 2010 at International level. He plays fly half. He also played rugby for his university where he graduated with a Bachelor's degree in Sports Science. The Player acknowledged throughout his career since 2006 he had received anti-doping education from the team doctors of the teams representing Japan and from his university rugby club. He had participated in two previous Out of Competition Tests in 2008 and 2009. The results of both tests were negative. Further in 2008 when the Player represented Japan at IRB Junior World Championships (JWC) Tournament he was required to sign a Player Consent Form in which he "*inter alia*" agreed to comply with the Tournament's Anti-Doping Programme. As a result of the foregoing the Player acknowledged he was fully aware of the principle of strict liability which underpins the IRB Anti-Doping Programme and it was his personal responsibility to take care to avoid taking any substance which could result in him committing an anti-doping rule violation.

5. The Player explained that acting on the advice of his barber towards the end of January 2011 he purchased without a doctor's prescription, two tubes of a product branded as "*Microgen Pastae*" ("the Product") commonly used in Japan for the purpose of generating hair growth. He intended growing a moustache to complement his beard. At the time of purchase the Player unfortunately omitted to ascertain whether the product contained a prohibited substance. In fact, the "*Microgen Pastae*" usage note stated:

"Microgen Pastae is hydrophilic cream. 1g of Microgen Pastae contains 10mg of methyltestosterone and 5mg of testosterone propionate (also contains stearyl alcohol, propylene glycol, polyoxyethylene hydrogenated castor oil, glyceryl stearate, paraben, Vaseline, cholesterol, quaternium-51, flavour as additives)."

6. The Player stated his barber was aware he was a member of the National Rugby Team but he gave no indication the product he recommended contained a prohibited substance. The product is available at drug stores without a doctor's prescription. It is presented in the form of a topical cream and the Player considered it to be a "*beauty product*", not a medicine. Thus, he did not make the connection that the "*beauty product*" contained a

prohibited substance and did not consider it was necessary to consult a doctor or discuss its use with team-mates before applying it.

7. These applications occurred during mid February 2011 on approximately seven occasions, "once or twice" during March and over a period of three days between 4th and 6th April while participating in a training camp for the National Team. In total the Player used one-third of a 6g tube between February and April on approximately 14 days. The Player stated the use of the product did not stimulate the anticipated hair growth above his upper lip and at no stage did he intend to use for the purpose of enhancing his playing performance.

The Doping Offence

8. The IRB Anti-Doping Regulations set out the framework under which all players can be subjected to Doping Control and the procedures for any alleged infringements of those Regulations. The IRB Regulations also adopt the mandatory provisions of the World Anti-Doping Code ("the Code").²
9. Both the IRB Anti-Doping Regulations and the Code are based on the principles of personal responsibility and strict liability for the presence of Prohibited Substances or the use of Prohibited Methods.
10. Pursuant to Regulation 21.2.1 the "*presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample*" constitutes an anti-doping rule violation.
11. Regulation 21.2.1(a) provides:
"It is each Player's personal duty to ensure that no Prohibited Substance enters his body. Players are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. 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 rule violation under Regulation 21.2.1."
12. In relation to the principle of personal responsibility Regulation 21.6 provides:
*"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;*

² The WADA Code can be found on the WADA website at http://www.wada-ama.org/documents/world_anti-doping_program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf

- (b) *he does not commit any other anti-doping rule violation;*
- (c) *...*
- (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 the Regulations.*

...

6.3 *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."*

13. 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. The Player accepts and does not challenge the analytical findings of the laboratory. Accordingly, the BJC finds the Board has established to the required standard the anti-doping rule violation; that is the presence of the prohibited substance Methyltestosterone and/or Methandriol in the Player's bodily sample.

Sanction

Regulatory Framework

14. The IRB's regulatory framework stipulates that in imposing the appropriate sanction the BJC is required to apply the relevant provisions of Regulation 21 (which are based on the World Anti-Doping Code). The period of Ineligibility for a Prohibited Substance for a first time offence is two years pursuant to Clause 22.1 (IRB Regulation 21.22.1).
15. Regulations 21.22.4 and 21.22.5 provide for the elimination or reduction of the otherwise applicable period of Ineligibility based on "*exceptional circumstances*":
"21.22.4 No Fault or Negligence
If a Player or other Person establishes in an individual case that he bears No Fault or Negligence, the otherwise-applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in a Player's Sample in violation of Clause 2.1 (presence of a Prohibited Substance or its Metabolites Markers), 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 Clause 22.4 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 Clause 22.10.

21.22.5 No Significant Fault or Negligence

If a Player or other Person establishes in an individual case that he bears No Significant Fault or Negligence, the otherwise applicable period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the 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 eight years. When a Prohibited Substance or its Markers or Metabolites is detected in a Player's Sample in violation of Clause 2.1 (presence of a Prohibited Substance or its Metabolites or Markers), the Player must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility reduced."

16. In this case the Player does not seek to invoke Regulation 21.22.4 but seeks a reduction in the minimum mandatory sanction on the basis the circumstances of his anti-doping offences comes within the exceptional circumstances provision set out in Regulation 21.22.5.

17. "No Significant Fault or Negligence" is defined in Section A of Regulation 21 as follows:

"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."

18. The criteria for "No Fault or Negligence" also are defined in Section A as follows:

"The Player's establishing that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered the Prohibited Substance or Prohibited Method."

Application of Regulation 21.22.5

19. Essentially, the application of Regulation 21.22.5 requires the Player to satisfy a pre-condition; that is to establish how the prohibited substance entered the Player's system. If the BJC accepts the Player's evidence in relation to the mode of ingestion, the BJC must then make an assessment of fault or negligence on the part of the Player.

20. In discussing Article 10.5.2 of the Code (IRB Regulation 21.22.5) an independent anti-doping tribunal of the International Tennis Federation in the case of Roy Mariano Hood (8 February 2006)³ stated:

"The purpose of this provision is to confine the circumstances in which the automatic sanctions may be reduced to truly exceptional circumstances in which the player can show, the burden of proof lying upon him, how the substance did indeed enter his body. That burden of proof must be discharged on the balance of probability. The provision thus ensures that mere protestations of innocence, and disavowal of motive or opportunity, by a player, however persuasively asserted, will not serve to engage these provisions if there remains any doubt as to how the prohibited substance entered his body. This provision is necessary to ensure that the fundamental principle that the player is personally responsible for ensuring that no prohibited substance enters his body is not undermined by an application of the mitigating provisions in the normal run of cases."

21. The ITF Tribunal noted the Player clearly established his positive test resulted from his use of a prohibited substance (*Finasteride*) for which a Therapeutic Use Exemption could have (but had not) been applied for, but stated that establishing the cause of the positive test does not necessarily make the circumstances of the case exceptional. Rather, by establishing how the substance entered his system, the athlete satisfies a precondition for the application of the exceptional circumstances provisions. The ITF Tribunal continued with these observations:

"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."

22. The case of IRB v Hanks (16 February 2006) is also instructive. It also involved the previously prohibited substance *finasteride* which had medically

³ <http://www.itftennis.com/shared/medialibrary/pdf/original/IO>

been prescribed for the Player's hair growth. In relation to the issue of "No Significant Fault or Negligence" the BJC stated, at para 47 of its decision:

"With respect to the question of whether the Player bears "No Significant Fault or Negligence", we have to view the totality of the circumstances, taking into account the criteria for No Fault or Negligence (i.e. whether the Player knew or suspected, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered the Prohibited Substance), and then conclude that the Player's fault or negligence was not significant in relationship to the antidoping rule violation."

Determination

23. The BJC accepts the Player's account as to his use of "Microgen Pastae" and for this reason does not consider it is necessary to receive further evidence from his barber. Further, although there was an absence of expert scientific evidence, based on the personal knowledge of two of its members, (both of whom are experienced Medical Practitioners specialising in Sports Medicine), the BJC accepts that the non-specific low level finding of the prohibited substance was consistent with skin absorption rather than other forms of ingestion.
24. There was no dispute the Player was at fault. The issue for the BJC to resolve was the extent of the fault, the Player describing it as not significant; the IRB as significant.
25. Over recent years there have been many cases involving sportsmen and sportswomen in which adjudicators have been required to assess fault. For example, in the case of Hanks (supra) which involved a previously prohibited substance medically prescribed for hair growth it was held the player had established the "no significant fault or negligence" threshold and as a result the mandatory minimum sanction (suspension for 1 year) was imposed. However, this case can be distinguished from Hanks on several grounds including the different nature of the prohibited substances (Finasteride is no longer a prohibited substance), and the markedly different circumstances (including the fact the substance was medically prescribed) which lead to the player ingesting the prohibited substance.
26. In our view, although previous authorities can be of assistance, care does need to be taken in relying too much on previous cases as authorities in

determining a sanction. Ultimately, every case will depend on its own facts and on the evidence presented at a hearing.

27. In assessing the Player's degree of fault the BJC considers the following factors are relevant:

- (a) The Player is an experienced rugby player. Under the strict liability principle of the IRB's anti-doping regime he properly accepted he was aware he had a personal duty of ensuring no Prohibited Substance entered his system. Since 2006 he had received extensive information on anti-doping and had been Out of Competition tested on two previous occasions. Pursuant to the 2011 Out of Competition Testing Programme he was aware he could be tested at any time. Also, he was aware the perils of using medically-related substances could result in an anti-doping offence and aware of the need to adopt a conservative approach by at least consulting a Team Doctor. Unfortunately, the Player did not adopt that approach because, as he stated, the Product was available without a doctor's prescription and he classified it as a "*beauty product*", not a medicine. However, as Mrs Ahern submitted this approach overlooks "*topical*" or "*beauty products*" on occasions can contain prohibited substances and their use in any form could result in an Adverse Analytical finding.
- (b) Further, given the Player's familiarity with anti-doping information he could have carried out his own research of the Product which he had purchased to enhance a specific masculine characteristic. As indicated, the information that came with the Product clearly stated it contained Methyltestosterone which he could have ascertained is a prohibited anabolic androgenic steroid.
- (c) The BJC accepts the use of the Product was not to enhance sporting performance. However, the Player did not have a valid clinical reason for its use; rather it was to produce the growth of hair for his moustache and in these circumstances the Player was under an obligation to ensure he "*met the standard of utmost caution*" (refer Section A definitions as discussed in Hood, supra). Clearly this did not occur; the Player using the product to stimulate hair growth without first ascertaining its content and effects.

28. This is another case which highlights the tension between the over-arching principle of strict liability on the one hand and understandable, but nevertheless negligent, conduct on the part of the Player. The BJC was impressed by the Player's candour and has sympathy for his current predicament but we are unable to conclude that the overall circumstances of this case come within the category of being truly exceptional which would allow a finding of no significant fault or negligence. Regrettably, from the Player's point of view this is not a case of excusable failure. If the Player had taken greater care the doping offence could have been prevented.
29. Accordingly, we conclude we are unable to impose a reduced sanction of between one and two years suspension but must impose the mandatory sanction of two years ineligibility.

Decision

30. On 9 April 2011 the Player committed an anti-doping rule violation, namely, the presence in his bodily sample of Methyltestosterone and/or Methandriol which is a Prohibited Substance under both Regulation 21 and the Code.
31. The sanction imposed for this anti-doping rule violation is a period of Ineligibility of two years, commencing on 28th April 2011 (the date upon which the Player was notified of the adverse analytical finding and provisionally suspended by JADA) and concluding on (but inclusive of) 27th April 2013.
32. The Player's attention is drawn to IRB Regulation 21.22.13 which provides, *inter alia*, that:
- "No Player ... who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a match and/or tournament (international or otherwise) or activity (other than authorised anti-doping education or rehabilitation programmes) authorised or organised by the Board or any Union or Tournament Organiser. Such participation includes but is limited to coaching, officiating, selection, team management, administration or promotion of the Game, playing, training as part of a team or squad, or involvement in the Game in any other capacity in any Union in membership of the IRB."*

The full text of Regulation 21.22.13 concerning status during Ineligibility should be consulted.

Costs

33. If the Board wishes us to exercise our discretion in relation to costs pursuant to Regulation 21.21.10, written submissions should be provided to the BJC via Mr Ricketts by 17:00 Dublin time on 19th August 2011, with any responding written submissions from the Player to be provided by no later than 17:00 Dublin time on 5th September 2011.

Review

34. This decision is final, subject to referral to a Post-Hearing Review Body (Regulation 21.25) or an appeal, where the circumstances permit, 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 within which the process must be initiated.

T.M Gresson
Chairman

3 August 2011

