# RUGBY FOOTBALL UNION DISCIPLINARY HEARING

**At:** Holiday Inn, Brighouse

On: Wednesday, 9<sup>th</sup> March 2011

#### **DECISION**

Player: KARENA WIHONGI Club: Sale Sharks

**Match:** Aviva Premiership: Newcastle Falcons v Sale Sharks

**Date of Match:** 7<sup>th</sup> January 2011

**Panel:** Antony Davies (Chairman), Dr. Barry O'Driscoll and Clif Barker ("the

Panel")

**Secretariat:** Bruce Reece-Russel (RFU Disciplinary Manager)

Sam Dimmock (RFU Legal Secretary)

**Attending:** Karena Wihongi ("the Player")

Martin Budworth (Counsel for the Player)

Matthew Barnes and Mike Blood (Solicitors instructing Mr. Budworth)

Kate Gallafent (Counsel for the RFU) Polly Handford (RFU Legal Officer)

**As Observers:** Richard Nunn (RFU Anti-Doping Officer)

Jason Torrance (UK Anti-Doping Authority)

#### **Charge and Plea**

1. The Player pleaded guilty to an anti-doping violation, accepting that a urine sample taken from him on 7<sup>th</sup> January 2011 contained the specified stimulant Methylhexaneamine ("MHA").

#### **Agreed Facts**

- 2.(i) The Player accepted the adverse analytical finding and raised no issue with the sample collection and testing procedure. He waived his right to have the "B" sample tested.
- (ii) On 18<sup>th</sup> September 2010 WADA published the 2011 prohibited list under which from

- 1<sup>st</sup> January 2011 MHA was included under Section 6(b) as a specified stimulant.
- (iii) At no time did the Player hold a valid and applicable TUE permitting the presence of the prohibited substance in question.
- (iv) Whilst under the Declaration of Medication section of the Doping Control form the Player declared "Anti-flammatory, USN Protein, USN Fat Burner, Cocodamol, Red Bull and nasal saltwater", he did not declare any other prescription or non-prescription medication or supplements taken in the previous seven days.

#### **The Regulatory Scheme**

- 3. The RFU Anti-Doping Provisions are contained in RFU Regulation 20, which expressly incorporates IRB Regulation 21, its procedural guidelines and the WADA Prohibited List and adopts them as its own Anti-Doping Regulations and procedure.
- 4. IRB Regulation 21.22.1 imposes a period of ineligibility for a violation of Regulations 21.2.1, 21.2.2 and 21.2.6 for a first violation of a period of ineligibility of two years unless conditions for eliminating or reducing the period of ineligibility are met. This is the Player's first violation.

#### 5. Regulation 21.22.3 states:

"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:

First violation: At a minimum reprimand and no period of ineligibility; and at a maximum two years.

To justify any elimination or reduction from the maximum period of ineligibility set out above, the player or other person must produce corroborating evidence in addition to

his word which establishes to the comfortable satisfaction of the Judicial Committee 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.

#### **Issues for the Panel**

- 6. The Panel considered that it should address the following:
- (i) How did the prohibited substance come to be in the Player's system to be established on the balance or probabilities.
- (ii) Was there corroborating evidence, in addition to the word of the Player, which established to the comfortable satisfaction of the Panel the absence of intent to enhance sport performance or mask the use of a performance enhancing substance?
- (iii) What degree of fault should be attributed to the Player and did this merit any reduction in the period of ineligibility? If so, how much?

#### The Player's Account

- 7. The Player is a 31 year old full-time professional rugby player. He has played in the French leagues for 10 years and now plays in the Aviva Premiership. He has been in the anti-doping regime for some 11 years and has previously provided negative samples. He has in the past taken a number of supplements and has had a great deal of anti-doping education. He has taken fat burners and is aware of the risks of the contents of such dietary supplements. He appreciates that the Clubs will often provide supplements but it is up to him as to whether he takes them or not. He is more than aware of the strict liability within the anti-doping regime.
- 8. In July 2010, USN became the Club's Sponsor and official supplier of its sports nutritional products. They were considered a reputable supplier, having already entered into a similar relationship with the current Rugby World Champions, South Africa. The Club had received assurances from USN that all supplements provided by them were in accordance with the Anti-Doping Regulations and free from any prohibited substances and had not resulted in

any positive tests.

- 9. One particular product which was recommended to the Club was Anabolic Nitro Extreme Energy Surge ("Anabolic Nitro"). The website of USN attests to the benefits of the product which include, inter alia, increased vasodilation, improved blood circulation, the speeding up of the healing of harmed tissue, generation of explosive energy during workout and the achievement of profound muscle gain. It is described as designed for body builders, strength and power athletes. In September 2010, the Club carried out a trial on its players using Anabolic Nitro. The trial was successful and Anabolic Nitro was ordered in bulk by the Club. The batch number of the delivery received was LM0808/01.
- 10. The Player stated that he had reacted badly to Anabolic Nitro in the trial he could not stomach the taste and he elected not to use it as a dietary supplement.
- 11. In November 2010, the Club and the Player became aware from the Press of the cases of two South African Rugby Internationals who had tested positive for traces of MHA as a result of ingesting a USN product and Anabolic Nitro was withdrawn as a precaution for a period. The Player was aware that it was subsequently reintroduced following assurances from USN and specific education from the Club Doctor, but did not take much more than a passing interest because it was not a supplement he was using.
- 12. By 7<sup>th</sup> January 2011 the Club had reinstated Anabolic Nitro as a supplement provided for about six of its players. It was consumed by them during the half time interval. Evidence was given in considerable detail by Alan Blease, the Kit and Logistics Manager, Peter Finch, the Strength and Conditioning Coach, and Andrew Jibson, also a Strength and Conditioning Coach, as to the match day protocol. Prior to half time, and upon the instruction of Mr. Finch, Mr. Blease prepared approximately six bottles of Anabolic Nitro by filling green Gatorade drinks bottles with water and emptying one sachet of Anabolic Nitro into each bottle, which were then provided to players who had specifically requested them for half time. Also available were bottles of:
- (i) Highland spring water in clear plastic marked bottles;
- (ii) Cans of Red Bull;
- (iii) Bottles of Gatorade in clear bottles in different colours and flavours;

- (iv) Green Gatorade branded bottles containing just water;
- (v) Green Gatorade branded bottles containing Anabolic Nitro.

The Gatorade branded bottles were opaque.

- 13. The Player and witnesses gave evidence as to the physically untidy and messy state of the changing rooms at half time, with the various drinks bottles referred to above on the floor on tables and in crates. The Player's written and oral evidence was that he entered the changing room, thirsty and requiring water to quench his thirst. He picked up a green Gatorade bottle believing that it contained water. He realised very quickly that it was not in fact water and recognised the taste as that which he had not been able stomach from the tests three months beforehand. There was evidence that he was seen to screw up his face and throw the offending bottle to the floor. Mr. Blease confirmed that the Player had indeed taken a bottle not intended for him but that he had pre-mixed for a nominated player, and further confirmed that since Anabolic Nitro had been introduced he had never made up a bottle for the Player.
- 14. Following notification of the adverse analytical finding, the Club began an immediate investigation. It sent for testing eleven substances which were supplied to or used by its players, including USN Anabolic Nitro, batch number LM0808/01, which it specifically requested be tested for MHA following the Club's concerns over the cause of the positive tests given by the South African players. On 21<sup>st</sup> February 2011, the Club received notification that the laboratory had completed its analysis but had not tested USN Anabolic Nitro in spite of the fact that a specific request had been made for such a test. Further investigation by the Club revealed that USN had contacted the laboratory asking that Anabolic Nitro batch LM0808/01 not be tested on the basis that it accepted batch LM0808/01 did contain MHA. USN also confirmed in writing that upon receipt of the batch LM0808/01 on 23<sup>rd</sup> August 2010, it had supplied sachets of Anabolic Nitro to the touring party from South Africa and Sale Sharks.
- 15. The Player submitted that he had no intention to enhance sporting performance, because although he was aware what he was consuming was not water, but Anabolic Nitro, he did not know at any stage prior to 7<sup>th</sup> January 2011 that Anabolic Nitro contained MHA. He was merely seeking to quench his thirst with water and as soon as he realised what it was he stopped drinking. Furthermore, the Player did not take the substance covertly, but in full view of the rest of his team and the coaching staff. He believed that the product had been

marketed as a product to promote muscle recovery and was not intended to be taken as a performance enhancing substance.

- 16. When asked about his declaration on the sample submission form, he pointed out that he had declared everything he thought to be relevant that he had been taking. He was not taking Anabolic Nitro (other than the small amount he had ingested by mistake) and so did not need to declare it on the form.
- 17. When questioned about the degree of fault the Player should bear, he submitted that his only fault was to drink from a drinks bottle that he genuinely considered would contain water. As it transpired, it did not. He accepted that he should have been aware that the bottle may have contained Anabolic Nitro, but that was not a cause of concern to him because Anabolic Nitro was sourced by the Club from one of its Sponsors who was believed to be a reputable company and provided by Club staff whose job it was to verify the legitimacy of the products that the players were taking.

#### **The RFU Position**

- 18. Miss Gallafent reminded the Panel of the standards and burdens of proof which had to be applied, the requirement for corroborating evidence in addition to the word of the Player, and by reference to the WADA code notes. She also pointed out the absence of disclosure on the sample collection form signed by the Player.
- 19. Evidence had been given by Mr. Blease that he believed the sachets made up by him on 7<sup>th</sup> January 2011 were from a fresh batch, <u>not</u> batch LM0808/01. It was barely credible that the rogue batch was still in use. The subsequent batch had been declared free of MHA so the Panel could not be satisfied that MHA was in the Player's system in the manner claimed by him.
- 20. As to the evidence as to a lack of intent to enhance performance, Miss Gallafent drew the Panel's attention to the concept of personal responsibility which underpins the anti-doping regime. She referred the Panel particularly to the exhortations to caution in the area of dietary supplements. Any taking of such supplements must be regarded by any reasonable professional as very risky and the Player appeared to have done little or nothing to investigate

the potentiality for contamination. The Player seemed to have relied far too much on others. He did not ask any medical expert. He should have been fully aware of the risks. He appeared not even to have heeded the specific warnings issued by the RFU Anti-Doping and Illicit Drugs Programme Manager on 9<sup>th</sup> November 2010. This e-mail (which is not reproduced in full here) referred to a number of cases being dealt with by UK Anti-Doping, that MHA was mainly found in energy products/fat burners and naming the pseudonyms MHA went by. It concluded with the telling warning "Any player caught in competition for it can expect at least a four month ban, but may get longer. Remember to get the guys to check their supplements".

21. Miss Gallafent took the Panel through a number of recent cases, distinguishing the facts and seeking to place this case appropriately by comparison. The Player was an experienced professional athlete with more than ten years in the anti-doping regime. He must have known it was entirely inappropriate just to grab any bottle in a lottery as to what it contained.

#### Submissions on behalf of the Player

- 22. Mr. Budworth summarised the evidence which he submitted contained no other plausible suggestion for the Player's positive test other than the contaminated batch of Anabolic Nitro supplied by USN. There was no doubt about the contamination because USN had countermanded the Clubs requested test on the Anabolic Nitro on the grounds that the batch had already been tested and had been found to contain MHA. The batch number submitted for testing by the Club was LM0808/4/01 which was so close to the contaminated batch that the proper conclusion to draw was that in fact there was no new batch as Mr. Blease thought, but a re-use of the old contaminated batch.
- 23. As to the issues of performance enhancement, fault and sanction, Mr. Budworth took the Panel through the reported cases. He submitted that the decision of the SARU Judicial Committee in the matter of Mahlatse Chiliboy Ralepelle and Bjorn Basson was a benchmark decision with almost identical facts to the current case and one which the Panel ought to consider as a precedent.

#### **Findings**

- 24. We are satisfied to the required standard of proof that Anabolic Nitro batch number LM0808/01 supplied by USN contained MHA. Mr. Blease used a contaminated sachet to make up a half time drink for another Sale Sharks player. The container was picked up and drunk from by the Player who wrongly believed its contents to be water alone. In fact, the drink was contaminated by MHA.
- 25. We have heard the evidence of the Player and this evidence has been subject to cross-examination by Miss Galafent and questioning from members of the Panel. We accept the Player's evidence that he was merely seeking to quench his thirst with water and as soon as he did not like the taste and recognised the product, he stopped drinking from the bottle. We find he had no intention to drink any other substance than water and certainly did not intend to consume a drink that contained MHA and/or was a performance enhancing substance. We further find those assertions corroborated by oral evidence from Messrs. Jibson, Finch and Blease and a written statement from another Sale Sharks player, Mr. Tonetti. That evidence supported the Player's contention that he had not taken the drink covertly. There is also corroboration of the Player's evidence that immediately he knew he was not drinking water, he screwed up his face and threw the offending bottle down. The totality of such evidence leaves us comfortably satisfied that the substance was not taken in an attempt to enhance the Player's sporting performance.
- 26. As to the issue of the degree of fault to be attributed, we have been considerably assisted by Miss Gallafent and Mr. Budworth in their analyses of the following recently reported cases:

UK Anti-Doping Ltd. v Wallader

UK Anti-Doping Ltd. v Dooler

UK Anti-Doping Ltd. v Duckworth

UK Anti-Doping Ltd. v Mensing

SARU Judicial Committee Decision in the matter of Ralepelle and Basson.

27. We have considered carefully Mr. Budworth's submissions as to how we should approach the South African Decision and that we should not place any period of ineligibility from rugby upon the Player. This Decision does not seem to us to sit easily with the underlying premise of the anti-doping legislation, i.e. that players are responsible for and have

a duty to ensure that no prohibited substance enters their body. However, all cases are fact sensitive and significant differences can be discerned between the facts recorded in that Decision and those we have considered in the present case. We have therefore placed the SARU case at one end of the spectrum of possible outcomes to be considered and viewed in the context of the Player's approach to doping control and his degree of fault.

- 28. We do have some sympathy for the Player, who does not bear sole responsibility in this case. The Club and the manufacturer, USN, share some responsibility for his predicament. USN supplied boxes from batch LM0808/01 to Sale Sharks on 13<sup>th</sup> October 2010. On 15<sup>th</sup> November 2010, USN became aware of the failed drug test and maintained that as a precaution they had withdrawn the produce from Sale Sharks, subsequently receiving items back at the end of November 2010. The product was re-tested and on 26<sup>th</sup> November 2010 HFL Sports Science identified the presence of MHA in batch number LM0808/01. On 8<sup>th</sup> December 2010, Mr. Karl Bickley of USN sent a text to Mr. Jibson offering to replace the product and stating "test results from HLB came back OK but we want to eliminate any risk by replacing with a complete new batch of products". Following the Player's positive test, a sample of the product was sent by the Club for independent testing, but USN appeared to have intervened to prevent re-testing. USN's assertion that it had previously informed the Club not to use Anabolic Nitro should be construed in the light of its intervention in the Club's testing requirement and the text of 8<sup>th</sup> December 2010 stating that the test results came back OK, when they did not.
- 29. The Club appears to have proceeded on the basis of mere assumptions as to safety. By Mr. Jibson's own admission, it did not employ good practice. It had an inadequate and confusing dressing-room protocol leading to a failure to segregate performance enhancing products from water. We found the evidence of Mr. Finch, Mr. Blease and Mr. Jibson individually unconvincing in certain respects and, taken together, so confusing that we could not even be sure that batch LM0808/01 was ever returned and replaced. Mr. Jibson in his written statement made it clear that he packaged up and sent the batch back, but in oral evidence denied this. He could not be sure it was returned and conceded the possibility that it was never returned. None of these three gentlemen could give evidence as to who took delivery of the replacement supply if it was ever requested or sent.

- 30. The Player is a full-time professional, with 11 years' exposure to the anti-doping regime. He has experienced much education in that time, including pertinently a presentation and hand-out given by the Club Doctor, Dr. David Jones, on 22<sup>nd</sup> November 2010 in response to the positive test of the South African players to MHA. That talk was specifically designed to highlight the risks and dangers of MHA. Furthermore, the Player is fully aware of his responsibility to ensure that no prohibited substance is found to be present in his body (IRB 21.6.1(a)) and is aware generally of his responsibility under IRB 21.6.4. He is also aware of the RFU education efforts, including Mr. Watkins' warning letter to Clubs of 9<sup>th</sup> November 2010.
- 31. Notwithstanding this background, the Player took no steps, or inadequate steps, himself, he sought to rely on others and did not ask any medically qualified expert. Thirty seconds investigation of the USN website reveals that Anabolic Nitro "generates explosive energy, increases vasodilation and improves endurance capacity". Any professional athlete subject to anti-doping should have been put on notice by this of the serious risk and danger that taking such a product involved. The Player knew the substance was performance enhancing (though he himself was not taking it) yet he entered a changing room and grabbed and drank from a bottle he knew might contain it. He closed his mind to the possibility of contamination and must have known that it was entirely inappropriate just to grab any bottle, when he could quite easily have grabbed Gatorade or Highland Spring in clear marked containers. Instead he slugged from an opaque bottle, the provenance of whose contents was distinctly dubious.
- 32. In all the circumstances, we cannot accept that a warning and a reprimand would be sufficient sanction in this case. Players still do not seem to be getting the message about the risks of the use of nutritional supplements and we feel a period of ineligibility is warranted in this case commensurate with our findings as to the Player's degree of fault.

#### **Sanction**

33. The Player will be subject to a period of ineligibility of four months (seventeen weeks), that is from 28<sup>th</sup> January 2011 to 26<sup>th</sup> May 2011 inclusive. He may play again on 27<sup>th</sup> May 2011. During the period of suspension, his status within the game is in accordance with IRB Regulation 21.22.13.

### Costs

Costs of £500.00 are awarded against the Player/his Club. 34.

## **Right of Appeal**

35.	The Player is reminded of his right of appeal against this decision, as provided by the
Disciplinary Regulations.	

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Antony Davies

Chairman 16<sup>th</sup> March 2011