

**BEFORE THE NEW ZEALAND RUGBY UNION  
ANTI-DOPING TRIBUNAL**

**BETWEEN** **DRUG FREE SPORT NEW ZEALAND**  
Applicant

**AND** **TRISTAN MORAN**  
Respondent

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**REASONS FOR DECISION OF THE TRIBUNAL MADE ON 25 AUGUST 2011  
REASONS GIVEN 6 SEPTEMBER 2011**

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<b>Hearing</b>	25 August 2011 at Wellington
<b>Tribunal Members</b>	Terry Sissons (Chair) Ian Murphy Inoke Afeaki
<b>In Attendance</b>	Tristan Moran - Player Michael Smyth - Counsel for Player
<b>In Attendance by telephone</b>	Jayne Kernohan - Drug Free Sport NZ Graeme Steel - Drug Free Sport NZ Paul David - Drug Free Sport NZ Dr Neil Matson - witness David Gibson - witness Chris Matson - witness
<b>Registrar</b>	Stuart Doig

## INTRODUCTION

1. On 24 August 2011 Drug Free Sport New Zealand (“DFS”) commenced proceedings under the New Zealand Rugby Union (“NZRU”) anti-doping regulations (which incorporate the New Zealand Sports Anti-Doping Rules (“the Rules”)), alleging that Tristan Moran (the “Player”) did, on 26 July 2011, compete with the prohibited substance Probenecid in his system, for which he had not applied for, and been granted, a Therapeutic Use Exemption (“TUE”) at the time of the test.
2. The application alleged a breach of Rule 3.1.
3. The Player admitted the violation, and indicated that he wished to make submissions and call evidence on the level of sanction to be imposed. The Tribunal had made an order on 19 August 2011 provisionally suspending the Player from that date.
4. Because the end of the representative rugby season was approaching, the Player requested that a hearing be expedited and the Tribunal acknowledges the cooperation of DFS in arranging for and participating in the hearing.
5. At the conclusion of the hearing the Tribunal imposed a period of ineligibility of one week, commencing from the date on which the provisional suspension was imposed and indicated that it would provide its reasons later.

## EVIDENCE

6. The Player is a professional rugby player representing the Bay of Plenty Rugby Union in the ITM Cup. As such he is subject to the NZRU’s anti-doping regulations, and to drug testing undertaken by DFS.
7. On 20 July 2011 the Player visited the surgery of Doctor Neil Matson, who he referred to as the Bay of Plenty team doctor. Dr Matson’s evidence was that he has previously been employed as team doctor on a paid part-time and shared basis, but that the Bay of Plenty Union does not currently engage a full time team doctor. He has however retained his involvement on a voluntary basis and treats players in his practice alongside two of his colleagues.
8. The Player’s concern was that one of his legs had developed a sore, and had started swelling and going red. He saw Dr Matson and was prescribed a course of oral anti-biotics. Dr Matson’s evidence was that the symptoms indicated possible cellulitis at this stage.
9. Two days later, on 22 July 2011, the condition had worsened and the Player returned to Dr Matson’s surgery. The Player was having trouble walking and viewed his condition as very serious.
10. Dr Matson again examined the Player and observed the leg had become more swollen and had developed an abscess and associated cellulitis that went from the upper thigh to 2cm above the knee and around the side of the thigh.
11. Dr Matson stated that immediate treatment was indicated, and noted that until several years ago this would require hospital admission. More recently however general practitioners have been encouraged to

treat patients in the surgery, following a protocol that involves antibiotics administered by an IV drip plus Probenecid tablets to be taken orally. Probenecid is a uricosuric drug and acts as a renal blocking agent, by keeping antibiotics in a patient's system, rather than allowing it to be excreted in the urine.

12. For the purposes of the Rules, Probenecid is categorised as a masking agent, because it might stop another prohibited substance from being excreted and detected by drug testing.
13. Dr Matson performed a surgical procedure under local anaesthetic to remove the infected tissue from the Player's leg and insert a wick. Before commencing the operation he explained what he would do and that he would be administering IV antibiotics. He does not recall mentioning Probenecid by name, and indicated that, if he mentioned anything about Probenecid at all, it would have been along the lines that he would be giving the Player tablets to help the antibiotics work better. However, it was quite possible that he did not say anything about the Probenecid before the operation because it is a recognised and routine treatment in these situations with little or no side effects, and essential for the treatment of the infection.
14. The Player said that no mention was ever made to him of Probenecid, and that he was not aware it had been given to him (although he acknowledges that he was given tablets to swallow). Shortly after the operation, prompted by a call from his father, the Player he asked the nurse who was attending him if the medicine was alright for him to take. He was told that she would check with Dr Matson and sort it out for him.
15. Mr David questioned why this information was not provided during the provisional suspension hearing. The Player explained that he had very little time to prepare for that hearing and did not call to mind all the details during what was a fairly brief hearing. The Tribunal notes that no corroborating testimony was provided by the nurse in question but accepts that some inquiry was made of the nurse.
16. On 23 and 24 July the player returned to the surgery for further IV antibiotics and Probenecid. Dr Matson briefly checked the condition of the operation site on each of those occasions.
17. Dr Matson said that, in normal circumstances, he would have filled out a TUE, but that on this occasion he simply forgot to complete the necessary paperwork.
18. On 27 July the Player provided a drug testing sample to DFS following a match at Rotorua International Stadium. The sample was tested, and the presence of Probenecid was detected. The Player did not contest the analysis.

#### **AVAILABLE SANCTIONS**

19. Probenecid is a specified substance under the Rules. Therefore, under Rule 14.4 a player may be able to reduce (from the period of two years proscribed by Rule 14.2) or eliminate the period of ineligibility if he can establish how the specified substance entered his body, and that the use was not intended to enhance sporting performance or mask the use of a performance-enhancing substance.

20. The Tribunal is comfortably satisfied, given the corroborating evidence of Dr Matson, about how the Probenecid entered the Player's body, and that its use was not intended to enhance sporting performance or mask the use of a performance-enhancing substance.
21. The focus of the hearing was therefore consideration of the extent to which the period of ineligibility should appropriately be reduced.

#### COUNSEL'S SUBMISSIONS

22. Mr Smyth for the Player correctly noted that an assessment of the level of the Player's fault is required to determine the appropriate period of ineligibility under Rules 14.4. He argued that, with reference to cases decided before the Sports Tribunal, his client's fault was nearer to the trivial end of the scale.
23. In particular Mr Smyth pointed to the fact that the Player had attended his team doctor, who knew that he was subject to drug testing and knew the Prohibited List. He contended that for the Player to advise Dr Matson that he was subject to drug testing was "superfluous and unnecessary because he already knew". He noted that the Player had spoken to the nurse after the procedure and received reassurance, but that where his client's fault lay was in not insisting that Dr Matson double check the New Ethicals Catalogue, and in failing to speak with Dr Matson directly about the medication.
24. Other mitigating factors, in Mr Smyth's submission, were:
  - a. The player did not have a "wallet card" and was not present at his team's anti-doping seminar due to illness;
  - b. The focus of the explanation of the procedure by Dr Matson was on anti-biotics, and it is well known that such medication is not on the Prohibited List;
  - c. The player's mental or emotional state when he presented at the surgery, described as being a severe state of stress, such that he could not think clearly;
  - d. The enquiry made of the nurse following the procedure, and the "reassurance" that was taken from that conversation;
  - e. The admission by Dr Matson that he forgot to complete the TUE, and that the Player should have been able to rely on his expertise.
25. Mr Smyth also submitted that the duty of the Tribunal is to impose a sanction that is meaningful, but not disproportionate and that, as a consequence, fault cannot be looked at in isolation of the wider ramifications of the sanction on the athlete. In this case his client had already served a two match suspension (effectively 20% of the ITM Cup), which has had significant ramifications on his future selection prospects, particularly his ability to secure a 2012 Super Rugby contract, and that he had been prevented from attaining his Bay of Plenty blazer. There was only one ITM Cup match remaining in the season.
26. In conclusion Mr Smyth submitted that, given the combined effect on his client, the imposition of any further period of ineligibility would be disproportionate to the player's level of fault.
27. Mr David for Drug-Free Sport argued that the Rules, and the WADA Code on which they are based, impose a regime of "utmost caution",

and that an athlete cannot avoid all personal responsibility by simply trusting a doctor or other medical professional.

28. Mr David contended that the focus is properly on what steps the athlete could have taken to avoid using the prohibited substance. Such matters as the disclosures made by the athlete to the doctor and any enquiry made or which could have been made to determine the nature of the substance prescribed are relevant to the fault of the athlete.
29. The Player had not raised the issue of anti-doping with the Doctor; had made no enquiry about the nature of the medications he was receiving; and he did not ask anyone to check the New Ethicals guide.
30. He noted that the conversation with the practice nurse had not been recalled when the Player gave informal evidence at the provisional suspension hearing.
31. In the circumstances Mr David contended that the Player's fault could not properly be described as trivial.

#### PREVIOUS CASES

32. While consideration of sanction must be based on the circumstances of the individual case, there have been a number of cases in which similar issues have arisen, and which provide some guidance.
33. Cases concerned with the application of Rule 14.4 are usefully summarised by the New Zealand Sports Tribunal in the case of *Bramwell* (ST03/11). Ms Bramwell was a competitive runner who had previously been an elite equestrian rider. Over a number of years she had been prescribed Spironolactone, a diuretic, for a medical condition, and expressed surprise when she returned a positive test as a result. Significantly she acknowledged that she had been "a little bit complacent" and had not advised the prescribing doctor that she was subject to drug testing. A period of three months ineligibility was imposed.
34. Mr Smyth referred to the cases of *Wallace* (ST15/08) and *Boswell* (ST1/09) both of which were considered in *Bramwell*. In *Wallace*, a boxer attended a general practice clinic and raised the issue of doping with the doctor, but received faulty advice regarding Probenecid. Despite Mr Wallace not asking the doctor to check the New Ethicals Catalogue, and failing to follow the issue up when he subsequently visited his own doctor, his fault was considered to be "nearer the trivial", and he received a reprimand. In *Boswell*, a rower also attended a general practice clinic, but this time failed to inform the doctor that he was subject to drug testing and subsequently received a three month period of ineligibility (reduced to two months on account of an issue with provisional suspension).
35. The Tribunal has also considered two IRB cases in which medications were prescribed by team medical personnel for genuine conditions, and no periods of ineligibility were imposed:
  - a. *Slimani*- a French rugby player who was given a medication containing a specified substance by a team doctor to treat nasal congestion received a reprimand; and

- b. *Sorokin* – a Russian rugby player, whose longstanding prescription for his cardiac condition was changed by his doctors to a new medication containing a specified substance, also received a reprimand.

#### TRIBUNAL'S CONSIDERATION

36. In assessing the Player's degree of fault, the Tribunal considers the following matters to be significant:

- a. First, the Player's selection of Dr Matson as his medical professional. The Player chose his team doctor, who knew his circumstances well, and who he reasonably believed to be knowledgeable in terms of anti-doping matters. This alone sets him apart from Wallace, Boswell and Bramwell, all of whom attended doctors whose relevant knowledge was restricted in one respect or another. Athletes who attend doctors who are unfamiliar with them personally and/or with the Rules, take a significant risk, and must exercise utmost caution or accept the consequences;
- b. While it does not excuse his own failings, it is understandable that the Player placed a degree of trust in Dr Matson to prescribe only safe drugs;
- c. Unlike Bramwell, where no fault attached to the doctor, Dr Matson has admitted making a mistake, not in administering the Probenecid, which the Tribunal accepts was indicated, but in not applying for a TUE immediately after the first procedure, or at least raising the need for a TUE with the Player;
- d. When the Player attended the surgery his condition had become serious, and the Player had a heightened degree of anxiety, not only because of the effect of such a condition on his own health, but also because of his experience with serious infections suffered by his father;
- e. There is also an issue about the amount of information that the Player was given about the medications administered. Dr Matson did not think he mentioned Probenecid by name. If he said anything about Probenecid at all it would have been "something along the lines that I would be giving him tablets to help the antibiotics work better". In circumstances where the player had received oral antibiotics two days earlier, and the Probenecid tablets were given "in the hand" rather than in a labelled container, the Player may not have fully realised the difference between the antibiotics and the secondary medication;
- f. During the recovery period immediately post operation he asked the nurse "if what they were giving me was alright for me to take". He understood that the nurse would check with Dr Matson, and got some reassurance when no concern was raised. However we give the Player only minimal credit for this inquiry because the issue should have been raised with Dr Matson directly, who checked his patient on at least two occasions post-operatively.

37. The Tribunal does not accept that the fact that the Player did not carry a wallet card was a mitigating factor. The Player knew about Drug-Free Sport and the drug-testing procedures they administer. While he missed the anti-doping seminar this year through illness, he attended such a seminar with a previous team. He also received regular reminders from his father of the need to be careful. In those circumstances his failure to pick up one of the cards, which were placed in the team room, is very much his own responsibility, and cannot be heard in mitigation.
38. While the factors referred to above suggest that the player's level of fault is not great this is not a case of absence of fault, which Mr Smyth acknowledged. The Player was at fault in not saying anything to Dr Matson about anti-doping before during or after the procedure. Mr Smyth suggests that advising Dr Matson that the Player was subject to drug testing was superfluous and unnecessary because he already knew, but the Tribunal disagrees. Given Dr Matson's knowledge and experience, any mention of the Rules, and the Player's status under them, would have reduced the probability of Dr Matson forgetting to "do the paperwork" for a TUE. Dr Matson had recorded the player as a BOP rugby player in his notes. However this does not mean he turned his mind to the Rules and, if the player had mentioned them, the Tribunal expects that "TUE required" or words to that effect would probably have been inserted beside that notation.
39. While it is the individual circumstances of the case that matter, and the Tribunal is not bound to follow earlier cases, we consider that the degree of fault in this case was more comparable to that present in *Wallace, Slimani, and Sorokin*, than in *Boswell or Bramwell*. Mr Smyth did not argue that, as in *Wallace, Slimani and Sorokin*, a reprimand is all that was required. We think that approach was realistic. The Player carries personal responsibility and if he is to avoid a period of ineligibility he should do more than simply rely on his doctor, even if reliance is to some extent understandable.
40. With regard to Mr Smyth's submission that the impact on the individual player should be taken into account when determining the appropriate length of suspension, we have considered whether the *Comment to Rule 14.4*, precludes such an approach. The Comment says that: *In assessing the Athlete's ... degree of fault ... the timing of the sporting calendar would not be [a] relevant factor to be considered in reducing the period of ineligibility under this Rule.*
41. The Comment applies where the Tribunal is being asked to reduce the period of ineligibility, which would otherwise be called for. It does not apply where, as here, the Tribunal can impose an appropriate period of ineligibility that fits with the sporting calendar. In this case the period of interim suspension, involving twenty per cent of the ITM Cup season has already had a significant impact on the Player's future prospects and represents a sufficient sanction. Any further period of ineligibility would have an impact that would be disproportionate to the degree of fault.

## DECISION

42. The Tribunal finds that a period of ineligibility of one week, commencing from the date on which the provisional suspension was imposed, is the appropriate penalty. The effect of the decision is that

the Player's period of ineligibility expired at midnight on Friday 26 August 2011.

43. The Tribunal notes that the Player is, as a result of this decision, no longer a "first offender" in terms of the Rules, and that he would not be able to rely on Rule 14.4 in the future if similar circumstances were to arise.
44. The parties are reminded of their rights of appeal to the NZRU Post Hearing Review Body and to the Court of Arbitration for Sport.
45. Finally, the Tribunal notes that this is the second case this year involving players associated with the Bay of Plenty Rugby Union. Perhaps it would be timely for the Union to review its player education programme in relation to anti-doping matters.

Dated 6 September 2011



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**Terry Sissons**  
Chairman