

INTERNATIONAL TENNIS FEDERATION

TENNIS ANTI-DOPING PROGRAMME

DECISION IN THE CASE OF LAURA POUS TIO

1. The Tribunal's decision

- 1.1 By decision dated 25 January 2008, an independent Tribunal convened under the 2007 Programme found that the Player had committed a Doping Offence under Article C.1 of the 2007 Programme (presence of Prohibited Substance in a player's sample), in that two Prohibited Substances (Hydrochlorothiazide and Amiloride) were present in a urine sample collected from her at Wimbledon.
- 1.2 Article C.1 of the 2007 Programme provided that the sanction for such an offence is a two-year period of Ineligibility, unless the Player could show No Fault or Negligence under Article M.5.1 or No Significant Fault or Negligence under Article M.5.2 of the 2007 Programme. Article M.3 – which was the only other provision of the 2007 Programme that could have given the Tribunal discretion to depart from a two-year ban – could not be invoked by the Player, because it only applies in cases involving Prohibited Substances that are classified as 'Specified Substances', and Hydrochlorothiazide and Amiloride were not classified as 'Specified Substances' under the 2007 Prohibited List.
- 1.3 The Tribunal found that the Prohibited Substances in question had entered the Player's system through her ingestion of Ameride, a medicine prescribed by her doctor to treat certain conditions from which the Player was suffering. However, it rejected her plea of No Significant Fault or Negligence because it found that she had not exercised any reasonable level of care to comply with the Programme. For example, she had not checked the ingredients of Ameride against the list of Prohibited Substances in the Programme; she had not asked her doctor, or her national federation, or her NADO, or called the ITF's telephone advice line.
- 1.4 The Tribunal therefore imposed a two-year ban on the Player, starting from 11 October 2007, which was the date she voluntarily withdrew from competition in light of the anti-doping charge against her. The Tribunal also disqualified certain of the results obtained by the Player prior to her withdrawal from competition.

2. The CAS's decision

- 2.1 On 15 February 2008, the Player filed an appeal against the Tribunal's decision to the Court of Arbitration for Sport ("CAS"), asking the CAS to reduce the ban imposed by the Tribunal in accordance with Article M.5.1 (No Fault or Negligence) or Article M.5.2 (No Significant Fault or Negligence). The Player subsequently dropped her appeal under Article M.5.1, leaving only her appeal under Article M.5.2, which she pursued on the basis that she had always taken special care to comply with the requirements of the Programme, she took the medication only upon advice and prescription by her doctor, and she used it for therapeutic purposes only, not to enhance her performance.
- 2.2 In its decision dated 22 August 2008, the CAS Panel rejected the Player's appeal, finding that her fault was too great to warrant a finding of No Significant Fault or Negligence under Article M.5.2, because she did not take any responsibility for checking whether her prescribed medication contained substances that were prohibited under the Programme. She

did not go to a doctor who was a sports medicine specialist (and so might be familiar with the Code and anti-doping rules generally), she did not advise her doctor that she was subject to strict anti-doping rules, she did not show the doctor the list of Prohibited Substances under the Programme, and she did not indicate she was subject to random drug testing for such substances. According to her own testimony, all she did was ask the doctor if the medicine would enhance her performance. The CAS Panel said this was simply not sufficient: *‘while it is understandable for an athlete to trust his or her medical professional, reliance on others and on one’s own ignorance as to the nature of the medication being prescribed does not satisfy the duty of care ... that must be exhibited to benefit from finding No Significant Fault or Negligence according to TADP Article M.5.2.’*

- 2.3 The CAS Panel did, however, conclude its decision by noting that under the 2009 World Anti-Doping Code (and therefore also under the 2009 Programme), diuretics such as those taken by the Player are reclassified as ‘Specified Substances’, meaning that if the Player’s case had been heard under the 2009 Programme, then the Tribunal would have had discretion (assuming it accepted that the Player did not take the medication with intent to enhance her performance) to impose a sanction of anything from a reprimand up to a two-year period of Ineligibility. The CAS Panel recommended that the Player use the transitional provision of Article 25.3 of the 2009 Code to apply to the ITF for reconsideration of the two-year ban, and recommended that the ITF *‘look favourably’* upon such application *‘and at least seriously consider the possibility of an early reinstatement for the Player if a request is received.’*

3. Analysis of application for early reinstatement

- 3.1 In a letter submitted by the Player, an application was duly made for early reinstatement (i.e., for reduction of the original two-year ban), as suggested by the CAS Panel. However, no argument in support of the application was provided, beyond simply quoting, and then repeating, the relevant parts of the CAS Panel’s decision where it recommends such an application be made. A detailed, substantiated argument as to why the Player’s ban should be reduced would have been helpful, particularly since the CAS Panel itself did not provide any reasoning to support its recommendation that the ITF *‘look favourably’* upon such an application.
- 3.2 Nevertheless, the ITF has considered the application carefully, in accordance with Article A.6.4 of the 2009 Programme, which expressly states:

Where a period of Ineligibility imposed under a predecessor version of the Programme has not yet expired as of the Effective Date, the Participant in question may apply to the ITF to consider a reduction in the period of Ineligibility in light of the amendments to the Programme based on the 2009 version of the Code. The ITF’s decision on such application is subject to appeal pursuant to Article O. To be valid, the application must be made before the period of Ineligibility has expired.

- 3.3 The Player’s period of Ineligibility will not expire until 10 October 2009, and therefore the application is valid.

3A Article M.4 of the 2009 Programme

- 3.4 Diuretics such as those taken by the Player are classified as ‘Specified Substances’ under the 2009 Programme, so that if the Player’s case had been considered under the 2009

Programme, the Tribunal would have had discretion not only under Article M.5.1 (No Fault or Negligence) or Article M.5.2 (No Significant Fault or Negligence) but also under Article M.4 of the 2009 Programme to depart from the otherwise mandatory two-year ban prescribed by Article M.1.

3.5 Article M.4 of the 2009 Programme ('Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specified Circumstances') provides as follows:

M.4.1 Where the Participant can establish how a Specified Substance entered his/her body or came into his/her 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 established in Article M.2 shall be replaced (assuming it is the Participant's first offence) with, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, a period of Ineligibility of two (2) years.

M.4.2 To qualify for any elimination or reduction under this Article, the Participant must produce corroborating evidence in addition to his/her word that establishes, to the comfortable satisfaction of the Anti-Doping Tribunal, the absence of an intent to enhance performance or mask the Use of a performance-enhancing substance. The Participant's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

3.6 Therefore, under Article M.4, the relevant questions are as follows:

3.6.1 Is the substance in question a Specified Substance?

3.6.2 Has the Player established, on the balance of probabilities, how the Specified Substance entered her body?

3.6.3 Has the Player established, to the comfortable satisfaction of the hearing body, by reference to corroborating evidence in addition to her own word, that her ingestion of the Specified Substance was not intended to enhance her sport performance or to mask the use of another Prohibited Substance?

3.7 If the answer to any of those questions is no, then no discretion arises under Article M.4. If the answer to all three of those questions is yes, however, then discretion is triggered under Article M.4 to impose a sanction ranging from a reprimand to a two year ban, depending on the assessment of the Player's degree of fault.

3B. Can the Player meet the conditions required to trigger discretion under Article M.4?

3.8 The ITF does consider that all three questions can all be answered in the affirmative.

3.9 First, the substances in question – Hydrochlorothiazide and Amiloride – are both diuretics and therefore Specified Substances under the 2009 Programme: see Article D.4.1 of the 2009 Programme.

3.10 Second, the Tribunal and the CAS Panel found that the Player had established, on the balance of probabilities, that the substances entered her system through her ingestion of the

medication Ameride prescribed by her doctor. There is no basis on which to disturb that finding.

3.11 Third, in contrast, neither the Tribunal nor the CAS Panel made any finding as to whether the Player took the substances with the intent of enhancing her sports performance or to mask the use of another prohibited substance. They did not have to, because the point was not in issue in the proceedings before them. The ITF comments on this issue as follows:

3.11.1 The ITF is not aware of any claim, let alone any evidence, that the Player might have been taking the diuretics in order to mask her use of another Prohibited Substance. Instead, the only question is whether the diuretics were *'intended to enhance [her] sport performance.'*

3.11.2 Taking that wording (which is repeated verbatim from Article 10.4 of the 2009 Code) literally, the fact is that the Player did take the Ameride with the intent to enhance her performance, in the sense that she was suffering from various conditions that she wanted treated so that she would feel better and therefore perform better. This interpretation would not allow discretion under Article M.4.

3.11.3 The ITF believes, however, that such an interpretation would be contrary to the intention behind Article M.4. More specifically, the ITF believes that use of a Specified Substance for legitimate therapeutic purposes was not intended to be excluded from the scope of Article M.4, even if (technically speaking) that means it could be said to be being used to enhance performance. Support for this view can be found in the commentary to Code Article 10.4,¹ which states: *'Examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent would include: ... 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.'*

3.11.4 In this case, there is evidence that the Ameride was prescribed to the Player prior to Wimbledon to treat (among other things) hypertension and PMT.² In addition, there is the Player's evidence – accepted by the CAS Panel – that she asked her doctor when he prescribed the Ameride whether it contained anything that might enhance her performance.

3.11.5 On the other hand, there is the fact that the Player failed to declare the medication she was taking on the Doping Control Form that she filled out when she provided her sample at Wimbledon in 2007. The Player has offered no explanation whatsoever for this omission, which the ITF finds extremely troubling. Indeed, the ITF considers that this fact alone could be argued to preclude a finding in favour of the Player under Article M.4 that her purpose in taking the medication was not to enhance her performance.

Article A.7 of the 2009 Programme provides that '[t]he Programme shall be interpreted in a manner that is consistent with the Code. ... The comments annotating various provisions of the Code may be used to assist in the understanding and interpretation of the Programme.'

According to the Player's evidence, it was also prescribed to help the Player lose weight. If this had been the only purpose, then the ITF may well have taken the view that the intent in taking the medication was to enhance performance within the meaning of Article M.4, so that that pre-condition to the exercise of discretion was not satisfied.

3.11.6 Nevertheless, and not without considerable hesitation, the ITF accepts by a narrow margin, on all of the circumstances of this case, that the Player did not take the Ameride with the intent of enhancing her performance.

3C. Exercising discretion under Article M.4

3.12 Accordingly, this is a case where discretion would exist under Article M.4 as to the sanction to be imposed. The scope of discretion conferred by Article M.4 is very broad – from as little as a reprimand to as much as a two-year ban – and there is little guidance in the Code (and therefore the Programme) as to how it should be exercised. As noted above, all that Article 10.4 of the Code (and Article M.4 of the Programme) states is that the criterion to be used in exercising that discretion is the ‘*degree of fault*’ of the Player. The comment to Code Article 10.4 then expands on that as follows:

In assessing the Athlete’s or other Person’s degree of fault, the circumstances considered must be specific and relevant to explain the Athlete’s or other Person’s departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article. It is anticipated that the period of Ineligibility will be eliminated in only the most exceptional cases.

3.13 Applying these provisions to the Player’s case, the ITF would comment as follows:

3.13.1 The ITF, like the Tribunal and the CAS Panel before it, believes that the Player’s fault in this case was significant. Indeed, the ITF would go further (neither the Tribunal nor the CAS Panel needed to do so) and would say that the Player’s fault in this case was very significant:

a. Article B.3 of the 2009 Programme states (as did the 2007 Programme) as follows:

It is the sole responsibility of each Player:

B.3.1 to acquaint him/herself, and to ensure that each Person from whom he/she takes advice (including medical personnel) is acquainted, with all of the requirements of the Programme;

B.3.2 to know what constitutes a Doping Offence under this Programme and what substances and methods have been included in the Prohibited List; and

B.3.3 to ensure that anything he/she ingests or uses, as well as any medical treatment he/she receives, does not give rise to a Doping Offence under this Programme.

b. This is a very strict responsibility on all players, which is fundamental to the fight against doping and to the pursuit of clean competition in the sport of tennis. In the words of the CAS Panel in this case, it requires Players to

'investigate to their fullest extent that the medication does not contain prohibited substances.'

- c. If this responsibility is not respected, even if out of ignorance rather than in an effort to cheat, it means that players are competing with substances in their systems that are prohibited under the Programme, and therefore the results obtained are tainted. If the player involved happens not to be tested after the match in question, then this will remain undetected and the results will be allowed to stand when they should have been Disqualified under the Programme.
- d. In this case, the Player did nothing to discharge her strict personal responsibility to ensure that the medical treatment she received did not involve substances that are prohibited under the Programme. She did not use the ITF wallet card, she did not call the ITF telephone advice line, she did not speak to her national federation or NADO. She did not tell her doctor (who was not a sports medicine specialist) about the strict anti-doping rules to which she was subject, nor did she ask him if the medicine he was prescribing for her contained any substances that were prohibited under the Programme. Pleading ignorance about these matters, and about the resources available to help her, is simply not good enough.
- e. Furthermore, as noted above, the Player failed to declare the medication she was taking on the Doping Control Form that she filled out when she provided her sample at Wimbledon in 2007.

3.13.2 Nevertheless, the ITF does accept that at least the Player did get the Ameride from a doctor, who prescribed it in good faith to treat legitimate medical conditions. This can be contrasted with cases where athletes take pills, supplements and other 'medications' without prescription or other proper medical advice. Although the Player was grossly negligent, she was not completely reckless, as are the athletes in such cases.

3.13.3 Furthermore, the ITF takes notice of the fact that an athlete who knowingly and intentionally takes a prohibited substance such as a steroid or hormone, specifically for the purpose of enhancing his/her sports performance, will still only be banned for two years under the 2009 Code (and the 2009 Programme), unless '*aggravating circumstances*' can be established: see Article 10.6 of the 2009 Code and Article M.6 of the 2009 Programme.

3.14 As a consequence, and despite its serious misgivings due to the abject conduct of the Player, and her failure to take virtually any steps to comply with her anti-doping obligations under the Programme, the ITF considers that it is appropriate in this case to reduce the two-year sanction imposed by the Tribunal. It draws support for this conclusion from the remark of the CAS Panel that the ITF should '*look favourably*' on an application for reduction of the length of the ban imposed on the Player by the Tribunal.

3.15 Specifically, the ITF believes it is appropriate to reduce the period of Ineligibility to be served by the Player by 6 months, i.e., from 24 months to 18 months. Accordingly, the Player's ban will now end on 10 May 2009, and she will be eligible to compete again from 11 May 2009.

4. Decision

- 4.1 For the reasons set out above, the ITF hereby reduces the period of Ineligibility to be served by the Player from 24 months to 18 months. Accordingly, the Player's ban will end on 10 May 2009, and she will be eligible to compete again from 11 May 2009 onwards, provided that the Player has by that date paid to the ITF all of the prize money forfeited under the Tribunal's decision of 25 January 2008.
- 4.2 The ITF notes that, in accordance with Article A.6.4 of the 2009 Programme, this decision may be appealed to the CAS by the Player, the Player's NADO or WADA, in accordance with Article O of the 2009 Programme.

Stuart Miller
Head of Science & Technical

23 December 2008