Arbitration CAS 2013/A/3361 Dominique Blake v. Jamaica Anti-Doping Commission (JADCO), award of 2 May 2014

Panel: The Hon. Yves Fortier, QC (Canada), President; Mr Graeme Mew (Canada); Mr David Rivkin (USA)

Athletics (sprint)
Doping (methylhexanamine – MHA)
Proof of the absence of intent to enhance sport performance
Timing of the ingestion
No significant fault or negligence
Correctness of sanctions

1. **Article 10.4 WADC requires the production of corroborating evidence, in addition to the athlete's own statement, to establish the absence of intent to enhance sport performance. This requires in turn the adjudicating body to make an objective evaluation of all this evidence. The non-exhaustive list of examples of the type of objective circumstances which might corroborate an athlete's non performance-enhancing intent includes the fact that the nature of the specified substance or the timing of the ingestion would not have been beneficial to the athlete, the athlete's open use or disclosure of his use of the specified substance, and a contemporaneous medical records file substantiating the non sport-related prescription of the specified substance.**

2. **An intent to enhance performance is present when a substance is taken to help an athlete recover from physical effort or better prepare for a sporting performance. Therefore, it cannot be maintained that the ingestion of a stimulant helping to combat fatigue one hour prior to a race would not have been beneficial to the athlete, as the nexus between the ingestion and the race is very close, especially if the reason to take the stimulant was to help the athlete recover from practice the day before.**

3. **Under Article 10.5.2 WADC, the athlete must establish that his or her fault or negligence, viewed in the totality of the circumstances and having regard to the criterion for "No Fault or Negligence", is not significant having regard to the doping offence. The criterion of "No Fault or Negligence" is defined under the WADC as requiring that an athlete did not know or suspect, or could not reasonably have known or suspected even with the exercise of utmost caution, that he or she used the prohibited substance. The athlete's fault is measured against the fundamental duty that he or she has under the WADC to do everything in his or her power to avoid ingesting any prohibited substance.**

4. **Although consistency of sanctions is a virtue, correctness remains a higher one: otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interests of sport.**

1 THE PARTIES

1.1 The Appellant, Dominique Blake ("Ms Blake" or the "Athlete") is a 27-year-old professional sprinter from Jamaica.

1.2 The Respondent, Jamaica Anti-Doping Commission ("JADCO") is the Jamaican governing body for anti-doping. Its responsibilities include the management and enforcement of the 2008 JADCO Anti-Doping Rules (the "Rules") which adopts in relevant part, *mutatis mutandis*, the World Anti-Doping Code ("WADC").

2 THE DECISION AND ISSUES ON APPEAL

2.1 Ms Blake appeals a decision of the Jamaica Anti-Doping Appeals Tribunal (the "Tribunal") dated 1 October 2013[1] (the "Decision") imposing sanctions upon her for a second doping offence.

2.2 This appeal is against sanctions only, i.e. whether Ms Blake is entitled under the Rules to a reduction of the period of ineligibility of six years imposed by the Decision.

3 FACTUAL BACKGROUND

3.1 Below is a summary of the main relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

3.2 The facts in this case are straightforward and are not substantially in dispute.

3.3 Ms Blake is a 27-year-old Jamaican professional sprinter.

3.4 On 1 July 2012, she participated at the National Senior Championships in the 400 metres, was selected for testing and voluntarily provided a urine sample.

3.5 The A sample revealed an adverse analytical finding ("AAF") for the substance "methylhexanamine" ("MHA"), a stimulant on the WADA 2012 list of prohibited substances. Ms Blake was charged with a doping offence on 29 August 2012.

[1] The Appellant states that: *"The Appeal Decision was received by the Appellant's current counsel on October 8th, and subsequently forwarded to the Appellant on that very day. Despite the delayed receipt of the Appeal Decision, the Appellant has operated with the October 1st date for the calculation of time periods".*

3.6 Ms Blake gave an explanation as to the adverse finding in a letter dated 29 August 2012 to the IAAF and by letter dated 11 September 2012 to JADCO.

3.7 JADCO referred the matter to the Jamaica Anti-Doping Disciplinary Panel (the "DP").

3.8 The DP convened several dates for the hearing which were vacated while Ms Blake settled her legal representation.

3.9 At the beginning of the hearing before the DP on 22 March 2013, Ms Blake admitted the charge.

3.10 Ms Blake asserted that (i) she was advised by her mentor to take the product Neurocore, (ii) she had taken the product on 1 July 2012, (iii) Neurocore contains geranium, (iv) geranium contains MHA, (v) MHA is a "Specified Substance", and (vi) she took Neurocore without the intent to make use of a prohibited substance and without the intent to enhance her sport performance.

3.11 JADCO only disputed and still disputes the proposition that Ms Blake had taken Neurocore without the intent to enhance her sport performance.

3.12 Following the hearing, the DP made the following determinations on 8 July 2013:

> *"43. The Respondent received a Reduced Sanction (RS) for a previous anti-doping rule violation and this is now the Respondent's second anti-doping rule violation.*
>
> *44. Based on the finding of the Panel, this second anti-doping rule violation would not be regarded as a Reduced Sanction, but as a Standard sanction (St).*
>
> *45. Using the table in Article 10.7 of the JADCO Rules, the range would be 4-6 years.*
>
> *46. The Panel considered the serious circumstances and the actions of the Respondent in this matter and in particular the intention to enhance performance and so imposed the period of ineligibility of 6 years.*
>
> *47. The Panel also found that although there was discretion to commence the period of ineligibility at an earlier time, it did not find circumstances of this matter and how it proceeded, merited an earlier commencement.*
>
> *48. The Panel therefore commenced the period of ineligibility from 13 June 2013".*

3.13 On 11 September 2013, at the conclusion of the hearing, the Tribunal confirmed the DP's decision of 8 July 2013 and dismissed the appeal. However it varied the date of commencement of the period of ineligibility. While the DP had ordered that the period of ineligibility should run as of 13 June 2013[2], the Tribunal determined that the starting date should be 24 July 2012[3]. On 1 October 2013, the Tribunal issued its written reasoned decision.

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[2] Article 10.9 of the Rules state that the period of ineligibility, if no exception applies, should run from *"the date of the hearing decision providing for Ineligibility"*. 13 June 2013 corresponds to the last hearing held before the DP (several hearings were held before the DP between January 2013 and June 2013 due to change in counsel (for Blake), unavailability of a witness, etc).

[3] This date corresponds to the date of the sample finding on paper according to Blake.

4 PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

4.1 On 17 October 2013, Ms Blake filed an appeal with the Court of Arbitration for Sport (the "CAS") against the Decision pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code").

4.2 On 28 October 2013, in accordance with Article R51 of the Code, Ms Blake filed her appeal brief.

4.3 On 19 November 2013, JADCO requested (i) that the appeal be terminated on the basis that such appeal was inadmissible having been filed more than 21 days after the decision of the DP and (ii) that the time limit for its answer on the merits be suspended pending a preliminary decision on the admissibility of the appeal.

4.4 On 21 November 2013, Ms Blake objected to JADCO's requests.

4.5 On 22 November 2013, the President of the CAS Appeals Arbitration Division informed the parties that he had decided to grant JADCO's request that the time limit for its answer on the merits be suspended pending a preliminary decision by the Panel on the admissibility of the appeal.

4.6 On 6 January 2014, the Panel decided that the appeal was admissible with reasons to be set out in the present final award[4].

4.7 In accordance with Article R55 of the Code, the Respondent filed its answer on 28 January 2014 and an amended version on 31 January 2014.

5 THE CONSTITUTION OF THE PANEL AND THE HEARING

5.1 By notice dated 2 December 2013, the CAS notified the parties that the appeal hearing panel (the "Panel") had been constituted as follows: the Hon. L. Yves Fortier O.C., C.C., Q.C. as President of the Panel, and Mr. Graeme Mew and Mr. David W. Rivkin as co-arbitrators. The parties did not raise any objections as to the constitution and composition of the Panel then or at the hearing.

5.2 On 5 March 2014, an Order of Procedure was made. Ms Blake signed the Order on 6 March 2014 and JADCO on 17 March 2014.

5.3 The Order of Procedure scheduled a hearing on 30 March 2014 in Toronto, Canada, following the parties' agreement in this respect (the "Hearing").

5.4 On 30 March 2014, the Hearing was duly held at Arbitration Place, in Toronto, Ontario, Canada.

[4] See para 6 below.

5.5 The following persons attended the Hearing:

For the Appellant:	D. Emir Crowne, Ms Christina Khoury and Mr. Dereck Balliram, counsel for the Appellant Ms Dominique Blake, the Appellant Ms Nazgol Namazi, Mr Khalid Karim and Mr. Purushoth Saravana, law students
For the Respondent:	Mr Lackston L. Robinson, counsel for the Respondent

5.6 Ms Annie Lespérance, Ad hoc Clerk, and Mr William Sternheimer, Managing Counsel and Head of Arbitration, assisted the Panel at the Hearing.

5.7 All members of the Panel attended the Hearing in person except for Mr. David Rivkin who, with the parties' agreement, attended via telephone because of ill health.

5.8 At the Hearing, the Panel heard the detailed submissions of counsel as well as the evidence of Ms Blake, who testified about her ingestion of Neurocore containing MHA, and her due diligence prior to ingesting the supplement.

5.9 At the conclusion of the Hearing:

5.9.1 the parties agreed that due process had been fully observed; and

5.9.2 in view of the Appellant's objection during the Hearing that JADCO should not have been allowed to use the transcript of the hearing before the DP (the "Transcript") to identify alleged inconsistencies between the Transcript and the Athlete's testimony before the Panel without having cross-examined the Athlete, the Panel allowed the Appellant to file a post-hearing submission limited to 25 pages.

5.10 The Appellant filed her post-hearing submission on 4 April 2014 and JADCO, after being granted leave by the Tribunal, filed its reply post-hearing submission on 18 April 2014.

6 JURISDICTION OF THE CAS AND ADMISSIBILITY

6.1 Article R47 of the Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".

6.2 CAS jurisdiction in this matter is derived from Article 13.5.4 of the Rules, which states that *"[n]o final decision of, or Consequences of Anti-Doping Rule Violations imposed by, the Jamaica Anti-Doping Appeals Tribunal may be quashed, varied or held invalid, by any court, arbitrator, tribunal or other hearing*

body other than CAS for any reason including for reason of any defect, irregularity, omission or departure from the procedures set out in these Anti-Doping Rules provided there has been no miscarriage of justice".

6.3 The signature of the Order of Procedure by the parties has confirmed this.

6.4 In respect of the admissibility of Ms Blake's appeal before the CAS, the Respondent submitted that:

1. *Having regard to the provisions of Article R49 of the CAS Rules the time for appealing in this matter runs from the 11th day of September 2013, that is, the date when the decision was pronounced by the Appeals Tribunal.*

2. *In the alternative the time for appealing runs from September 13, 2013, that is, the day on which the written decision was received and receipt acknowledged by the Appellant's attorney-at-law.*

3. *The twenty-one days limited by Article R49 expired on the 2nd of October 2013 having regard to paragraph 1 above or on the 4th of October 2013 having regard to paragraph 2 above.*

4. *The appeal, having been filed on October 19, 2013, is late and is not properly before the CAS".*

6.5 The Panel notes that Article R49 of the Code states that *"the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".*

6.6 The Panel further notes that two decisions were issued by the Tribunal: (i) a summary decision dated 11 September 2013, and (ii) a reasoned decision issued on 1 October 2013.

6.7 The Panel considers that the reasoned decision of 1 October 2013 is the final decision against which Ms Blake has instituted an appeal in the present case and that the time limit for her appeal must therefore run from 1 October 2013. The Panel refers in particular to Section 22 of the "Anti-Doping in Sport Act" of 2008 from Jamaica which provides that a motivated decision must follow the operative part. An athlete should be able to review a reasoned decision to better assess the nature of the findings against him or her before deciding whether to appeal.

6.8 Since Ms Blake filed her appeal on 17 October 2013, five days before the expiry of the time limit prescribed in Article R49 of the Code, the Panel finds the appeal admissible and confirms its decision of 6 January 2014.

7 APPLICABLE LAW

7.1 Article R58 of the Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

7.2 This appeal is governed by the provisions of the Rules and the WADC, as interpreted and applied by the CAS (with relevant decisions of other sports panels of persuasive authority). The comments to the WADC are to be used as a guide to the interpretation of the Rules, and Jamaican law applies complementarily (see Article 20.3 of the Rules).

8 THE PARTIES' SUBMISSIONS

A. Appellant's Submissions and Requests for Relief

8.1 Ms Blake requests:

8.1.1 that the period of ineligibility be reduced to 1-2 years as she had no intention to improperly enhance her athletic performance in ingesting the Specified Substance; or, in the alternative,

8.1.2 that the period of ineligibility be reduced to 2 years as she bears no significant fault or negligence in ingesting the Specified Substance; or, in the alternative,

8.1.3 that the period of ineligibility be reduced to 4 years due to the mitigating, and unusual circumstances of the present case; and

8.1.4 that the period of ineligibility imposed by the Panel run from 1 July 2012 (the date of the sample collection).

8.2 In summary, Ms Blake submits:

"[I]n her preparation for the National Championship her training was very rigorous and that had taken a serious toll on her body. It was an Olympic year. Mr. Christopher Rosengrant whom she describes as her "mentor" informed her of a new product named Neurocore which would alleviate stress of her exhaustive training routine. She researched the ingredients of the product on the DPS Nutrition Website (DPS) and then went to the WADA website and was satisfied that none of the ingredients revealed on the DPS website was prohibited by WADA. She therefore felt confident in procuring and ingesting Neurocore".

8.3 Accordingly, she asserts that a reduction of the period of ineligibility imposed by the Tribunal is warranted since she had no intention to improperly enhance her performance, or, in the alternative, since she bears no significant fault or negligence.

8.4 In respect of her assertion that she did not intend to enhance her performance by ingesting Neurocore, she argues the following:

8.4.1 She took the Neurocore supplement to help her training and recovery.

8.4.2 *"It is a trite observation that all athletes take supplements".*

8.4.3 She researched the ingredients found in the Neurocore supplement on the dpsnutrition.net site before she purchased it. The site did not (and still does not) disclose the presence of geranium extract which contains the Specified Substance.

8.4.4 She rejects the Tribunal's conclusion at paragraph 16 of the Decision that, relying on the site's fine print[5], she should have physically examined the supplement's container once delivered as the ingredients listed online are merely a simulation. She argues that the word "simulation" is confusing, that this fine print is exactly the type of exclusionary clause that common law courts have held to be unenforceable, and that accordingly, she was entitled to rely on the nutrition facts set out on the site. In this respect, she cites *Tilden Rent-A-Car Co. v. Clendenning*, [1978] O.J. No. 3260 of the Ontario Court of Appeal; *Jaques v. Lloyd D. George & Partners Ltd.*, [1968] 1 W.L.R. 625; and *Specht v. Netscape*, 306 F.3d 17 (2d Cir. 2002).

8.4.5 The "Warnings" set out on the dpsnutrition.net site also did not disclose the presence of geranium and athletic testing by WADA.

8.4.6 It is for those reasons that she did not become aware of the warning on the label of the supplement when she received it.

8.4.7 In those circumstances, she has acted reasonably and did what she could reasonably be expected to do.

8.4.8 As to the potential performance-enhancing benefit of the Specified Substance, both her expert[6] and the Respondent's expert[7] before the DP testified that the benefits were not scientifically proven.

8.5 In view of the above, Ms Blake, having received a reduced sanction of 9 months for her first inadvertent violation[8] and guided by the principles in CAS 2012/A/2756, submits that the appropriate range for a sanction is 1-2 years as she performed much more than a cursory check of the supplement's ingredients online, and, in the circumstances, acted reasonably.

8.6 In respect of her assertion that she bears no significant fault or negligence, Ms Blake submits the following:

8.6.1 She admits that she bears some measure of responsibility for the doping violation (she should also have examined the label of the Neurocore supplement when it arrived): *"it is insincere to contend otherwise"*.

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[5] *"Nutritions Facts are a simulation of the product "Nutrition Label". For the actual Nutrition Label please refer to the product packaging".*
[6] Dr Ruddock: *"There have been no studies to show that [methylhexanamine] has adverse or positive effect on athletic performance".*
[7] Dr. Campbell: *"There is no scientific study on the effect of methylhexanamine".*
[8] At paras. 20 and 21 of the DP's decision: *"Mrs. Valerie Williams, the mother of Dominique Blake gave evidence concerning Miss Blake's first doping violation of ephedrine. That evidence was that she had given Miss. Blake Vitamin C and cape aloe vera which she got from a health food store and that the whole family was taking it for about three (3) years and when she was tested the ephedrine was in the aloe vera".*

8.6.2 Her degree of fault, however, is not significant. She acted on the basis of her pre-existing research. She reasonably relied on the fact that the nutritional website would correctly list the ingredients of the supplements and proceeded to research those ingredients before purchasing the product.

8.6.3 Once an online product is delivered, few consumers, if any, would perform additional research, after examining the name of the product to ensure that it matches the one ordered.

8.7 In view of the above, Ms Blake, having received a reduced sanction of 9 months for her first inadvertent violation, submits that a 2 year suspension today is the appropriate sanction as it properly balances the unique circumstances of the case and the Athlete's previous inadvertent doping violation.

8.8 Should the Panel reject Ms Blake's arguments, she requests that the period of ineligibility be reduced to four years under Article 10.7 of the Rules *"due to the mitigating, and unusual, circumstances outlined within this appeal"*. In support of her request, she states that a 6-year ban effectively ends her viable career as a sprinter and that a 4-year ban, starting from the date of sample collection (1 July 2012) affords her a year or two to still compete at the national, international and Olympic levels. She states that *"while age per se may not be a mitigating factor, when combined with [her] research, some measure of leniency ought to be afforded to her"*.

8.9 Ms Blake further argues that the Decision held her to an unusually high and imprecise standard of showing that there was no basis whatsoever for the DP's decision. This meant that she had to show that the DP's decision was either arbitrary or absurd.

8.10 She also submits that the Decision is disproportionate to the offence in view of CAS 2012/A/2756.

8.11 Pursuant to Articles 10.9.1 and 10.9.2 of the Rules, she finally requests that the date of sanction run from 1 July 2012 (the date of the sample collection), due to lengthy delays that have arisen in the present case and/or her timely acknowledgement of the adverse analytical findings. The Tribunal, in its Decision, ruled that the period of ineligibility would start to run from 24 July 2012 as *"requested by [Ms Blake]"*. However, Ms Blake asserts that the Tribunal told her that the period of ineligibility ought to run from the date of the sample finding on paper (i.e. 24 July 2012). Ms Blake's new counsel before this Panel contests this finding as not based on any legal principle.

8.12 In her post-hearing written submission, Ms Blake requests that the entirety (or vast majority) of the Respondent's closing remarks made at the Hearing be struck from the record for the following reasons:

8.12.1 During her testimony at the Hearing, Ms Blake stated that the DP had committed serious breaches of her natural justice rights in view of the fact that (i) members of the DP had slept and laughed at times during the hearing, and (ii) members of the DP had appeared disinterested and unfamiliar with the sports arbitration process.

8.12.2 In view of the above, the Respondent should not be allowed to rely on the Transcript. This is especially so since counsel for the Respondent used the Transcript in his closing remarks to identify alleged inconsistencies with the Athlete's testimony before the Panel, instead of cross-examining the Athlete in respect of these alleged inconsistencies. By doing so, counsel for the Respondent deprived counsel for the Appellant of an opportunity to re-examine the Athlete, thereby aggravating the breach of her natural justice rights.

8.13 Moreover, Ms Blake argues that the four cases mentioned by counsel for the Respondent in his closing remarks[9] in respect of sanctions do not apply to the present case or actually support the Appellant's position.

8.14 Finally, Ms Blake's counsel submitted at the Hearing (and in his post-hearing brief) that even if the Athlete had done more extensive Internet research, it would have still revealed that the manufacturer of Neurocore removed the geranium from its product at least as early as May 2012. The Panel did not accept this statement by Dr. Crowne which could not form part of the record.

B. Respondent's Submissions and Requests for Relief

8.15 JADCO requests that the appeal be dismissed in its entirety.

8.16 JADCO confirms that the issue is not how the prohibited substance got into Ms Blake's body but the purpose for which it was taken and whether she acted negligently or intentionally in taking the substance.

8.17 In respect of Ms Blake's assertion that she did not intend to enhance her performance by ingesting Neurocore, JADCO submits the following:

8.17.1 Ms Blake failed to make full disclosure to the Doping Control Officer. In this respect, the Tribunal found that:

"there is scant similarity between the words Neurocore and Nitro. The Appellant has spent quite some time researching Neurocore. She had had discussions about this product with her 'mentor' Rosengrant. It is inconceivable that after all this she could not in such a short span of time recall a simple word. Further, it is more than a little curious that the Appellant's stated purpose for taking Neurocore was for training yet she took it on the day of the competition to select athlete to represent Jamaica at the Olympics".

[9]CAS 2012/A/2701 *WADA v Aaron Rathy*; *CCES v Dmitry Shulga*; CAS 2003/A/484 *Kicker Vencill v USADA*; CAS 2008/A/*1489 Serge Despres v CCES and WADA*.

8.17.2 There is conclusive evidence that Ms Blake flagrantly disregarded the express warnings (i) on the bottle containing the Neurocore supplement, (ii) in the explanatory notes on the 2011 and the 2012 WADA prohibited list, and (iii) on the DPS Nutrition Website.

8.17.3 The DP was correct in finding that Ms Blake *"turned a blind eye"* to the ingredients in the Neurocore and the Tribunal was also correct in upholding this finding.

8.17.4 When Ms Blake took the Neurocore she knew that it contained geranium, that geranium was linked to MHA and that MHA is a prohibited substance. In the premises, the conclusion must be that she took the supplement with the intention to enhance her performance.

8.17.5 Ms Blake's stated inability to understand the meaning of the word "simulation" is not credible since she testified before the DP that she read everything on the DPS Nutrition Website and that she understood the instruction to examine the nutrition label on the bottle.

8.17.6 Common law relating to exclusionary clauses in contracts has no bearing on the issues in this appeal.

8.17.7 The question whether MHA is capable of enhancing performance or actually enhanced Ms Blake's performance is of no relevance. In any event, Dr Campbell, the Respondent's expert before the DP, testified that there was empirical scientific conclusion that MHA has performance enhancing effects.

8.17.8 The Panel ought not to interfere with the findings of fact made by the DP and upheld by the Tribunal unless those findings are unreasonable.

8.18 In view of the above, JADCO submits that the DP and the Tribunal were correct in holding that Ms Blake is not entitled to a reduction of sanction under Article 10.4 of the Rules.

8.19 In respect of Ms Blake's assertion that she bears no significant fault or negligence, JADCO submits the following:

8.19.1 A reduction of sanction under Article 10.5.2 of the Rules is not possible if the Panel finds that Ms Blake took Neurocore with the intent of enhancing her sport performance.

8.19.2 The standard under Article 10.5.2 of the Rules is high (Ms Blake's fault or negligence must be viewed in the totality of the circumstances and has to take into account the criteria of no fault or negligence – that is that Ms Blake has used utmost caution – in determining whether she bears no significant fault or negligence) (see CAS 2005/A/847).

8.19.3 No evidence has been adduced by Ms Blake to explain her departure from the expected standard of behaviour of an elite athlete (see CAS 2009/A/2012).

8.19.4 There is no evidence of exceptional circumstances which would merit a reduction of sanctions in accordance with the provisions of Article 10.5.2 (see CAS OG 04/003 and CAS 2004/A/690).

8.20 In view of the above, JADCO submits that the Tribunal was correct in holding that Ms Blake was not entitled to a reduced sanction under article 10.5.2 of the Rules.

8.21 JADCO submits that since Ms Blake has failed to justify any reduction of sanction under Article 10.4 and 10.5 of the Rules, and that this is her second anti-doping violation, she becomes subject to the standard and mandatory sanction under Article 10.7 of the Rules.

8.22 JADCO does not dispute that Ms Blake's first violation attracted a reduced sanction and since her second violation would, if it were her first violation, attract a standard sanction, the sanction imposed under Article 10.7 of the Rules must fall within the range of 4-6 years.

8.23 JADCO submits that what constitutes an appropriate sanction under Article 10.7 of the Rules is dependent on the degree of fault or negligence on the part of Ms Blake. In this respect, JADCO argues that the degree of fault or negligence which the Panel uses to determine whether Ms Blake satisfies the conditions for reduction of sanction under Article 10.5.2 of the Rules is that which should be applied in determining the appropriate sanction within the range permitted by Article 10.7 of the Rules (see CAS 2005/A/847).

8.24 Therefore, JADCO submits that there is no alternative but for the Panel to impose the maximum sanction permitted by Article 10.7 of the Rules and that the alleged mitigating factors cited by Ms Blake are not factors which the Panel can take into account in reducing the sanction.

8.25 In respect of the commencement of the sanction, JADCO recalls that Article 10.9 of the Rules provides that the period of ineligibility shall commence on the date of the hearing decision. However, where there have been substantial delays in the hearing process or other aspects of doping control not attributable to the athlete the period of ineligibility may commence earlier.

8.26 JADCO submits that the delay which the Tribunal took into account in determining that sanctions should commence on 24 July 2012 is the period between 3 July 2012 when the sample was delivered to the laboratory in Montreal, Canada, and 22 August 2012 when the results were posted on ADAMS. This delay was occasioned by the laboratory.

8.27 However, JADCO argues that (i) any delay in completing the hearing process was entirely attributable to Ms Blake (she postponed the hearing on various occasions) and that (ii) she did not make a timely admission of the Anti-Doping Rule violation (she only admitted it on 22 March 2013).

8.28 Therefore, without conceding that Ms Blake was entitled to have her sanction commence on a date earlier than that stipulated in Article 10.9.1 of the Rules, JADCO urges the Panel not to interfere with the date fixed by the Tribunal, to wit, 24 July 2012.

8.29 In its reply post-hearing submission, the Respondent submits that the Panel should reject the Appellant's request to strike its closing remarks made at the Hearing from the record, *inter alia* for the following reasons:

8.29.1 In his closing remarks, counsel for the Respondent identified only one inconsistency between the Athlete's testimony at the Hearing and the Transcript, which he withdrew at the request of a Panel member.

8.29.2 Otherwise, counsel for the Respondent was allowed to refer to the Transcript in his closing remarks at the Hearing as the Transcript is an integral part of the record before the Panel.

8.29.3 The Appellant has not provided any particulars to support its allegation that *"there were serious breaches of her natural justice rights before the [DP]"*.

9 MERITS OF THE APPEAL

A. The Panel's scope of review

9.1 Under Article R57 of the Code, the Panel has full power to review the facts and the law on this appeal.

9.2 The Panel denies the Appellant's request that *"the entirety (or vast majority) of the Respondent's closing remarks be struck or disregarded"*.

9.3 The Panel is of the view that:

9.3.1 The Appellant has not substantiated her allegation that the hearing before the DP *"was manifestly unfair"*. The Appellant made this allegation without adducing any evidence to support it.

9.3.2 In any event, the Respondent was allowed to rely on the Transcript as (i) it is an integral part of the record before the Panel and (ii) counsel for the Respondent agreed during the Hearing to withdraw any remarks he made purporting to show inconsistencies between Ms Blake's testimony before the Panel and the Transcript.

B. The first ground for appeal: reduction of the period of ineligibility based on Article 10.4 WADC

9.4 Article 10.4 WADC, which is identical to Article 10.4 of the Rules, provides:

"10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

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

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

9.5 According to Article 10.4 WADC, two conditions must be satisfied to allow for the possibility of a reduction of the period of ineligibility. The first condition that the athlete must satisfy is whether he can establish how the specified substance entered his body (the "First Condition"). The second condition that the athlete must satisfy is whether he can establish that such specified substance was not intended to enhance his sport performance (the "Second Condition").

A. The First Condition

9.6 The parties agreed that the source of Ms Blake's anti-doping rule violation was the ingestion of Neurocore, thereby satisfying the First Condition. Where the parties differ is whether Ms Blake satisfies the Second Condition, i.e. whether she took Neurocore with the intent of enhancing her sport performance.

B. The Second Condition

a) The Test

9.7 In order to satisfy the Second Condition, Ms Blake must demonstrate that the substance, at the time of its ingestion, was not intended to enhance her performance. Article 10.4 WADC also requires the production of corroborating evidence, in addition to the athlete's own statement, to establish the absence of intent to enhance sport performance. This requires in turn the Panel to make an objective evaluation of all this evidence.

9.8 The commentary to Article 10.4 WADC provides a non-exhaustive list of examples of the type of objective circumstances which might corroborate an athlete's non performance-enhancing intent as they help to determine the nexus between the ingestion of the substance and the actual sporting event. These circumstances include the fact that the nature of the Specified Substance or the timing of the ingestion would not have been beneficial to the athlete, the athlete's open use or disclosure of his use of the Specified Substance, and a contemporaneous medical records file substantiating the non sport-related prescription of the Specified Substance.

9.9 Article 10.4 WADC also states that an absence of intent to enhance sport performance must be established by this evidence to the comfortable satisfaction of the hearing panel. Article 3.1 WADC states that this is a higher standard of proof than the balance of probability.

b) Application of the Test to the Facts at Hand

9.10 After an objective review of the evidence submitted before it, the Panel concludes that Ms Blake has not established to the comfortable satisfaction of the Panel that she had no intent of enhancing her sport performance. The Panel notes, in particular, that Ms Blake ingested Neurocore, which contains MHA, a Specified Substance, on the morning of 1 July 2012, and that she participated in her sporting event an hour later, on the same day. The nexus is obvious.

9.11 The Panel finds that, although there were occasional inconsistencies in Ms Blake's evidence and her omission to declare her use of Neurocore on her doping control form was never satisfactorily explained, JADCO did not submit that she was a doping cheat, and the Panel makes no finding to that effect. However, as prescribed by Article 10.4 WADC, the Panel also needs to search for, in addition to Ms Blake's word, corroboration of her absence of intent as required by Article 10.4 WADC.

9.12 Having reviewed the totality of the evidence, the Panel finds that Ms Blake has not produced any corroborating evidence in addition to her word. The Panel's analysis is developed below with respect to each of the objective circumstances listed in the commentary to Article 10.4 WADC.

aa) Nature of the product and timing of ingestion

9.13 During her oral testimony before the Panel, Ms Blake stated that:

9.13.1 she purchased Neurocore in June 2012 upon the recommendation of her mentor, Mr. Christopher Rosengrant, to alleviate stress of her exhaustive training routine in her preparation for the National Championship;

9.13.2 she took Neurocore about twice a week during the weeks preceding the National Championships up until she received the positive results of her doping tests on 24 July 2012;

9.13.3 she took Neurocore on practice days only because it would make her feel better; and

9.13.4 she took Neurocore one hour prior to the National Championships on 1 July 2012 to recover from practice the day before.

9.14 The New Zealand Sports Tribunal in *Drug Free Sport NZ v. Prestney*, decision of 15 December 2011, found at paragraph 28 that *"athletes who take supplements or substances […] for purposes relating to their physical wellbeing or improvement run a very high risk that they will be held to have taken them to enhance their sports performance"*. The Panel agrees with this finding.

9.15 The Panel finds that Neurocore is a stimulant (as shown on the product's label), which helps athletes combat fatigue. Thus, it cannot be maintained that the nature of Neurocore would not have been beneficial to Ms Blake.

9.16 Moreover, as noted earlier, Ms Blake ingested this stimulant one hour prior to her race at the National Championships. The nexus between the ingestion and Ms Blake's race is very close, especially since she said that the reason why she took Neurocore when she did was to help her recover from practice the day before. In CAS 2011/A/2645, the CAS panel commented at paragraph 82 that an intent to enhance performance is present when a substance is taken *"… to help an athlete recover from physical effort or better prepare for a sporting performance"*.

bb) Athlete's open use or disclosure of her use of the Specified Substance

9.17 Not only is there no corroborating evidence of open use of Neurocore in the record, but also there is no corroborating evidence of open use on 1 July 2012 at the time of the ingestion of the product. In fact, it can be said that there is corroborating evidence of non-open use since Ms Blake did not declare Neurocore on the doping control form whilst she disclosed "Multi Pro 32 x (multivitamin)", "Ibuprofen", "NanoVapor" and "Nitro".

9.18 The Panel does not accept Ms Blake's submission that her failure to disclose Neurocore was due to (i) her lack of experience and (ii) the fact that it was a new product whose name she could not remember. The doping control form specifically requires disclosure of supplements, in the broadest meaning of the term, taken in the last seven days, and Ms Blake had been taking this product for two to three weeks prior to the National Championships, including the morning of the race.

cc) Contemporaneous medical records file substantiating the non sport-related prescription of the Specified Substance

9.19 The Panel notes that this issue is not applicable in the present case.

9.20 In summary, the Athlete has failed to establish to the comfortable satisfaction of the Panel the absence of an intent to enhance her sport performance when she ingested MHA the morning of her competition. The Panel repeats that it is not making a finding that Ms Blake is a doping cheat: there are simply no objective circumstances, as prescribed by Article 10.4 WADC, which corroborate Ms Blake's word and establish to the comfortable satisfaction of the Panel the absence of an intent to enhance her sport performance.

C. The second ground for appeal: reduction of the period of ineligibility based on Article 10.5.2 WADC

9.21 Since the Panel has found that Article 10.4 WADC was not applicable, Ms Blake's degree of fault under this provision need not be considered.

9.22 The Panel notes that Ms Blake has requested that, in the event Article 10.4 WADC is considered not applicable, the evaluation of her fault should be assessed under Article 10.5.2 WADC.

9.23 Article 10.5.2 WADC provides in its relevant part as follows:

"10.5.2 No Significant Fault or Negligence

If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then 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. (…)".

9.24 It is well established that under this provision, Ms Blake must establish that her fault or negligence, viewed in the totality of the circumstances and having regard to the criterion for "No Fault or Negligence", is not significant having regard to the doping offence.

9.25 The criterion of "No Fault or Negligence" is defined under the WADC as requiring that an athlete did not know or suspect, or could not reasonably have known or suspected even with the exercise of utmost caution, that he or she used the prohibited substance.

9.26 The athlete's fault is measured against the fundamental duty that he or she has under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance. In CAS 2003/A/484, at para. 57, the CAS panel stated:

"We begin with the basic principle, so critical to anti-doping efforts in international sport…that "[i]t is each Competitor's personal duty to ensure that no Prohibited Substance enters his or her body" and that "Competitors are responsible for any Prohibited Substance or its Metabolites or Markers found to be present their bodily Specimens". The essential question is whether [the athlete] has lived up to this duty …".

9.27 For the reasons set out below, the Panel finds that Ms Blake has failed to establish that she bears no significant fault or negligence in relation to the doping violation. Her claim for a reduction of sanction under Article 10.5.2 is thus denied.

9.28 While the Panel accepts Ms Blake's evidence that she researched Neurocore's ingredients on the DPS Nutrition website and cross-checked them against the WADA list of Prohibited Substances, the Panel does not accept Ms Blake's submission that she therefore bears no significant fault or negligence in the circumstances.

9.29 To the contrary, the Panel notes the abundant evidence adduced by JADCO regarding the numerous warnings as to the risk of presence of a Specified Substance in Neurocore. In particular, the Panel considers that the following two warnings couldn't have gone unnoticed by Ms Blake:

9.29.1 on the DPS nutrition website: *"Nutritions Facts are a simulation of the product "Nutrition Label". For the actual Nutrition Label please refer to the product packaging"*; and

9.29.2 on the product's label, in a different colour and different font size than other wording: *"This product contains geranium and should not be used by those concerned with athletic testing such as required by WADA"*.

9.30 In view of these clear warnings, the Panel does not accept Ms Blake's submission that (i) as far as she was concerned, the product which she ordered online was different from the one she received, and (ii) she was unaware of the warning on the product's label until it was brought to her attention by counsel. This is so especially since she testified before the Panel that she did examine the product's label in respect of directions as to how to ingest it. The last sentence of the directions section of the label reads as follows: *"Read entire label before use"*.

9.31 Consequently, without wishing to attribute any particular motivation to Ms Blake in this case, the Panel is of the view that by ignoring these clear warnings and relying on the advice of her mentor, Ms Blake wilfully turned a blind eye for which she must be held responsible. Ms Blake's conduct in the circumstances amounts to a total disregard of her positive duty to ensure that no prohibited substance enters her body, a duty which she was reminded of and to which she pledged after committing her first doping offence.

D. The third ground for appeal: reduction of the period of ineligibility based on Article 10.7 WADC

9.32 Since the Panel has found that Article 10.5.2 WADC was not applicable, Ms Blake's degree of fault remains to be assessed under Article 10.7 WADC.

9.33 The Panel notes that Ms Blake received a Reduced Sanction (RS) for her first doping offence. This is now her second anti-doping rule violation. Based on the findings of the Panel, this second anti-doping rule violation would not be regarded as a Reduced Sanction, but rather as a Standard sanction (St). Using the table at Article 10.7 WADC, the applicable range of period of ineligibility is 4-6 years.

9.34 In order to assess Ms Blake's degree of fault, the Panel considers mitigating and aggravating circumstances surrounding Ms Blake's doping violation.

9.35 In the Panel's view, circumstances favourable to Ms Blake include the following.

9.35.1 She actually did some research and that research was directed precisely to comparing Neurocore's ingredients listed on the DPS Nutrition website and the WADA list of Prohibited Substances. This was, in the Panel's view, not only an intelligible, but the most rational first step.

9.35.2 Instead of clearly indicating that Neurocore contains Geranium, a WADA Prohibited substance, on the DPS Nutrition website, the manufacturer, perhaps deliberately, elected to specify it only on the product's label.

9.35.3 She was provided with barely any anti-doping education by her university or racers' club in Jamaica.

9.35.4 She has only had one previous experience with doping control (when she was 19 years-old).

9.36 Circumstances adverse to Ms Blake include those listed in the Tribunal's analysis under Articles 10.4 and 10.5.2 WADC.

9.37 The Panel considers that although consistency of sanctions is a virtue, correctness remains a higher one: otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interests of sport.

9.38 Having regard to all of the circumstances, the Panel has come to the conclusion that the 6-year sanction imposed by the Tribunal was too severe. Having regard to Ms Blake's degree of fault and, the mitigating factors listed above, the Panel concludes that an appropriate sanction would be a period of Ineligibility of 4 years and 6 months. The Panel emphasises that this represents the Panel's own evaluation and weighing of the evidence and the submissions received, as well as the Panel's careful consideration of the authorities that it has found relevant.

E. Commencement of Period of Ineligibility

9.39 As to the starting day of the period of Ineligibility, the Panel notes that the Tribunal has determined in its Decision that it should be back-dated from 13 June 2013 (the date of the hearing decision according to Article 10.9 WADC) to 24 July 2012:

"The circumstances pertaining to the conduct of this matter was quite protracted and not in harmony with the expediency envisioned by the JADCO Rules. Whereas it is clear that the Appellant did cause delays by changes of attorneys it cannot be said that at the initiation of the process there was not significant or substantial delay not attributablet o her.

Accordingly, we are of the view and so state, that the period of ineligibility should run as from […] 24 July, 2012".

9.40 The Panel further notes that the Athlete, in her Appeal Brief, submits that the Tribunal erred in choosing 24 July 2012 since that date corresponds to the *"sample finding on paper"*. The correct date should be 1 July 2012 which is the date of the sample collection.

9.41 In the circumstances, and in accordance with Article 10.9 WADC, the Panel decides that the starting day of the Athlete's period of Ineligibility is 1 July 2012.

10 CONCLUSION

10.1 The Panel would allow Ms Blake's appeal to the extent that the 6-year period of Ineligibility imposed by the Decision should be reduced to 4 years and 6 months. The starting date for the term of Ineligibility is 1 July 2012.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Ms Dominique Blake on 17 October 2013 against the Jamaica Anti-Doping Commission concerning the decision of the Jamaica Anti-Doping Appeals Tribunal of 1 October 2013 is partially upheld.

2. The decision of the Jamaica Anti-Doping Appeals Tribunal of 1 October 2013 is set aside.

3. Ms Dominique Blake is suspended for a period of 4 years and 6 months from 1 July 2012.

(…)

6. All other or further claims are dismissed.