

CAS 2005/A/828 Mr. Stefan Koubek v/ International Tennis Federation

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr. Quentin **Byrne-Sutton**, Attorney-at-law in **Geneva**, Switzerland

between

Mr. Stefan Koubek (hereinafter “Stefan Koubek”)

Represented by Mr. Karlheinz **Demel**, General Legal Advisor of the “*Österreichisches Anti-Doping-Comité*” in **Vienna**, Austria

and

International Tennis Federation (hereinafter “ITF”)

Represented by Mr. Jonathan **Taylor**, Attorney-at-Law, **London**, United Kingdom

I. THE PARTIES AND THE ORIGIN OF THE DISPUTE

A. The Parties

a) *The Appellant*

1. Stefan Koubek is an Austrian professional tennis player, who is highly ranked on the Association of Tennis Professionals' ("ATP") Tour.

b) *The Respondent*

2. The ITF is the international governing body for the sport of tennis worldwide.

B. The Origin of the Dispute

3. Stefan Koubek was born in 1977. He turned professional in 1994, is a member of the ATP Tour and plays in numerous tournaments throughout the world.

4. His coach for many years has been Mr Gunter Bresnik, a former captain of the Austrian Davis Cup team.

5. In general, Stefan Koubek and his coach relied on various sources of medical advice. For routine ailments Stefan Koubek consulted Mr Bresnik's father, a retired doctor. For more specialised problems he would consult Professor Dr Weinstabl, the team doctor for the Austrian Tennis Federation. On occasions Stefan Koubek also consulted a Dr Scharbus, another specialist doctor.

6. On 5 January 2004, Stefan Koubek signed a consent form agreeing to be bound by the ATP Rules, which include the "*Tennis Anti-Doping Programme 2004*" (hereinafter the "2004 Programme").

7. In relation with the Australian Open, the ATP has organized information meetings, which are mandatory for players. Stefan Koubek attended one such "*ATP Mandatory Player Meeting*" on 17 January 2004, at which he was given a so called "wallet card", designed to be carried in a player's wallet.

8. The wallet card contained a warning that players should keep the card with them at all times and should give a copy to their physician, coach and personal trainer. It also warned that a player "*must apply for a TUE [therapeutic use exemption] before using any banned substance*" and invited players to "*check with the ITF, WTA Tour or ATP*" if there were any questions. A "*hotline*" telephone and fax number was also given on the card. A warning about dietary supplements was included. In small print there was a

summary of the applicable sanctions for doping offences and a long list of substances and methods prohibited in and out of competition.

9. However, Stefan Koubek did not keep his wallet card.
10. In or about March 2004, Stefan Koubek began experiencing pain in his right wrist. He is left-handed and uses his left hand to hold his racket, apart from limited use of the right hand when playing a double-handed backhand. Around the end of March, ATP trainers and a doctor in Miami looked at his right wrist. He was advised to apply ice and put on a bandage or cast. He followed that advice but the pain persisted intermittently thereafter.
11. Stefan Koubek applied to compete in the French Open at Roland Garros, signing an entry form which he did not date but presumably prior to the closing date which was in April 2004. At about the same time Stefan Koubek applied to compete in a tournament at St Pölten, Austria. The tournament was scheduled to start on 17 May 2004 and the application had to be submitted at least six weeks beforehand. In April and May 2004 he competed in Valencia, Rome, Barcelona and Hamburg. Shortly before the St Pölten tournament was due to start, he was still experiencing pain in his right wrist. The last day on which a Stefan Koubek could withdraw from the St Pölten tournament without the permission of the tournament doctor was 14 May 2004.
12. On the advice of a Mr Strenberger, a friend, Stefan Koubek decided to consult Dr Martin Leixnering, whom he had not previously seen and did not know. He obtained the telephone number from Mr Strenberger and gave it to Mr Bresnik, who telephoned Dr Leixnering during the evening of 14 May 2004 and obtained an appointment for the next morning, Saturday 15 May. Stefan Koubek did not wish to withdraw from the St Pölten tournament. The pain was not in his main racket wrist. Nevertheless he wanted treatment if possible, to eliminate or alleviate the pain.
13. Dr Leixnering is an eminent hand surgeon in private practice in Vienna. His letterhead states that he is a specialist in accident surgery, hand surgery and "*Sporttraumatologie*" (sport traumatology).
14. Until 2003 Dr Leixnering was the team doctor for a celebrated ice-hockey team, the Vienna Capitals. In April 2004 he became the medical co-ordinator of the International Ice Hockey Federation. He has been appointed to the position of medical chief for the world ice-hockey championship in 2005. As such his responsibilities would include overseeing anti-doping testing procedures.
15. When Stefan Koubek visited Dr Leixnering's private surgery on 15 May 2004, Mr Bresnik was not present.
16. Stefan Koubek did not show his wallet card to Dr Leixnering and the subject of TUE was not raised by either of them. Stefan Koubek asked Dr Leixnering whether the

- injection Dr Leixnering was proposing to administer could cause any difficulty with doping and Dr Leixnering gave an answer in the negative.
17. Dr Leixnering then administered an injection containing local anaesthetic and also 2ml of Volon A40, a glucocorticosteroid preparation containing *Triamcinolone Acetonide*.
 18. Stefan Koubek competed in the St Pölten tournament in the singles and doubles. He went back to see Dr Leixnering, as had been pre-arranged, on 19 May 2004. He was pain free on that occasion and therefore no further treatment was sought or given.
 19. The French Open at Roland Garros took place from 24 May to 8 June 2004. Stefan Koubek competed and lost in the third round. He received 35,230 Euros in prize money, 75 ATP entry points and 15 ATP race points. On 29 May 2004, he underwent a doping test. On the doping control form he declared only a vitamin mineral drink called *Peeroton*. He did not declare any substance arising from the injection two weeks earlier. His explanation was that he did not even know what substances were in the injection, it was some two weeks since it was given, and Dr Leixnering had assured him there was no doping problem with it.
 20. The A sample was analysed at the “Laboratoire National de Depistage du Dopage” in Paris and found to contain *Triamcinolone Acetonide* in a concentration of about 1 ng/ml. The laboratory issued a certificate of analysis so stating on 15 June 2004. The results were reported to Mr Sahlström of “International Doping Tests & Management” in Sweden. A review board of three members determined that there was a case of doping to answer. Mr Sahlström so informed Stefan Koubek by letter dated 16 July 2004 and also informed him of his right to an analysis of the B sample.
 21. Stefan Koubek suspected the injection administered by Dr Leixnering might be the cause of the positive test result. Shortly after receiving Mr Sahlström’s letter of 16 July, Stefan Koubek contacted Dr Leixnering by telephone, also sending him by fax the certificate of analysis and Mr Sahlström’s letter. Dr Leixnering checked his records and rang Stefan Koubek back a short time later confirming that the injection was indeed the cause of the positive test result.
 22. The player did not request an analysis of the B sample. By letter of 22 September 2004, the ITF charged him with a doping offence relying on the positive test result from the tournament at Roland Garros.
 23. By fax dated 29 September 2004, Dr Karl-Heinz Demel replied that Stefan Koubek “*does not admit*” to having committed the doping offence and requests a hearing before the Anti-Doping Tribunal as provided in Article K of the 2004 Programme.
 24. As a result, further to Stefan Koubek and the ITF having filed their submissions and evidence, a tribunal of three members was convened under article K of the 2004 Programme to decide on the case.

25. On 13 December 2004, Dr Leixnering signed a witness statement, indicating, among others, that although since treating the player on 15 May 2004 he had acquired knowledge of the provisions of the 2004 Programme and in particular that *Triamcinolone Acetonide* is a prohibited substance, on the day of the consultation and treatment, he was “... *not aware that such treatment could give rise to a positive test result and advised Mr, Koubek accordingly*”.
26. A hearing took place in London on 21 December 2004 in front of the Anti-Doping Tribunal.
27. On 18 January 2005, the Anti-Doping Tribunal rendered its decision, which contained the following ruling:
- “Accordingly, for the reasons given above, the Tribunal:*
- (1) confirms the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 22 September 2004: namely that a prohibited substance, Triamcinolone Acetonide, a glucocorticosteroid, has been found to be present in the urine sample that the player provided at the French Open on 29 May 2004;*
 - (2) orders that the player's individual result must be disqualified in respect of the French Open held at Roland Garros, France, and in consequence rules that the ranking points and prize money obtained by the player through his participation in that event, must be forfeited;*
 - (3) orders, further, that the player's individual results in competitions subsequent to the French Open shall not be disqualified but shall remain undisturbed;*
 - (4) finds that the player has succeeded in establishing on the balance of probabilities that his use of the prohibited substance leading to the positive test result in respect of the sample taken on 29 May 2004 was not intended to enhance sport performance;*
 - (5) declares that the player shall be ineligible for a period of three months starting on 21 December 2004 from participating in any capacity in any event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised by the ITF or any national or regional entity which is a member of or is recognised by the ITF as the entity governing the sport of tennis in that nation or region.”*

II. SUMMARY OF THE ARBITRATION PROCEEDINGS

28. On 31 January 2005, Stefan Koubek filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter the “CAS”) against the Anti-Doping Tribunal’s

decision of 18 January 2005. The Statement of Claim included the following prayers for relief:

- “1. Allowing the statement of appeal and repealing the imposed sanction of three months of ineligibility as non appropriate;*
- 2. Declaring the Appellants all rights as a member of the ATP and the Austrian Tennis Federation and the rights to participate in further sports competitions of any kind are restored to the Appellant;*
- 3. If the Respondent agrees to a Panel composed of a sole Arbitrator or the President of the Division considers, that the matter is an emergency and the appeal should be submitted to a sole Arbitrator (CAS Procedural Rules R50).”*

29. On 2 February 2005, Stefan Koubek filed an Additional Statement indicating “... *that Mister Koubek will not use his opportunity to file an appeal brief ...*” and requesting “... *that the CAS declares as soon as possible the appellants rights to participate in further sports competitions of any kind*”
30. On 8 February 2005, the ITF informed the CAS that it had no objection to the appointment of a Sole Arbitrator.
31. On 16 February 2005, the CAS confirmed the appointment of Mr. Quentin Byrne-Sutton as Sole Arbitrator.
32. On 17 February 2005, the ITF indicated it would not be opposed to the case being decided by the Sole Arbitrator without a hearing, as allowed under art. R57 of the Code of Sports-Related Arbitration (the “Code”).
33. On 18 February 2005, the ITF filed its Answer requesting as follows:

“Conclusion

- 1. For the reasons set out above, the ITF respectfully submits that no grounds for disturbing the Decision have been made out and that therefore the appeal should be dismissed.*
- 2. In any event, the appeal is only against that part of the Decision that imposes a period of Ineligibility of three months on Mr Koubek. Even if (which the ITF strongly disputes) Mr Koubek is right to contend that the period of Ineligibility should have been eliminated entirely on account of his alleged No Fault or Negligence, the Decision should not be disturbed to the extent that it (a) finds that Mr Koubek has committed a doping offence within the meaning of Article C.1 of the 2004 TADP; and (b) by operation of the mandatory provisions of Article L of the 2004 TADP, disqualifies the individual results achieved by Mr Koubek at the Roland Garros event in question, leading to forfeiture of the prize money and the ranking points that he won there.”*

34. On 22 February 2005, the CAS invited Stefan Koubek to indicate whether he would allow the Sole Arbitrator to issue an award on the sole basis of the written submissions.
35. On 22 February 2005, Stefan Koubek replied that he agreed to the Sole Arbitrator issuing an award on the sole basis of the written submissions.
36. The written submissions contained, among others, the full transcript of the hearing of 21 December 2004 that took place in front of the Anti-Doping Tribunal.
37. On 1 March 2005, the Sole Arbitrator rendered his decision, the holding of which was notified by the CAS to the Parties with the indication that the award containing the grounds would follow.

III. THE PARTIES' CONTENTIONS

A. Stefan Koubek

38. In essence, Stefan Koubek is submitting that:
 - He bears no fault or negligence for taking a prohibited substance since Dr Leixnering is a well-know specialist in sports medicine and in such capacity gave him assurances that the proposed treatment could not give rise to a positive test.
 - In any event, the use of the substance was not intended to enhance his sport performance and therefore, in the circumstances as established, he is entitled to a lesser sanction in accordance with article M.3 of the 2004 Programme.

B. ITF

39. In essence, the ITF is submitting that:
 - Under the applicable definitions of no fault or negligence, notably those provided in Appendix One of the 2004 Programme and in the World Anti-Doping Code ("WADC"), Stefan Koubek's behaviour cannot be qualified as exempt of negligence.
 - Consequently, Stefan Koubek was liable for a sanction and the reduced three-month suspension decided by the Anti-Doping Tribunal was appropriate and reasonable in the circumstances as established.

IV. DISCUSSION OF THE CLAIMS

A. Jurisdiction

40. The jurisdiction of the CAS, which is not disputed, derives from article O of the 2004 Programme and art. R47 of the Code of Sports-related Arbitration (the “Code”).
41. Furthermore, it is not disputed that the appeal was timely.
42. The scope of the Panel’s jurisdiction is defined in art. R57 of the Code, which provides that: *“The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance”*.
43. In addition and in conformity with art. R57 of the Code, the Parties have expressly accepted that the CAS rule on the sole basis of their written submissions.

B. Applicable Law

44. Art. R58 of the Code provides that:

“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.”

45. The Parties having both relied on the provisions of the 2004 Programme, these are deemed applicable. Since article A (the introduction) of the 2004 Programme indicates that it was adopted and implemented pursuant to the mandatory provisions of the WADC, the latter shall also serve to construe the provisions of the 2004 Programme.
46. The following provisions, among others, of the 2004 Programme and of the WADC are relevant in deciding the case:

a) *The 2004 Programme*

“ A.1 The purpose of this Tennis Anti-Doping Programme (the “Programme”) is to maintain the integrity of tennis and to protect the health and rights of all tennis players.

[...]

C. Doping Offences

Doping is defined as the occurrence of one or more of the following [...]:

C.1 The presence of a Prohibited Substance or its Metabolites or Markers in a Player's Specimen, unless the Player establishes that the presence is pursuant to a therapeutic use exemption granted in accordance with Article E.

C.1.1 It is each Player's personal duty to ensure that no Prohibited Substance enters his or her body. A Player is responsible for any Prohibited Substance or its Metabolites or Markers found to be present in his or her Specimen. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Player's part be demonstrated in order to establish a Doping Offence under Article C.1; nor is the Player's lack of intent, fault or negligence or knowledge a defence to a charge that a Doping Offence has been committed under Article C.1.

[...]

M.2 Imposition of Ineligibility for Prohibited Substances and Prohibited Methods.

Except where the substance at issue is one of the specified substances identified in Article M.3, the period of Ineligibility imposed for a violation of Article C.1 (presence of Prohibited Substance or its Metabolites or Markers), Article C.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article C.6 (Possession of Prohibited Substances and/or Prohibited Methods) shall be:

First offence: Two (2) years' Ineligibility.

Second offence: Lifetime Ineligibility.

However, the Participant shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article M.5.

M.3 Lesser Sanction for Specified Substances.

The Prohibited List may identify specified substances that are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or that are less likely to be successfully abused as doping agents (a "Specified Substance"). Where a Player can establish that the Use of such a Specified Substance was not intended to enhance sport performance, the period of Ineligibility found in Article M.2 shall be replaced with the following:

First offence: At a minimum, a warning and reprimand and no period of Ineligibility from future Events, and at a maximum, one (1) year's Ineligibility.

Second offence: Two (2) years' Ineligibility.

Third offence: Lifetime Ineligibility.

However, the Participant shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing (in the case of a second or third offence) this sanction as provided in Article M.5.

[...]

M.5.1 If the Player establishes in an individual case involving a Doping Offence under Article C.1 (presence of Prohibited Substance or its Metabolites or Markers) or Article C.2 (Use of Prohibited Substance or Prohibited Method) that he or she bears No Fault or Negligence for the offence, the otherwise applicable period of Ineligibility shall be eliminated. When the case involves a Doping Offence under Article C.1 (presence of Prohibited Substance or its Metabolites or Markers), the Player must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event that this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the Doping Offence shall not be considered a Doping Offence for the limited purpose of determining the period of Ineligibility for multiple Doping Offences under Articles M.2, M.3 and M.6.

[...]

Appendix One

Definitions

No Fault or Negligence. *The Player establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method.”*

b) *The WADC*

“Article 10.5.1 No Fault or Negligence

If the Athlete establishes in an individual case involving an anti-doping rule violation under Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers) or Use of a Prohibited Substance or Prohibited Method under Article 2.2 that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (Presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this

Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Articles 10.2, 10.3 and 10.6.

[...]

10.5.2 Comment: [...] *Article 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.*

To illustrate the operation of Article 10.5, an example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a prohibited substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any prohibited substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.)

[...]

21.1 Roles and Responsibilities of Athletes

21.1.1 To be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant the Code.

21.1.2 To be available for Sample collection.

21.1.3 To take responsibility, in the context of anti-doping, for what they ingest and use.

21.1.4 To inform medical personnel of their obligation not to Use Prohibited Substances and Prohibited Methods and to take responsibility to make sure that any medical treatment received does not violate anti-doping policies and rules adopted pursuant to the Code.”

C. The Doping Offence

47. It is undisputed that Stefan Koubek committed a Doping Offence as defined under article C.1 of the 2004 Programme.
48. Consequently, the existence of a doping offence is not an issue to be decided; the only issue to be determined being whether the sanction applied by the Anti-Doping Tribunal was admissible and appropriate.

D. The Sanction

a) *Sporting Sanction (disqualification; forfeiture of ranking points and prize money)*

49. According to Stefan Koubek's submission and his prayers for relief, he is not challenging the sporting sanction ordered by the Anti-Doping Tribunal in the form of disqualification of his individual result and forfeiture of his ranking points and prize money obtained at the 2004 French Open in Roland Garros.
50. Consequently, that part of the appealed decision is not being considered in this proceeding in front of CAS.

b) *Disciplinary Sanction (suspension)*

51. Under article M.5.2 of the 2004 Programme and 10.5.2 of the WADC, a finding of "*No Significant Fault or Negligence*" (emphasis added) can only lead to a reduced suspension of half the basic penalty, i.e. in this case to a minimum suspension of 12 months. For this reason and because the Anti-Doping Tribunal imposed a suspension limited to three months on Stefan Koubek in application of article M3 of the 2004 Programme, the condition of no significant fault or negligence does not come into consideration here.
52. Instead, the only questions which need deciding are (i) whether Stefan Koubek can invoke the condition of "*No Fault or Negligence*" (emphasis added), which, if fulfilled would lead to the elimination of the otherwise applicable period of ineligibility, and, if not (ii) whether the reduced ineligibility period of three months decided by the Anti-Doping Tribunal on the basis of article M3 of the 2004 Programme can be deemed commensurate with Stefan's Koubek's negligence.

- i. The Condition of “No Fault or Negligence”
53. The definitions of “*No Fault or Negligence*” (emphasis added) in the WADC and in the 2004 Programme are identical, the latter being an implementation of the former.
54. The condition of no fault or negligence is not only an extremely strict test by definition due to the word “no”. It is also necessarily very strict in order to be distinguishable from the test of “*No Significant Fault or Negligence*” (emphasis added) which exists under both sets of rules and which allows for a degree, albeit small, of fault or negligence.
55. Consequently, to meet the test of no fault or negligence, an athlete must have acted in a fashion that is completely diligent, considering what could reasonably be expected in the circumstances. This is expressed by the requirement that an athlete exercise “*utmost caution*”.
56. Furthermore, the condition of no significant fault or negligence needs to be applied bearing in mind athletes’ duties, specified under article 21 of the WADA Code, to “... *be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code*”, to “... *take responsibility, in the context of anti-doping, for what they ingest and use...*” and to “...*inform medical personnel of their obligation not to Use Prohibited Substances and Prohibited Methods and to take responsibility to make sure that any medical treatment received does not violate anti-doping policies and rules adopted pursuant to the Code*”; which amount to requiring that athletes adopt an overall responsible attitude, be properly informed regarding doping issues and more generally be knowledgeable of and abide by the rules and codes of conduct governing their sports activity.
57. Thus, in assessing whether an athlete has been completely diligent in dealing with a choice of medical treatment or the use of a food supplement, it is not sufficient to evaluate the athlete’s actions at the specific point in time when the final decision was made by the athlete to have the treatment or to ingest the substance. More generally, all the circumstances relevant to the occurrence of the doping offense need to be considered.
58. For example, an athlete who has not made the effort to keep abreast of anti-doping rules or, worse, who deliberately casts a blind eye on them is more prone to ignoring the opportunity offered by the procedure of therapeutic test exemptions and will be less aware of the significance of the list of Prohibited Substances and of the importance of double-checking the possible consequences of a doctor’s proposed therapy. Similarly, an athlete who has taken no interest in doping cases pertaining to food supplements and the debate surrounding them will be less attuned to the risk of using food supplements.

59. With respect to Stefan Koubek's fault and degree of fault, the Anti-Doping Tribunal found, among others, that:

*"In terms of the definition of "No Fault or Negligence" in Appendix One to the Programme, we accept that the player "did not know or suspect... that he., had Used or been administered the Prohibited Substance ..."; but we also consider that the player could, "with the exercise of the **utmost** caution", have discovered that the injection Dr Leixnering proposed to administer contained a prohibited substance."*

[...]

In the present case we consider the degree of the player's fault to be neither trivial nor very grave, but between the two extremes. The Tribunal identifies three categories of personal fault of which the player was guilty; (i) failing to pay attention to Mr Ings' presentation, throwing away his wallet card and failing to read and learn what was stated on it; (ii) failing in consequence to produce the wallet card to Dr Leixnering on 15 May 2004; and (iii) failing to consult on and cross-check Dr Leixnering's reassurances given on 15 May 2004."

60. The Sole Arbitrator agrees with the Anti-Doping Tribunal's foregoing findings for the following reasons:

- One of the main purposes of the 2004 Programme is to " ... *maintain the integrity of tennis and protect the health ... of all tennis players*".
- To this end, a considerable effort has been invested in activities designed to educate tennis players regarding anti-doping rules, such as the organization of the ATP meetings for players and the distribution of "wallet cards".
- At the same time, an important goal and consequence of the WADC (see for example article 21) is to render athletes responsible for their own actions, which encompasses the duty to personally manage their dietary and medical needs in a responsible manner in light of anti-doping rules.
- In such regulatory framework and given the publicity given to doping offenses involving medical treatment and food supplements, athletes cannot ignore that receiving medical treatment and taking food supplements create a degree of risk of breaching anti-doping rules.
- Thus, athletes' responsibility under anti-doping rules includes informing themselves properly regarding available preventive measures, such as the procedure for therapeutic use exemptions, and being mindful of the rules of conduct of their profession, such as for professional tennis players the correct use of their wallet card.

- The high degree of diligence now required of athletes in the foregoing context is encapsulated in the 2004 Programme under the definition of “No Fault of Negligence”, whereby to be entitled to invoke an absence of responsibility the player must establish that “... *he or she did not know or suspect and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method*”. It is also reflected in the comment to article 10.5 of the WADC, in which “... *the administration of a prohibited substance by the Athlete’s personal physician or trainer without disclosure to the Athlete*” is given as an example of what in principle is not a circumstance warranting a finding of no fault or negligence.
 - Stefan Koubek’s behaviour has not been one of utmost caution, since - according to his own admission during his hearing in front of the Anti-Doping Tribunal - he never made any enquiries with the ATP or ITF regarding anti-doping rules (page 50, lines 7-10, and page 53, lines 3-5 of the transcript), he did not know of the existence of TUE (page 50, lines 22-23, of the transcript), he was not interested in listening to the information about anti-doping provided at the ATP mandatory meeting he attended in Australia in January 2004 (page 44, lines 6-8, of the transcript), he “*did not keep*” the wallet card (page 43, line 13, of the transcript) provided to him, he could not therefore give Dr Leixnering a copy of the wallet card (page 52, lines 4-5, of the transcript) and he relied on Dr Leixnering’s advice with respect to the treatment for his wrist although he had never met Dr. Leixnering before (page 60, line 15 – page 61, line 8 of the transcript). Furthermore, Stephan Koubek consulted Dr Leixnering on very short notice, despite the fact that the wrist injury had been affecting him for some time, and he accepted the proposed treatment immediately without seriously verifying whether Dr Leixnering was correct in affirming that it would cause no problem with doping.
61. As a result and given the scope of the test “*No Fault or Negligence*” examined above (§ 52-58), the Sole Arbitrator finds that Stefan Koubek could and should have been more serious in educating himself about anti-doping measures and more responsible in implementing what he had learnt. If he had made that effort he could and should have been more aware of the means of reducing the risk of involuntarily committing a doping offense, among others by exploring the possibility of applying for a TUE and by being more cautious when consulting Dr Leixnering. Having not made such effort or taken the available precautionary steps, Stefan Koubek failed to meet the requirement of “*utmost caution*” set by the 2004 Programme and the WADC to benefit from an exemption under the condition of “*No Fault or Negligence*”.

ii. The Application of article M3 of the 2004 Programme

62. With respect to the length of the suspension, the Anti-Doping Tribunal found, among others, that:

“For those reasons, we have reached the conclusion that the player has succeeded in establishing on the balance of probabilities that his use of Triamcinolone Acetonide leading to the positive test result was "not intended to enhance sport performance". As this is the player's first offence, the Tribunal therefore has discretion under Article M3 to impose, at a minimum, a warning and reprimand and no period of ineligibility, and at a maximum, one year's ineligibility.”

[...]

How long should that period be? We dismiss any suggestion that it should be nil. We have already commented on the nature and extent of the player's Fault, Taking all the factors mentioned above into account including the Tribunal's decision not to disqualify the player's results subsequent to the French Open, the Tribunal has concluded that a period of ineligibility of three months is appropriate in this case.

63. The Sole Arbitrator agrees with the Anti-Doping Tribunal's foregoing findings and considers the sanction of three months – compared to a possible maximum penalty of one year – to be reasonable given Stefan Koubek's attitude towards doping issues in general, revealed by his testimony, which notably led him to disregard the rules of conduct required of tennis players in relation to the wallet cards and to act without any particular precaution when dealing with Dr. Leixnering.

V. COSTS

64. In accordance with art. R65.1 of the Code, this proceeding is free except for the Court Office fee of CHF 500 (five hundred Swiss Francs) already paid by the Appellant and to be retained by the CAS.
65. Due to Stefan Koubek succumbing in his appeal but taking into account the absence of any expenses linked to a hearing in front of the CAS, the Sole Arbitrator has decided Stefan Koubek shall pay CHF 2'500 to the ITF as a contribution to its costs.
66. Having failed in his appeal Stefan Koubek shall bear his own legal costs.

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ON THESE GROUNDS

The Court of Arbitration for Sport:

1. Dismisses the appeal filed by Stefan Koubek on 31 January 2005.
2. Declares that the award is pronounced without costs, except for the Court Office fee of CHF 500 (five hundred Swiss Francs) already paid by the Appellant and to be retained by the CAS.
3. Orders Stefan Koubek to pay an amount of CHF 2'500 (two thousand five hundred Swiss Francs) to the ITF as a contribution towards its costs.

Lausanne, 13 April 2005

THE COURT OF ARBITRATION FOR SPORT

Quentin Byrne-Sutton
Sole Arbitrator