

INTERNATIONAL TENNIS FEDERATION

INDEPENDENT ANTI-DOPING TRIBUNAL

DECISION IN THE CASE OF HOLGER FISCHER

Tim Kerr QC, Chairman (sitting alone)

Introduction

1. This is the decision of the independent Anti-Doping Tribunal (“the Tribunal”) appointed by the the Anti-Doping Administrator of the International Tennis Federation (“the ITF”) under Article K.1.1 of the ITF Tennis Anti-Doping Programme 2005 (“the Programme”) to determine a charge brought against Mr Holger Fischer (“the player”) following a positive drug test result in respect of a urine sample no. 115908 provided by the player on 22 September 2005 at the Swiss Tennis Satellite Circuit Masters event in Montreux, Switzerland.
2. By two letters dated 16 January 2006, one in English and one in German, the player through his lawyer admitted the doping offence, with which he was charged by letter dated 5 January 2006 from Mr Jonathan Harris, the ITF’s Anti-Doping Administrator. Accordingly by Article K.1.3 of the Programme a hearing before the Tribunal was not required. In one of the two letters, written in German, the player confirmed (and has also verbally confirmed direct to the ITF) that he is content for the matter to be dealt with by the chairman sitting alone.

3. I have therefore considered the written representations submitted by and on behalf of the player in those two letters, and on behalf of the ITF by Hammonds, the ITF's solicitors in London, in a letter (addressed to my predecessor in this case, Mr Charles Flint QC), which was also copied to the player's lawyer in Heidelberg. I am grateful to the parties for their clear and helpful representations made in that correspondence.

The Facts

4. The player is a German citizen born on 11 December 1980, who is now therefore aged 25. With effect from 1 January 2004 he became bound, in relation to events organised by the ITF, by the Programme. By what is now Article S8 of the 2005 version of the Programme, cannabinoids are a prohibited substance. They became prohibited for the first time on 1 January 2004 when the 2004 version of the Programme entered into force.
5. During the week of 20-24 September 2005 the player was due to take part in week 4 of the Swiss Tennis Satellite Masters event, at Territet, Montreux, in Switzerland. Either shortly before or during that tournament he went out with friends to a discotheque in Lausanne, Switzerland, where he unwisely accepted an offer of some cookies laced with cannabis, without stopping to think that he would be or could thereby be committing a doping offence.
6. He took part in week 4 of the tournament and lost in the quarter final. He had previously taken part in weeks 1, 2 and 3 of the same tournament. He thereby gained four ranking points and earned US\$ 635.94. On 22 September 2005 he was selected for doping control. He provided a urine sample, which was numbered 115908 and sent for analysis to the WADA accredited laboratory in Switzerland, the Laboratoire Suisse d'Analyse du Dopage in Lausanne. The player has voluntarily abstained from competing in any ITF competitions since 22 September 2005.

7. The A sample was analysed and found to contain Carboxy-THC, a metabolite of cannabis, in a concentration of more than 15 ng/ml, indeed at least 294.6 ng/ml. The certificate of analysis was dated 7 October 2005. Accordingly Mr Staffan Sahlström, the Anti-Doping Program Administrator, of International Doping Tests and Management (“IDTM”) based at Lindigö, Sweden, convened a review board in accordance with the Programme to consider whether there was a case to answer. By 21 November 2005 all the members of the review board had concluded that there was a case to answer and had so informed IDTM.

8. On 30 November 2005 Mr Sahlström wrote to the player informing him of the positive test result, enclosing a copy of the certificate of analysis and informing him that the B sample had been scheduled to take place in Lausanne on 6 December 2005. This was subsequently postponed to 15 December 2005 due to postal delay, apparently leading to delayed receipt by the player of Mr Sahlström’s letter of 30 November. The B sample was then analysed at the same WADA accredited laboratory and also found to contain Carboxy-THC in a concentration above 15 ng/ml. I do not have evidence of the concentration determined in the B sample.

The Proceedings

9. By a letter dated 5 January 2006 the ITF formally charged the player with a doping offence under Article C.1 of the Programme. The player consulted lawyers in Heidelberg, Germany who responded on his behalf by two letters dated 16 January 2006, one in English and one in German. From those letters it is clear that the player admits the doping offence, expresses his regret, states that he is determined not to make such an error of judgment again, explains the circumstances of the doping offence, explains that he did not intend to enhance his sporting performance and asks for a lenient penalty to be determined by a chairman sitting alone, without an oral hearing.

10. The ITF's solicitors, in a helpful letter dated 24 January 2006, invites the Tribunal to impose the normal consequences relating to the event itself, namely annulment of results of the event in which the doping offence took place. The ITF also invites the Tribunal to impose a period of ineligibility of two months, by reference to the body of precedent now available in first offence cases of recreational ingestion of cannabis which have been determined (both in the sport of tennis and other sports) in accordance with the World Anti-Doping Code since 1 January 2004.
11. The ITF's solicitors refer in their letter to various of those precedents and deduce from them that the normal period of ineligibility for a first offence of recreational use of cannabis, without aggravating circumstances, is about two months – sometimes a bit more, sometimes a bit less. In the same letter the ITF's solicitors confirm that they accept that the player has voluntarily abstained from competition since the positive test result and that accordingly the period since the date the test was taken, 22 September 2005, should count towards any period of ineligibility.

The Tribunal's Conclusions, With Reasons

12. The player has admitted the commission of a doping offence under Article C.1 of the Programme. Accordingly pursuant to Article K.1.3 of the Programme, the Tribunal is required to confirm the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 5 January 2006: namely that a prohibited substance, the cannabis metabolite Carboxy-THC, has been found to be present in the urine specimen that the player provided at Territet, Montreux, on 22 September 2005.
13. Irrespective of the player's intention or otherwise to enhance performance for the purpose of determining the applicability of Article M.3 of the Programme, the Tribunal is obliged by Article K.1.3 to apply the mandatory consequences provided for in Article L.1 of the Programme. Accordingly the player's results

in the Swiss Tennis Satellite Circuit Masters event must be disqualified and the four ranking points and US \$635.94 earned from that event, must be forfeited.

14. The next question is whether the player can successfully invoke Article M.3 of the Programme. This provides that in the case of a “Specified Substance”, identified as such in the list of prohibited substances, where a player can establish on the balance of probabilities that the use of the substance “was not intended to enhance sport performance”, the period of ineligibility for a first offence shall be, instead of a mandatory period of two years, at a minimum a warning and reprimand and no period of ineligibility, and at a maximum one year. The issue is therefore whether the player can establish that his use of cannabis was not intended to enhance sport performance.
15. The ITF accepts that cannabis and its metabolites are Specified Substances and does not dispute the player’s account of the circumstances in which he took cannabis at the discotheque in Lausanne. There is no reason to doubt the truthfulness of that account. In those circumstances it would be highly unlikely that the player intended to enhance his sport performance. I find that he did not intend to do so and that he has succeeded in establishing on the balance of probabilities that his use of cannabis leading to the positive test result was “not intended to enhance sport performance”.
16. As this is the player’s first offence, the Tribunal therefore has discretion under Article M.3 to impose, at a minimum, a warning and reprimand and no period of ineligibility, and at a maximum, one year’s ineligibility. I must therefore consider how to exercise that discretion in the present case. In mitigation, I bear in mind all the points made by the player in this lawyer’s two letters dated 16 January 2006. Those points are summarised above at paragraph 9 of this decision. I need not repeat them.

17. I take all those factors into account. However I am unclear, upon carefully reading the two letters sent by the player's lawyer, whether the player is saying that he did not know whether the cookie consumed by him contained cannabis or not; or whether he positively believed that it did not and if so on what grounds; or whether he suspected, or had reason to suspect, that it did. Nor is it clear whether the player is saying that he knew cannabis was a prohibited substance and had momentarily forgotten this; or that he did not know this (in which case he should have done).
18. It would have been better if in the present case the player had provided more detail about his exact state of knowledge and his exact state of mind both as to whether the cookie in question contained cannabis and as to his knowledge and understanding of the status of cannabis as a prohibited substance under the Programme and the World Anti-Doping Code. It is important that players are full as well as frank in their accounts in cases of this kind. In any case, I must approach the case on the basis that all players must now be taken to be aware that cannabis is a prohibited substance under the Code and therefore under the anti-doping rules applicable in those sports, including tennis, whose governing bodies have signed up to the Code.
19. As in the case of *Moffat*, ITF Anti-Doping Tribunal decision dated 8 August 2004, the player has not been as forthcoming as he could have been about the circumstances in which he took cannabis. He has been more frank than the player was in the *Moffat* case. On the other hand, the concentration in this case is considerably higher than in *Moffat*. That case was very different in that the player took a conscious decision to use cannabis for therapeutic reasons on a repeated and sustained basis and continued to do so after the ban came into force, without persuading the Tribunal that he was ignorant of the ban. I do however agree with the observation of the ITF's solicitors in their letter of 24 January 2006 that if *Moffat* were to be decided today, the period of ineligibility would probably have been shorter than six months.

20. Taking all the above into account, I decide that it is appropriate to impose a period of ineligibility of three months, which pursuant to Article M.8.3(a) of the Programme should run from the date following the end of the Swiss Tennis Satellite Circuit Masters event. I understand that the last day of that event was 24 September 2005. Accordingly the three month period of ineligibility should run from 25 September 2005 until 24 December 2005. It follows that the player has already served his period of ineligibility and from the date of this decision is free to compete once more.

The Tribunal's Ruling

21. 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 5 January 2006: namely that a prohibited substance, Carboxy-THC, a cannabis metabolite, has been found to be present in the urine specimen that the player provided at the Swiss Tennis Satellite Circuit Masters event at Montreux on 22 September 2005;
 - (2) orders that the player's individual result must be disqualified in respect of the Swiss Tennis Satellite Circuit Masters event, and in consequence rules that the four ranking points and the prize money of US \$635.94 obtained by the player through his participation in that event, must be forfeited;
 - (3) finds that the player has succeeded in establishing on the balance of probabilities that his use of cannabis leading to the positive test result in was not intended to enhance sport performance;

- (4) declares the player ineligible for a period of three months running from 25 September 2005 to 24 December 2005 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.

Tim Kerr QC, Chairman of the Anti-Doping Tribunal

30 January 2006