

**IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF
THE INTERNATIONAL TENNIS FEDERATION**

Before:

Carol Roberts (Chair)
Professor Brian Lunn
Professor Isla Mackenzie

BETWEEN:

INTERNATIONAL TENNIS FEDERATION

Anti-Doping Organisation

and

ASHLEY KRATZER

Respondent

DECISION OF THE INDEPENDENT TRIBUNAL

INTRODUCTION

1. The International Tennis Federation (“**ITF**”) is the world governing body for the sport of Tennis. It is a signatory to the World Anti-Doping Code (the “**Code**”). As part of its responsibilities under the Code, the ITF has issued the Tennis Anti-Doping Programme (the “**TADP**”) which establishes Code compliant anti-doping rules for professional tennis.

2. The ITF has established the Independent Tribunal (the '**Tribunal**') in accordance with Article 1.3.5 of the TADP, which provides that the Tribunal shall determine Anti-Doping Rule Violations ("**ADRV**") committed under the TADP.
3. The ITF has, pursuant to Article 8.1.2 of the TADP and Article 1.1 of the Procedural Rules Governing Proceedings Before an Independent Tribunal Convened under ITF Rules (the "**Procedural Rules**") elected to refer cases to an Independent Tribunal for resolution.
4. Ashley Kratzer (the "**Athlete**") is a 21 year old professional tennis athlete from Newport Beach, California. She was the 2017 United States Tennis Association National Girls Champion and has a career-high WTA singles ranking of 200.
5. The Athlete does not dispute that she is bound by the 2020 TADP and that she is subject to the jurisdiction of the Independent Tribunal to resolve this matter.
6. On 18 March 2020, the ITF notified the Athlete of an ADRV pursuant to Article 2.1 of the TADP in connection with the presence of Growth Hormone-Releasing Peptide 6 (GHRP-6) in a Sample collected from the Athlete at the Newport Beach Oracle Challenger Series tournament (the "**Tournament**") on 27 January 2020. GHRP-6 is Prohibited both in and out of competition under Section S2 of the 2020 WADA Prohibited List.
7. The Athlete was provisionally suspended on 28 March 2020. The Athlete denied the charge and requested a hearing before the Independent Tribunal.
8. On 15 May 2020, the ITF informed the Athlete that the presence of GHRP-6 had been found in the Athlete's B sample, confirming the finding in the A sample. The Athlete does not dispute the presence of the Prohibited Substance in her system.
9. On 28 May 2020, the Chairman of the Independent Panel, Charles Flint QC, appointed Carol Roberts, Professor Brian Lunn and Professor Isla Mackenzie to form an Independent Tribunal to hear and determine the dispute.
10. On 29 May 2020, the Tribunal issued procedural directions and a hearing schedule. On 1 July 2020 due to testing delays in the supplements and samples the parties requested that the hearing schedule be modified.

11. The Tribunal conducted a hearing by video conference on 14 October 2020. The ITF was represented by Chris Lavey of Bird & Bird LLP and Dr. Stuart Miller, the ITF Anti-Doping Manager. The Athlete was represented by Howard Jacobs and Lindsay Brandon of the Law Offices of Howard L. Jacobs. The Tribunal also heard evidence from Dr. Christiane Ayotte, Professor and Director of Institut Armand-Frappier, the Montreal based WADA laboratory, for ITF; and from Ms. Kratzer, her father Michael Kratzer, Ms. Kratzer's coach Jason Leavitt, and Paul Scott, President of Curative-Korva Labs, for the Athlete.
12. For the reasons that follow, it is not necessary to recount the evidence of any of the parties in any significant detail.

EVIDENCE

13. The Athlete suffers from a longstanding, severe blistering problem on the heels, toes and sides of her feet. The blisters often turn into open sores and cause her to bleed through her shoes. The severity of the blisters is influenced by the duration of her time on court, the type of court, the style of shoe and the climatic conditions.
14. The Athlete has consulted several doctors and physiotherapists for this problem and has received a variety of opinions and treatments including skin creams, medications and different shoes, without any lasting success. The Athlete has also taped and bandaged her feet before her matches in an effort to curtail the blisters, which has also had limited success. In fact, at the 27 January 2020 match, the chair umpire called a medical time out after observing that the Athlete's feet had bled onto the court.
15. In April 2019, the Athlete travelled to Anning, China to compete in the Kunming Open Tennis Tournament. She stayed at a five-star resort with clay tennis courts in advance of the tournament to practise. As the Athlete's coach was unable to travel with her, she arranged with the hotel front desk staff to have a practise trainer. She believed that the trainer's name was 'Zhang' but did not know his last name. She said that she was told that he was affiliated with the Chinese federation and was a local tennis professional who worked with Chinese athletes.

16. While practising in advance of the tournament, the Athlete began to experience severe blistering. She said that 'Zhang' provided her with a pump bottle of cream (the "**Cream**"), which he said a number of Chinese players also used. The bottle had no packaging. The Athlete agreed that the outside of the bottle was sticky and may at one time have had a label but said that it was unlabelled when Zhang gave it to her. The Athlete said Zhang's English was limited but she understood from what Zhang told her that it was a "Chinese anti-bacterial cream" like Neosporin and was commonly used by several Chinese athletes. The Athlete did not ask Zhang whether he was a doctor or whether he had any medical training.
17. The Athlete brought the Cream back with her to the United States following the Kunming Tournament because she found it helpful in healing her blisters as well as alleviating the pain associated with the blisters. She continued to use it after returning home, applying it "as needed" and twice a day when the blisters got bad. The Athlete testified that she was never curious about what the Cream contained, or whether she could obtain more of it when it seemed to help her blistering problem.
18. The Athlete said that she used the Cream for approximately six or seven days leading up to the Tournament. She also applied the Cream directly onto the blisters on 27 January 2020, the day of her first match. Later that day, the Athlete was selected to provide a sample for doping control. On her Doping Control Form ("**DCF**"), she listed medications she was taking. She did not list any creams, gels or lotions that she had used because she did not consider them to be "prescription/non-prescription medications or supplements, including vitamins and minerals" as identified on the DCF. She believed that, had a doctor prescribed the Cream, she would have declared it.
19. When informed of the positive test, the Athlete collected substances she had used leading up to the tournament and, through her counsel, submitted a number of creams and supplements to two different laboratories for testing. The substances were sent for testing in April, June and July 2020. None were reported to contain GHRP-6. On 27 July 2020, the Athlete sent two more products, including the Cream, for testing. On 31 July 2020, the laboratory reported that the Cream contained a significant amount of GHRP-6, a finding that was consistent with the findings of the WADA-accredited laboratory in Montreal.

20. The Athlete said, and her father confirmed, that after testing positive for a Prohibited Substance, she was in shock and denial. She said she made a number of attempts to locate 'Zhang' since being informed of the source of GHRP-6, without success. This included contacting the resort, who informed her they had no knowledge of anyone by the name of Zhang. She also said that the Chinese Tennis Federation was of no help to her. The Athlete said that her attempts to find answers were hindered by the fact that few people at the resort speak more than limited English.
21. Over her tennis career, the Athlete has used only limited substances, typically consisting of amino acid and protein powder. She says she is aware of the dangers of supplement use and tries to limit her intake of supplements to trusted brands and types.
22. The Athlete denied intentionally or knowingly taking GHRP-6 and argues that she had no way of knowing that the Cream contained a Prohibited Substance. She says that she never considered the possibility that using a skin cream or lotion such as this one might cause a positive test for a banned substance.
23. The Athlete, who is not in the registered testing pool, testified that she had been subject to drug testing twice in her career. She said that her anti-doping education was limited to being provided with documentation about which her knowledge was assessed annually, in the form of a limited number of online multiple-choice questions. While the content of that education was not in evidence, the Athlete agreed that she had read the ITF anti-doping rules.
24. Both Professor Ayotte and Mr. Scott testified that GHRP-6 is not approved for use in China or the United States, and that GHRP-6 could only have been obtained on the black market. They also agreed that the Cream contained GHRP-6 as a constituent component rather than being contaminated with it.

Argument

25. The ITF initially took the position that because the Athlete was unable to prove how the substance entered her system, she was unable to rebut the presumption of intent. However, after hearing the evidence of the Athlete, Mr. Kratzer, Mr. Leavitt, Mr. Scott and

Professor Ayotte, and notwithstanding Professor Ayotte's opinion that the application of the Cream in the way described by the Athlete would be "highly unlikely" to cause the concentration of GHRP-6 found in the Athlete's sample, as well as the Athlete's failure to declare the Cream on her DCF, the ITF accepted that the Athlete had satisfactorily explained, on a balance of probabilities, that the Cream was the source of the Prohibited Substance.

26. Notwithstanding her ability to explain how the substance had entered her body, the ITF contended that the Athlete had not discharged her burden of showing that the ADRV was not "intentional" within the meaning of Article 10.2.3 and that the Tribunal had no ability to reduce the sanction below four years. The ITF argued, in the alternative, that if the Athlete had met her burden of demonstrating that the ADRV was not intentional, she had not demonstrated No Significant Fault or Negligence and that no further reduction to the two year period of Ineligibility should be made.
27. The Athlete says that she did not know the Cream used to treat her blisters provided to her by a trainer whom she was told was associated with the Chinese Federation contained GHRP-6 and would cause her to test positive for a Prohibited Substance. She argues that because she did not know there was a significant risk that her use of the Cream might constitute or result in an ADRV, she could not have manifestly disregarded that risk. She contends that because she used GHRP-6 inadvertently through her application of the Cream, the ADRV was not intentional within the meaning of TADP 10.2.3.
28. The Athlete argues that because she did not intentionally violate the anti-doping rules, the default sanction should be two years as opposed to four years. She further argues that she was not significantly at fault or significantly negligent, and in the circumstances, the sanction should be not more than 16 months.

ANALYSIS

Applicable rules

29. Article 1.12 of the TADP provides that it is the sole responsibility of each Player:

- 1.12.1 *to acquaint him/herself, and to ensure that each Person from whom he/she takes advice (including medical personnel) is acquainted, with all of the requirements of the Programme;*
- 1.12.2 *to know what constitutes an Anti-Doping Rule Violation under this Programme and what substances and methods are prohibited;*
- 1.12.3 *to be available for Sample collection at all times upon request;*
- 1.12.4 *to ensure that anything he/she ingests or Uses, as well as any medical treatment he/she receives, does not give rise to an Anti-Doping Rule Violation; [...]*

Anti-Doping Rule Violation

30. Article 2.1.1 of the TADP states:

It is each Player's personal duty to ensure that no Prohibited Substance enters his/her body. A Player is responsible for any Prohibited Substance or its Metabolites or Markers found to be present in his/her Sample. Accordingly, it is not necessary that intent, Fault, negligence, or knowing Use on the Player's part be demonstrated in order to establish an Anti-Doping Rule Violation under Article 2.1; nor is the Player's lack of intent, Fault, negligence or knowledge a defence to a charge that an Anti-Doping rule Violation has been committed under Article 2.1.

31. The ITF bears the burden of establishing that an ADRV has been committed. The Athlete does not deny the ADRV.

Consequences for the Anti-Doping Rule Violation

Period of Ineligibility

32. Where an ADRV is the Athlete's first anti-doping offence, Article 10.2.1 of the TADP provides for the imposition of a period of Ineligibility of four years where the ADRV involves

a Prohibited Substance unless the Athlete establishes that the ADRV was not intentional. If the Athlete can demonstrate that the ADRV was not intentional, Article 10.2.2 provides that the period of Ineligibility is presumptively two years:

10.2.1 The period of Ineligibility shall be four years where:

*(a) The Anti-Doping Rule Violation involves a Prohibited Substance that is not a Specified Substance, unless the Participant establishes that the Anti-Doping Rule Violation was not intentional.
[...]*

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6.

10.2.3 As used in Articles 10.2 and 10.3, the term “intentional” is meant to identify those Participants who cheat. The term, therefore, requires that the Participant engaged in conduct that he/she knew constituted an Anti-Doping Rule Violation and knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk. [...]

33. The burden is on the Athlete to show that the ADRV was not intentional.
34. The Tribunal accepts that the Athlete has little anti-doping education, that she did not deliberately use GHRP-6 and that the ADRV came as a shock to her. Nevertheless, having read the TADP, the Athlete is aware of her responsibility to ensure that anything she ingests or uses, as well as any medical treatments she receives, does not give rise to an ADRV (Article 1.12.4).
35. The parties agree that CAS jurisprudence on the Code is of extreme importance in the interpretation of related anti-doping regimes, such as the TADP, for the purpose of “enforcing anti-doping rules in a global and harmonized way” (page 18 of the Preamble to the WADC). (*FINA v. Cielo Filho & CBDA*, CAS 2011/A/2495, para.10)
36. Anti-doping panels have found conduct defined in Article 10.2.3 to encompass conduct that is broader than what is ordinarily understood to be deliberate action. They have

determined that it includes engaging in conduct knowing there is a significant risk that might result in an ADRV and manifestly disregarding that risk. In other words, conduct that is reckless. This has been described as “indirect intention” (see *Qerimaj v. IWF*, CAS 2012/A/2822 at para. 8.14 and 8.23, *FIFA v. CBF & Lopes*, CAS 2017/A/5022 at para.94-96 and 109; and *WADA v. Indian NADA & Pereira*, CAS 2016/A/4609 at para. 63).

37. In the Tribunal’s view, the Athlete engaged in conduct knowing that there was a significant risk that it might result in an ADRV and manifestly disregarded that risk.
38. The Athlete was given the Cream by an individual she had met only a few days before, and whose full name she still does not know. She believes, but did not confirm, that the individual was associated with the Chinese Federation. She does not know, and did not ask, whether the individual has any medical training or experience. She relied on the statement of this individual that the Cream was like a “Chinese Neosporin.” It is unclear if the Athlete was directly told that the Cream was “like a Chinese Neosporin,” or that she understood, based on his explanation, that it was similar to Neosporin.
39. Most significantly however, the Cream was both unpackaged and unlabelled.
40. In the Tribunal’s view, all these circumstances ought to have raised significant concerns for the Athlete, particularly when she was in a country that is often criticised for its lack of transparency.
41. Even after the Athlete tested positive, her efforts to track down Zhang or verify his credentials were extremely limited. The Athlete explained her limited inquiries on a language barrier, but it does not appear that she ever considered engaging an interpreter or translator to assist her.
42. In the Tribunal’s view, the fact that the Athlete, who is a professional, is not in the registered testing pool or had minimal anti-doping education is not an explanation for her complete lack of curiosity or concern about the substance she was given to treat open sores. Even if the Athlete could not have known that the Cream contained a Prohibited Substance, the circumstances in which she received it ought to have raised concern that the Cream might be, or contain, a Prohibited Substance. Other substances used by the

Athlete for the same purpose, other than home remedies such as baking soda and water and moisturising creams, had been prescribed by medical professionals.

43. Athletes have a duty of care about what substances are found in their system, irrespective of the extent of their anti-doping education. The Tribunal finds that the Athlete failed to make even the most basic enquiries.
44. It is not enough for the Athlete to say that there is no way she could have known that use of the Cream posed a significant risk. An Athlete cannot be “wilfully blind” to obvious risks and then argue that their wilful blindness should qualify them for a reduced sanction.
45. The Tribunal finds that the Athlete has not discharged her burden of rebutting the presumption of intentional use. In light of this conclusion, the Tribunal need not consider whether she acted with No Fault or Negligence, or No Significant Fault or Negligence. Therefore, under Article 10.2.1 (a), the period of Ineligibility is four years.
46. The four-year period of Ineligibility shall run from 28 March 2020, the date of the Athlete’s provisional suspension, in accordance with Article 10.10.3(a) of the TADP.

Disqualification of Results and Other Consequences

47. Article 9.1 of the TADP provides that an ADRV committed by a Player in connection with or arising out of an In-Competition test automatically leads to disqualification of the results obtained by the Player in the competition, with all resulting consequences. In addition, all further results obtained by the Player in subsequent events may be disqualified.
48. The Athlete entered one competition since the Tournament, but played only preliminary matches before it was cancelled due to the COVID-19 pandemic. For greater certainty, any results obtained by the Athlete between 28 March 2020 and 28 October 2020 are disqualified pursuant to Article 9.1, with all resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money.

ORDER

49. We therefore make the following Order:

- (i) The Tribunal has the jurisdiction to decide this dispute;
- (ii) The Athlete has committed an Anti-Doping Rule Violation under Article 2.1 of the TADP;
- (iii) The Athlete is ineligible for a period of four (4) years for the Anti-Doping Rule Violation, commencing on the date of this Order, with credit for the time the Athlete was provisionally suspended from 28 March 2020 onwards;
- (iv) Results obtained by the Athlete from 28 March 2020 are disqualified with all resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money pursuant to Article 9.1 of the TADP.

50. In accordance with Article 12 of the TADP, this decision may be appealed to the Court of Arbitration for Sport within 21 days of receipt of the decision, save for WADA, for whom the provisions of Article 12.5.2 apply.

COSTS

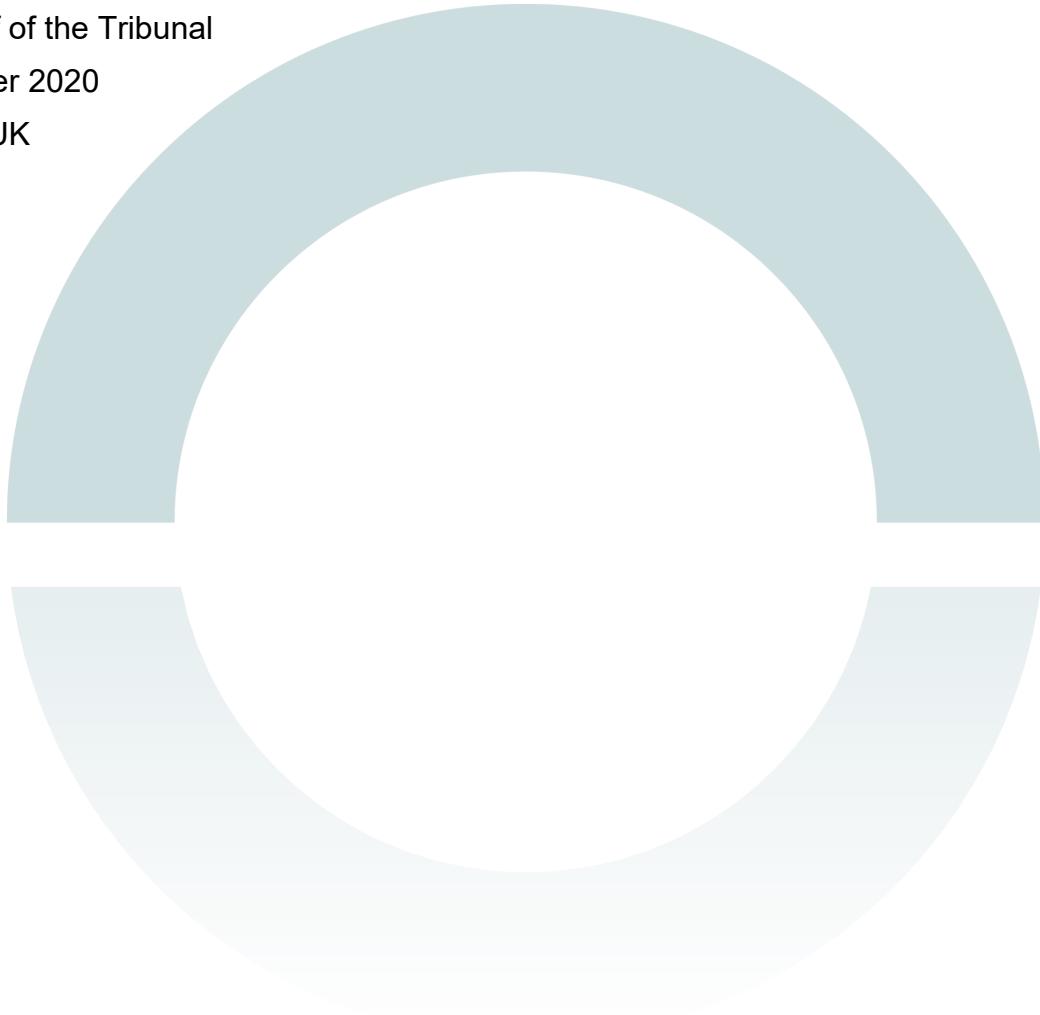
51. The Tribunal has the power, under article 8.8.4 of the TADP to make an award of costs.

52. If either party wishes to make an application for costs, they should do so no later than 4:00 p.m. (BST) November 4, 2020

53. If costs are applied for, and the party against whom costs are sought opposes the request, the responding party shall have until 4:00 p.m. (BST) on November 11, 2020 to file a written response.



Carol Roberts
On behalf of the Tribunal
28 October 2020
London, UK



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