

IN THE MATTER OF PROCEEDINGS BROUGHT BY THE INTERNATIONAL TENNIS INTEGRITY AGENCY UNDER THE 2023 TENNIS ANTI-DOPING PROGRAMME

Before:

Carol Roberts (Chair)
Erika Riedl
Kwadjo Adjepong

BETWEEN:

INTERNATIONAL TENNIS INTEGRITY AGENCY

Anti-Doping Organisation

and

JENSON BROOKSBY

Respondent

DECISION OF THE INDEPENDENT TRIBUNAL

A. INTRODUCTION

1. The International Tennis Integrity Agency (“**ITIA**”) is the delegated third party under the World Anti-Doping Code (the “**Code**”) of the International Tennis Federation (“**ITF**”), the international governing body for the sport of tennis and a signatory of the Code. As the delegated third party of the ITF, the ITIA is responsible for the management and administration of the Tennis Anti-Doping Programme (the “**TADP**”) which establishes *Code*-compliant anti-doping rules applicable to players competing in ‘Covered Events’.

THE INDEPENDENT EXPERTS

2. The Independent Tribunal (the “**Tribunal**”) has been established in accordance with Article 8.1 of the TADP, which provides that the Tribunal shall determine Anti-Doping Rule Violations committed under the TADP.
3. Jenson Brooksby (the “**Player**”) is a 22-year-old professional tennis athlete from Sacramento, California. He has competed in ITF events since 2019, reaching a career-high singles ranking of Number 33 in June 2022. As one of the top 100 singles tennis players in the world, he is bound by the TADP and, since 1 January 2022, has been included in the ITIA’s International Registered Testing Pool (“**IRTP**”).
4. The Player does not dispute that he is bound by the TADP or that he is subject to the jurisdiction of the Independent Tribunal to resolve this matter.
5. On 7 June 2023, the ITIA charged the Player with an Anti-Doping Rule Violation (“**ADRV**”) pursuant to Article 2.4 of the TADP as a result of having three missed tests recorded against him between April 2022 and February 2023.
6. The Player accepted a voluntary provisional suspension, effective 5 July 2023. The Player denied the charge and requested a hearing before the Independent Tribunal.
7. On 30 June 2023, the Chairman of the Independent Panel, Charles Flint KC, appointed Carol Roberts as Chair of the Independent Tribunal. Erika Riedl and Kwadjo Adjepong were appointed in September 2023 to form the Independent Tribunal that would hear and determine the dispute.
8. The Tribunal conducted an in-person oral hearing on 10 October 2023. Diarmuid Laffan of 4 New Square and Chris Lavey of Bird & Bird LLP represented the ITIA. Howard Jacobs and Katy Freeman of the Law Offices of Howard L. Jacobs represented the Player. The Tribunal heard evidence from Enrique Gonzales Martinez, the Doping Control Officer, for the ITIA and Paul Kinney, the Player’s Physical Therapist, for the Player.

B. APPLICABLE RULES

Tennis Anti-Doping Program

9. Two of the three asserted missed tests occurred in 2022 and the third in 2023. Therefore, the substantive anti-doping rules of the 2022 edition of the TADP apply to the first two missed tests and the 2023 edition applies to the third missed test.
10. It is each player's personal responsibility "to be knowledgeable of and comply with this Programme at all times" (Article 1.3.1.1 TADP) and "to be available for Sample collection at all times upon request, whether in-Competition or Out-of-Competition" (Article 1.3.1.2).
11. A Player who is included in the IRTP is required "(a) to advise the ITIA of their whereabouts on a quarterly basis: (b) to update that information as necessary, so that it remains accurate and complete at all times: and (c) to make themselves available for Testing at such whereabouts". (Article 5.4.2.2 TADP)
12. "Any combination of three Missed Tests and/or Filing Failures within a 12- month period by a Player in a Registered Testing Pool" (Whereabouts Failures) constitutes an ADRV (Article 2.4 TADP).
13. For the purposes of Article 2.4, a failure by a Player in the IRTP to comply with the requirements in International Standard for Testing and Investigations ("ISTI") Articles 4.8.8 and/or 4.8.9 will be deemed a Filing Failure or a Missed Test where the conditions set out in Annex B of the International Standard for Results Management ("ISRM") for declaring a Filing Failure or a Missed Test are met (Article 5.4.2.5 TADP).

International Standard for Testing and Investigations

14. An Athlete who is in the *Registered Testing Pool* shall:
 - a) "Make quarterly Whereabouts Filings that provide accurate and complete information about the Athlete's whereabouts during the forthcoming quarter, including identifying where they will be living, training and competing during that quarter, and to update those Whereabouts Filings where necessary, so that they can be located for Testing during that quarter at the times and locations specified in the relevant Whereabouts Filing, as specified in Article 4.8.8. A failure to do so may be declared a Filing Failure; and
 - b) Specify in their Whereabouts Filings, for each day in the forthcoming quarter, one specific 60-minute time slot where they will be available at a specific location for Testing, as specified in Article 4.8.8.3.

[...]

[I]f the Athlete is not available for Testing at such location during the 60-minute time slot specified for that day in their Whereabouts Filing, that failure may be declared a Missed Test". (Article 4.8.6.2 ISTI)

15. "Subject to Article 4.8.8.4, the Whereabouts Filing must also include, for each day during the following quarter, one specific 60-minute time slot between 5 a.m. and 11 p.m. each day where the Athlete will be available and accessible for Testing at a specific location." (Article 4.8.8.3 ISTI)

[Comment to 4.8.8.3: "The Athlete can choose which 60-minute time slot between 5 a.m. and 11 p.m. to use for this purpose, provided that during the time slot in question they are somewhere accessible by the DCO... An Athlete is entitled to specify a 60-minute time slot during which they will be at a hotel, apartment building, gated community or other location where access to the Athlete is obtained via a front desk, or security guard. It is up to the Athlete to ensure accessibility to their selected 60-minute location with no advance warning to the Athlete... any failure to be accessible and available for Testing at the specified location during the specified time slot shall be pursued as a Missed Test".] (Article 4.8.8.3 ISTI)

16. "It is the Athlete's responsibility to ensure that they provide all of the information required in a Whereabouts Filing as outlined in Articles 4.8.8.2 and 4.8.8.3 accurately and in sufficient detail to enable any Anti-Doping Organization wishing to do so, to locate the Athlete for Testing on any given day in the quarter at the times and locations specified by the Athlete in their Whereabouts Filing for that day, including but not limited to during the 60-minute time slot specified for that day in the Whereabouts Filing.

a) More specifically, the Athlete shall provide sufficient information to enable the DCO [Doping Control Officer] to find the location, to gain access to the location, and to find the Athlete at the location with no advance notice to the Athlete. A failure to do so may be pursued as a Filing Failure [...]

b) [...]

c) [...]

Once the DCO has arrived at the location specified for the 60-minute time slot, if the Athlete cannot be located immediately, then the DCO should remain at that location for whatever time is left of the 60-minute time slot and

during that remaining time they should do what is reasonable in the circumstances to try to locate the Athlete. See WADA's guidelines for sample Collection in determining what is reasonable in such circumstances." (Article 4.8.8.5 ISTI)

[Comment to 4.8.8.5 (d): "Where an Athlete has not been located despite the DCO's reasonable efforts, and there are only five (5) minutes left within the 60-minute time slot, then as a last resort the DCO may (but does not have to) telephone the Athlete ... to see if they are at the specified location. ..."]
(Article 4.8.8.5 ISTI)

17. No Advance Notice Testing shall be the method for *Sample* collection save in exceptional and justifiable circumstances. The *Athlete* shall be the first Person notified that they have been selected for Sample collection, except where prior contact with a third party is required as specified in Article 5.3.7. In order to ensure that *Testing* is conducted on a No Advance Notice Testing basis, the Testing Authority (and the Sample Collection Authority, if different) shall ensure that *Athlete* selection decisions are only disclosed in advance of *Testing* to those who strictly need to know in order for such *Testing* to be conducted. Any notification to a third party shall be conducted in a secure and confidential manner so that there is no risk that the *Athlete* will receive any advance notice of their selection for *Sample* collection. (Article 5.3.1 ISTI)

International Standard for Results Management

18. Annex B Article B.2.4 of the ISRM provides that an Athlete can only be declared to have committed a Missed Test where the ITIA can establish:

- a) "That when the Athlete was given notice that he/she had been designated for inclusion in a Registered Testing Pool, he/she was advised that he/she would be liable for a Missed Test if he/she was unavailable for Testing during the 60-minute time slot specified in his/her Whereabouts Filing at the location specified for that time slot;
- b) That a DCO attempted to test the Athlete on a given day in the quarter, during the 60-minute time slot specified in the Athlete's Whereabouts Filing for that day, by visiting the location specified for that time slot;
- c) That during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e. given the nature of the specified

location) to try to locate the Athlete, short of giving the Athlete any advance notice of the test;

- d) That Article B.2.3...does not apply, or, if (it applies), that it was complied with; and
- e) That the Athlete's failure to be available for Testing at the specified location during the specified 60-minute time slot was at least negligent. For these purposes, the Athlete will be presumed to have been negligent upon proof of the matters set out at sub-Articles B.2.4 (a) to (d). That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on his/her part caused or contributed to his/her failure (i) to be available for Testing at such location during such time slot, and (ii) to update his/her most recent Whereabouts Filing to give notice of a different location where he/she would instead be available for Testing during a specified 60-minute time slot on the relevant day." (Annex B Article B.2.4 the ISRM)

Out of Competition 'Whereabouts' testing Protocol for DCO's ("Protocol")

19. The ITF's testing protocol provides guidelines to assist DCO's in determining what constitutes a 'reasonable effort' to locate the Player and "*aim to reduce the risk that the DCO fails to locate a Player even though the Player is at the location where he/she said they would be during the 60-minute time slot in question.*" (Paragraph 4 Protocol)
20. Notably, the Protocol provides that the ITF "does not want to declare a Missed Test where the Player was present at the location, but the DCO has been unable to find him/her.. It is ultimately the Player's responsibility to ensure that he/she can be located for testing, and the ITF will not accept any excuses from the Player if the DCO has been unable to find him/her despite making a reasonable attempt to do so. It is absolutely vital, therefore, that the DCO does everything reasonable in the circumstances to locate the Player. By following these guidelines, the DCO can ensure that is the case". (Paragraph 5 Protocol)
21. The Protocol indicates that the DCO should check whether the Player has filed any updates in their whereabouts information "*up to the very last minute before the 60-minute time slot in question*" (Paragraph 6 Protocol) and insofar as is possible, avoid giving the Player any advance notice that he/she is to be tested. (Paragraph 8 Protocol)

22. When conducting Out-of-Competition testing at a hotel, the Protocol provides that a DCO should identify themselves to reception and show their credentials, not to ask for the Player's room number but ask the receptionist to call the Player's room on their behalf, and then have the receptionist speak to the Player directly. When they speak to the Player, the DCO is to tell them that they are required to provide a sample under the TADP and ask the Player for their room number in order to do so. (Paragraphs 20.1, 20.2 and 20.3 Protocol)
23. The Protocol further provides that if the DCO is still unable (despite having been connected to the Player's room) to locate the Player, he/she should repeat the process of calling the Player's room every 10-15 minutes and call the Player's mobile phone number only during the last 5 minutes of the time slot, if it is provided in ADAMS. (Paragraph 20.7 Protocol)
24. The Panel acknowledges the onerous burden the Whereabouts Regime places on an athlete. As noted by other panels, the purpose of whereabouts filings is so that athletes can be subjected to Out-of-Competition testing without advance notice. Athletes relinquish a considerable amount of both privacy and autonomy in the name of clean sport.

C. BACKGROUND

25. On 9 December 2021, the ITF notified the Player that he had been selected for inclusion in its International Registered Testing Pool effective from 1 January 2022. The notice letter and attached documents detailed the obligations the Player would be subject to as a result including:
- The quarterly whereabouts information he would have to file, including the full address of where the Player would be staying overnight, the name and address of each location the Player would train, work or conduct any other regular activity and a specific 60-minute time slot and location between 5 a.m. and 11 p.m. every day where he would be available and accessible for Testing;
 - How to provide the information through the online Anti-Doping Administration and Management System ("**ADAMS**");
 - The responsibility of the Player for ensuring the accuracy and detail of the information provided "*to enable the Doping Control Officer (DCO) to locate you for testing on any given day during the quarter, including, but not limited to, during the 60-minute time slot*

specified for that day. [...] It is your responsibility to make sure you have made sufficient arrangements to allow the DCO to gain access to the building/area”; and

- Explaining that failing to provide the whereabouts information required (a Filing Failure) and/or failing to be available for testing within the 60-minute time slot specified (a Missed Test) could result in an ADRV with significant consequences, including the possible imposition of a period of ineligibility of between 12 and 24 months.

26. While the Player acknowledged receiving the ITIA letter and documentation, he testified that he did not read it in any detail, as he left many of the responsibilities of meeting his anti-doping obligations to his agent, Amrit Narasimhan.

27. The Player agreed that the ITIA staff provided him with information regarding his anti-doping obligations, including an offer to speak to him in-person at Roland Garros in May 2022, and an invitation to attend an online webinar in December 2022.

28. The Player also agreed that he had been provided with information on how to log in to ADAMS to update his whereabouts. However, he testified that he had never personally done that, as he always delegated that responsibility to his agent.

29. During a 12-month period starting on 19 April 2022, International Doping Tests & Management (IDTM), an anti-doping service commissioned by the ITIA to conduct testing and other services pursuant to the TADP, was directed to test the Player Out-of-Competition on a number of occasions.

30. The ITIA charged the Player with an ADRV based on three Whereabouts Failures: the first on 19 April 2022, the second on 4 June 2022 and the third on 4 February 2023. The Player does not dispute the first or third missed tests but challenges the charge of a missed test on 4 June 2022.

First Missed Test

31. In February 2022, IDTM instructed one of its DCOs to collect blood and urine samples from the Player. The DCO attempted to test the Player on 19 April 2022 at the location he stated in his whereabouts filing, which was a tennis court where he normally practised. The DCO was unable to locate the Player at that location. Five minutes prior to the end of the 60-minute time slot, the

DCO called the Player and eventually reached his agent, who confirmed the Player had changed his training location at the last minute and had forgotten to update his whereabouts information. On 22 April the ITIA notified the Player of the missed test on 19 April 2022. On 18 May 2022, the Player acknowledged that he had forgotten to update his schedule and advised the ITIA that he would “do a better job going forward”.

32. The Player testified that he assumed that his coach would have communicated the changed practise location to his agent in order that his agent update his whereabouts and that this had not been done. The Player acknowledged that although it was ultimately his responsibility to ensure his whereabouts information was accurate, he trusted people around him to take the necessary steps to update his whereabouts and that they had not done their jobs. Following the missed test, his agent, who also books his flights and hotels, was to update his whereabouts information in ADAMS and texted photos of the information to him.
33. On 31 May 2022, the ITIA informed the Player that he had one Whereabouts Failure recorded against him and that WADA and his National Anti-Doping Organization would be notified of the decision.

Second Missed Test

34. In late May 2022, the IDTM instructed a DCO, Enrique Gonzalez Martinez, to collect samples from the Player. Having been a DCO since approximately 1998, Mr. Gonzalez Martinez is both experienced and knowledgeable about the rules regarding sample collection.
35. Mr. Gonzalez Martinez intended to test the Player at the location he identified in his whereabouts filing – the [REDACTED] Hotel [REDACTED] (the “Hotel”) S’Hertogenbosch, Netherlands, during his stated 60-minute testing window (between 6:00 a.m. and 7:00 a.m.)
36. At 6:00 am on 4 June 2022, Mr. Gonzalez Martinez arrived in the lobby of the Hotel and spoke to the front desk staff. He showed the desk staff his credentials and explained what he was there to do. According to Mr. Gonzalez Martinez, the staff clearly understood the nature of his inquiry and checked the hotel reservation system. Mr. Gonzalez Martinez said that the front desk staff also contacted the manager to assist. Mr. Gonzalez Martinez was told that the Player had not yet checked in and that he was not there. The hotel staff informed Mr. Gonzalez Martinez that the Player was supposed to check in later that day as the first night of his stay was from the 4th to the 5th of June. To Mr. Gonzalez Martinez’ surprise, the manager also allowed him to view the

information in their reservation system showing the Player's reservation. Mr. Gonzalez Martinez said that a hotel had never before allowed him to do that, but that the staff were very cooperative. Mr. Gonzalez Martinez photographed the computer screen (in which information pertaining to other guests was concealed) and included that with his report. The computer information indicated that the Player had a reservation commencing on 4 June 2022 ending 12 June 2022. They did not explain what the notations "515" or "twin" meant to him, nor did he ask, as his concern was the Player's check in date. The staff told him that check-in time was 2:00 p.m. and suggested that he return then.

37. Mr. Gonzalez Martinez remained in the Hotel lobby in sight of the front desk for one hour, occasionally asking the front desk staff if there had been any change to the Player's status. He observed between 3 to 5 people walking through the lobby but the Player did not appear. He did not speak to any of those people because it appeared to him that none of them were connected to the Player.
38. While waiting, Mr. Gonzalez Martinez checked the ADAMS database to ensure that the Player had not changed his whereabouts information and noted that he had not.
39. At 6:56 a.m., Mr. Gonzalez Martinez placed a call to the Player's mobile phone. His evidence was that the phone rang 5 times before "*a voice message said the phone was out of reach or disconnected and transferred the call to a voice messaging system.*" Mr. Gonzalez Martinez did not leave a message "*as per ITIA instructions.*"
40. On 8 June 2022, the ITIA notified the Player of the 4 June 2022 Missed Test and informed him about the consequences of recording three Whereabouts Failures within a 12-month period. The ITIA asked the Player to confirm if he accepted or contested the Missed Test by 22 June 2022. The Player did not respond to the letter by 22 June 2022. On 23 June 2022, the ITIA informed the Player that it was recording a Missed Test and a second Whereabouts Failure, and informed him that he had the right to request an Administrative Review of that decision by 30 June 2022.
41. The Player requested an Administrative Review on 24 June 2022 because he had been in the location specified in his whereabouts submission. In his request, the Player stated that the Hotel "*couldn't find him in the system because they didn't look to see who my roommate was. I was rooming with my physio – Donald Kinney (Paul Kinney) and the room was under his name. [W]e did an external booking and he used his [REDACTED] status to get a better deal.*"

42. On 23 March 2023, pursuant to TADP Article 5.7 and prior to referring the Player's case to the Independent Review Board, the ITIA sought further information from the Player with respect to his 4 June 2022 missed test.
43. In his response to the ITIA's questions, the Player indicated that the room he stayed in was booked under his physiotherapist's name from 31 May to 4 June 2022, and under his name from 4 June to 9 June. When asked what steps he had taken to ensure any DCO who asked at the hotel's reception for him in relation to a doping control test would be able to locate him, the Player responded that he offered to give his passport information [to the front desk staff] when he checked in and he was told that it was not needed.
44. The Player testified that he travelled to S'Hertogenbosch on 31 May 2022 with his physiotherapist, Paul Kinney. Mr. Kinney made a reservation directly with the Hotel as he was able to obtain a rate that was cheaper than that obtained by the Player because of his [REDACTED] status, and the reservation that had been made previously under the Player's name for the period 31 May 2022 to 4 June 2022 was cancelled. The Player's reservation (which had been arranged through Tennis UNO) for the period 4 June 2022 to 9 June 2022 remained. The Player said that his agent was aware the hotel room was in Mr. Kinney's name.
45. Mr. Kinney checked into the Hotel on 31 May 2022 and shared his room with the Player. On 3 June 2022, Mr. Kinney made arrangements to stay on in room 515 for the duration of the Player's reservation because he and the Player had settled into that room and did not want to move to another room the following day when the Player's reservation began. The hotel accommodated this request, and simply transferred the Player's reservation to room 515 effective from 4 June 2022.
46. The Player testified that on 1 June or 2 June he lost his room key and had to get a replacement. When he went to the front desk to obtain a new key, he asked to have his name added to the reservation. He said that the front desk staff told him that could not be done electronically, so they wrote it on a piece of paper that was left on the desk. He testified that he impressed upon the front desk staff that it was important in the event a DCO showed up to test him.
47. The Player says that he was in room 515 of the Hotel between 6:00 a.m. and 7:00 a.m. on 4 June 2023 but was unaware the DCO had arrived in the lobby for a sample collection. He says that neither he nor Mr. Kinney heard his cell phone ring because he had set it to silent.

48. Mr. Kinney testified that he booked two rooms at the hotel using the [REDACTED] app in order to save money prior to the Player's reservation starting on 4 June 2022. Mr. Kinney booked one room for the Player's coach, the other for himself and the Player. Both rooms were made in Mr. Kinney's name.

49. Mr. Kinney said that the hotel already had a reservation in the Player's name before he made his own, and that this reservation was cancelled. When Mr. Kinney checked in, he did not ask the hotel staff to put the Player's name on the reservation even though he could have done so, but he did not think it was important to the Player and it did not occur to Mr. Kinney.

50. Mr. Kinney testified that he communicated the change to the Player's agent on either the 29th or 30th of May.

Third Missed Test

51. In January 2023, the IDTM instructed a DCO to collect samples from the Player. The DCO went to the location the Player stated in his whereabouts filing, which was in Florida. The DCO was unable to locate the Player at the hotel and the front desk repeatedly tried to call the Player. Five minutes before the end of the 60-minute time slot, the DCO telephoned the Player at the number listed in his whereabouts entry. The DCO eventually reached the Player's agent, who informed the DCO that the Player was in California and had changed his plan to return to Florida that night.

52. The Player testified that on 4 February 2023, he notified his long-time coach that he would be ending their relationship and had flown from Dallas to Los Angeles to inquire into the possibility of securing a different coach. Although he was scheduled to fly back to Dallas the same day after meeting with a prospective new coach, he changed his mind. [REDACTED]
[REDACTED]. Although he communicated his decision to his agent, his whereabouts information was not updated.

53. The Player agreed that his whereabouts information for 4 February 2023 had not been updated. The ITIA notified the Player of the missed test on 9 February 2023. On 8 March 2023, the ITIA informed the Player that it was recording a third Whereabouts Failure against the Player.

54. The Player does not contest this as a missed test.

Argument

55. The Player argues that the DCO did not do what was reasonable in the circumstances to collect a sample from him between 6:00 a.m. and 7:00 a.m. on 4 June 2023. He contends that the Hotel reservation which was viewed by the DCO contained details which showed his room number as 515 and that his room was identified as a “twin” as opposed to a “king.”
56. He argues that the DCO should, in the circumstances, have made further inquiries with the receptionist, including asking why room 515 was designated to the Player if he had not checked in yet, how many people were staying in room 515 or whether, in fact, the Player was already in the room.
57. Alternatively, the Player argues that the DCO’s inability to collect a sample within the 60-minute time slot was not due to any negligence on his part. He contends that there was nothing more he could have done before 4 June 2022 to notify the hotel receptionist that he was staying in room 515, and that the hotel receptionist would have known of this fact because arrangements had been made to transfer the room to his name effective 4 June.
58. The ITIA argues that the DCO did what was reasonable in the circumstances, given the nature of the information provided by the Player, to locate the Player, and that the Player cannot rebut the presumption of negligence. It contends that the Player ought to have known of the risk of a DCO arriving at the hotel and being unable to locate him because the room was registered in Mr. Kinney’s name, and that the Player did nothing to address that risk.
59. The ITIA submits that the Tribunal should uphold the three missed test recorded against the Player and find that he has committed an ADRV under Article 2.4 TADP.

D. ANALYSIS

60. The TADP must be interpreted in a manner that is consistent with the *World Anti-Doping Code* (the “Code”) and the International Standards. (Article 1.4.4 TADP)
61. The Tribunal agrees that, absent exceptional circumstances, the Independent Tribunal should follow Court of Arbitration for Sport (CAS) interpretations of *Code* provisions when called upon

to apply the same provision in cases under the TADP in order to achieve the consistency and harmonisation that are the main objectives of the *Code*. (*Hipperdinger v. ATP*, CAS 2004/A/690, *FINA v. Cielo Filho & CBCA*, CAS 2011/A/2495)

62. The Tribunal accepts the evidence of Mr. Kinney and the Player and finds that the Player was in room 515 at the Hotel between 6:00 a.m. and 7:00 a.m. on 4 June 2022 as indicated in his whereabouts submission. However, the Player's duty is not simply to be present. His duty extends to also being available and accessible, and his availability is to be evaluated based on the location provided in his Whereabouts Information. (*World Athletics v. Salwa Eid Naser*, CAS 2020/A/7526, *WADA v. World Athletics & Salwa Eid Naser*, CAS 2020/A/7559, para. 152)

Did the DCO do all that was reasonable in the circumstances to locate the Player on 4 June 2022?

63. The reasonableness of the actions of the DCO are to be assessed objectively, without reference to the situation of the athlete. (*Drug Free Sport New Zealand v. Gemmell*, CAS 2014/A/2)

64. The Tribunal finds that the actions of Mr. Gonzalez Martinez complied with the ITIA Protocol as well as with the requirements under the ISTI.

65. Mr. Gonzalez Martinez was entitled, but not required, to speak to other people he encountered. In his experienced view, the individuals walking through the lobby were not associated with the Player, so he did not ask them if they knew the Player. Given that there was no reason for Mr. Gonzalez Martinez to presume the strangers knew the Player coupled with the DCO's obligation to avoid, as far as possible, giving the Player any advance notice, his actions were, in the Panel's view, reasonable.

66. Finally, the protocol provides that a DCO may, as a last resort only, telephone the Player in the final five minutes of the 60-minute time slot. Mr. Gonzalez Martinez did place a telephone call to the Player at 6:56 a.m.

67. The Tribunal also finds that Mr. Gonzalez Martinez took all reasonable steps in the circumstances to locate the Player between 6:00 a.m. and 7:00 a.m. on 4 June 2022 at the Hotel. Mr. Gonzalez Martinez explained to the front desk staff who he was and why he was there. He made inquiries with the front desk staff about the Player's room. The front desk staff as well as

the Hotel manager checked and re-checked the reservation system. Mr. Gonzalez Martinez was informed that the Player had not yet checked in and was not at the Hotel.

68. Mr. Gonzalez Martinez was aware, from his experience, that it was a legal requirement for guests to provide their passports upon check-in. The front desk staff confirmed that the Player was expected to be checking in that day and allowed Mr. Gonzalez Martinez to view the reservation screen to verify what he was being told. The computer screen confirmed that the Player had a reservation beginning 4 June 2022. Mr. Gonzalez Martinez saw the notation “twin” and “515” but did not ask what these notations referred to, since his primary concern was the Player’s check-in date. Mr. Gonzalez Martinez was under no obligation to ask the Hotel’s staff what the notation “515” stood for. Furthermore, because the Protocol specifically states that a DCO should not ask the receptionist for the Player’s room number, the Panel finds that the DCO took all reasonable steps in the particular circumstances of the case.

69. The Tribunal finds that, in all of the circumstances, after being told by the hotel manager that the Player had not yet checked in, there was no reason for Mr. Gonzalez Martinez to make any additional inquiries, or, as the Player argued, to ask the hotel staff to call room 515.

70. The Tribunal finds that *Cornet (ITF v. Cornet, SR/adhocsport/12/2018)*, which the Player asks us to follow, can be distinguished from the facts before us. In *Cornet*, the DCO had the athlete’s home address, where it was reasonable to assume the athlete would be present and available. Having been told by the hotel manager that the Player had not yet checked in, Mr. Gonzalez Martinez had no obligation to make further inquiries, discreet or otherwise, with individuals walking through the lobby.

Was the Player negligent in not being available during the specified 60-minute window?

71. The Player is presumed to be negligent upon proof of the matters set out in Annex B sub-Articles B.2.4 (a) to (d) ISRM, and such presumption can only be rebutted if he can establish, on a balance of probabilities, that no negligent behaviour on his part caused or contributed to his failure to be available for testing.

72. The Panel finds that Annex B sub-Articles B.2.4. (a) to (d) ISRM have been proven. The Player acknowledges that he was given notice he had been designated for inclusion in the registered testing pool. The Tribunal finds, and the Player does not appear to dispute, that a DCO attempted to test him on 4 June 2022 at the Hotel. The Panel finds that the ITIA has established, to its

comfortable satisfaction, that the DCO did what was reasonable in the circumstances to try to locate the Player. Therefore, the burden shifts to the Player to establish that he was not negligent.

73. While negligence is not defined in the TADP, the ISRM or the WADA Code, the CAS Panel in *Houdet v. ITF* (CAS 2022/A/9031 & 9137), determined that it was to be given its ordinary meaning, that being “a failure to observe the duty of care expected of a reasonable athlete similarly situated.” Any analysis requires consideration of the obligations placed on athletes in relation to the whereabouts scheme, and in particular, the obligation of athletes to file a whereabouts update as soon as possible after they become aware of the change in circumstances; and the particular facts and circumstances of the case, including information known by the athlete or reasonably available to him. (para. 80)
74. The Player has the duty to provide sufficient information to enable the DCO to find him at the Hotel without any particular effort. A DCO relies on the information provided by the player and the Player has a duty of diligence in foreseeing and reducing potential difficulties for the DCO to locate him. (*WADA & World Athletics v Naser* (CAS 2020A/7526 & 7559), paras. 126 and 127)
75. The Player agreed that while he had identified his location in his Whereabouts Filing to be the Hotel, he did not update his whereabouts filing to indicate that his room number was 515, despite knowing that the room he was staying in was registered to Mr. Kinney. The Player agreed that he did not ask Mr. Kinney to ensure that his name was included on the reservation either at check-in or at any time prior to 4 June 2022.
76. The Player also agreed that he did not answer his telephone when Mr. Gonzalez Martinez telephoned him at 6:56 a.m. because he had left the phone in silent mode and did not hear the call.
77. The Player testified for the first time at the hearing that he told front desk staff that it was important that he be found if a DCO showed up to test him and insisted that they write his name on a piece of paper along with his room number in the event that occurred. While the ITIA asked the Tribunal to find the Player’s evidence in this regard to be unreliable given that he had never previously mentioned this despite been asked on several occasions to provide details regarding his filing failure, the Panel considers it unnecessary to do so. The Tribunal finds that even if the Player did insist the front desk staff to take such steps, those actions were insufficient to rebut the presumption.

78. The Tribunal infers that the Player is aware that hotels employ a number of front desk staff to cover the many shifts in the course of one week. Given that hotel guest information in 2022 is computer-based rather than a paper-based system, it is not unreasonable to infer that any piece of paper containing guest information, if one existed, could go missing or be overlooked by staff who were not on shift when the paper information was created. The Tribunal finds that if the Player had in fact asked a staff member, who he could not describe, to take such actions, his conduct was negligent.
79. The Player could have asked Mr. Kinney to ensure that he was registered to the room. Mr. Kinney's evidence was that the Player did not make such a request, either on check-in or at any time until 4 June 2022. The Player could have updated his whereabouts filing to ensure Room 515 was included in the information with the notation that the room was booked in someone else's name to ensure the DCO could have located him. He did not do so.
80. The Player cannot rebut his burden of establishing no negligence by shifting his responsibility for his failure to ensure his Whereabouts information was incomplete on hotel staff.
81. Finally, when Mr. Gonzalez Martinez placed a call to the Player at 6:56 a.m., the Player did not hear it because he had his phone on silent. Even if Mr. Gonzalez Martinez was unable to locate the Player in room 515, the Player could have avoided the missed test by turning his phone off the silent mode so that he was in fact available.
82. The Tribunal finds that the Player has not discharged his burden of showing that he was not negligent in making himself available to the DCO for Out-of-Competition testing.
83. Consequently, the Tribunal finds that the Player has committed an ADRV under Article 2.4 TADP based on three missed tests in a 12-month period.

E. SANCTION

84. Article 10.3.2 of the TADP provides for a period of Ineligibility of two years, subject to reduction down to a minimum of one year, depending on the Player's degree of Fault, for an Article 2.4 TADP ADRV that is the Player's first doping offence.
85. This is the Player's first ADRV.

86. The Player submits that, should the Panel find an ADRV, the period of Ineligibility should be reduced to one year based on a degree of Fault that “falls at the very lowest end of the scale.” The Player relies on *Coleman v. World Athletics* (CAS 2020/A/7528), *USADA v. Rollins* (American Arbitration Association AAA 01-17-001-3244) and *ITF v. Mikael Ymer* (CAS 2022/A/9033) in asking the Panel to impose a period of ineligibility of 12 months.

87. The ITIA submits that the Player’s Fault is significant and that there should be no reduction to the default period of Ineligibility.

88. The TADP defines Fault as:

“Fault is any breach of duty or lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Player’s [...] degree of Fault include, for example, the Player’s [...] experience [...] the degree of risk that should have been perceived by the Player and the level of care and investigation exercised by the Player in relation to what should have been the perceived level of risk. In assessing the Player’s [...] degree of Fault, the circumstances considered must be specific and relevant to explain the Player’s [...] departure from the expected standard of behaviour [...].”

89. The Tribunal has considered the following:

- The Player is 22 years old and is an elite tennis player;
- He was selected for inclusion in the IRTP effective 1 January 2022;
- He is aware of the obligations of membership in the IRTP;
- Despite being offered anti-doping education on repeated occasions, he delegated his responsibilities for ensuring the accuracy of his whereabouts information to his agent. The Tribunal heard no evidence from the Player’s agent, so has no knowledge of his experience or background;
- The Player’s first missed test occurred on the 19 April 2022, 3.5 months into his inclusion in the IRTP. He acknowledged responsibility and stated he would do a better job going forward. He developed a “protocol” with his agent for updating his whereabouts filing;
- The Player was aware that on the morning of 4 June 2022, he was staying in a room that he was not registered to;
- The Player did not ask Mr. Kinney to ensure that his name was on the reservation;

- The Player did not ensure that the whereabouts information provided details such as his room number or the fact that the room was not registered in his name;
- The Player did not hear the telephone call the DCO placed to his cellular phone within the 60-minute testing window because he had not turned off the silent mode;
- The Player was notified of the consequences of missed tests on each occasion.

90. The Tribunal appreciates that the value of precedents in whereabouts sanctions are of limited usefulness given the wide range of factual circumstances. (See also *Ymer*)

91. Having had two missed tests recorded against him, the Player ought to have been on “extremely high alert” about missing a third. Notwithstanding those two missed tests and clear warnings about the consequences of a third, on 4 February 2023 he again failed completely to update his whereabouts filing, a charge he admits. The Tribunal finds that the Player’s degree of Fault in these circumstances is high. [REDACTED]

92. The Tribunal finds the *Rollins* decision is of limited usefulness. In that case, the panel reduced the athlete’s sanction in part because it determined that “*the computer filing system and the agencies connected with it*” had created a confusing program and failed to assist her in ensuring compliance and in part because she was being celebrated at a public event which distracted her from her filing obligations. No similar circumstances exist in this case.

93. In *Coleman*, although the panel found that although the athlete demonstrated a high degree of negligence, it reduced the sanction from 24 months to 18 months, because it determined that the athlete was entitled to rely on the fact that he had always been called within the 60-minute window. No similar circumstances exist in this case. In fact, had the Player turned the phone off silent mode, it is unlikely there would be a case to answer.

94. Similarly, in *Ymer*, where the player was more experienced as he had been in the ITRP for a longer period of time, the CAS Panel determined that “*the standard by which respect of the rules must be assessed is the hypothetical experienced tennis player, a threshold that can reasonably be expected to be met by all athletes, who are included in the ITRP, who is acutely aware of the*

risk of ineligibility at the third whereabouts violation within a 12-month period.” (para. 174.) The Panel concurs with this view.

95. The Tribunal finds that the Player’s conduct demonstrates a high level of Fault. He has not provided any circumstances that would explain his departure from the expected standard of behaviour and agrees that there should be no reduction to the Player’s period of Ineligibility. To the contrary, the Player admitted that he never read the ITIA Rules fully, he declined the ITIA’s offers of seminars and other educational opportunities regarding his anti-doping obligations and relied entirely on his agent to update his whereabouts filings. At the time of the hearing, the Player explained that he was still trying to learn about doing his whereabouts filings himself but was in fact, still relying on his agent. As such, the Tribunal finds that a period of Ineligibility at the upper end of the 12-to-24-month range is warranted.
96. The Panel has considered the 18-month period of Ineligibility imposed in *Ymer*, an athlete with more experience than the Player who also delegated his responsibility to update his whereabouts information to an experienced tennis agent. In the absence of any evidence of the background or experience of Mr. Narasimhan, the age and experience of the Player, and in light of the objectives of proportionality and consistency, the Panel is of the view that the Player should be declared ineligible for a period of 18 months.
97. The Player should be given credit for the period of Provisional Suspension he has voluntarily accepted from 5 July 2023 until the date of this decision.
98. The Player has not competed since January 2023 and therefore no results exist in the relevant period to be considered for disqualification.
99. Article 8.5.3 of the TADP provides that the ITIA will pay the costs of convening the Independent Tribunal and of staging the hearing subject to any costs-shifting order that the Independent Tribunal may make against any party, “*where it is proportionate to do so*” under Article 8.5.4 TADP. The Athlete conducted these proceedings in a reasonable and co-operative manner and the Tribunal does not find it proportionate to make any order of costs against him.

F. RIGHT OF APPEAL

100. Mr Brooksby is an International-Level Player as defined in the TADP. Accordingly, under TADP Article 13, there will be a right of appeal exclusively to the Court of Arbitration for Sport, located at Palais de Beaulieu, Av. Des. Bergières 10, CH-1004 Lausanne, Switzerland (procedures@tas-cas.org), against the whole or any part of the Tribunal's final decision.

101. TADP Article 13.8.1.1 outlines the deadline for the Player to file an appeal to CAS, which is 21 days from the date of receipt of this decision.

G. DECISION

102. We therefore make the following Decision:

- (i) The Tribunal has jurisdiction to decide on the subject matter of this dispute;
- (ii) The Athlete has committed an Anti-Doping Rule Violation pursuant to Article 2.4 of the TADP;
- (iii) A period of Ineligibility of 18 months is imposed upon the Athlete for the Anti-Doping Rule Violation, commencing on the date of the Tribunal's Decision;
- (iv) The Athlete is given credit for the period of Provisional Suspension voluntarily accepted by him from 5 July 2023 until the date of the Tribunal's Decision against the total period of Ineligibility; and
- (v) There be no order as to costs.



Carol Roberts (Chair)



Erika Riedl



Kwadjo Adjepong

24 October 2023

London, UK



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