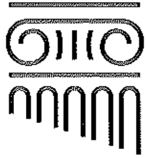

TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

CAS 2021/A/7983 Brianna McNeal v. World Athletics
CAS 2021/A/8059 World Athletics v. Brianna McNeal

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	Mr Rui Botica Santos, Attorney-at-law in Lisbon, Portugal
Arbitrators:	Ms Barbara Reeves, Mediator & Arbitrator in California, United States of America
	Mr Ulrich Haas, Professor in Zurich and Attorney-at-Law, Switzerland

in the arbitration between

Brianna McNeal, United States of America

Represented by Mr Howard L. Jacobs and Ms Lindsay S. Brandon of Law Offices of Howard L. Jacobs in California, United States of America

- Appellant in CAS 2021/A/7983 and
Respondent in CAS 2021/A/8059

and

World Athletics, Monaco

Represented by Mr Adam Taylor and Mr Ross Wenzel of Kellerhals Carrard in Lausanne, Switzerland

- Respondent in CAS 2021/A/7983 and
Appellant in CAS 2021/A/8059

I. PARTIES

1. Brianna McNeal (the "Athlete") is a 29-year-old internationally renowned athlete from the United States of America ("USA") who competes in the 100 metres hurdles. The Athlete was in 2013 the World champion in the 100 meters hurdles and, among many other achievements, won the Olympic Gold medal at the 2016 Rio Olympic Games.

2. World Athletics (the "WA"), formerly known as the "International Association of Athletics Federations" (the "IAAF"), is the world governing body for track and field, recognized as such by the International Olympic Committee. One of its responsibilities is the regulation of track and field, including, under the World Anti-Doping Code (the "WADA Code"), the running and enforcing of an anti-doping programme. WA has delegated its powers in relation to the implementation of its Anti-Doping Rules (the "WA ADR") to the Athletics Integrity Unit (the "AIU"), whose role is to protect the integrity of International-Level Athletes and Athlete Support Personnel, including but not limited to the following activities: education, testing, investigations, results management, hearings, sanctions and appeals.

3. Brianna McNeal and World Athletics are collectively referred to as the "Parties". All the words used in this award ("Award") beginning with a capital letter and not previously defined have the meaning set forth in the specific definitions of the WA ADR.

II. FACTUAL BACKGROUND

(A) INTRODUCTION – WHAT IS THIS CASE ABOUT?

4. On 21 April 2021, the WA Disciplinary Tribunal (the "WA Tribunal") rendered a decision (the "Appealed Decision"), which considered that the Athlete had committed an Antidoping Rule Violation (the "ADRV") by breaching the provision established on Rule 2.5 of the 2021 WA ADR and imposed on the Athlete a 5-year ineligibility period starting as of 15 August 2020.

5. The ineligibility was imposed in connection with a WA Athletics Integrity Unit (the "AIU") missed test investigation. On 12 January 2020 the Athlete failed an AIU's Doping Control Process ("Missed Test"). WA submitted that the Athlete jeopardised its results management of the Missed Test by (i) deliberately providing false information with the intention of evading the record of a second missed test in a period of twelve months by altering medical documents for an improper purpose and (ii) by engaging in a conduct to deliberately subvert the AIU's Doping Control Process.

6. On 21 May 2021, the Athlete filed an Appeal to set aside the Appealed Decision, because she did not intend to subvert the doping control process. The Athlete also pleads – in case the Panel finds that an ADRV has been committed – the maximum reduction of the ineligibility period under the WA ADR (due to the disproportionality of the sanction) and that the start date of the sanction should be 15 April 2020 or, in the worst-case scenario, 14 August 2020.

7. On 17 June 2021, WA filed a cross-appeal with CAS against the Appealed Decision, solely on the basis that the period of ineligibility imposed on the Athlete by the Disciplinary Tribunal at first instance was insufficient and that all competitive results obtained by the Athlete between 13 February 2020 and the date of the CAS award shall be disqualified, with all resulting consequences.

8. This case is not about abortion, its stigma or trauma, which is well documented and unanimously recognized; instead, this case concerns essentially to determine if the Athlete committed a tampering violation and, if so, to assess her degree of fault. The alleged tampering is related to official documents which were provided to the AIU in support of a very specific excuse for the Missed Test. In addition, it is important to note that at no point during these proceedings or before the WA Tribunal was the Athlete accused of using any prohibited substances.

(B) Background Facts

9. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions and relevant documentation produced. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning. The Panel highlights that this case is not of a criminal nature, but rather about the behaviour of the Appellant.

(B.1) *The Athlete's background and experience*

10. The Athlete is a 29-year-old American track and field athlete who specializes in the 100 meters hurdles. The Athlete is the 2013 World champion and the 2016 Olympic champion for the Women's 100 meters hurdles.

11. Since 2012, when the Athlete began running track professionally, the Athlete has been part of the Registered Testing Pool (the "RTP") and has been tested at least 70 times during that period. The Athlete has never tested positive. However, in 2017, the Athlete was sanctioned for one year by the United States Anti-Doping Agency (the "USADA") for a Whereabouts related violation as she missed three tests in a 12-month period. The Athlete was sanctioned under Rule 2.4 of the 2015 WADA Code.

(B.2) *Facts Surrounding the Missed Test and the Athlete's explanation*

12. On 12 January 2020, a Doping Control Officer (the "DCO") was assigned to test the Athlete at the address specified in her Whereabouts information for the date between 06:00-07:00 a.m. (which was the time set by the Athlete as her 60-minute time slot). The Athlete could not however be reached by the DCO since no one answered the door nor the phone calls made. The DCO was

thus obligated to file an Unsuccessful Attempt Report with the AIU in accordance with the WA 2019 ADR.

13. On 30 January 2020, the AIU notified the Athlete via e-mail of an apparently Missed Test and requested the explanation/justification for the occurrence of such event. At that time, there was already one missed test (committed in June 2019) recorded against the Athlete in the past twelve-month period.

14. On 13 February 2020, the Athlete submitted an explanation as to why she failed to open the door or answer the phone on 12 January 2020. The Athlete stated that she was at her specified address for the duration of the one-hour period, however, on 11 January 2020, she had undergone a "surprise medical procedure" (which was not disclosed in nature to the AIU) at a clinic in Los Angeles, California. The Athlete explained that she was not aware that due to the pain medication and sedatives which had been prescribed to her, to assist with her recovery, she would be unable to wake up and undergo testing at the designated hour.

15. Attached to the explanation for the Missed Test, the Athlete included a copy of a handwritten medical note dated 7 February 2020 and signed by a practicing physician at the clinic where the medical procedure occurred which reads that the Athlete had a procedure on 11 January 2020 and describes the medication given to her (the "First Medical Note").

16. Upon visually inspecting the First Medical Note, the AIU considered that the date of the treatment given on the First Medical Note had been erased / altered and, on 4 March 2020, the AIU requested from the Athlete additional documentation in support of the facts which were alleged as the explanation for the Missed Test.

17. On 14 March 2020, two additional handwritten medical notes from the same physician (the "Second and Third Medical Notes"), both indicating again that the treatment took place on 11 January 2020, were submitted by the Athlete.

18. Once again, upon visual inspection, the AIU considered that the Second and Third Medical Notes had been manipulated with respect to the date of the medical procedure. As such, the AIU requested, on 30 March 2020, that copies of all the documents, notes and records concerning her treatment were handed over for analysis.

19. On 15 April 2020, the AIU received the full medical file related to the treatment undergone by the Athlete (the "Medical File"). Inside the Medical File, an original copy of the First Medical Note, which stated that the date of the Athlete's treatment was 10 January 2020, was found. Pages 11 and 12 of the Medical File also confirmed that the treatment of the Athlete had effectively taken place on 10 January 2020 and not on 11 January 2020.

20. Considering that the effective date of the treatment was 10 January 2020, this information is inconsistent with the Athlete's explanation that she had received the medication "just the day before".

21. On 3 August 2020, this inconsistency prompted the AIU to invite the Athlete to attend an interview to explain the discrepancy in the dates appearing on the First, Second and Third Medical Notes (collectively referred to as the "Medical Notes") which were initially provided by her to the AIU.

22. The interview took place on 14 August 2020 between representatives of the AIU and the Athlete accompanied by her legal counsel (the "AIU Interview").

23. During the AIU Interview, the Athlete provided further information with respect to the circumstances of the Missed Test, the medical procedure she underwent, and the documentation provided in support of her explanation. The Athlete admitted that she altered the date of the treatment in the Medical Notes because she actually recalled that the treatment had taken place on 11 January 2020 (a Saturday) and not on 10 January 2020 (a Friday). In addition to that, the Athlete confirmed that she had not sought confirmation of the relevant date from anyone before altering the date inscribed in the Medical Notes initially provided to the AIU.

(B.3) *Procedural Background – Notice of Charges of the AIU*

24. On 13 January 2021, five months after the AIU Interview, a notice of charges was issued by the AIU charging the Athlete with a violation of Rule 2.5 of the WA 2019 ADR due to "Tampering or Attempted Tampering with any part of Doping Control" (the "Notice of Charges").

25. Pursuant to Rule 7.10.4 of the WA 2019 ADR, the head of the AIU imposed a provisional suspension on the Athlete until the matter was fully decided before the WA Tribunal, barring the athlete from participating in any competition or activity until the decision was rendered under Rule 8 of the WA 2019 ADR.

26. The Notice of Charges also informs the Athlete about the following implications:

a) Imposition of a period of ineligibility of 8 years in accordance with Rule 10.7.1 of the WA 2019 ADR, since this would be the Athlete's second ADRV;

b) Disqualification of all competitive results that occurred from the date the ADRV occurred (14 February 2020) through the commencement of the Provisional Suspension (13 January 2021), including forfeiture of any medals, titles, ranking points, prize and appearance money, pursuant to Rule 10.8 of the WA 2019 ADR; and

c) In accordance with Rule 14.3 of the WA 2019 ADR, public disclosure of the full details of this matter by the AIU / AIU website.

27. The Athlete exercised her right to be heard before the WA Tribunal.

(B.4) *Procedures before the WA Tribunal*

28. On 7 April 2021, a video conference hearing was held. At the beginning of the Hearing, the Parties' consented on a few procedural matters which included the applicability of the 2021 WA

ADR (under the principle of *lex mitior*), the jurisdiction of the WA Tribunal to hear this matter and the acceptance of the composition of the first instance panel.

29. After the hearing was conducted, the WA Tribunal deliberated and rendered the Appealed Decision:

"(...)

K. ORDER

146. Pursuant to Rule 2.5 ADR, the Panel finds that the Athlete has committed an ADRV of Tampering.

147. Pursuant to Rule 10.9.1 (a) (ii) ADR, a period of ineligibility of five (5) years from participating in any competition/event, in all sports applies and shall start as of 15 August 2020.

(...)"

30. The grounds of the Appealed Decision can be summarised as follows:

(1) Applicable regulations and burden of proof

i. Both Parties have agreed that the 2021 WA ADR are more favourable to the Athlete (*Lex Mitior* principle); and

ii. The burden of proof as to the existence of the Tampering lies with WA, to the comfortable satisfaction of the Panel. The submission of false documents goes beyond the bounds of legitimate defence under any civilized system of law.

(2) Intent to subvert the doping control process

i. Causation is not a requirement to establish Tampering, otherwise athletes would not have anything discouraging them from trying to tamper with evidence;

ii. The Athlete was reckless and breached Rule 5.7.9 2021 WA ADR and if she was convinced that the date of the procedure really was 11 January 2020, then she should have verified the accuracy of the documents, given the importance of this piece of evidence;

iii. The Athlete made matters worse for herself by altering the Second and Third Medical Notes just four weeks later, again failing to verify the dates and uncaringly tampering with the evidence that she submitted to the AIU; and

iv. The Athlete stated that the date of her procedure was never written down since it was a date too important for her to forget. Therefore, it is not acceptable that she was confused about the date of the medical procedure.

(3) Finding on Tampering

i. Athletes cannot falsify or alter pieces of evidence in the course of the results management with impunity;

ii. Manually changing three hand-written medical notes in defence to a Missed Test, without verifying the dates of the procedure with the Clinic or anyone else before doing so and submitting such documents to the AIU must be considered an intentional act, whether or not the Athlete knew that such acts constituted a violation of Rule 2.5 2021 WA ADR;

iii. The Athlete's actions cannot be construed as being part of her legitimate defence to an ADRV and repeated falsification clearly goes beyond the bounds of legitimate defence; and

iv. The Athlete committed a Tampering ADRV as defined in the Rule 2.5 2021 WA ADR.

(4) The Athlete's degree of fault

i. To determine the applicable period of Ineligibility, the decision maker must determine – based on the Athlete's degree of fault – the applicable ineligibility period in case the Tampering was a first offense (Rule 10.9.1 (a) (ii) of the WA 2019 ADR must be applied);

ii. The findings regarding the Athlete's degree of Fault in relation to the established Tampering violation can be summarised as follows:

- by deliberately manipulating evidence throughout the AIU investigation, an experienced athlete should have perceived the high level of risk in her actions that she was breaching her duty of care;

- the argument that the alteration was obvious and, as such, insignificant, is not convincing. The Athlete has not only changed one Medical Note. The Athlete changed three Medical Notes on two occasions, never thinking to verify the accuracy of the dates or explaining the alteration. The Athlete's actions fall well below the standard of care and investigation expected of all athletes, especially those experienced like herself;

- nevertheless, the WA Tribunal was of the view that, on subjective factors, the Athlete went through a traumatic experience, in result of the abortion. The Athlete suffered from various physical problems and side effects;

- the WA Tribunal accepted Dr. Moayedi's evidence, which stands unopposed, and gave it significant weight. The expert report stated that it is not uncommon that women return to regular activities after an abortion and the stigma many women feel from abortion usually causes them to misclassify their abortion experiences;

- the Athlete's cognitive ability was hazy, her state of mind jumbled, and her judgement clouded. It was a very stressful and difficult period which affected her seriously;

- although the AIU argued that the Athlete's explanation is unrealistic, the WA Tribunal finds that the case provides enough subjective elements – based on the effects of the abortion stigma – to allow the Athlete to benefit from a sanction reduction based on her degree of fault. The impairment caused by abortion stigma was also taken into account in assessing the Athlete's degree of fault (Rule 10.9.1 (a) (ii) 2021 WA ADR); and

- the Athlete's degree of Fault for the Tampering justifies a reduction of 1 year from what would normally be a 4-year period of ineligibility. In result a 3-year period of ineligibility for the Tampering is appropriated. The Athlete's arguments on her degree of fault were compelling but not sufficiently to reduce her period of Ineligibility any further than 1 year.

(5) The Athlete's degree of Fault in relation to the second ADRV:

i. The personal trauma of the Athlete and the circumstances allow for a further reduction of the sanction based on her degree of Fault; and

ii. As the possible scale for her period of Ineligibility is now within four and six years, the Panel finds another one-year reduction to be the maximum period of Ineligibility appropriate (Rule 10.9.1 (a) (ii) 2021 WA ADR).

(6) The appropriate sanction

i. Under Rule 10.3.1 WA 2021 ADR, the period of Ineligibility applicable for the second ADRV (Tampering) (when treated as if it were a first violation) was reduced from 4 years to 3 years;

ii. Rule 10.9.1 (a) (ii) of the 2021 WA ADR, this being the Athlete's second ADRV, provides that the range should be between *"the sum of the period of Ineligibility imposed for the first ADRV plus the period of Ineligibility otherwise applicable to the second ADRV treated as if it were a first violation (here: 1 year + 3 years); and (bb)*

twice the period of Ineligibility otherwise applicable to the second anti-doping rue violation treated as if it were a first violation (here: 2 x 3 years), with the period of Ineligibility within the range (here thus 4 to 6 years)(...)";

iii. The period is determined within this range based on the Athlete's degree of Fault considered for the second ADRV; and

iv. In light of the above arguments exposed, the WA Tribunal considered that the applicable period of Ineligibility shall be of five years starting from 15 August 2020 (day of the AIU Interview). In addition, all competitive results achieved by the Athlete from 15 August till 13 January 2021 shall be disqualified with all resulting consequences. Results prior to this date shall not be disqualified, as fairness so requires since the Athlete was not using any prohibited substances.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

31. On 21 May 2021, in accordance with Article R47 of the Code of Sports-related Arbitration ("CAS Code"), the Athlete filed its statement of appeal (the "Athlete's Statement of Appeal"), jointly with her appeal brief (the "Athlete's Appeal Brief"), with the Court of Arbitration for Sport (the "CAS") challenging the Appealed Decision. The Athlete's Statement of Appeal and the Athlete's Appeal Brief is jointly referred to as the "Athlete's Submissions". The matter was registered as CAS 2021/A/7983.

32. Along with her submissions, the Athlete nominated Ms Barbara Reeves as arbitrator and asked that an expedited procedure be adopted for a decision to be issued on or before 4 June 2021.

33. On 27 May 2021, the CAS informed the Parties that no expedited procedure would be implemented since the consent of both Parties was not possible (Article R44.4 of the CAS Code).

34. On 27 May 2021, the Athlete filed an Urgent Request for Provisional Measures with the CAS requesting:

"*7.1.1 That the execution of the decision of the WA Disciplinary Panel rendered on 21 April 2021 be stayed until such time as the Appeal filed by the Appellant has been heard and a decision rendered by CAS.*

7.1.2 That these provisional measures shall be communicated to the parties on or before 6 June 2021, in order that Appellant may be timely entered in the 2021 United States Olympic Trials."

35. On 1 June 2021, WA filed its Answer to the Request for Provisional Measures requesting the following:

"*42.1. Rejects Brianna McNeal's request for provisional measures;*

42.2. In the alternative, the Appealed Decision should be stayed for the limited and sole purpose of the Athlete being entered to, and participating in, the US Olympic Trials taking place between 18 June 2021 and 27 June 2021."

36. On 3 June 2021, the President of the CAS Appeals Arbitration Division issued the operative part of its Order on the Request for Provisional Measures, which read as follows:

"*(...)*

(1) The Request for provisional measures filed by Ms Brianna McNeal on 27 May 2021, in the matter CAS 2021/A/7983 Brianna McNeal v. World Athletics is partially granted as follows:

The Decision issued by the World Athletics Disciplinary Tribunal dated 21 April 2021 is provisionally stayed between the date of the present Order and 27 June 2021 at midnight (Pacific time zone), for the limited and sole purpose of Ms Brianna McNeal being able to, and participating in, the US Olympic Trials taking place between 18 June 2021 and 27 June 2021."

37. On 7 June 2021, WA nominated Prof. Dr. Ulrich Haas as arbitrator.

38. On 17 June 2021, WA filed its answer (the "WA's Answer") in the matter registered as CAS 2021/A/7983. On this same date, and in accordance with the Rule 13.2.4 of the 2021 WA ADR, WA filed a cross-appeal by way of a joint statement of appeal and appeal brief (the "Cross-Appeal") challenging the Appealed Decision. The WA's statement of appeal and the WA's appeal brief is jointly referred to as the "WA's Submissions". The Cross-Appeal proceedings were registered as CAS 2021/A/8059. The Parties have agreed to consolidate this procedure with CAS 2021/A/7983.

39. On 21 June 2021, the Athlete requested an urgent hearing by videoconference based on the fact that she would have to be declared eligible on or before 2 July 2021 for her name to be submitted to the U.S. Olympic and Paralympic Committee in time for the 2021 Tokyo Olympic Games.

40. On 22 June 2021, WA replied stating that it would be available for a hearing if the Athlete managed to file its Answer to the Cross-Appeal by 25 June 2021 and suggested that both Appeals should be heard together.

41. Also on 22 June 2021, the Athlete agreed that both Appeals should be heard together and that it would be available to file its Answer to the Cross-Appeal by 25 June if the operative part of the Award could be issued on 2 July 2021.

42. On 23 June 2021, the CAS Court Office informed the Parties that pursuant to Article R54 of the CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the Panel of the procedure registered as CAS 2021/A/7983 had been constituted as follows:

President: Mr Rui Botica Santos, Attorney-at-Law, Lisbon, Portugal

Arbitrators: Ms Barbara Reeves, Mediator & Arbitrator in California, USA

Mr Ulrich Haas, Professor in Zurich and Attorney-at-Law, Switzerland

43. On 25 June 2021, the Athlete filed her answer (the "Athlete's Answer") to the Cross-Appeal.

44. On 25 June 2021, the CAS Court Office informed the Parties that pursuant to Article R54 of the CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the Panel of the procedure registered as CAS 2021/A/8053 had been constituted with the same composition of the CAS 2021/A/7983 (see para. 42).

45. On 29 June 2021, a hearing was held by videoconference. The following persons attended the hearing in addition to the Panel and Ms Andrea Sherpa-Zimmermann, as CAS Counsel:

(1) For the Athlete

- Mr Howard L. Jacobs – Legal Counsel
- Ms Lindsay S. Brandon – Legal Counsel
- Ms Brianna McNeal – Athlete / Party
- Dr. Ghazaleh Moayedi - Expert Witness
- Ms Kacie Wallace –Independent Observer from the US Olympic Committee

(2) For the WA

- Mr Adam Taylor – Legal Counsel
- Mr Ross Wenzel – Legal Counsel
- Ms Laura Gallo – AIU Representative
- Dr. Michael Craig – Expert Witness

46. As a preliminary remark, the Parties were requested to confirm not having any objection to the composition of the Panel, and they so confirmed.

47. The Panel carefully examined and duly considered all the arguments presented in the hearing by the Parties, as well as the oral statements of the Athlete, the written statement of her husband (Mr. McNeal) and the expert's reports and their oral statements. The Panel will not reproduce the same statements in the Award. The relevant content of the witnesses and expert's testimony will be referred to in the merits of this decision only to the extent that they are deemed relevant to the reasoning of the decision and only if the Panel considers it as appropriate.

48. The Parties had the opportunity to examine, and cross examine, the expert witnesses and answer the questions posed by the Panel. All Parties confirmed that they were given full opportunity to present their cases and submit their arguments. Before the hearing was concluded, all Parties

expressly stated that they had no objection to the procedure adopted by the Panel and that the equal treatment of the Parties and their right to be heard had been respected.

IV. THE PARTIES' SUBMISSIONS

49. The following summary of the Parties' positions is illustrative and does not necessarily comprise each contention put forward by the Parties. The Panel, however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows:

(A) <u>THE POSITION OF THE ATHLETE IN THE APPEAL AND IN THE CROSS-APPEAL</u>

50. In CAS 2021/A/7983, the Athlete puts forward the following prayers for relief:

> *"9.1 For all the foregoing reasons, Brianna McNeal respectfully requests that CAS set aside the decision of the WA Disciplinary Panel, and find that no anti-doping rule violation has been proven in this case.*
>
> *9.2 Alternatively, if the Panel finds that Brianna McNeal has committed an anti-doping rule violation, she respectfully requests that the Panel find (i) that she is entitled to the maximum reduction under the WADC; and (ii) that her sanction should be further reduced under the doctrine of proportionality.*
>
> *9.3 Additionally, if the Panel finds that Brianna McNeal has committed an anti-doping rule violation, she respectfully requests that the Panel find that any sanction should finally, commence the sanction on 15 April 2020, or in the alternative, 14 August 2020.*
>
> *9.4 Finally, Brianna McNeal respectfully requests that World Athletics be ordered to bear all costs of the proceedings, including a contribution toward Appellant's legal costs."*

51. In CAS 2021/A/8059, the Athlete put forward the following prayers for relief:

> *"6.1. For all the foregoing reasons, it is submitted that World Athletics' Cross-Appeal be dismissed."*

(A.1) <u>*The Facts surrounding the Missed Test*</u>

52. In early January 2020, the Athlete found out that she was pregnant. However, she and her husband decided that, since the Tokyo Olympic Games were approaching, she would not be able to take part in that event if she were to have her baby. As such, both decided to terminate the pregnancy. According to both the Athlete and her husband, it was a difficult but necessary decision that took its toll on their physical and mental health.

53. The Athlete chose to do the abortion in a clinic in California (the "Clinic") close to her home, highly rated and which offered flexible hours that would allow her to reduce her time off of training (possibly over the weekend).

54. The appointments in the Clinic were done with the desk/administrative staff, a common practice in the USA. Contact with the doctor was limited.

55. The Athlete was given heavy sedatives to help her relax during the surgical abortion. She was later taken home by her husband and does not remember much about the days immediately following the abortion.

56. Following the procedure, due to some pelvic pain, the Athlete once again sought medical help due to irregularities. On 20 February 2020, during an appointment at the Clinic, the doctor and/or medical staff wrote the date of the abortion procedure wrong – 2 January 2020, 8 days before the actual procedure. This situation and the irregularities made the Athlete abandon trust in the doctor and limit contact with the Clinic to a minimum.

57. On 12 January 2020, neither the Athlete nor her husband were aware that doping control was at their home. Only on 30 January 2020, when they received a notification letter, did they learn this.

58. Having realized that the Missed Test was shortly after the abortion procedure, she believed that, given her state, and her husband's, they must have not heard the DCO. She was, however, terrified of having to provide any explanation due to the fear of disclosing her abortion.

59. An explanation that she underwent an emergency medical procedure that required the prescription of sedatives on 11 January 2020 was ultimately provided on 13 February 2020. All of it being true, except for the date, which after conferring with her husband, she honestly believed to be the day on which the abortion took place.

60. The Athlete asked for a note from the Clinic and was faxed the First Medical Note, indicating that the procedure occurred on 10 January 2020; believing it to be incorrect, and not having spoken directly with the doctor, she corrected the date to 11 January 2020.

61. Despite having no obligation to do so, upon another request from the AIU, the Athlete provided another note explaining the severity of the procedure. Again, since she believed the date to be 11 January 2020 and not 10 January 2020, she corrected it. This did not, however, change the nature of her explanation, as the doctor confirmed that she was expected to be on bed rest until she fully recovered.

62. WA then demanded more proof of the medical procedure that the Athlete underwent, and the full Medical File was provided by her on 14 April 2020. This file confirmed that the abortion procedure occurred on 10 January 2020 and a preliminary appointment took place on 3 January 2020.

63. The explanation provided was not altered by the fact that the procedure had taken place a full 24 hours prior.

64. The Athlete voluntarily submitted to an interview with WA on 3 August 2020 and explained why she altered the Medical Notes. The Athlete chose to cooperate with WA and is now being punished for doing so.

65. Furthermore, on 15 January 2020, the Athlete even submitted an out-of-competition test without issues, i.e. three days after the Missed Test.

66. To her surprise, only over a year after the Missed Test and five months after the AIU Interview did she hear about the disciplinary process against her via the Notice of Charges.

67. It is clear that the Athlete made a mistake, but the intent behind it was not to subvert the doping control process, only to protect her privacy. She has been in a frail mental state as a result of the abortion procedure.

(A.2) *The application of Lex Mitior and the Appropriate Application of the WADA Code*

68. No dispute arose as to the more favourable nature of the 2021 WA ADR and WADA Code and, pursuant to the *lex mitior* principle, which is also expressly recognised by Rule 27.2 2021 WA ADR, these were the provisions applied in the first instance ruling.

69. However, if the term "intentional" in Rule 2.5 2021 WA ADR is to be interpreted "generally", as opposed to "specifically", with regards to the subversion of the doping control process by the CAS, then the 2015 WADA Code and WA 2015 ADR version must be applied.

(A.3) *Does the conduct of the Athlete constitute a "Tampering" violation?*

70. Even though WA will argue that what the Athlete did constitutes a clear example of "Tampering" (*"falsifying documents submitted to an Anti-Doping Organization or TUE Committee or hearing panel"*), it is not that simple. There must be an analysis of what the rules mean by "intent".

71. Rule 2.5 2021 WA ADR only targets intentional conduct that "subverts the Doping Control process", this being supported by examples in language used in the commentary. Rule 2.5 2021 WA ADR is thus only capable of encompassing conducts which are *a priori* capable of impacting the doping control process (regardless of its success).

72. In addition to that, "Tampering" requires a "specific" intent which incorporates an additional component of "purpose", i.e. the intention must be directed at subverting – in the various forms described in Rule 2.5 2021 WA ADR - the doping control process. The AIU has the burden of proving this, since this is an element of the ADRV under Rule 2.5 2021 WA ADR.

73. CAS and first-instance tribunals have found violations of Rule 2.5 2021 WA ADR only when clear evidence of fraudulent behaviour directed at misleading the authorities or a tribunal to subvert the doping control process.

74. Due to the seriousness of a "Tampering" offense, CAS also held that it should be proven to a high threshold within the onus of comfortable satisfaction (CAS 2017/A/4937, par. 130).

75. In similar cases, CAS has also recognized a general right of the persons charged not to produce evidence to incriminate themselves, including recognising that the limits of legitimate defence are determined by the boundaries of criminal law (CAS 2015/A/3979; CAS 2013/A/3080[1]). These cases demonstrate that "Tampering" was not intended to be so broadly interpreted. The 2021 WADA Code confirms this through its language, since the modifications to this code aimed to

[1] Cases from the UCI Anti-doping tribunal, with the references ADT 05.2016 and 02.2017.

address the problem of athletes or other support personnel lying or submitting fraudulent documents during an investigation or the results management process. In WADA's eyes, only deliberate obstruction during an investigation should lead to a tampering offense.

76. Since CAS has interpreted "Tampering" provisions to mean conduct that is (i) "*fraudulently misleading*" such that it (ii) "*subverts the doping control process*" (CAS 2017/A/4937, par. 126, 128), there must be an "intent to deceive" doping control or an "intent to subvert the investigation" (CAS 2013/A/3341, par. 128). In order to do so, such conduct must be able to possibly impact the specific stage of doping control process in a way that diminishes the authority of the Results Management institution or anti-doping organization (CAS 2015/A/3979, par. 147; CAS 2017/A/4937, par. 144).

77. In light of the above, and since the Athlete cooperated with the AIU at each and every stage, her personal belief genuinely being that the abortion procedure took place on 11 January instead of 10 January 2020, such conduct cannot constitute Tampering because:

   a) As Dr. Moayedi confirmed, it is common for abortion providers to give patients intentionally vague notes, such as the ones provided by the Athlete;

   b) The Athlete requested a note only after the procedure had taken place and did not speak directly with the doctor of the Clinic, but rather with administrative staff, which is not unusual in the USA;

   c) The Athlete provided an explanation even though she did not have to do it, clearly acting in good-faith;

   d) The Athlete was afraid that details about her procedure would be made public;

   e) The Athlete genuinely believed that she had the procedure on 11 January 2020 and, even though she attempted to confirm with her husband, he had no recollection of the date of the medical procedure;

   f) Due to her mistrust of the doctor and the Clinic, motivated by the fact that the procedure was not entirely successful, the Athlete did not contact the doctor to confirm the date;

   g) The Athlete immediately sent the medical records, which confirmed the procedure had taken place on 10 January 2020, to the AIU just one day after receiving them, a fact which has been ignored;

   h) The Athlete thus had no other point of reference than the Medical Notes and her own memory, on which she genuinely relied and trusted;

   i) Even though she admitted to having changed the Medical Notes that she received, it is clear that the underlying reason for that was not to subvert the doping control process, since the change of date would not have made it more likely that the AIU would forgive the Athlete's Missed Test on 12 January 2020; and

j) The alteration of the date of the Medical Notes does not amount to a fraudulent act, since no intent to deceive the AIU and its investigators was present. The underlying reason advanced for missing the test is also unaltered by this conduct.

78. It is for WA to prove that the Athlete deliberately tried to mislead the AIU and that the intended purpose was to obstruct the proceedings against her (of which there were none, since a single Missed Test would not have constituted an ADRV by itself). Her primary concern was to protect the information that she had an abortion procedure.

79. Moreover, the case CAS 2017/A/4937 is the most analogous to the Athlete's case, since in that case the panel dismissed the tampering charge against the athlete due to the fact that it could not be said that the false statements he provided to doping control officials subverted the doping control process under the circumstances. The athlete is such case had provided three false statements during the investigation, however, the Panel from that case came to the conclusion that the effect and influence of the athlete's false statements was negligible to the point that it did not have any effect on the investigation at all and, as such, was unable to result in the subversion of the process.

80. Similarly to the case CAS 2017/A/4937, the Athlete provided misinformation to the AIU; however, unlike the athlete in the aforementioned case, the Athlete simply incorrectly adjusted the date of the Medical Notes based on her memory, leaving the underlying explanation materially unchanged. This did not frustrate the doping control process or the AIU's investigation at any point.

81. The first instance tribunal wrongly relied upon the case IAAF v. Sumgong[2] (related to the submission of false medical documents by a Kenyan athlete); this case bears no resemblance to that, since the Athlete never forged any medical records, in fact, they were provided unaltered to the AIU.

82. The only thing wrong with the Athlete's explanation was a 24-hour discrepancy, which is not something to be compared with an entire fabrication of documents to justify a procedure that never happened (precisely what was at stake in IAAF v. Sumgong).

83. In USADA v. Cosby[3], an athlete's lack of judgement, caused by a depression, was acknowledged. In the present case, given the amount of stress that the Athlete was under during that period, caused by the traumatic event she endured, should not be faulted by her lack of judgement; in fact, just stress can be a factor for considering a lower degree of fault and it must also be noted so as to ascertain if the athlete intended or not to subvert the doping process, as opposed to committing a careless mistake in response to her trauma and fear of having to disclose the abortion (see CAS 2013/A/3327, par. 76 (d)(iii)).

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[2] Decided by an IAAF Disciplinary Tribunal with the reference SR/Adhocsport/140/2018

[3] A case brought forward before the American Arbitration Association, with reference AAA No.7719000543 09

84. The Athlete's willingness to hand over the complete and genuine Medical File demonstrate that she never intended to subvert the doping control process nor to prevent normal procedures from occurring.

85. The Athlete did not want to disclose her abortion, but fully cooperated with the AIU; she asked for a handwritten note rather than a typed letter and simply did not believe the date to be correct. If this had been typed by the doctor, the Athlete would have obviously refrained from changing it.

(A.4) *Alternatively, in case this Panel considers that the Athlete committed an ADRV*

86. In case the Panel comes to the conclusion that an ADRV has been committed by the Athlete, she is entitled to the maximum reduction under the rules pursuant to the 2021 WA ADR.

87. If a second ADRV is to be found, the Athlete's sanction should range between a minimum of 3 years (1 year of the previous ADRV + 2 years for the violation of Rule 2.5 2021 WA ADR) and a maximum of 4 years (double the period applicable to the currently assessed violation of Rule 2.5 2021 WA ADR). All of this in accordance with Rule 10.3.1 (i) and (ii) of the 2021 WA ADR, applicable under *lex mitior*, since, as was explained, the commission of the ADRV was not intentional and was certainly a result of exceptional circumstances.

88. The recent case of Nelly Jepkosgei[4], which fabricated a story and created/obtained falsified medical records to prove that she had to immediately go to a hospital following a car crash which involved her sister, can provide some guidance as to the degree of fault assessment. In that case, due to the admission of guilt which occurred about a year later, Ms Nelly Jepkosgei's sanction was reduced from 4 to 3 years under a first offense. The Athlete's degree of fault must be considered inferior to that of Ms Nelly Jepkosgei.

89. Furthermore, analysis of degree of fault under Whereabouts violations could provide additional guidance to the Panel:

- In USADA v. Rollins[5], the Athlete's sanction was reduced from two years to one year based on her extensive travelling and lack of understanding of the Whereabouts reporting system; and

- In CAS 2013/A/3241 - an athlete missed a test and forgot to update her Whereabouts location, because she was travelling to see her doctor. Since the athlete was preoccupied with her physical state, the tribunal determined that her conduct bore no significant fault or negligence and reduced her sanction to the minimum of one year.

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[4] See https://www.cbc.ca/sports/olympics/summer/trackandfield/jepkosgei-banned-3-years-for-fake-car-crash-as-excuse-for-missing-doping-test-1.5933211, the news article submitted by the Appellant.

[5] The case where the Athlete's first ADRV was asserted and which was brought before the American Arbitration Association with reference number AAA No. 01-17-001-3244

90. The WA tribunal, despite acknowledging the exceptional facts of the case, did not impose a correct sanction on the Athlete. There is no reason to consider a five-year sanction appropriate given the circumstances and the degree of fault analysis made by the first instance tribunal.

91. If any fault is to be found on the part of the Athlete, then such fault must be at the lowest end of the scale. If a violation is found, then only the minimum sanction of 3 years is appropriate.

(A.5) *The sanction imposed by the WA Tribunal is disproportionate*

92. All sanctions must comply with the principle of proportionality, in the sense that there must be a reasonable balance between the kind of the misconduct and the sanction (CAS 2005/C/976 & 986).

93. In the case CAS 2006/A/1025, the tribunal recognized the problems with issuing decisions under the WADA Code without taking into consideration the unique circumstances of a case:

"*But the problem with any 'one size fits all' solution is that there are inevitably going to be instances in which the one size does not fit all. The Panel makes no apology for repeating its view that the WADC works admirably in all but the very rare case. It is, however, in the very rare case that the imposition of the WADC sanction will produce a result that is neither just nor proportionate ... Any sanction must be just and proportionate. If it is not, the sanction may be challenged. The Panel has concluded, therefore, that in those very rare cases in which Rules 10.5.1 and 10.5.2 of the WADC do not provide a just and proportionate sanction, i.e., when there is a gap or lacuna in the WADC, that gap or lacuna must be filled by the Panel.*"

94. CAS also recognized that even though the WADA Code includes mechanisms under which sanctions can be reduced or eliminated that does not exclude the disciplinary tribunal's duty to measure the sanction applied in accordance with the principle of proportionality (CAS 2005/A/830, par. 48). In fact, proportionality has been applied to reduce sanctions which would be mandatory in accordance with the WADA Code in many cases (CAS 2007/A/1252; CAS 2010/A/2268; CAS A4/2016).

95. In Livermore v. FA[6], the Panel considered that the recourse to the proportionality principle would be difficult in any case where there was a Prohibited Substance and any suggestion of performance enhancing effect; in essence, that would mean that the application of the principle of proportionality is especially appropriate in a case like the present one, where no allegation of the use of a banned substance occurred.

96. The 2015 and 2021 versions of the WADA Code both state (at pp. 17-18 of the Codes) that:

"*These sport-specific rules and procedures, aimed at enforcing anti-doping rules in a global and harmonized way, are distinct in nature from criminal and civil proceedings. They are not intended to be subject to or limited by any national requirements and legal standards applicable to such*

[6] A case of Antidoping brought before a Regulatory Comission between the Football Association and Jake Livermore and decided on 8 September 2015

proceedings, although they are intended to be applied in a manner which respects the principles of proportionality and human rights."

97. The Athlete has never been accused of doping and produced upwards of 80 negative tests over the course of her career. She is not to be regarded as the type of athlete that the WADA Codes aim to punish; yet, she has been sanctioned more harshly than many other Athletes which were effectively doping and even given a punishment worse than that which was decided for a case of organized nation-wide doping (CAS/O/6689).

98. As such, in the event that a violation of Rule 2.5 2021 WA ADR by the Athlete is considered by the Panel to have occurred, the principle of proportionality must be applied so as to reduce Ms McNeal's sanction.

(A.6) *The start date of the sanction*

99. Pursuant to Rule 10.13.1 2021 WA ADR, a substantial delay in the hearing process or other aspects of doping control enables the body imposing the sanction to decide that the period of ineligibility may start at an earlier date, commencing as early as the date on which an ADRV occurred.

100. Given the Athlete was not interviewed until four months after providing her medical records, and eight months after the Missed Test, the appropriate start date for any sanction in this case should be 15 April 2020, when the medical records were submitted; alternatively, any sanction must start on 14 August 2020, the date she was interviewed, as there were no reasons for the AIU to delay the results management process or to wait so long to press charges.

(A.7) *Lack of reasons to impose a greater sanction on the Athlete*

101. In the Cross Appeal filed, the Athlete has laid out some of the reasons which the Panel should consider to refrain from imposing a greater sanction on her.

(A.7.1) *Failure to demonstrate which version of the WADA Code/WA ADR is applicable*

102. WA failed to demonstrate why the 2021 WADA Code/ 2021 WA ADR should be applicable, since it can only be applied to a conduct which took place in 2020 under the *lex mitior* doctrine.

103. The Athlete is not "hedging her bets" by submitting that the Panel must assess which version of the applicable rules proves to be more favourable to the Athlete.

104. This request is based on the assessment that the WA Tribunal made regarding the applicable rules, since its analysis of the 2021 WADA Code and 2021 WA ADR actually decreased the "level of intent" necessary for a tampering violation to be found, apparently violating the *lex mitior* doctrine.

(A.7.2) *The attack on the Athlete's credibility*

105. The Athlete's credibility was fiercely attacked by a series of condescending questions which were asked to her during the hearing of the WA Tribunal.

106. As Dr. Moayedi explained it would not be unusual for a patient not to remember all the details of what she did after an abortion.

(A.7.3) *The lack of "exceptional circumstances"*

107. WA also states that no "exceptional circumstances" can justify the reduction of the sanction under the relevant WA ADR. This statement is false since:

a) The Athlete genuinely believed the date was wrong and the fact that the abortion was a single day off does not alter the underlying reason for her Missed Test, this being a part but not the entire basis for her provided explanation;

b) The Athlete produced two sets of notes within a one-month period and did not falsify records over the course of several months. She was only a fragile, overwhelmed and emotionally confused woman, not a "diabolical mastermind", and was treated far worse than athletes which have fabricated medical records about non-existing medical procedures;

c) Her mental state was truly fragile and the fact that she sought spiritual advice as an alternative source to help her mental state does not disqualify her trauma, which should be obvious to any reasonable human being. Dr Moayedi also confirmed that her elevated progesterone levels could have impacted her mental state; and

d) The Athlete did not fail to admit her conduct: the AIU controlled the timeline of the investigation and she only discovered that she was wrong about the date of the abortion when she was preparing for the AIU Interview, to which she had voluntarily agreed and assumed that said interview was the appropriate time for her to explain this.

(A.7.4) *The correct application of the "Multiple Violations" provisions*

108. The WA Tribunal correctly applied the multiple violations provisions (Rule 10.9.1 of the WADA Code and 2021 WA ADR), since the 5-year sanction reflects a second ADRV: the Athlete's previous 1-year sanction was factored in and the range of sanction was correctly established in between a minimum of 3 years (1 year plus a *minimum* 2-year penalty under a first violation) and 8 years (twice the *maximum* 4-year penalty under a first violation). There is no basis under which the WA Tribunal had to consider a *minimum* sanction of four years.

(A.7.5) *The disproportionate measure of an 8-year sanction*

109. An 8-year sanction would be disproportionate. The opinion that proportionality is "built in" the WADA Code cannot be accepted in a tampering case, since the Costa Legal Opinion which portrayed such doctrine did not address Rule 2.5 WADA Code/ 2021 WA ADR (Tampering). In fact, proportionality was never found to be already incorporated in the rules in tampering cases jurisprudence (see CAS 2018/A/5546; CAS 2017/A/5015 and CAS 2017/A/5110).

(B) THE POSITION OF WORLD ATHLETICS IN THE APPEAL AND IN THE CROSS-APPEAL

110. In CAS 2021/A/7983, WA puts forward the following prayers for relief:

"57. World Athletics respectfully requests that the Appeal of Brianna McNeal is dismissed.

58. World Athletics also requests that Brianna McNeal is ordered to pay the arbitration costs (if any), and to provide a contribution to World Athletics' legal and other costs."

111. In CAS 2021/A/8059, WA puts forward the following prayers for relief:

"29. WA respectfully requests that the Panel grant the following relief:

(i) The Appeal of World Athletics is admissible.

(ii) The decision of the World Athletics Disciplinary Tribunal dated 21 April 2021 is set aside.

(iii) Brianna McNeal is found to have committed the anti-doping rule violation of Tampering and/or Attempted Tampering pursuant to Rule 2.5 of the WA 2021 ADR.

(iv) Brianna McNeal is sanctioned with a period of Ineligibility of eight years pursuant to Rules 10.3.1 and 10.9.1(a)(ii) of the WA 2021 ADR, to commence on the date of the Panel's award. Any period of provisional suspension and/or period of ineligibility effectively served by Brianna McNeal shall be credited against the period of Ineligibility imposed upon her.

(v) All competitive results obtained by Brianna McNeal between 13 February 2020 and the date of the CAS Award shall be disqualified, with all resulting Consequences including forfeiture of any medals, titles, points, prize money, and prizes, pursuant to Rule 10.10 WA 2021 ADR.

(vi) Brianna Mc Neal is to bear the arbitration costs of the proceedings, if any.

(vii) Brianna McNeal is to provide a contribution to World Athletics' legal and other costs in relation to the proceedings."

(B.1) <u>The background of the case</u>

112. The Athlete's justification for the Missed Test was based on the fact that she had taken medication connected to her abortion for the first time on the previous day, 11 January 2020. She overslept and did not realize that a testing attempt was made because, being the first time taking this medication, she did not know its effects.

113. It is also established that the Athlete purposedly altered three medical notes issued by the Clinic, each signed by a doctor, changing the date of the abortion from 10 January 2020 to 11 January 2020.

114. Basically, the Athlete altered documents to give credibility to her explanation, since without the change of date, the explanation regarding the "unforeseeable consequences of medication" would not be available to her as it rested on the fact that she had been medicated in the evening before the DCO's visit.

115. The Athlete submitted the altered documents to the AIU to support her explanation, knowing they would be considered original evidence. She submitted three altered documents on two separate occasions (13 February 2020 and 14 March 2020), one or two months after the abortion.

116. For the subsequent 6 months, the Athlete failed to explain what she had done or confess that the documents were not original until she was confronted about her actions during an interview at the AIU.

117. All of this was done in the hope that the missed test was dismissed, as if this was not the case, she could not have afforded a further Whereabouts failure in the following six-month period (as she would face severe consequences, due to the fact that this would be her second ADRV and harsher "multiple violations" sanctions would apply).

(B.2) *The WA Disciplinary Tribunal decision*

118. The WA Disciplinary Tribunal made its decision based on the submitted evidence and the hearing which occurred before it on 7 March 2021. During this hearing, it was clear that the Athlete was contradictory and unconvincing in her statements (as the transcript clearly shows), which led the WA Tribunal to consider, on paragraph 121, that *"(...) the Athlete has been contradictory in much of her evidence and submission"*

119. The WA Tribunal clearly found that the Athlete committed a tampering ADRV, stating, among other things, the following:

a) *"Then, making matters far worse for herself, she altered the Second and Third Medical Notes approximately four weeks later. Again, without conferring with anyone, without requesting from the Clinic that a correct note be resent to her, without disclosing her alteration, and without any regard for the fact that she was Tampering with the evidence she eventually would submit to the AIU by falsifying it. The expanded definition of Tampering is on point as it now expressly included "without limitation - ... falsifying documents submitted to an Anti-Doping Organisation*";

b) *"Strikingly, when asked by WA if she had written down the date for her procedure in any calendar she unequivocally stated that she had not done so because it was a date too important for her to forget. She had thus cemented the January 10 date in her brain as a date not to forget.*";

c) *"The Panel comprehends even less how the Athlete could have been so wrong, especially considering the fact that – as clearly presented by the AIU – she has never been to the Clinic on a Saturday... she also stated herself that she has never gone to the Clinic on an off-training day (e.g. a Saturday)"* ;

d) *"WA submits that the evidence demonstrates that the Athlete did act intentionally to subvert the doping control process – by personally falsifying the dates on the Clinic notes and submitted these altered notes to the AIU. For the reasons set out above, the Panel agrees."*; and

e) *"Repeated falsification of evidence 'inevitably goes beyond the bounds of legitimate defence under any civilized system of law*".

120. In short, the WA Disciplinary Tribunal carefully considered the evidence and concluded that the Athlete's explanations were unbelievable, that she remembered the date of the abortion procedure before engaging in the tampering conduct and that such conduct is illegitimate defence and unacceptable. The WA Disciplinary Tribunal thus considered that a tampering ADRV was committed, considering also that the intent requirement was present, since it found the Athlete intended to subvert the doping control process through the falsification of the Medical Note's dates.

(B.3) <u>*Further Factual Matters regarding the Athlete's conduct*</u>

(B.3.1) *The Athlete's background*

121. The Athlete was found to have committed an ADRV in 2017 which was punished with a 1-year period of ineligibility. This involved her committing three Whereabouts Failures in 2016.

122. In August 2019, she committed another Whereabouts failure and, as such, the Missed Test in January 2020 would be her fifth Whereabouts Failure.

123. Naturally, she wished to avoid the recording of another missed test, since she would be one missed test away from committing the same violation again, this time with more serious consequences given it would be her second ADRV. In fact, if the Missed Test was confirmed, the Athlete would be in serious risk of committing another ADRV if she missed a test in the following 6 months; because of this, she was interested in justifying the Missed Test, even though it is technically correct that she could have ignored it.

124. The negative doping test of the Athlete three days after 12 January 2020 is irrelevant: this case is not about doping; it is about avoiding the recording of a Missed Test by document falsification.

(B.3.2) *Effect of the change of dates*

125. The Athlete wrongly argues that the changing of the date does not affect her excuse. This is wrong since her explanation was essentially based on the fact that she had undergone a surprise medical procedure just the day before and she was under medication and sedatives to relief her pain; since she took the medication on 11 January 2020, she was not aware of its effects and, as a result, failed to hear the DCO on 12 January 2020. As such, the whole basis of the Athlete's excuse concerns the fact that she took the drugs for the first time the day before the Missed Test not knowing it would incapacitate her from hearing the DCO and waking up to submit to doping control.

126. When it was revealed that she took the drugs two days before and not only one, her explanation did not change but fell apart.

127. It is also impossible to understand how changing the dates (from 10 January 2020 to 11 January 2020) would protect the Athlete's privacy. This argument is inconsistent with the Athlete's statement that she genuinely recalled the abortion to have occurred on 11 January 2020 and that this was the only reason for her to have changed the date.

(B.3.3) *Failure to report and correct her conduct*

128. The Athlete also argues that she voluntarily submitted to an interview with the AIU, however, this is not precise. The Athlete did not voluntarily provide any indication that she submitted false or tampered evidence nor explain her conduct until she was confronted by the AIU in the interview. It was a confession upon confrontation.

(B.3.4) *Social Media Evidence*

129. Contrary to the Athlete's allegations, she was not passed out or asleep for the entire weekend after the procedure. The Athlete was awake and tweeting from 10:00 on 11 January 2020, the morning after the procedure, as well as in the evening before she supposedly was unable to wake to submit to doping control.

130. The Panel will note the following activity on the Athlete's social media accounts:

a) The Athlete engaged with a Twitter thread following a tweet by USATF by replying twice, on 11 January 2020 at 10:04 (the morning after her abortion procedure) and again on 11 January 2020 at 19:11 (the evening after her abortion procedure and directly before the Missed Test the following morning).

b) The Athlete tweeted on 11 January 2020 at 19:39, stating "*Ready for some college football championship. These blow out games are terry*".

c) The Athlete tweeted on 12 January 2020, at 18:05, apparently in relation to indoor track events and the upcoming track season, on the day of the Missed Test.

d) The Athlete tweeted on 13 January 2020 at 18:52, the day after the Missed Test, stating "*#ALLIN*".

(B.3.5) *Whereabouts Updates*

131. The Athlete appears to defend herself on the basis that her mental state was harshly affected by the abortion, which prevented her from functioning normally, remembering dates and making rational decisions; however, her Whereabouts updates appear to contradict this thesis. In fact, the Athlete managed to update her Whereabouts Information regularly between the date of her abortion and the submission of the medical records to the AIU in April 2020. She was capable of keeping track of her professional schedule, traveling for events and managing daily affairs.

132. On 27 January 2020, a few weeks after her abortion, she updated her Whereabouts Information for a competition which took place in Texas, on 31 January 2020.

133. On 7 February 2020, she was able to update her Whereabouts Information for the USAFT Indoor Championships 2020, in New Mexico, which took place on 15 February 2020 and where the Athlete finished third in the 60m sprint.

(B.3.6) *Nature of the Tampering ADRV*

134. The definition of the Tampering ADRV, Rule 2.5 2021 WA ADR, includes "*falsifying documents submitted to an Anti-Doping Organisation*". This is precisely what the Athlete did as she herself admitted. This conduct alone should constitute an ADRV for practical and policy reasons. Otherwise, athletes would be able to submit false evidence and argue that said evidence accurately reflects their belief and understanding of the facts. Chaos would follow if athletes were able to do this with impunity.

135. Furthermore, forging a document is a criminal offence under Swiss Law (Article 251 of the Swiss Criminal Code).

136. The case USADA v. Brown[7] has striking similarities to the present one. In that case, the physician Dr. Jeffery Brown was convicted for tampering with records relating to L-carnitine infusions provided to athletes; due to the fact that he was being investigated, Dr. Brown added infusion volumes to the original medical records and never noted or explained what he had done so as to give them the appearance of original documents. The panel of such case considered the following:

(a) *"Simply altering the records is not the issue. The problem is that the Respondent altered the records after being informed of the anti-doping investigation, and chose to do so without any notation of what had occurred."*

(b) "*the alteration of the records appears to have been directed to ensuring that records existed to substantiate a position to be taken in the course of these proceedings, and in the view of the Panel that constitutes tampering under the WADA Code.*"

137. The Athlete clearly falsified the most important part of the document to justify her excuse for the Missed Test, since it would have been her first time taking the drugs and, as such, she could not foresee its effects and failed to wake up for testing. In addition, the falsification was conducted in the Medical Notes which still retained the treating physician's signature in authentication of the note's content; this clearly being a highly material falsification.

138. In addition to that, the evidence clearly shows that the Athlete did act intentionally to subvert the doping control process when changing the dates of the Medical Notes. These documents were altered so that they would be consistent with her explanation since the AIU would have no reason to doubt her version; if, instead, she provided the Medical Notes unaltered, she would have had to provide further evidence due to the disparity between the documents and her explanation. The Athlete clearly mislead the AIU intentionally.

139. In fact, the Athlete's justification for changing the dates is not even persuasive:

a) It is not realistic that she would have taken such a fraudulent step and alter signed documents long after the procedure occurred solely on the basis of an unverified belief;

[7] A case which was which was brought before the American Arbitration Association with reference number No. AAA 01-17-0003-6197

b) No further steps were taken to confirm the correct date of the procedure. She never contacted the Clinic to check this, even though she asked for the Medical Notes and had multiple post-abortion visits to said Clinic where she saw the doctor who carried out the abortion procedure;

c) It is unrealistic that the Athlete failed to consider that her recollection was wrong even after receiving the Second and Third Medical Notes, carrying the same date as the First Medical Note.

d) Since the Athlete never visited the Clinic on a Saturday, it is unrealistic that she would have decided to change the date based on the belief that the abortion had been on a Saturday. This is especially strange when it was revealed that she had supposedly chosen a clinic for the abortion based on the fact that it was open on weekends, but never benefited from such situation (all appointments were on weekdays);

e) The real date of 10 January 2020 having been established, the Athlete does not have any clear alternative explanation and social media evidence suggests that her physical incapacity was not as serious as she portrayed during the weekend after the abortion.

140. Although the Athlete relied greatly on the case CAS 2017/A/4937, such case was misinterpreted by her since:

a) That case was mainly concerned with the right of an individual to put forward its version of the facts in an interview, even if they were to be eventually tested in Court and rejected;

b) The Athlete went much further than lying in an interview: she tampered with three separate documents on two separate occasions and submitted them as genuine to the AIU, never taking any steps to correct her position in the following 6 months (despite having received the full Medical File that showed the date was wrong); and

c) Although in CAS 2017/A/4937 the authorities already had information suggesting that the athlete provided false statements, in the present case the AIU did not have such information and the forgery undertaken by the Athlete could well have never come to light if it were not for the keen observation of the documents.

141. The conduct of the Athlete can be considered as being "much closer" to other cases, such as IAAF v Sumgong (SR/Adhocsport/1402018), where the tribunal considered that "*the submission of the false medical documents by her to the Kenyan Tribunal can only be analysed as a deliberate attempt to prevent the administration of justice in her case and improperly to affect the outcome of the hearing in respect of the AAF for r-EPO. Perjury and forgery inevitably go beyond the bounds of legitimate defence under any civilized system of law*"

142. In UKAD v Dry[8], for example, a Tampering ADRV was established on the basis that Mr. Dry lied about his whereabouts to excuse a missed test and only provided a short-written response

[8] A Case decided by a UK National Anti-doping Panel, with the reference no. SR/324/2019

from his partner confirming the untrue account of his whereabouts. This was a much less serious conduct and yet still considered as Tampering.

143. In the alternative, even if the Athlete genuinely believed that the abortion took place on 11 January 2020, *quod non*, she was extremely careless to not have checked the veracity of her belief. In fact, she had simple methods to check the correct date which she could have used to avoid using; she changed her position repeatedly when asked if she consulted her husband or not, which undermines her credibility; she ignored the content of the Second and Third Medical Notes and kept on with her conduct and she even failed to verify her belief when the medical records were made available to her. In short, her recklessness demonstrates that she acted with at least an indirect intent to subvert the doping control process.

144. Finally, even though the Athlete argues that stress did affect her mental state and capacities, the WA notes that she was able to function normally and return to competition shortly after the medical procedure and was never diagnosed with any psychological condition. Furthermore, even if she had been suffering from any psychological condition, it was for the Athlete to prove (i) such medical diagnosis, (ii) a causative link between the diagnosis and the cognitive impairment and (iii) that such cognitive impairment was linked to the ADRV circumstances.

145. Causation is not a requirement for a Tampering ADRV to be established, as otherwise no offence of Attempted Tampering could ever succeed. There would be no disincentive for Athletes to provide false documents, since they would either get caught and suffer no additional adverse consequences or, if they did not get caught, the false documents or explanation would assist them.

146. In any case, the Athlete clearly subverted the doping control process, since the AIU had no knowledge at the time that the Athlete's excuse was not authentic. If no suspicions had been raised, her explanation would have likely been considered genuine and the fact that such outcome could have occurred, and that the Athlete would be happy to see it occur by her actions, would amount to the subversion of the doping control process.

(B.3.7) *The applicable consequences*

147. There are no exceptional circumstances which justify the reduction of the starting point sanction from four years and the Athlete's degree of fault was high enough to avoid any reduction. Exceptional circumstances are reserved for outside the norm cases; however, the present case reveals a repeated serious conduct over a considerable period of time which was never corrected.

148. The Athlete tampered with three separate medical documents, which were signed by a doctor, thus implicating him in the affair and undermining his professional status by making it look like he had approved the content of such documents.

149. The tampering took place on two separate occasions over the course of several months and the tampered date was the effective basis on which her excuse for the Missed Test relied.

150. The Athlete never confessed her conduct until she was confronted during an interview conducted before the AIU (on August 2020).

151. No evidence was presented to confirm that the Athlete suffered from any psychological condition after her abortion and during the period when the Tampering occurred and neither proof on how any condition could be relevant to her actions.

152. This was her second ADRV and the Athlete should have known better, since she did not have a clean record and she is a high-profile international athlete with many years of experience.

153. WA could have even requested the application of the Aggravating Circumstances rules under the 2021 WA ADR, due to the multiple incidents of tampering and the Athlete's failure to confess her conduct across a considerable amount of time.

154. The position of WA is that the Panel should consider that a period of Ineligibility for the Athlete must be set in a range between a minimum of five years and eight years in accordance with Rule 10.9.1 (a) (ii) 2021 WA ADR. In addition, an eight-year period of Ineligibility should be imposed given the Athlete's high degree of fault. This is the sanction that WA seeks in its Cross Appeal.

155. On the other hand, pursuant to Rule 10.10 2021 WA ADR, all competitive results obtained by the Athlete from 13 February onwards shall be disqualified, including forfeiture of any medals, titles, points, prize money, and prizes.

(B.3.8) *The Principle of Proportionality*

156. As set out in CAS 2018/A/5546 (para. 86-87):

> "***86.*** *Additionally, the CAS jurisprudence since the coming into effect of WADC 2015 is clearly hostile to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for by the WADC (and there is only one example of its being applied under the previous version of the WADC). In CAS 2016/A/4534, when addressing the issue of proportionality, the Panel stated:*
>
> > *'The WADC 2015 was the product of wide consultation and represented the best consensus of sporting authorities as to what was needed to achieve as far as possible the desired end. It sought itself to fashion in a detailed and sophisticated way a proportionate response in pursuit of a legitimate aim' (para. 51).*
>
> ***87.*** *In CAS 2017/A/5015 & CAS 2017/A/5110, the CAS Panel, with a further reference to CAS 2016/A/4643, confirmed the well-established perception that the WADC "has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been built into its assessment of length of sanction" (emphasis added, para. 227) as was vouched for by an opinion of a previous President of the European Court of Human Rights there referred to see https://www.wada-ama.org/en/resources/legal/legal-opinion-on-the-draft-2015-world-anti-doping-code.*"

157. A similar reasoning was held in CAS 2018/A/5651, where the Sole Arbitrator considered that the WADA Code was drafted to reflect the principle of proportionality and, as such, the application of the principle of proportionality in separate could not be considered. Proportionality is already

enshrined in the WADA Code (as well as in the 2021 WA ADR, which implements the WADA Code). There is nothing disproportionate about an Athlete which commits a Tampering ADRV being handed a substantial sanction in accordance with the relevant provisions of the ADR.

(3.4) *Reasons set forth in the Cross-Appeal filed by WA*

158. It appears that the WA Disciplinary Tribunal did not make any explicit finding concerning exceptional circumstances that could justify a reduction of the sanction's starting point from four to three years and, at a later stage from six years to five years. The WA Tribunal failed to carry out an analysis of exceptional circumstances.

159. It is also difficult to understand why the Appealed Decision mentions that the reduction "*may not be less than one-half of the period of Ineligibility*", since Rule 10.3.1 2021 WA ADR does not have a wording which provided this solution.

160. The Athlete's degree of fault is so high that no exceptional circumstances can be considered to exist. Exceptional circumstances are reserved for very "outside the norm" cases and this is confirmed by the example advanced on the comment to Rule 10.5 2021 WA ADR (namely, the sabotage by another competitor despite the athlete taking all due care, a truly exceptional situation). In the present case, there has been a repeated and serious conduct over a considerable period of time which the Athlete never corrected.

161. It is not understandable how the WA Tribunal which found that the Athlete's conduct "*(...) well below the standard of care and investigation expected of all athletes, especially experienced ones like herself*" and arrived to the conclusion that "*exceptional circumstances*" present in the case demanded a reduction of the starting point of the sanction.

162. It is difficult to understand how the WA Tribunal, having found that the Athlete's degree of fault was placed at mid-to-upper end of the spectrum, imposed a sanction in the middle of the bracket. This is even more difficult to understand since the WA Tribunal criticized the Athlete's lack of diligence in avoiding more Whereabouts Failures and by the fact that she did not promptly admit the date change.

163. The WA Tribunal should have considered that a period of Ineligibility for the Tampering ADRV would have to be set between five years and eight years and, in particular, that the appropriate sanction would have been an 8-year period of ineligibility.

V. JURISDICTION OF THE CAS

164. Article R47 of the CAS Code provides as follows:

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

165. The jurisdiction of CAS is based on Rule 13.2.1 of the 2021 WA ADR that provides:

*"**13.2.1 Appeals involving International-Level Athletes or International Competitions.** In case involving International-Level Athletes or arising from Persons participating in an international Competition, the decision may be appealed exclusively to CAS."*

166. Rule 13.2.4 of the 2021 WA ADR also provides:

*"**13.2.4 Cross-appeals and other subsequent appeals allowed.** Cross-appeals and other subsequent appeals by any respondent named in cases brought to CAS under these Anti-Doping Rules are specifically permitted. Any party with a right to appeal under this Rule 13 must file a cross-appeal or subsequent appeal at the latest with the party's answer to the appeal."*

167. The Panel notes that the CAS jurisdiction to decide the Appeal and Cross-Appeal is derived from Rules 13.2.1 and 13.2.4 of the 2021 WA ADR. The CAS jurisdiction is not contested by the Parties and that the Order of Procedure was duly signed without any observation or objection in relation to this matter.

168. It follows that the CAS has jurisdiction to hear the dispute and the Panel was satisfied to hear the Appeal and the Cross-Appeal together. The proceedings were conducted on this basis.

169. The Panel highlights that under Rule 13.7 2021 WA ADR:

"The decision of CAS shall be final and binding on all parties, and no right of appeal shall lie from the CAS decision, save in limited circumstances to the Swiss federal Tribunal. Subject to Rule 14.3.7, the CAS decision shall be Publicity Reported by World Athletics within 20 days of receipt."

VI. APPLICABLE LAW

170. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

171. In its fight against doping, WA follows the WA ADR and the rules applicable are those in effect at the time of the facts. Since the alleged anti-doping violation occurred on 13 February 2020 and on 14 March 2020, the regulations which in principle govern the dispute are those were in force from 1 November 2019 and during the date of the facts (the "2019 WA ADR").

172. In the meantime, a new edition of the WA ADR was approved and implemented – which came into force from 1 January 2021 (the "2021 WA ADR"). The 2021 WA ADR reflects the promulgation of the new 2021 edition of the World Anti-Doping Code (the "2021 WADA Code").

173. Under Rule 13.9.4 of the 2019 WA ADR it is established that:

"*13.9.4 In all CAS appeals involving the IAAF* [WA], *the CAS Panel shall be bound by the IAAF* [WA] *Constitution, Rules and Regulations (including the Anti-Doping Rules and Regulations). In the case of conflict between the CAS rules currently in force and the IAAF Constitution, Rules and Regulations, the IAAF* [WA] *Constitution, Rules and Regulations shall take precedence.*"

174. Furthermore, Rule 13.9.5 of the 2019 WA ADR reads as follows:

"*13.9.5 In all CAS appeals involving the IAAF* [WA], *the governing law shall be Monegasque law and the appeal shall be conducted in English, unless the parties agree otherwise.*"

175. The Panel highlights that an exception to the principle of application of the law at the time of the facts exists if *lex mitior* doctrine applies. The principle of *lex mitior* occupies a central place in sports law and establishes that the "*set of rules most favourable as a whole is to be applied.*" (CAS 2015/A/4005 para.115; and CAS 2020/A/6755 para. 51). The principle of *lex mitior* is enshrined in Rule 1.7.2 of the 2021 WA ADR (and was already similarly established in Article 21.3 of the 2019 ADR). This rule establishes that:

"*1.7.2 These Anti-Doping Rules do not apply retroactively to matters pending before the Effective Date, save that:*

(...)

(b) Any anti-doping rule violation case that is pending as of the Effective Date or is brought after the Effective Date but based on an anti-doping rule violation that occurred prior to the Effective Date, shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred and not by the substantive antidoping rules set out in these Anti-Doping Rules, unless the hearing panel determines that the principle of lex mitior appropriately applies under the circumstances of the case, and with respect to procedural matters by (i) these Anti-Doping Rules for anti-doping rule violations committed on or after 3 April 2017, and (ii) the 2016-2017 IAAF Competition Rules for anti-doping rule violations committed prior to 3 April 2017. For the purposes of this Rule, the retrospective periods in which prior violations can be considered for the purposes of multiple violations under Rule 10.9.4 and the statute of limitations set out in Rule 18 are procedural rules, not substantive rules, and should be applied retroactively, along with all the other procedural rules in these Anti-Doping Rules (provided however that Rule 18 will only be applied retroactively if the statute of limitations period – whether the original one or as extended by subsequent rules – has not already expired by the Effective Date)."

176. The Panel accepts and concurs that there is no discretion on the application of the *lex mitior* principle once it is found that the case appropriately falls within its scope.

177. It is not in dispute that 2021 WA ADR only came into effect for cases where the ADRV occurred after 1 January 2021 – Rule 1.7.1 and 1.7.2 2021 WA ADR. However, during the discussion before the WA Disciplinary Tribunal, both Parties appeared to agree that the 2021 WA ADR was more favourable to the Athlete and that, as such, these rules would apply.

178. Despite the above, in the present proceedings, the Athlete questioned whether the 2021 WA ADR is more favourable to her. Nevertheless, neither in the Athlete's Submissions, nor in the Athlete's oral pleadings, was any argument presented about the fact that the 2021 WA ADR rules are less favourable to the Athlete, as established in the Appeal Decision.

179. As the Athlete underlined during the proceedings before the WA Tribunal, the Panel concurs that the 2021 WA ADR rules are more favourable to the Athlete. *Lex mitior* principle is relevant and applicable when and if – as it is the case of these proceedings – the new rules (i) provide for a reduced sanction; and/or (ii) redefine the disciplinary offense. The 2021 WA ADR offers more favourable terms to athletes with respect to the imposition of sanctions for violations of Tampering offences. Equally, the new rules afford considerably greater flexibility in connection with the consequences to be drawn from a finding of multiple anti-doping rule violations, which is the case, since the Athlete has already committed another ADRV in 2019 and, if the ADRV disputed under these procedures is confirmed, that will be the Athlete's second violation. Therefore, it is the Panel's view that 2021 WA ADR is more favourable to the Athlete and that she must benefit from all its provisions.

180. In light of the above and considering that the applicable law is not in dispute, the Panel concludes that the present matter is governed by the 2021 WA ADR and, on a subsidiary basis, the Monegasque Law.

VII. ADMISSIBILITY

181. Article R49 of the CAS Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late."

182. The time limits of Article R49 of the CAS Code do not apply, because the 2021 WA ADR specifically set a time limit for the filling of an appeal and a cross-appeal. The relevant 2021 WA ADR rules are the following:

1. Rule 13.6 of the 2021 WA ADR governing time for filing appeals provides the following:

"13.6.1 Appeals to CAS

(a) The time to file an appeal to the CAS will be thirty (30) days from the date of receipt of the reasoned decision by the appealing party. Where the appellant is a party

other than World Athletics or WADA, to be a valid filing under this Rule 13.6.1, a copy of the appeal must be filed on the same day with the World Athletics.

(...)."

2. Rule 13.2.4 of the 2021 WA ADR governing time for filing a cross-appeal provides the following:

"***13.2.4 Cross-appeals and other subsequent appeals allowed.*** *Cross-appeals and other subsequent appeals by any respondent named in cases brought to CAS under these Anti-Doping Rules are specifically permitted. Any party with a right to appeal under this Rule 13 must file a cross-appeal or subsequent appeal at the latest with the party's answer to the appeal.*"

183. The Appealed Decision was notified to the Parties on 21 April 2021.

184. The Athlete appealed against the Appealed Decision by way of a Statement of Appeal and Appeal Brief both dated 20 May 2012, *i.e* within the 30 days deadline.

185. WA filed its Cross-Appeal against the Appealed Decision by way of a Statement of Appeal and Appeal Brief on 17 June 2021, *i.e.* on the date that the WA's Answer was filed. Therefore, the Cross-Appeal was filed within the established deadline of Rule 13.2.4 of the 2021 WA ADR.

186. The Panel notes that the admissibility of the Appeal and Cross-Appeal are not contested by the Parties and that the Order of Procedure was duly signed without any observation or objection in relation to this matter.

187. It follows that the Appeal and Cross-Appeal are admissible.

VIII. MERITS

(A) Introduction

(A.1) <u>*What is this case about?*</u>

188. This case is essentially about a Tampering accusation made by WA against the Athlete which was decided, at first instance, by the WA Disciplinary Tribunal. Although this case concerns the breach of ADVs, this is not a case about the presence or use of prohibited substances.

189. The Athlete failed to make herself available to be tested by a DCO on the morning of 12 January 2020, between 6:00 and 7:00 AM. When notified by the AIU in order to provide an explanation for her Missed Test, the Athlete sent the First Medical Note to the AIU and alleged that she failed to wake up due to the unpredictable effects of the medication she took on the previous day for the first time, following a "surprise" medical procedure.

190. The AIU suspected that the First Medical Note had been altered and asked for further evidence from the Athlete, which she provided in the form of two additional medical notes (the Second and Third Medical Notes). Once again, the AIU did not deem such documents to be originals.

191. The Athlete then provided the Medical File when asked to do so by the AIU and, upon being called for an interview in August 2020, confessed that she had indeed changed the dates of the Medical Notes from 10 January 2020 (the real date) to 11 January 2020 (the false date).

192. On 13 January 2021, the AIU charged the Athlete with a Tampering violation under the provision of Article 2.5 2019 WA ADR/WADC and, on 21 April 2021, a decision was issued by the WA Disciplinary Tribunal imposing a 5-year period of Ineligibility on the Athlete due to a Tampering ADRV which was the Athlete's second violation of anti-doping rules.

193. The present procedure is a consequence of the Appeal lodged by the Athlete against the decision of the WA Disciplinary Tribunal and of the Cross-Appeal lodged by the WA also against that decision. Both appeals were consolidated into one single procedure and will be simultaneously decided due to the commonalty of issues at stake.

(A.2) _The Burden of Proof, the applicable standard and the evaluation of the evidence_

194. Considering the disciplinary nature ADRV cases, the Panel shall determine first the burden of proof, the applicable standard of proof and the evaluation of the evidence presented to it in order to be able to proceed with the analysis of the merits of the dispute.

(A.2.1) *The burden of proof*

195. The burden of proof has to be ascertained in accordance with Rule 3.1 2021 WA ADR, which states that:

"The Integrity Unit or other Anti-Doping Organisation will have the burden of establishing that an anti-doping rule violation has occurred."

196. It is the Panel's opinion that the burden of proof to demonstrate that the Athlete committed a Tampering ADRV lies with WA. Naturally, the party that bears the burden of proof in relation to certain facts is obliged to submit these to the court.

197. It is the Panel's duty to verify whether WA has discharged this burden by proving the facts it alleged regarding the involvement of the Athlete in the tampering conduct. However, the Panel stresses that the Athlete has an evident interest in proving and convincing the Panel of the contrary.

(A.2.2) *Standard of proof*

198. According to Rule 3.1 2021 WA ADR:

"*(...) The standard of proof will be whether the Integrity Unit or other Anti-Doping Organisation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that has been made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an antidoping rule violation to rebut a presumption or establish specified facts or circumstances, except as provided in Rules 3.2.4 and 3.2.5, the standard of proof will be by a balance of probability.*"

199. The comment to Rule 3.1 2021 WA ADR also sheds some light into what the standard of proof "comfortable satisfaction" is considered to be:

"*[Comment to Rule 3.1: This standard of proof required to be met by the Integrity Unit is comparable to the standard that is applied in most countries to cases involving professional misconduct.]*"

200. CAS Jurisprudence is well acquainted with the "comfortable satisfaction" of the Panel standard of proof and the formula used in Article 3.1 2021 WA ADR ("*greater than a mere balance of probability but less than proof beyond reasonable doubt*") is similar to the jurisprudence's findings. In fact, it has been described as "*a kind of sliding scale, based on the allegations at stake: the more serious the allegation and its consequences, the higher certainty (level of proof) the Panel would require to be 'comfortable satisfied'*" (CAS 2014/A/3625, para. 132).

201. Despite having to bear "*in mind the seriousness of the allegation that has been made*", the standard of proof itself does not vary. As established in CAS 2017/A/5732, para. 679, "*(...) the standard remains constant, but inherent within that immutable standard is a requirement that the more serious the allegation, the more cogent the supporting evidence must be in order for the allegation to be found proven*".

202. As such, the Panel concludes that the applicable standard of proof is that of "comfortable satisfaction". In this context, the assessment of the evidence contributes significantly to the decision-making, the Panel needs to have strong evidence that certain facts occurred in a given manner and the evidence also has to satisfy the Panel in the same sense. The relevant circumstances of the case assessed individually and/or combined, commonly known as the context, are major elements to reach this conclusion.

(A.2.3) *Evaluation of the evidence*

203. The "evaluation of the evidence" concept refers to the judicial process of weighing/assessing the evidence on the record (*appréciation des preuves*). The Panel reminds the Parties that under Swiss arbitration law, the deciding body is free in its evaluation of the evidence (*libre appréciation des preuves*). This principle is expressly recalled by Article 9(1) of the IBA Rules of Evidence, according to which "*the Arbitral Tribunal shall determine the (...) relevance, materially and weigh of evidence*" (see Berger/Kellerhals, International Arbitration in Switzerland, 2nd Ed., London, 2010, para 1328).

204. In this instance, it is also important to note that according to the wording of Rule 3.2 2021 WA ADR:

"*Facts related to anti-doping rule violations may be established by any reliable means, including admissions.*"

205. The comment to this rule is also a relevant piece of information for the Panel in the matters of the evaluation of the evidence, as it states the following:

"*[Comment to Rule 3.2: For example, the Integrity Unit may establish an anti-doping rule violation under Rule 2.2 (Use of a Prohibited Substance or Prohibited Method) based on the Athlete's admissions, the credible testimony of third Persons, reliable documentary evidence, reliable analytical data from either an A or B Sample as provided in the comments to Rule 2.2, or conclusions drawn from the profile of a series of the Athlete's blood or urine Samples, such as data from the Athlete's Biological Passport.]*"

(A.2.4) *Conclusions of the Panel regarding the burden of proof*

206. In light of the above, the Panel must conclude, regarding the burden of proof, that it is for WA to demonstrate, to the comfortable satisfaction of the Panel, that the Athlete did indeed engage and commit an ADRV of Tampering (Rule 2.5 2021 WA ADR), which includes objective and subjective factors.

207. Nonetheless, the burden of proving that the Athlete was suffering from psychological or mental health issues during the period when the Medical Note's dates were changed, which in turn affected her judgement and reason, lies with the Athlete. In fact, the Athlete is the one which needs to demonstrate the psychological or mental conditions argued during the proceedings that could lead the Panel to consider that she did not act with fault or negligence or even that her degree of fault is lower than what WA argues, seeing as she is the person who derives rights from that fact.

(B) Main Issues to Be Decided

208. In this Appeal and Cross-Appeal, the Athlete essentially argues that she did not have any intent to subvert the Doping Control Process by changing the dates of the Medical Notes and, as such, she cannot be considered as having committed a Tampering ADRV; on the other hand, WA argues that the Athlete intentionally falsified evidence provided to the AIU in support of her missed test justification with the goal of subverting the doping control process and that the Athlete should be punished with a harsher sanction than the one which was imposed on her by the WA Disciplinary Tribunal in first instance. For this reason, the issues to be determined by the Panel are the following:

(a) Under Article 2.5 ADR/WADC, what constitutes a Tampering ADRV?

(b) Did WA manage to discharge its burden of proof and prove that the Athlete committed a Tampering ADRV?

(c) If so, what was the Athlete's degree of fault and what are the appropriate consequences?

(C) What Constitutes Tampering ADRV Under Article 2.5 ADR?

209. Rule 2.5 2021 WA ADR states that:

> ***"2. Anti-Doping Rule Violations***
> *Doping is defined as the occurrence of one or more of the violations set out in Rules 2.1 to 2.11 below.*
> *The purpose of this Rule 2 is to specify the circumstances and conduct which constitute anti-doping rule violations. Hearings in doping cases will proceed based on the assertion that one or more of the specific rules have been violated.*
> *Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods that have been included on the Prohibited List. Each of the following constitutes an anti-doping rule violation:*
>
> *(...)*
>
> ***2.5 Tampering or Attempted Tampering with any part of Doping Control by an Athlete or other Person"***

210. Although Rule 2.5 2021 WA ADR does not itself define the meaning of the term "Tampering," this issue is resolved in Annex I of that regulation, which reads as follows:

> ***"Tampering:*** *Intentional conduct that subverts the Doping Control process but that would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, offering or accepting a bribe to perform or fail to perform an act, preventing the collection of a Sample, affecting or making impossible the analysis of a Sample, falsifying documents submitted to an Anti-Doping Organisation or TUE committee or hearing panel, procuring false testimony from witnesses, committing any other fraudulent act upon the Anti-Doping Organisation or hearing body to affect Results Management or the imposition of Consequences, and any other similar intentional interference or Attempted interference with any aspect of Doping Control.*
>
> *[Comment to Tampering: For example, this Rule would prohibit altering identification numbers on a Doping Control form during Testing, breaking the B bottle at the time of B Sample analysis, altering a Sample by the addition of a foreign substance, or intimidating or attempting to intimidate a potential witness or a witness who has provided testimony or information in the Doping Control process. Tampering includes misconduct that occurs during the Results Management process. See Rule 10.9.3(c). However, actions taken as part of a Person's legitimate defence to an anti-doping rule violation charge shall not be considered Tampering. Offensive conduct towards a Doping Control official or other Person involved in Doping Control that does not otherwise constitute Tampering shall be addressed in the disciplinary rules of sport organisations.]"*

211. The provision commences by stating the general formula according to which Tampering amounts to: intentional conduct that subverts the Doping Control process but that would not otherwise be included in the definition of Prohibited Methods. Thereafter, the provision provides examples of conduct that can amount to Tampering, in a non-exhaustive list, which includes the following,

"falsifying documents submitted to an Anti-Doping Organisation or TUE committee falsifying or hearing panel".

212. Three important issues arise from the said provision:

(1) Is it necessary that the conduct in question is proved to have actually subverted the Doping Control Process, or does it suffice that the said conduct could, in theory, have done so?

(2) Is intent to subvert the Doping Control Process a necessary element of violation of Rule 2.5 2021 WA ADR?

(3) Are the examples given in the rule automatically considered to be Tampering, or must they be interpreted in accordance with the general formula stated in the first sentence of the Rule?

(C.1) *Is actual subversion of the Doping Control Process a necessary requirement for conduct to be considered to be Tampering, or not?*

213. The WA Disciplinary Tribunal considered that the fact that conduct does not result in an actual subversion of the Doping Control Process does not mean that it cannot be punished as a Tampering violation. It would be unfair for an athlete to be able to submit adulterated tests, and for it not to be possible, if the said tests are rejected, (and therefore without any effect on that case), to punish the athlete, as it would otherwise be more advantageous (and less risky) to falsify tests and to seek to have them accepted by the anti-doping authorities, than to comply scrupulously with the rules.

214. Accordingly, it should not be considered that the existence of a result, i.e. the actual subversion of the Doping Control Process, is a necessary requirement of Tampering violations. The Panel therefore agrees with the reasoning of the tribunal, at first instance.

215. Moreover, it should not be overlooked that rule 2.5 2021 WA ADR includes the following possibility among the examples it provides, i.e.: "*intentional interference or* ***Attempted interference*** *with any aspect of Doping Control.* ". This part of the rule ("*Attempted Interference*") would make no sense, and it would be not possible to obtain any conviction for attempt to violate this rule, if the result, i.e. subversion of the Doping Control Process, was considered to be a necessary requirement for the commission of this violation.

216. The Panel therefore considers that it is not necessary for a Doping Control Process to be actually subverted, in order for a violation of Rule 2.5 2021 WA ADR to exist, and that it suffices, for that purpose, that the conduct in question could, in theory, is capable of subverting the said process.

217. Finally, it is important to note that a charge of Tampering can also be based on the circumstances provided in Rule 5.7.9 2021 WA ADR:

"If an Athlete or other Person obstructs or delays an investigation (e.g., ***by providing false, misleading or incomplete information or documentation and/or by tampering or destroying any documentation or other information that may be relevant to the investigation)****,*

proceedings may be brought against them for violation of Rule 2.5 (Tampering or Attempted Tampering)."

(Emphasis added by the Panel)

(C.2) *Is intent to subvert the Doping Control Process necessary, in order for a violation of Rule 2.5 WA 2021 ADR to exist?*

218. Rule 2.5 2021 WA ADR also uses the term "*intentional conduct*" and it is necessary to decide, in that regard, whether the said intentional conduct involves intent to subvert the Doping Control Process, or merely objective intent to act in a certain way, even if without intent to interfere with the Doping Control Process.

219. The WA Disciplinary Tribunal also addressed this matter, to a certain extent, in its comment on Rule 10.2.3 ADR, which defines intentional ADRVs, and provides as follows:

> "(…) *Outside Rule 10.2, the term 'intentional' as used in these Rules means that the person intended to commit the act(s) based on which the Anti-Doping Rule Violation is asserted, regardless of whether the person knew that such act(s) constituted an anti-doping rule violation".*

220. It appears to follow from this fragment that "intent" is necessary in order for Rule 2.5 2021 WA ADR to be violated. However, it apparently suffices that this intent is merely objective, so that the offender's intent, or lack of intent, to subvert the Doping Control Process matters not in terms of the commission of a Tampering violation, as intent to practice the said acts is sufficient, even if the offender was unaware that they could subvert the said Doping Control Process.

221. However, and notwithstanding the fact that CAS case law does not include many Tampering cases, it has commented on this violation, i.e. in CAS, 2017/A/4937:

> "*126. On a reading of the words of SADR 2.5 the prohibition requires that a Doping Organisation should bring an allegation of tampering if an athlete's conduct is fraudulently misleading. A breach of the provision therein contained has three parts: there must be "tampering"; which "subverts"; the "doping control process" (...)*
>
> (…)
>
> "*128. The Panel finds the phrase "tampering", i.e. fraudulently misleading to subvert doping control, is intended to have a wide ambit and cover any circumstance related to any violation of the rules of anti-doping up to the finality of all appeals provisions. SADR 2.5 purposely construed covers the investigation period and an allegation of fraudulent misleading an investigation **requires an intent to subvert the investigation***"

(Emphasis added by the Panel)

222. In the light of this interpretation, the Panel accepts that the commission of a violation of Rule 2.5 2021 WA ADR always requires satisfactory proof that the offender intended to subvert the investigation, even if he/she was unaware that he/she was violating an anti-doping provision. The Panel, however, notes that there are different forms of intent. The Panel is of the view that in the specific context of the rules, intent does not need to be direct in the sense that subverting the doping control process was the sole and only driving motive behind the athlete's actions. Rather, it is sufficient for there to be intent that the athlete recognised the consequences of his or her actions and accepted that such consequences have the potential to subvert the process.

(C.3) *Are the examples given in the rule automatically considered to be Tampering, or must they be interpreted in accordance with the general formula stated in the first sentence of the Rule?*

223. Rule 2.5 2021 WA ADR provides examples of situations that can amount to Tampering:

> "*Tampering shall include, without limitation, offering or accepting a bribe to perform or fail to perform an act, preventing the collection of a Sample, affecting or making impossible the analysis of a Sample, falsifying documents submitted to an Anti-Doping Organisation or TUE committee or hearing panel, procuring false testimony from witnesses, committing any other fraudulent act upon the Anti-Doping Organisation or hearing body to affect Results Management or the imposition of Consequences, and any other similar intentional interference or Attempted interference with any aspect of Doping Control.*"

(Emphasis added by the Panel)

224. There is no case law on this aspect and the decision at first instance also did not consider this issue in any depth.

225. However, it must be concluded from the terms of the rule and the understanding advanced that the offender must intend to subvert the Doping Control Process, that the said examples must always be taken into consideration, together with the general formulation, and that they do not amount, per se and in isolation, to autonomous examples of Tampering.

226. Accordingly, the Panel concludes that a violation of Rule 2.5 2021 WA ADR cannot be established merely by reference to the examples included in the rule and therefore that a finding that the offence has actually been committed must include consideration of the subjective aspects of the case. Essentially, the rule merely states some situations that typically amount to Tampering, but which may, depending on the subjective aspects, particularly the offender's intentions, not do so.

(D) Did WA Manage to Discharge Its Burden of Proof and Prove that the Athlete Committed a Tampering ADRV?

227. Having established the prerequisites for a finding that Rule 2.5 2021 WA ADR has been violated, this Panel must now consider whether the Athlete did, or did not, commit, a Tampering ADRV. It is noted, as explained above (see paras 207-208), that the burden of proof regarding the

commission of this offence lies with WA, and must be discharged according to a standard of "comfortable satisfaction".

(D.1) *The Athlete's Conduct between January and August 2020*

228. The Athlete discovered she was pregnant at the beginning of 2020 and, together with her husband, decided to abort, in order to be able to compete in the Tokyo Olympic Games (which, as is now known, were postponed, by a decision announced on 24 March 2020). The Athlete decided, in order to ensure the confidentiality of the procedure, to have recourse to a specialist abortion clinic, near her home, and which, according to the Athlete, had the advantage that the abortion could be performed without any loss of training time, i.e. on the weekend.

229. It is not disputed that the abortion occurred on 10 January 2020 and that the medicine was only administered to the Athlete that afternoon. During the following days, the Athlete remained at home resting and, according to her account, spent a lot of time asleep (which is hardly surprising, given the medical procedure to which she had been subjected).

230. On 12 January 2020, a DCO called at the Athlete's home to conduct a doping control test, but obtained no reply and was unable to carry out the test, despite the fact that the DCO rang the doorbell and contacted the Athlete by telephone.

231. The Athlete was not available for testing and, when challenged, produced a medical note issued by the clinic to explain the missed test, having asked the clinic not to be overly precise regarding the type of procedure to which she has been subjected. The Athlete later confessed that she altered the original date of the said note from 10 January 2020 to 11 January 2020, and that she had only done so because she was unsure, because of the effects that the medical procedure had had on her, of the exact day on which the abortion had, in fact, been performed.

232. The AIU perused the note and immediately concluded that it may have been falsified, and therefore requested the Athlete to provide additional evidence regarding the medical procedure in question. The Athlete submitted two further medical notes and later admitted that she altered the date of both of them, as she had also done with the first medical note.

233. The AIU again concluded that the documents submitted by the Athlete were not authentic and requested the submission of her Medical File. The Athlete submitted the said documents, in an untampered form, on 15 April 2020. The analysis conducted by the AIU revealed the discrepancy between the original Medical Notes and the Medical Notes falsified by the Athlete.

234. Despite this, it was only after the AIU invited the Athlete to an interview, in August 2020, that she admitted that she had altered the dates of the Medical Notes.

(D.2) *Evaluation of the Athlete's conduct*

235. The facts in this case are clear, and are, to a very great extent, not at issue between the Parties and have not altered significantly between the decision at first instance and this appeal. The central

issue is the interpretation of the facts and inferences that can be made from such facts and the Athlete's conduct.

236. For, the essential task of the Panel, in this appeal, is to evaluate whether the Athlete's conduct, i.e. the alteration of the medical notes submitted to the AIU to explain the missed test, does, or does not, amount to a violation of Rule 2.5 2021 WA ADR, i.e. Tampering. In order to make this evaluation, it is first necessary to establish whether the alteration of the dates, could, or could not, influence or subvert the Doping Control Process; and then to seek to establish whether the Athlete did, or did not, intend, by her said conduct, to subvert the Doping Control Process.

(D.2.1) *Can the alteration of the dates subvert the Doping Control Process?*

237. The Athlete gave the following explanation for having missed the test that the DCO sought to administer on 12 January 2020:

> "*Ms. McNeal was at home for the entire duration of the sample collection attempt by Mr. Willie Newman and Ms. Dani Newman. However, because Ms. McNeal had recently* ***undergone a surprise medical procedure just the day before (in the afternoon), her doctor had prescribed her with pain medication and sedatives to ease her pain during recovery****. See note from Dr. Payman, enclosed herewith. Ms. McNeal took the medication for the first time on 11 January 2020, and was not aware how much the medication would impact her.*"
>
> *For this reason, Ms. McNeal did not change her one-hour window, because she knew that she would be home and typically would have no problem waking up to answer the door.* ***She did not anticipate that the medication she took on 11 January would make it so that she was unable to wake up before 6:00 a.m., and was unable to hear the DCO during the collection attempt.***
>
> *(...)*"

(Emphasis Added by the Panel)

238. The Athlete's explanation is essentially based on three arguments, which are supported by the Medical Note submitted:

- The Athlete had been subjected to a "surprise operation";
- The operation had taken place on the afternoon of the previous day (i.e. on the afternoon of 11 January 2020);
- The doctor had "prescribed" medication for the Athlete to relieve her pain, and to assist her recovery;
- As this was the first time she had taken the medicine "prescribed" by the doctor, the Athlete did not anticipate that she would be unable to awake, in order to be tested by the DCO, at the time and in the place chosen.

239. However, it was apparent from the evidence adduced by the Parties and the debate during the hearing, that the medical treatment to which the Athlete was subjected was not a surprise, but was rather a medical procedure that had been planned by the Athlete, who had selected the clinic, at which she had had appointments prior to the abortion. The operation was scheduled for 10 January 2020 and the Athlete even stated, at first instance, that she had not made a note of the date, because it would be a date that she would "*never forget*".

240. However, this is not the key issue where Tampering is concerned. The issue is not the truth, or otherwise, of the explanation provided, but is rather whether the falsification of the dates of the Medical Notes provided added support to the Athlete's explanation, i.e. did the changing of the dates, combined with the explanation provided, suffice, or not, in theory, to subvert the Doping Control Process?

241. In the Panel's opinion, the answer to this question is undoubtedly that it did. For, the Athlete's arguments all focus on a key event, i.e. the fact that she was subjected to a medical procedure on the afternoon of the previous day. To the extent that it was necessary to substantiate this claim, the alteration of the dates on the Medical Notes, was essential in order to prove to said fact.

242. The explanation given would therefore be considerably bolstered by the submission of a Medical Note, which confirmed the conduct of a medical procedure on 11 January 2020. However, had the Medical Notes been submitted with the original/true date of 10 January 2020, this would certainly have given rise to doubt on the part of the AIU, and they would probably have been rejected, given the conflict between the documents and the reasons given by the Athlete. It is therefore clear that the alteration of the dates was a course of action that was clearly capable of subverting the Doping Control Process, as it would very probably have had a major impact on the acceptance, or rejection, of the Athlete's explanation of the Missed Test.

243. In short, the alteration of the dates of the Medical Notes can not only be considered to be falsification of a document, under Rules 2.5 and 5.7.9 2021 WA ADR, but also clearly amounts to conduct that tends to/is capable of subverting the Doping Control Process, as it was intended to favour and give added support the explanation given by the Athlete.

(D.2.2) *Did the Athlete intend her conduct to subvert the Doping Control Process?*

244. Having established that the Athlete's conduct had the potential to subvert the Doping Control Process, it is necessary to consider the subjective aspects of the Athlete's act, particularly the Athlete's intentions. It is therefore necessary to evaluate the explanations given by the Athlete during the proceedings.

245. The Panel considers that the Athlete was not able to provide credible reasons for her lack of diligence in confirming the actual date of the abortion. At the outset, it is simply not possible to believe that the Athlete, when confronted with the AIU's second request, did not consider, or seek, in any way, to check, whether her "belief" that the abortion was performed on 10 January 2020, was mistaken.

246. It is noteworthy that the alteration of a Medical Note signed by a doctor did not only occur once. Instead, the alteration was done on three Medical Notes, the dates of which were altered on two separate occasions, i.e., on 13 February 2020 and 14 March 2020. The Panel is not prepared to accept that the Athlete saw no need to seek confirmation of the true date of the abortion, at least when she submitted the last two Medical Notes, either by contacting the Clinic (which she had to contact anyway, in order to request the documents), or by checking her emails, phone call records and SMS (given the fact that she stated, at the hearing, that the Clinic normally called her to warn her of appointments), or by some other method available to her.

247. The Panel also does not accept that the Athlete failed to do so because she did not trust either the Clinic, or the doctor that performed the abortion, as she continued to have appointments at the Clinic, with the same doctor, after the abortion, because of the complications that arose. Even if it is credible that the Athlete did not trust the Clinic completely, because of the said postoperative complications, it is incomprehensible that this would prevent her from confirming the real date of the procedure, by contacting the doctor, or by checking her medical records, which she had the opportunity to do, on various occasions.

248. The evidence of the Athlete and her husband was also contradictory. The Athlete states in her written statement: *"(...) I might have asked him [her husband] if he remembered which day it was (...)* [the abortion]". The Athlete's oral evidence was hesitant and inconsistent. Sometimes, she stated that she asked her husband what the date of the abortion was, while, at other times, she stated that she could not remember whether she asked him, or not. In his written evidence, the Athlete's husband says: *"(...) I do recall her asking me if I remembered what date it happened* [the abortion]". Both of them state, however, that they did not recall the exact day, because they wanted not to remember that day, because it was an emotional burden for both of them. In any event, the Panel considers that there is contradictory evidence regarding this matter, which, once again, indicates a certain lack of "memory" on the part of the Athlete; moreover, if her husband did not remember the exact date of the abortion, the mere fact that she asked him, does not release the Athlete from the duty to ascertain the correct date of the procedure, preferably by contacting the Clinic, before altering this detail in an official document.

249. This scenario advanced by the Athlete becomes even less credible in light of the Athlete's statement during the hearing before the WA Disciplinary Tribunal, and confirmed during the CAS hearing, that the date of the abortion was so important date that she would *"never forget"*, and that this was the reason why she did not make a written note of it.

250. The Athlete's statements regarding this matter were contradictory and did not prove that she really did not remember the date on which the abortion was performed. There is no doubt that Athlete's lack of care and diligence in not seeking to confirm the real date of the abortion by any means, and by relying solely on her memory, when any reasonable and diligent person placed in the Athlete's position, would, when confronted with "external warnings", certainly have sought, in some way, to confirm the real date of the procedure, instead of relying blindly on her memory. This is all the more important considering that she had already a Whereabouts failure and that an additional one would push her close to a bleeding edge.

251. The Athlete's lawyer also argued that the dates were altered because the Athlete was going through a very difficult period following the abortion, given the psychological consequences thereof, which not only caused the confusion regarding the dates, but also caused a general inability to make decisions, with the reasonableness required of her.

252. However, and as stated above, the burden to prove this argument lies with the Athlete. It is for her to prove that the entire list of dramatic events affected her to such an extent that she was unaware of the improper nature of her conduct when she falsified the clinic documents, without having confirmed the real date of the procedure. If that was indeed the case, the Panel accepts, in theory, that it could then be considered that the Athlete never intended to subvert the Doping Control Process.

253. However, the Athlete has not proven that this was the case. The Panel is perfectly cognisant of the psychological effects of abortion, as explained by the expert evidence. The effects of an abortion can be devastating, and it is well-known that abortion carries a major stigma with it, which cannot be underestimated. Despite this, it is necessary, in order to prove that a psychological condition has affected a person's judgment, to prove (i) the existence of the psychological condition alleged, and (ii) the causal nexus between the psychological condition and the person's conduct.

254. The Panel understands, particularly from the evidence of Dr. Michael Craig, that the psychological effects of an abortion and consequent complications vary greatly from person to person. Not all women react in the same way. Accordingly, it is not possible to reach a conclusion without considering the individual case.

255. It is clear, in this case, that the report of the specialist Dr. Moyaedi is not a personal and individualised evaluation of the Athlete, as the report is based solely on a short conversation with her, and fails to take a series of other factors in the Athlete's clinical history into consideration. Indeed, Dr. Moyaedi's report must be considered to be a more general and generic view, rather than an individual report, as the basis of the report is such that it does not permit the drawing of definite conclusions regarding the effects of the abortion on this specific Athlete.

256. The Athlete has therefore failed to establish that she was, when she altered the Medical Notes, in fact, suffering from a psychological alteration that caused her to falsify the said documents. It is also noted that one of the factors that caused the Athlete the most anguish and which, according to her, caused her to become depressed, was the fact that the Tokyo Olympic Games were postponed; however, this postponement was only decided and announced on 24 March 2020, many days after the Athlete altered and submitted the Second and the Third Medical Notes. It cannot therefore be argued that the postponement of the Games affected her decision.

257. The Panel also recognizes that the Athlete's explanation of the Missed Test must be considered to be to her advantage, even if the Missed Test had not resulted in the imposition of any penalty. However, the Athlete would have had every interest in explaining this situation, as she had already missed another test during the previous 12 months; i.e. this would be a second "strike" and

therefore one more missed test during that period would have rendered her liable to the imposition of a sanction, which would always be more severe, as it would be the Athlete's second ADRV.

258. For the reasons stated, it must therefore be concluded, to the "comfortable satisfaction" of the Panel, that the Athlete was not only not unaware of the date on which the abortion actually took place (10 January 2020), but also intentionally altered the Medical Notes with intent to subvert the Doping Control Process, and by doing so, sought to substantiate the explanation she had given to the AIU, in order to ensure that her said explanation would be accepted. The WA has therefore successfully discharged its burden of proof by arguments and the submission of evidence that prove the commission of a Tampering ADRV. The Athlete has failed to prove the facts on which her defence was based, i.e. she has not comfortably convinced the Panel that the psychological effects of the abortion had such an overwhelming effect on her that she was unable to comprehend the consequences of her acts, and is thus free of all liability in respect thereof.

(E) What Was the Athlete's Degree of Fault and What are the Appropriate Consequences?

259. The Panel having found that a Tampering ADRV has been committed, via violation of Rules 2.5 and 5.9.7 2021 WA ADR, the fixing of the appropriate penalty necessarily and above all involves consideration of what the punishment for this ADRV would be, on a first offence basis. This is because a 1-year period of ineligibility was previously imposed on the Athlete for a Whereabouts Failure, so that the confirmation of this ADRV will mean the commission of a second violation of anti-doping rules, to which the special framework applicable to multiple violations, in WADC 2021 WA ADR, will apply.

260. Only once this "punishment" has been identified will it be possible to apply the provisions regarding multiple violations (i.e. Rule 10.9.1 2021 WA ADR) and to fix the definitive penalty.

(E.1) *The appropriate sanction for the Tampering ADRV as a first offence*

261. Firstly, the provisions of Rule 10.3.1 ADR regarding the Period of Ineligibility applicable to violations of Rules 2.3 or 2.5 ADR must be considered:

> *"10.3.1* ***For violations of Rule 2.3 or Rule 2.5, the period of Ineligibility will be four (4) years except****: (i) in the case of failing to submit to Sample collection, if the Athlete can establish that the commission of the anti-doping rule violation was not intentional, the period of Ineligibility will be two (2) years; (ii)* ***in all other cases, if the Athlete or other Person can establish exceptional circumstances that justify a reduction of the period of Ineligibility, the period of Ineligibility will be in a range from two (2) years to four (4) years depending on the Athlete's or other Person's degree of Fault****; or (iii) in a case involving a Protected Person or Recreational Athlete, the period of Ineligibility will be in a range between a maximum of two (2) years and, at a minimum, a reprimand and no period of Ineligibility, depending on the Protected Person or Recreational Athlete's degree of Fault."*

(Emphasis added by the Panel)

262. From this, it follows that the correct penalty is, in principle, a 4-year Period of Ineligibility. Despite this, the rule offers the possibility, in Tampering cases, that the penalty applicable to an

athlete, or other person, can be reduced in appropriate "exceptional circumstances". In that case, the penalty can vary from a minimum period of ineligibility of 2 years to a maximum of 4 years, according to the degree of fault of the athlete in question.

263. The first step is therefore to establish the existence, or non-existence, of "exceptional circumstances", in this case. There is little or no case law regarding violations of Rule 2.5 2021 WA ADR, and the possibility created by Rule 10.3.1 2021 WA ADR.

264. 2021 WA ADR and the WADC also contain no guidance regarding the specific meaning of this term, which is not defined in Rule 10.3.1 2021 WA ADR. However, the rules provide some examples of what can be considered to be "exceptional circumstances", in the context of other rules:

> *"[Comment to Rule 10.5: (...) They will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, they were sabotaged by a competitor."*
>
> *"12.4 If the decision of the Disciplinary Tribunal is that a violation of Rule 12 has been committed, save in exceptional circumstances (for example, where the Athlete or other Person is a Minor) (...)"*
>
> *"12.6 If the decision of CAS is that a violation of Rule 12 has been committed, save in exceptional circumstances (for example, where the Athlete or other Person is a Protected Person)"*

265. According to the Merriam-Webster dictionary, the word "exceptional" can have the following meanings:

"*1: <u>forming an exception: RARE</u>*

For example: an exceptional number of rainy days

2: better than average: SUPERIOR

For example: exceptional skill

3: <u>deviating from the norm: such as</u>

a: having above or below average intelligence

b: physically disabled"

(Emphasis Added by the Panel)

266. It appears therefore that the expression "exceptional circumstances" must be interpreted with the greatest possible care, so as only to include very unusual or abnormal situations. The interpretation of this expression must therefore be restrictive.

267. In cases such as this, the existence of exceptional circumstances requires a good dose of reflection regarding the circumstances and background of the Tampering that occurred. Essentially, the aim is to ascertain whether the conduct at issue does, or does not, fall within a range of events that are

so clearly beyond the bounds of "normal" or "foreseeable" conduct, that the imposition of a Period of Ineligibility of 2 to 4 years is justified (even if it is subsequently concluded, following specific analysis of the case, that the degree of fault of the offender, is not such as to permit any reduction).

268. In the Panel's opinion, and notwithstanding the fact that there is no doubt that the Athlete has failed to prove that she did not intend to subvert the Doping Control Process, it can be concluded that her conduct betrays a certain level of psychological disturbance, which does not, however, alter the seriousness of her acts and the fact that she committed an ADRV.

269. An Athlete, who competes at the highest level worldwide and is an Olympic medallist is required to conduct herself with great diligence in order to avoid the commission of ADRVs. Nevertheless, only the deterioration of her psychological/mental state can explain her conduct, which appears to have been both strange and incautious.

270. The erratic falsification by the Athlete of the Medical Notes, and her failure to seek to confirm the same, evinces a blatant lack of diligence, which is completely abnormal for any athlete at this competitive level, and cannot be explained solely in terms of her desire to explain the Missed Test and to subvert the Doping Control Process. As demonstrated in the report of the specialist Dr. Moyaedi, albeit in general terms, an abortion can cause a series of mental and psychological debilities that can distort a person's judgment.

271. Moreover, the fact that the Athlete failed, on receipt of her Medical File, to immediately realise that her belief regarding the real date of the abortion was mistaken and to inform the AIU accordingly, can be viewed in two different ways: firstly, as further proof of the Athlete's blatant lack of diligence; and secondly, by considering that the fact that the Athlete did not falsify the entire Medical File she sent to the AIU, which was therefore inconsistent with the alterations she had previously made, shows that she had, at least to a certain extent, "abandoned" her previous intention to perpetuate the falsification of the Medical Notes submitted. This course of conduct, which was inconsistent with her initial course of conduct, is a convincing indication that the Athlete was not making decisions in a "natural" way, and that it is very probable that her psychological state was affected to a certain extent.

272. The Panel's assessment that the Athlete could, at least to a certain extent, have been affected by psychological factors that impacted her actions, does not invalidate the condemnation that her actions merit. For, there is no indication that the Athlete was unaware that she was subverting the investigation of her Missed Test, which was also part of the Doping Control Process (and also amounted to investigation within the meaning of Doping Control, in Appendix 1 of 2021 WA ADR). However, notwithstanding the fact that the said psychological factors did not vitiate the Athlete's intent to subvert the Doping Control Process, they clearly amount to an abnormality, that was "not within the bounds of normal conduct".

273. Furthermore, it should not be overlooked that the Athlete's mental state was the consequence of a traumatic event, that is of particular difficulty in the life of any woman and always involves a high probability of *sequellae*. This is clearly a traumatic and abnormal situation, even in the "world of medical procedures", because of all the factors in play before and after an abortion.

274. The Panel therefore concludes that there are exceptional circumstances in this case that justify that the penalty imposed on the Athlete for the Tampering ADRV, when fixed on a first offence basis, varies according to her degree of fault, within a range of from two to four years of Ineligibility, in accordance with Rule 10.3.1 (ii) 2021 WA ADR.

275. The next step is to determine the degree of the Athlete's fault and the extent to which it permits the reduction of the penalty that would be imposed if this was the Athlete's first ADRV. Fault is defined in the ADR, as follows:

> "***Fault***: *Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete's or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Protected Person, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in a career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Rule 10.6.1 or 10.6.2.*
>
> *[Comment: The criteria for assessing an Athlete's degree of fault are the same under all Rules where fault is to be considered. However, under Rule 10.6.2, no reduction of sanction is appropriate unless, when the degree of fault is assessed, the conclusion is that No Significant Fault or Negligence on the part of the Athlete or other Person was involved.]"*

276. The case CAS 2013/A/3335 establishes the existence of three degrees of fault:

> *"69. The breadth of sanction is from 0 – 24 months. As Article 10.4 says, the decisive criterion based on which the period of ineligibility shall be determined within the applicable range of sanctions is fault. The Panel recognises the following degrees of fault:*
>
> *a. Significant degree of or considerable fault.*
>
> *b. Normal degree of fault.*
>
> *c. Light degree of fault."*

277. The following ranking can be established, as the penalty must be fixed within a range of 4 to 2 years:

a) Significant degree of fault – 4 years **to** 3 years and 4 months;

b) Normal degree of fault – 3 years and 4 months **to** 2 years and 8 months;

c) Light degree of fault – 2 years and 8 months **to** 2 years;

278. Moreover, the analysis of the degree of fault must comply with the formula provided in the said CAS case law:

> *"71. In order to determine into which category of fault a particular case might fall, it is helpful to consider **both the objective and the subjective level of fault**. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities.*
>
> *72. The Panel suggests that the objective element should be foremost in determining into which of the three relevant categories a particular case falls.*
>
> *73. The subjective element can then be used to move a particular athlete up or down within that category.*
>
> *74. Of course, **in exceptional cases**, it may be that the subjective elements are so significant that they move a particular athlete not only to the extremity of a particular category, but also into a different category altogether. That would be the exception to the rule, however."*

279. Therefore, and in accordance with the CAS case law, the Panel will determine the Athlete's degree of fault on the basis of objective and subjective criteria.

(E.1.1) *The objective analysis of the Athlete's degree of fault*

280. From an objective point of view, the Panel's duty can be summarised as the duty to determine the extent of the fault of a normal person, when placed in the same position as the Athlete, and particularly to evaluate the minimum level of diligence and care that would be required of such a person.

281. There can be little doubt, so far as the objective aspects are concerned, that any normal person, when placed in the Athlete's position, should avoid alteration of the date of official documents that contain the signature of a doctor.

282. The falsification of documents via the alteration of the date thereof, cannot be justified by the argument that there was a "genuine memory lapse" on the part of the Athlete, regarding the actual day on which a medical procedure took place. The invocation of this explanation is unsustainable when three documents were tampered with, and the Athlete was aware that the correct date of the said medical procedure could be checked (by contacting the clinic, from telephone records, messages, or by other reliable means). Matters become even more incomprehensible, when the Athlete herself states that she made no attempt to establish the date on which the medical procedure took place and that she does not recall whether she asked her husband, who was with her that day and during the days following the procedure.

283. It is therefore not possible to reduce the Athlete's degree of fault from the first level, as she acted, in objective terms, with a "significant degree of fault".

(E.1.2) *The subjective analysis of the Athlete's degree of fault*

284. Nevertheless, and taking the Athlete's specific situation into consideration, the Panel finds that there are various aspects that strongly indicate that her mental faculties were negatively affected.

285. The conclusions detailed in paragraphs 268 to 274 regarding the Athlete's psychological impairment are deemed to be reproduced here.

286. The Panel further concludes, notwithstanding the fact that it is unable to conclude that the Athlete had no intent to subvert the Doping Control Process, particularly because of her extreme lack of care, that it is nevertheless convinced that the traumatic experience through which the Athlete passed must be taken into consideration as a factor that shadowed her judgment, to a certain extent.

287. Moreover, the Panel has already concluded that there are exceptional circumstances in this case, because of the nature of the medical procedure to which the Athlete was subjected and the risk and psychological disturbance that the said procedure involves.

288. The Panel accordingly also considers that the said exceptional circumstances are closely linked to the subjective aspects of the case, and that it is appropriate, because of the said aspects, to reduce the Athlete's degree of fault from a "significant degree of fault" to a "normal degree of fault".

289. The Panel also considers, given the reduced degree of fault now applied to the Athlete, that it is also appropriate that the reduction of the applicable penalty should not exceed a 1-year and therefore fixes the penalty to be imposed on the Athlete, on a first offence basis, for the commission of this Tampering ADRV, as a 3-year period of ineligibility.

(E.2) *The multiple violations provisions and the appropriate sanction*

290. We note that, in this case, the Athlete has a previous ADRV recorded against her, i.e. a Whereabouts Failure that occurred in 2017 and led to the imposition of a 1-year ineligibility period.

291. The provisions of the 2021 WA ADR regarding this type of case, i.e. Rule 10.9.1 (a) (ii), which provide as follows, are therefore applicable:

"***10.9 Multiple Violations***

10.9.1 *Second or third anti-doping rule violation:*

(a) For an Athlete or other Person's second anti-doping rule violation, the period of Ineligibility will be the greater of:

(i) a six-month period of Ineligibility; or

(ii) a period of Ineligibility in the range between:

(aa) the sum of the period of Ineligibility imposed for the first anti-doping rule violation plus the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation; and

(bb) twice the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation.

The period of Ineligibility within this range will be determined ***based on the entirety of the circumstances*** *and* ***the Athlete or other Person's degree of Fault with respect to the second violation****.*"

(Emphasis Added by the Panel)

292. The Panel has already decided that the appropriate penalty for the Tampering ADRV committed by the Athlete, on a first offence basis, would be a 3-year Ineligibility period. Accordingly, and as the minimum level of the penalty to be imposed is the sum total of the period imposed for the Athlete's first ADRV (1 year) and the period of ineligibility that would be imposed on the Athlete for the second ADRV, on a first offence basis (3 years), the minimum period of Ineligibility that can be imposed is 4 years.

293. The maximum limit is twice the period of Ineligibility that would be imposed on the Athlete for the second ADRV, on a first offence basis (3 years), i.e. 6 years.

294. It follows therefore, according to Rule 10.9.1 (a) (ii) of the 2021 WA ADR, that the appropriate penalty will be a period of Ineligibility of from 4 to 6 years. The specific penalty applicable must be fixed within this range, by reference to all the circumstances and the Athlete's degree of fault with regard to the second offence.

295. For this reason, and according to the formula in 2021 WA ADR, and having already considered that the Athlete's degree of fault, taking all the circumstances of the case into consideration, is such that her penalty can be reduced by one year, the Panel confirms the said conclusion, which shall be applied in the final penalty.

296. The Panel therefore considers that the application of the rules to this case requires the imposition, on the Athlete, of a period of ineligibility of 5 years, for this ADRV, and therefore upholds the decision of the WA Disciplinary Tribunal.

(E.3) *The potential autonomous application of the Principle of Proportionality*

297. The Athlete also raised the issue of the principle of proportionality, arguing that any sanction that would be determined under the 2021 WA ADR Rules would have to be balanced against the application of this principle and the consequent reduction of the sanction.

298. The previous version of the WADA Code (2015) has been consistently considered by CAS jurisprudence to already having proportionality "built in" its mechanisms. In fact, the Panel in CAS 2018/A/5546 accurately captured this:

> *"86. Additionally, the CAS jurisprudence since the coming into effect of WADC 2015 is clearly hostile to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for by the WADC (and there is only one example of its being applied under the previous version of the WADC). In CAS 2016/A/4534, when addressing the issue of proportionality, the Panel stated: "The WADC 2015 was the product of wide consultation and represented the best consensus of sporting authorities as to what was needed to achieve as far as possible the desired end. It sought itself to fashion in a detailed and sophisticated way a proportionate response in pursuit of a legitimate aim" (para. 51).*
>
> *87. In CAS 2017/A/5015 & CAS 2017/A/5110, the CAS Panel, with a further reference to CAS 2016/A/4643, confirmed the well-established perception that the WADC "has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been built into its assessment of length of sanction" (emphasis added, para. 227) as was vouched for by an opinion of a previous President of the European Court of Human Rights there referred to see https://www.wada-ama.org/en/resources/legal/legal-opinion-on-the-draft-2015-worldanti-doping-code."*

299. While CAS 2006/A/1025 appears to open the door to consider the application of the principle of proportionality autonomously, this Panel notes that such jurisprudence not only relates to an older version of the WADC but the Panel also notes that cases where this argument is valid are rare:

> *"92. In the circumstances of the present case, the fact that it is the second offence does not, in the Panel's view, require the imposition of a sanction that would have the effect of bringing Mr Puerta's career to an end. The Panel's view in this regard is fortified when it considers the circumstances of the first offence by Mr Puerta (albeit of the 2003 ATP Anti-Doping Program rather than the WADC) and the Award of a very experienced CAS arbitrator, Professor Richard McLaren, in that case. Whether taken individually or cumulatively, **the degree of fault or blame (or negligence) on the part of Mr Puerta has been very small**. As the Panel has stated elsewhere in this Award, it is satisfied that Mr Puerta is not a cheat, and that the fact that he has been found to have been in breach of anti-doping regulations **is more the result of bad luck than of any fault or negligence on his part.***
>
> *93. But what is a CAS Panel to do in such a case? In the Panel's view, the answer is clear, albeit not without problems and difficulties. Any sanction must be just and proportionate. If it is not, the sanction may be challenged. **The Panel has concluded, therefore, that in those very rare cases in which Articles 10.5.1 and 10.5.2 of the WADC do not provide a just and proportionate sanction, i.e., when there is a gap or lacuna in the WADC, that gap or lacuna must be filled by the Panel.** That gap or lacuna, which the Panel very much hopes will be filled when the WADC is revised in the light of experience in 2007, is to be filled by the Panel applying the overarching principle of justice and proportionality on which all systems of law, and the WADC itself, is based.*

(...)

95. __The circumstances in which a tribunal might find that a gap or lacuna exists in the WADC in relation to sanctions for breach of its provisions will arise only very rarely__.(...)

96. (...) Indeed, the Panel repeats its view that __in all but the very rarest of cases the sanction stipulated by the WADC is just and proportionate__. There are unlikely to be many cases in which, as in the present case, the combination of circumstances of the two offences convinces the Panel that the WADC does not produce a just and proportionate result."

(Emphasis Added by the Panel)

300. In light of the above, it is clear that the principle of proportionality may be applied if the WADC does not provide a just and proportionate sanction or a *lacuna* or gap is found. Despite this, the jurisprudence of CAS 2006/A/1025 is also clear in establishing that such cases are "very rare" and that its decision was based on its assessment that the athlete had a very small degree of fault and that his breach of antidoping regulations was more a result of "bad luck" than of any fault or negligence. Clearly, this is not the case of the Athlete and it certainly does not resemble the findings of this Panel.

301. Even though this Panel considers that the sanction to be imposed on the Athlete is indeed a harsh sanction, which may end her career, there is no reason to consider that this is a disproportionate or unfair decision, especially given the fact that she falsified three official documents on two separate occasions. There are simply no similarities with the case CAS 2006/A/1025 above referenced which would allow this Panel to consider any proportionality arguments to further reduce the 5-year period of ineligibility to be imposed.

302. On the contrary, not only does this Panel consider that proportionality has already been considered and is "built in" the WADC / WA ADR, but it also adheres to the following reasoning from CAS 2018/A/5546:

"89. The Panel is conscious of the much quoted legal adage "Hard cases make bad law", and the Panel cannot be tempted to breach the boundaries of the WADC (or FIFA ADR) because their application in a particular case may bear harshly on a particular individual. Legal certainty is an important principle and to depart from the WADC would be destructive of it and involve endless debate as to when in future such departure would be warranted. __A trickle could thus become a torrent; and the exceptional mutate into the norm.__

90. It is in the Panel's view better, indeed necessary, for it to adhere to the WADC. If change is required, that is for a legislative body in the iterative process of review of the WADC, not an adjudicative body which has to apply the lex lata, and not some version of the lex ferenda."

(Emphasis Added by the Panel)

303. In light of the above, the 5-year period of Ineligibility sanction to be imposed on the Athlete may not be further reduced under the principle of proportionality, since the elements of such principle

have already been dully considered by the Panel and are a part of the 2021 WADC; when applying these regulations, only the most extreme and rare cases, where sanctions are clearly disproportionate and unfair, allow for an autonomous consideration of the principle of proportionality.

(E.4) *The start date of the sanction*

304. Pursuant to Rule 10.13 2021 WA ADR, by default all periods of ineligibility should start on the date of the decision of the hearing panel providing for Ineligibility. Despite this, when delays which are not attributable to the Athlete or other Person occur the period of ineligibility may start prior to that moment.

305. In this case, the Panel finds that there have been substantial delays in the hearing process and other aspects of Doping Control. It was clearly demonstrated during the procedures that these delays were clearly not attributable to the Athlete and, as such, Rule 10.13.1 2021 WA ADR may apply:

"Where there have been substantial delays in the hearing process or other aspects of Doping Control, and the Athlete or other Person can establish that such delays are not attributable to him/her, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, will be Disqualified."

306. In light of the above, the Panel considers appropriate that the 5-year Period of Ineligibility starts on 15 August 2020, the day after the AIU Interview (after which no additional evidence or facts which could justify the delay of the process were discovered).

(E.5) *Disqualification of results*

307. In accordance with Rule 10.10 2021 WA ADR:

"In addition to the automatic Disqualification of the results in the Competition that produced the positive Sample under Rule 9, all other competitive results obtained by the Athlete from the date a positive Sample was collected (whether In-Competition or Out-of-Competition) or other anti-doping rule violation occurred through the commencement of any Provisional Suspension or Ineligibility period, will, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, titles, points, prize money, and prizes."

308. The Panel finds that even though the Athlete did not, at any stage, use any prohibited substance, there are no substantial reasons not to disqualify her competitive results from prior to 15 August 2020, as the WA Disciplinary Tribunal decided.

309. As such, the Panel determines that all competitive results obtained by Ms. Brianna McNeal between 13 February 2020 and 14 August 2020 shall be disqualified with all resulting consequences including forfeiture of any medals, titles, points, prize money and prizes.

(F) Final Remarks / Conclusions

310. In this final section, the Panel wishes to summarize its reasoning.

311. After due consideration, the Panel arrived at the conclusion that the 2021 WA ADR are indeed more athlete-friendly, since the 2021 WA ADR offers more favorable terms to athletes with respect to the imposition of sanctions for violations of Tampering offences and considerably greater flexibility in connection with the consequences to be drawn from a finding of multiple anti-doping rule violations (which is very relevant to our case).

312. Following such reasoning, under which the *lex mitior* principle's application to the present case was confirmed, the Panel sought to describe exactly the requirements under which a Tampering ADRV may be established for the breach of Rules 2.5 and 5.7.9 2021 WA ADR.

313. The Panel then analyzed the conduct of the Athlete and the arguments of both Parties and considered that (i) WA managed to establish and discharge his burden of proof regarding the Tampering ADRV and that (ii) the Athlete did not manage to prove to the comfortable satisfaction of the Panel that she did not intend to subvert the doping control process.

314. Having established that the Athlete committed a Tampering ADRV, the Panel proceeded to determine the adequate sanction to be imposed on the Athlete, considering that this would be her second ADRV. It was determined that, according to Rules 10.3.1 and 10.9.1. (a) (ii) 2021 WA ADR, a 5-year period of Ineligibility would be the appropriate sanction.

315. Finally, the Panel sought to clarify whether the principle of proportionality could or could not provide, in the present case, a further reduction of the sanction to be imposed on the Athlete. The conclusion was, however, that proportionality had already been "factored in" the decision and the WADC and that an autonomous consideration of the principle of proportionality is only possible in very rare situations.

316. In taking the above-mentioned steps, the Panel took its time to go through all of the Parties' submissions and considered all of the arguments laid out in the hearing. The Athlete's oral statements were a crucial part of this proceedings, since they allowed the Panel to further analyze the totality of the elements surrounding the case, including her explanations and interpretation of the facts, as well as some contradictions in her statements. While the Athlete's husband did not take the stand as a witness, his written statement (the content of which the Parties' agreed to be already so complete that it justified not examining and cross-examining this witness during the hearing) was also duly considered and relevant for the Panel to reach its conclusions and provide its reasoning.

317. In addition, the expert reports and oral statements provided by Dr Moayedi and Dr Michael C. Craig were an important part of the proceedings, since they allowed the Panel to learn the full scope of the psychological and mental effects which an abortion may provoke on women, providing very relevant insight into how the Athlete's judgement could have been altered by such medical procedure.

318. In the end, a period of ineligibility of five years was determined as the appropriate sanction to be imposed on the Athlete, taking into account that this is her second ADRV. The Panel understands that such a sanction may end the Athlete's career prematurely but, in any case, this Panel is bound by the WADC /WA ADR and its mechanisms. The Athlete should have been more diligent and tried to verify the correct date. Furthermore, the Athlete could have rectified her decision many times and come forward with the true facts. The Panel notes that the Athlete never took the opportunity to step back from the attempt. Only when her attempt to get rid of the Whereabouts failure with her false declaration definitely failed, did she decide to come clean. Instead of turning around and correcting the mistake, she has gone further and further into a dead end in a kind of tunnel vision. However, the Panel is also sensitive to the psychological aspects of the case and understands that, at least to some degree, although not to an excusable one, she was personally affected and distracted by other circumstances.

319. Finally, the Panel must again recall that this case does not directly concern abortion. This is a mere case of Tampering, where an Athlete has falsified the dates of three official documents and submitted them to the AIU. While the abortion she undertook played a part on her reasoning, that element is not the main concern of this Panel but only a factor among others which influenced the Athlete's sane judgement, and which was duly weighted by the Panel.

IX. COSTS

320. Article R65.2 of the CAS Code provides the following:

321. "*Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of CAS are borne by CAS*" Article R655.3 of the CAS Code reads as follows:

> "*Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties..*"

322. Since the Appeal and Cross-Appeal are lodged against a decision of an exclusively disciplinary nature rendered by an international federation, no costs are payable to CAS by the Parties in addition to the Court Office fee of CHF 1,000 (one thousand Swiss Francs) paid by each Party, which is in any event retained by CAS.

323. As a general rule, the award shall grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with these arbitration proceedings. Considering the dismissed of the Appeal and that the main purpose of the Cross-Appeal was to increase the Athlete's period of ineligibility, request that has also been dismissed, as well as the conduct and

the financial resources of the Parties, the Panel finds it reasonable and fair that each Party should bear its own costs and expenses incurred in connection with these arbitration proceedings.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Ms Brianna McNeal on 21 May 2021 against the decision of the World Athletics Disciplinary Tribunal dated 21 April 2021 is dismissed.

2. The appeal filed by World Athletics on 17 June 2021 against the decision of the World Athletics Disciplinary Tribunal dated 21 April 2021 is partially upheld.

3. The decision of the World Athletics Disciplinary Tribunal dated 21 April 2021 is confirmed in full, with the following additional item:

   "All competitive results obtained by Ms. Brianna McNeal between 13 February 2020 and 14 August 2020 shall be disqualified with all resulting consequences including forfeiture of any medals, titles, points, prize money and prizes."

4. This Award is pronounced without costs, except for the CAS Court Office of CHF 1'000 (one thousand swiss francs) paid by Ms Brianna McNeal and World Athletics which is retained by the CAS.

5. Each Party shall bear its own legal and other costs incurred in connection with these arbitration proceedings.

6. All other motions or prayers for relief are dismissed.

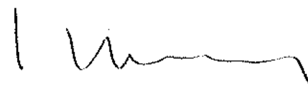
Lausanne, 9 June 2022

Operative part of this Award was issued on 2 July 2021

THE COURT OF ARBITRATION FOR SPORT

Rui Botica Santos
President of the Panel

Barbara Reeves
Arbitrator



Ulrich Hass
Arbitrator