SPORT RESOLUTIONS

SR/092/2020

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF WORLD ATHLETICS

Before:
the Hon. Robert Décary QC (Chair)
Thomas H. Murray
Joëlle Monlouis

BETWEEN:

WORLD ATHLETICS **Anti-Doping Organisation**

and

DEAJAH STEVENS **Respondent**

DECISION OF THE DISCIPLINARY TRIBUNAL

A. Introduction

1. This Tribunal has been appointed to adjudicate a charge brought against Ms Deajah Stevens in respect of an asserted Anti-Doping Rule Violation in connection with Whereabouts Failures within the meaning of Article 2.4 of the IAAF Anti-Doping Rules (effective 1 January 2019). ("the **2019 Rules**") The charge was set out in a Notice of Charge dated 30 March 2020.

2. The Claimant, World Athletics ("**WA**") (formerly the International Association of Athletics Federations – the "**IAAF**"), is the International Federation governing the sport of Athletics worldwide. It has its registered seat in Monaco. It is represented in these proceedings by the Athletics Integrity Unit ("**AIU**") which has delegated authority for results management and hearings on behalf of World Athletics pursuant to Article 1.2 of the 2019 Rules.

3. The Respondent, Ms. Deajah Stevens (the "**Athlete**") is a 25-year old sprinter from the United States of America. She specializes in the 100 and 200 meter events and has competed as a professional athlete since approximately 2015. She has reached the No. 7 rank in the world in her signature event, the 200 meters. She represented the United States in the 2016 Olympics, where she placed 7th in the 200 meters. She has been in the Registered Testing Pool since approximately 2015 and has been subject to doping control for over 5 years. She has been extensively tested throughout her career and has never had a positive test.

4. Pursuant to the Notice of Charge, the Athlete was charged by the AIU under Article 2.4 of the 2019 Rules in connection with Whereabouts Failures, specifically for three missed tests dated 21 February 2019, 18 August 2019 and 25 November 2019. The Notice of Charge set out the detailed facts and included the supporting documentation and evidence upon which the AIU intended to rely; it also set out the Consequences that the AIU was seeking, particularly a period of Ineligibility of two years pursuant to Article 10.3.2 of the Rules, beginning on the date that the decision imposing Consequences is issued in this matter.

5. The Athlete was provisionally suspended from the date of the Notice of Charge, i.e. 30 March 2020 in accordance with Article 7.10.4 of the 2019 Rules.

6. On 9 April 2020, by e-mail from her appointed attorney, the Athlete denied the violation and requested a hearing before the Disciplinary Tribunal. By further e-mail on the same date, the attorney set out the Athlete's summary reasoning for denying the charge.

7. The hearing was held on 25 June 2020 via video-conference. Participants were spread into four time-zones. Counsel for the AIU (Mr. Ross Wenzel) was in Lausanne. The Athlete and her counsel, Mr. Howard Jacobs, were in Los Angeles. The members of the Panel were, respectively, in Gatineau, Qc (Canada), Paris and Brewster, Massachusetts (USA). In addition to the Athlete herself, eight witnesses testified. The Parties did not challenge in any way the procedure adopted by the Panel during the hearing. The hearing lasted from 6:00am (Los Angeles time) to 8:30pm (Paris time), with two short breaks of five and ten minutes respectively.

8. The Panel confirms that it has carefully considered and taken into account in its award all of the submissions, evidence, arguments and cases presented by the parties, even if they have not been specifically summarized or referred to in the present arbitral award.

B. Applicable Rules and Jurisdiction

9. No issues were raised by the parties with respect to the constitution of the panel, the jurisdiction of the Disciplinary Tribunal, the authority of the AIU nor the application of the 2019 Rules to this matter. The AIU's authority rests on Articles 1.2 and 7.2 of the 2019 Rules. The Athlete was at all material times a member of USA Track and Field, the World Athletics Member Federation in the USA; she is an Athlete within the meaning of Article 1.6 and an International-Level Athlete within the meaning of Article 1.8. The Tribunal's jurisdiction is clearly set out in Article 8.1(a). Finally, pursuant to Article 5.4.1, all testing done in 2019 was to be conducted in accordance with the 2019 IAAF Rules and Regulations.

C. Issues before the Tribunal

10. Briefly and simply put, in the circumstances of this case, it is alleged by the AIU that the Athlete missed three tests within a twelve-months period, a failure which constitutes an Anti-Doping Rule Violation, called a Whereabouts Failure, under Article 2.4 of the 2019 Rules. For a Missed Testing violation to be found, the AIU has first to establish (inter alia) that the Doping Control Officer ("**DCO**") who was to conduct the tests, did what was reasonable in the circumstances to try to locate the athlete, short of giving the Athlete any advance notice of the test. Should the AIU succeed on this first point (and on others which are not in issue), the Athlete is presumed to have been negligent and can only rebut this presumption by establishing that no negligent behaviour on her part caused or contributed to her failure. Should the Athlete fail to rebut the presumption, the violation is deemed to have been proven and the Athlete can seek a reduction of up to one year of the prescribed period of Ineligibility of two-years on the basis of her degree of Fault. In any event, the Athlete can ask that the beginning of the period of Ineligibility be backdated where there have been substantial delays not attributable to her in the hearing process.

11. Four issues have been raised before this Tribunal: 1) whether the attempts made by the DCO to reach the Athlete were reasonable attempts, as required by Paragraph 4.3(c) of Appendix A to

the 2019 Regulations and Article 9.2.1 of the Guidelines; 2) whether there was negligent behaviour on the part of the Athlete that caused or contributed to the Missed Tests (Paragraph 4.3(e) of Appendix A); 3) whether the degree of Fault of the Athlete is such as to entitle her to a reduction of the two-years period of Ineligibility (Article 10.3.2 of the 2019 Rules); and 4) whether the start of the period of Ineligibility should be backdated pursuant to Article 10.10(c) of the 2019 Rules.

12. An important factor for the Tribunal's consideration is the allegation by the Athlete that the harassment of which she was allegedly a victim contributed to exclude or diminish her alleged negligence or Fault.

D. Relevant provisions

13. The provisions relevant to these proceedings are found, essentially, a) in Articles 2.4, 10.3.2 and 10.10 (c) of the 2019 Rules, b) in Appendix A to the 2019 Regulations, which reproduces the Whereabouts requirements set out in Annex I of the *International Standard for Testing and Investigations 2019 (*"**ISTI**") and c) in WADA's *Guidelines for Implementing an Effective Testing Program, October 2014.* ("**GUIDELINES**")

14. The Panel notes some variations between the text of Appendix A of the 2019 Regulations and the text of ISTI, notably the absence, in Appendix A, of the Comments made in ISTI. Article 1.11 of the Regulations determines that Appendices, such as Appendix A, "shall all form an integral part of these Anti-Doping Regulations." It is not clear whether the incorporation of the ISTI in the 2019 Regulations includes the incorporation of the Comments. The Panel has reached the view, considering the interconnection between the Rules, the Regulations and the Standard and also the wording of Article 2.4 of the Rules which refers to Whereabouts Failures "as defined in the International Standard for Testing and Investigation", that the ISTI Comments can be referred to in interpreting Appendix A. The Panel notes that the World Anti-Doping Code, at Article 24.2, states that "the comments annotating various provisions of the Code shall be used to interpret the Code" and that Article 20.2 of the Rules states that "the comments annotating various provisions of the Code and the International Standards shall be used to interpret these Anti-Doping Rules."

a) Articles 2.4, 10.3.2 and 10.10 (c) of the 2019 Rules

15. The 2019 Rules define the "Whereabouts Failures" anti-doping violation as follows:

> Article 2.4: **Whereabouts Failures**
>
> Any combination of three Missed Tests and/or Filing Failures. as defined in the International Standard for Testing and Investigations, within a twelve-month period by an Athlete in a Registered Testing Pool.

16. The Ineligibility Consequences of a violation under Article 2.4 that is the Athlete's first anti-doping offence are set out in Article 10.3.2:

> Article 10.3.2
>
> The period of Ineligibility imposed shall be two years, subject to reduction down to a minimum of one year, depending on the Athlete's degree of Fault. The flexibility between two years and one year of Ineligibility in this Article is not available to Athletes where a pattern of last-minute whereabouts changes or other conduct raises a serious suspicion that the Athlete was trying to avoid being available for Testing.

17. Pursuant to Article 10.10(c), which deals with the starting point of the period of Ineligibility:

> Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other person, the period of Ineligibility may be deemed to have started at an earlier date, commencing as early as the date the Anti-Doping Rule Violation last occurred (...)

18. "Fault" is defined as follows in the Definitions of the 2019 Rules and in Appendix 1 of the *World Anti-Doping Code*:

> "**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...degree of Fault include, for example, the Athlete's...experience...,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. (...)

b) Appendix A to the 2019 Regulations

19. The International Standard for Testing and Investigations annexed as Appendix A to the Regulations[1] sets out the general details of an athlete's individual whereabouts responsibilities.

20. Para. 1.1 of Appendix A:

> **a)** to make quarterly Whereabouts Filings that provide accurate and complete information about the Athlete's whereabouts during the forthcoming quarter, including identifying where he/she will be living, training and competing during that quarter, and to update those Whereabouts Filings where necessary, so that he/she can be located for Testing during that quarter at the times and locations specified in the relevant Whereabouts Filing, as specified in Article 1.3. A failure to do so may be declared a Filing Failure; and
>
> **b)** to specify in his/her Whereabouts Filings, for each day of the forthcoming quarter, one specific 60-minute time slot where he/she will be available at a specific location for Testing...However, if the Athlete is not available for Testing at such location during the 60-minute time slot specified for that day in his/her Whereabouts Filing, that failure may be declared a Missed Test…

21. Para. 3.1 of Appendix A describes the minimum information an athlete must include in his/her Whereabouts Filing:

> **a)** a complete mailing address...
>
> **b)** details of any impairment of the *Athlete* that may affect the procedure to be followed in conducting a Sample Collection Session;
>
> **c)** specific confirmation of the *Athlete*'s consent to the sharing of his/her Whereabouts Filing with other Anti-Doping Organizations that have Testing Authority over him/her;
>
> **d)** for each day during the following quarter, the full address of the place where the *Athlete* will be staying overnight (e.g. home, temporary lodgings, hotel, etc);
>
> **e)** ...the name and address of each location where the *Athlete* will train...

22. Para. 3.2 requires the inclusion in the Whereabouts Filing of the following information:

> For each day during the following quarter, one specific 60-minute time slot between 5 a.m. and 11 p.m. each day where the *Athlete* will be available and accessible for *Testing* at a specific location.

[1] There are some slight differences in the texts of Annex A of the Regulations and the ISTI, but on the whole, the content is substantially the same. Accordingly, references to one or the other are made interchangeably throughout this decision.

(The Comment on that paragraph in ISTI states that *"An Athlete is entitled to specify a 60-minute time slot during which he/she will be at a hotel, apartment building, gated community or other location where access to the Athlete is obtained via a front desk, or doorman, or security guard.)*

23. Para. 3.4 of Appendix A sets out that:

> It is the *Athlete*'s responsibility to ensure that he/she provides all of the information required in a Whereabouts Filing accurately and in sufficient detail to enable any *Anti-Doping Organization* wishing to do so to locate the *Athlete* for *Testing* on any given day in the quarter at the times and locations specified by the *Athlete* for that day in the Whereabouts Filing, including but not limited to during the 60-minute time slot specified for that day in the Whereabouts Filing. More specifically, the *Athlete* must provide sufficient information to enable the DCO to find the location, to gain access to the location, and to find the *Athlete* at the location...

24. Para. 3.5 of Appendix A provides that:

> Where a change in circumstances means that the information in a Whereabouts Filing is no longer accurate or complete as required by paragraph 3.4 above, the *Athlete* **must** file an update so that the information on file is again accurate and complete. In particular, the *Athlete* **must** always update his/her Whereabouts Filing to reflect any change in any day in the quarter in question (a) in the time or location of the 60-minute time slot...; and/or (b) in the place where he is staying overnight. The *Athlete* **must** file the update as soon as possible after the circumstances change, and in any event prior to the 60-minute time slot specified in his filing for the day in question. A failure to do so may be pursued as a Filing Failure... (our emphasis)

25. Para. 4.1 of Appendix A requires an Athlete in a Registered Testing Pool:

> ...to specifically be present and available for *Testing* on any given day in the relevant quarter during the 60-minute time slot specified for that day in his Whereabouts Filing, at the location that the *Athlete* has specified for that time slot in such filing. A *Failure to Comply* with this requirement shall be pursued as an apparent *Missed Test*...
>
> *(Comment to 4.1: For Testing to be effective in deterring and detecting cheating, it should be as unpredictable as possible. Therefore, the intent behind the 60-minute time slot is not to limit Testing to that period, or to create a 'default' period for Testing, but rather a) to make it very clear when an unsuccessful attempt to test an Athlete will count as a Missed Test; b) to guarantee that the Athlete can be found, and a Sample can be collected, at least once per day...)*

26. Para.4.2 of Appendix A states that:

> To ensure fairness to the *Athlete*, where an unsuccessful attempt has been made to test an *Athlete* during one of the 60-minute time slots specified in his/her Whereabouts Filing, any subsequent unsuccessful attempt to test that *Athlete*...may only be counted as a Missed Test... against the *Athlete* if that subsequent attempt takes place after the *Athlete* has received notice...of the original unsuccessful attempt.
>
> *(Comment to 4.2: The requirement is to give the Athlete notice of one Missed Test before a subsequent Missed Test may be pursued against him/her. But that is all that is required. In particular, it is not necessary to complete the results management process with respect to the first Missed Test before pursuing a second Missed Test against the Athlete.)*

27. Para. 4.3 of Appendix A states that:

> An *Athlete* may only be declared to have committed a Missed Test where the Results Management Authority can establish each of the following:
>
> a) that when the *Athlete* was given notice that he/she had been designated for inclusion in a Registered Testing Pool, he/she was advised that he/she would be liable for a Missed Test if he/she was unavailable for testing during the 60-minute time slot specified in his/her Whereabouts Filing at the location specified for that time slot; (not in issue in these proceedings)
>
> b) that a DCO attempted to test the *Athlete* on a given day in the quarter, during the 60-minute time slot specified in the *Athlete*'s Whereabouts Filing for that day, by visiting the location specified for that time slot; (not in issue in these proceedings)
>
> c) that during the specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e. given the nature of the specific location) to try to locate the *Athlete*, short of giving the *Athlete* any advance notice of the test;
>
> *(Comment on paragraph (c):*
>
> *Once the DCO has arrived at the location specified for the 60-minute time slot, if the Athlete cannot be located immediately then the DCO should remain at that location for whatever time is left of the 60-minute time slot and during that remaining time he/she should do what is reasonable in the circumstances to try to locate the Athlete...*
>
> *Where an Athlete has not been located despite the DCO's reasonable efforts, and there are only five minutes left within the 60-minute time slot, then as a last resort the DCO may (but*

does not have to) telephone the Athlete (assuming he/she has provided his/her telephone number in his/her Whereabouts Filing) to see if he/she is at the specific location...

Because the making of a telephone call is discretionary rather than mandatory, and is left entirely to the absolute discretion of the Sample Collection Authority, proof that a telephone call was made is not a requisite element of a Missed Test, and the lack of a telephone call does not give the Athlete a defence to the assertion of a Missed Test.)

d) that Article 4.2 does not apply or (if it applies) was complied with; (not in issue in these proceedings); and

e) that the *Athlete*'s failure to be available for testing at the specified location during the specified 60-minute time slot was at least negligent. For these purposes, the *Athlete* will be presumed to have been negligent upon proof of the matters set out at subparagraphs (a) to (d) above. That presumption may only be rebutted by the *Athlete* establishing that no negligent behaviour on his/her part caused or contributed to his failure (i) to be available for *Testing* at such location during such time slot; and (ii) to update his most recent Whereabouts Filing to give notice of a different location where he/she would instead be available for Testing during a specified 60-minute time slot on the relevant day.

c) WADA's Guidelines for Implementing an Effective Testing Program, October 2014

28. Art 1.1.1 **Introduction**

... As with all Guidelines under the *Code*, this document is subject to ongoing review and assessment to ensure it continues to reflect best practice moving forward**...**

29. Art. 1.2 **Scope**

The primary objective of these Guidelines is to ensure that each *ADO* has an anti-doping program in place that is as effective as resources permit, and that maximizes the probability of both detection and deterrence.

[ ]

Each section details related steps prescribed by the ISTI and provides best practice recommendations to equip *ADO*s to implement a *Testing* program that tests the **right athletes** for the **right substances** at the **right time**. (emphasis in the text)

30. Art.8.3.1 **What information must the Athlete provide?**

...The overriding principle is that the *Athlete* is responsible for making him/herself available for *Testing*. In particular, if the *Athlete* specifies a location for the 60-minute timeslot where he/she isn't easy to find and/or doesn't remain at that location for the full 60-minute timeslot, then he/she risks a Missed Test.

31. Art.8.3.4 **Updating Whereabouts Information**

Where a change in circumstances means that an *Athlete'*s current Whereabouts Filing is no longer accurate or complete, such that it will not enable an *ADO* to locate the *Athlete* for *Testing* on a given day in the relevant quarter, the *Athlete* must update the Whereabouts Filings so that the information on file is again accurate and complete, or else risk a Missed Test or other ADRV.

The *Athlete* should update his/her Whereabouts Filing once the whereabouts information provided in it becomes outdated. The *Athlete* shouldn't wait until the last minute to update his/her information, unless unavoidable.

32. Art.9.2.1 **Making a Reasonable Testing Attempt**

An unsuccessful attempt to test an *Athlete* will not amount to a Missed Test unless the *ADO* on whose behalf the test was attempted can demonstrate to the comfortable satisfaction of the hearing panel that (among other things) the DCO made a reasonable attempt to locate the *Athlete* for *Testing* during the 60-minute timeslot specified for the day in question in the *Athlete*'s Whereabouts Filing.

What constitutes a reasonable attempt to locate an *Athlete* for *Testing* during the 60-minute timeslot cannot be fixed in advance, as it will necessarily depend on the particular circumstances of the case in question, and in particular on the nature of the location chosen by the *Athlete* for that timeslot.

The only truly universal guideline is that the DCO should use his/her common sense. He/She should ask him/herself: “Given the nature of the location specified by the *Athlete*, what do I need to do to ensure that if the *Athlete* is present, he/she will know that a DCO is here to collect a *Sample* from him/her?”

In this context, the *DCO* should bear in mind the requirement to avoid insofar as possible giving the *Athlete* advance notice of *Testing* that might provide an opportunity for *Tampering* or evasion or other improper conduct.

In certain circumstances, a degree of advance notice may simply be unavoidable. For example, an *Athlete* may live or train at a location where access is controlled by security personnel who will not permit access to anyone without first speaking to the *Athlete* or (for example) a team official.

This in itself is neither improper nor suspicious, but the DCO should be especially vigilant in such cases of any other circumstances which may be suspicious (such as a long delay between the security guard contacting the *Athlete* or team official and the DCO being given access to the *Athlete*). In this case, the DCO should provide a full report of such suspicious circumstances and should consider requiring the *Athlete* to give a second *Sample.*

The DCO does not necessarily have to be present at the location specified for the 60-minute time-lot from the beginning of the sixty minutes specified in order for the attempt to be reasonable. However, once he/she arrives at the location the *DCO* should remain at that location for whatever time is left of the 60-minute timeslot, and the DCO should ensure that he/she allows sufficient time to make a reasonable attempt to locate the *Athlete* during that remaining time.

For example, if the location specified is a sports center, and the *Athlete* has said he/she will be in either the gym or the pool or the changing room, then the *Athlete* may need to check each of those possible places, and so it is likely that more time will be required to make a proper attempt than if the location specified is the *Athlete*'s house.

[Comment: The DCO should stay at the specified location for the remainder of the 60-minute timeslot even if he/she receives apparently reliable information that the Athlete will not be at the location during the 60-minute timeslot (e.g. because he/she is out of the country). This is to avoid any subsequent argument that the information received was in fact wrong and the Athlete turned up at the location after the DCO had left.]

If the specified location is the *Athlete'*s house or other place of residence, the DCO should ring any entry bell and knock on the door as soon as he/she arrives. If the *Athlete* does not answer, the DCO may telephone the *Athlete* to advise him/her of the attempt in the closing five minutes of the 60-minute period. Such a call is not mandatory however, nor should it be used to invite the *Athlete* for *Testing*, but rather to potentially further validate that the *Athlete* is not present.

[ ]

Preferably, the DCO should wait somewhere close by (e.g. in his/her car) in a place where he/she can observe the (main) entrance to the residence. He/she should then knock/ring again a short time later (e.g. 15 minutes), and should keep doing so periodically until the end of the 60 minutes. At that point, he/she should try one last time at the end of the 60 minutes before leaving the location and completing an Unsuccessful Attempt Report.

[ ]

Whatever the location specified, it may be appropriate for the DCO to speak to people he/she encounters during the attempt to see if they can assist in locating the *Athlete*. If so, the DCO should try to get the names and positions (e.g. neighbour, coach, receptionist) of the people with whom

he/she speaks, for recording (along with relevant details of the conversations) on the Unsuccessful Attempt Report. The DCO should not identify the purpose of his/her visit, unless necessary for safety or security reasons.

The DCO should note any circumstances he/she observes during his/her attempt to test the *Athlete* that could be relevant.

For example, if the attempt is made at the *Athlete*'s home, and no one answers the door, the DCO should note whether or not there are any lights on in the house, or if he/she notices any movement in the house. If there is a car in the driveway, the DCO might note the make/colour/licence plate number, and check whether the engine hood is warm, indicating that the car has been used recently. It is up to the DCO to gather such anti-doping intelligence as may be useful to the *ADO*. This information should be included in the Unsuccessful Attempt Report.

[ ]

If the DCO is unable to locate the *Athlete* during the 60-minute timeslot, he/she should complete and submit an Unsuccessful Attempt Form to the *ADO* that ordered the mission as soon as possible, and in any event no more than three working days after the attempt.

The DCO should provide a detailed account in the Unsuccessful Attempt Report of exactly what he/she did during the 60-minute timeslot to try to find the *Athlete*. For example, if the attempt was at the *Athlete*'s home, the DCO should note when and how many times he knocked on the door, where he/she waited in between attempts, etc.). The DCO should specify exactly where he/she went, for how long, what he/she did, who he/she spoke to about where the *Athlete* might be (including the names of the people involved, and what was said.

E. Interpretation, Burden and Standard of Proof and Presumptions

a) Interpretation

33. Articles 20.1 and 20.2 of the 2019 Rules set out the general principle of interpretation of the Rules:

> 20.1 [...]Aimed at enforcing anti-doping principles in a global and harmonized manner, they are distinct in nature from criminal and civil laws, and are not intended to be subject to or limited by any national requirements and legal standards applicable to criminal or civil proceedings. When reviewing the facts and the law of a given case, all courts, arbitral tribunals and other adjudicating bodies should be aware of and respect the distinct nature of these Anti-Doping Rules implementing the Code and

the fact that these rules represent the consensus of a broad spectrum of stakeholders around the world as to what is necessary to protect and ensure fair sport.

20.2 These Anti-Doping Rules shall be interpreted in a manner that is consistent with the Code. The Code shall be interpreted as an independent and autonomous text and not by reference to the existing laws or statutes of any Signatory or government. The comments annotating various provisions of the Code and the International Standards shall be used to interpret these Anti-Doping Rules.

b) Burdens, Standard of Proof, Presumptions

34. All matters that come before the Disciplinary Tribunal are subject to the general Burdens and Standards of Proof set out in Article 3.1 of the 2019 Rules:

> 3.1 Burdens and Standards of Proof
>
> The IAAF or other Anti-Doping Organisation shall have the burden of establishing that an Anti-Doping Rule Violation has been committed. The standard of proof shall be whether the IAAF has established the commission of the alleged Anti-Doping Rule Violation **to the comfortable satisfaction** of the hearing panel, bearing in mind the seriousness of the allegation that is 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 Anti-Doping Rule Violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be **by a balance of probability.** (our emphasis)

35. In matters pertaining to Whereabouts requirements, additional burdens and presumptions have been set out in ISTI, which have been referred to earlier in these reasons.

36. In the instant case, as a result of the proceedings and of the positions advanced by the Parties, the burden is on the AIU to establish to the comfortable satisfaction of the Panel that the DCO made a reasonable attempt to try to locate the Athlete on the Second Missed Test (counsel for the Athlete has conceded at the hearing that the AIU had met its burden with respect to the Third Test); should the AIU succeed with respect to the Second Test, the Athlete would be presumed to have been negligent and to rebut that presumption the Athlete would need to establish by a balance of probability that no negligent behaviour on her part caused or contributed to her failure to be available for the Second and Third Missed Tests; should the Athlete fail, and the anti-doping rule violation be established, the Athlete would need to rely on Article 10.3.2 of the 2019

Rules and seek a reduction of up to one year of her period of Ineligibility, depending on her degree of Fault.

F. THE THREE MISSED TESTS

37. The Notice of Charge (Hearing Bundle, pages 101 to 104) describes the circumstances of the three Missed Tests as follows. The time slot chosen by the Athlete in her Whereabouts information was between 5:00 and 6:00am.

a) Missed Test dated 21 February 2019, at a given address in Oregon:

> "the Doping Control Officer ("DCO") arrived at the above address on 21 February 2019 to conduct Testing but was unable to reach the specified location due to the property having a restricted access. Therefore at 05:00am, the DCO tried to contact you using the telephone number contained in your Whereabouts information, but he was unable to reach you. Having been unable to locate you for Testing during the 60-minute period, the DCO concluded the attempt at 06:00am. " The Athlete did not request an Administrative review.

b) Missed Test dated 18 August 2019, at a given address in West Hollywood:

> "the DCO arrived at the above location and treated the location as a restricted access location as the door to the complex was locked and secured and no attendant was present. The DCO also reported that your name was not listed on the directory. At 05:01, 05:10, 05:20, 05:30 and 05:55 the DCO tried to reach you by phone but was unable to do so. The DCO reported that at 05:31 he managed to gain access into the apartment complex through another occupant. He knocked on your door at 05:34, 05:49 and 05:56 and waited outside of the door during that period, but no one opened the door."

38. On 2 September 2019, the AIU received the Athlete's explanation:

> "[The Athlete] claimed that [she] were not listed in the building directory because [she] had moved into the address two months prior to the attempt on 18 August 2019 and that despite [her] requests for the directory to be updated to the building manager, the directory was not updated. [She] claimed that there was no way for [her] to know that the DCO was at [her] door. [She] also asserted that, once [she] woke up and had charged [her] phone (which had run out of battery during the evening), [she] saw several missed calls. [She] admitted that it was [her] fault for not ensuring that [her] phone was charged before [she] went to sleep and that [her] phone 'died in the night'."

39. On 28 November 2019, the AIU wrote to the Athlete and confirmed the apparent Missed Test on 18 August 2019.

40. The Athlete sought an Administrative review on 27 December 2019, on the following grounds:

> "... on 18 August 2019 [she was] at [her] residence during [her] 60-minute time slot with [her] fiancé, but [she was] unable to hear the DCO's attempts from [her] position in [her] bedroom at the back of the house. In addition, [she] asserted that [she] did not receive any calls from the DCO because [her] phone had become disconnected over the course of the evening and the battery had died."

41. On 4 February 2020, the AIU upheld its decision: "The AIU maintained that Article 4.1 of Appendix A of the Regulations placed a specific requirement on you to be present and available for Testing on any given day in the relevant quarter during the 60-minute time slot specified for that day in your Whereabouts information, at the location specified for that time slot. The AIU therefore concluded that the assertion that you were present at the specified address was not sufficient to be able to demonstrate that you were not negligent, and that you were indeed negligent in failing to make yourself available. The AIU considered that you were also negligent in failing to ensure that your mobile phone remained sufficiently charged such that it could register a call during the 60-minute time slot."

c) Missed Test dated 25 November 2019, at the same given address in West Hollywood:

42. "The DCO arrived at the building at the above address at 04:54 and searched [her] name in the door directory, but it was not listed. The DCO stated that the door was locked, and the building parking garage gate was also closed. The DCO treated the location as a restricted access location and tried to reach [her] by phone at 05:00, 05:02 and 05:03, but was unable to reach [her]. [Her] phone number went immediately to a voicemail that said, 'the number you are trying to reach is not a working number'. The DCO remained in the location but no one came or left the building. He then called [her] again at 05:55, 05:57 and 05:59 and received the same message as was received during the earlier attempts to contact [her] by phone. The DCO concluded the attempt at 06:03"

43. The Athlete did not provide any explanation and was afforded by the AIU, on 27 December 2019, the right to request an Administrative review by no later than 10 January 2020. On 11 January 2020, she sent her request, which is summarized as follows in the Notice of Charge:

> "...your Administrative review request stated that on 25 November 2019 you were at your residence during your 60-minute window but unaware that the DCO had arrived to collect a sample from you. You explained that, between July and December 2019, you had experienced harassment by an unknown individual who made contact with you by phone before contacting your fiancé and certain

acquaintances. You claimed that you had received numerous text messages and that when you blocked the phone number that was being used to contact you, the individual would simply create a new phone number in order to continue harassing you. You asserted that a threat had been made to your fiancé's life. In these circumstances, you decided to go and stay with your fiancé in Minnesota in October 2019 and to change your phone number on or around 13 October 2019.

You asserted that, due to the circumstances described above, in order to protect yourself, you chose not to have your name listed in the building directory.

You also stated that the address has a leasing office which would have allowed the DCO to enter the building on the date in question and that at least one USADA DCO had previously accessed the same location to test you despite your name being absent from the registry. You claimed that, had the DCO taken the necessary steps to notify you (i.e., by entering the leasing office to request access), you would have provided a sample."

44. On 4 February 2020, the AIU wrote to the Athlete with the outcome of the Administrative review. The AIU concluded that [her] explanation failed to establish that no negligent behaviour on [her] part caused or contributed to [her] failure to be available for Testing on 25 November 2019:

"The AIU maintained that Article 4.1 of Appendix A of the Regulations places a specific requirement on you to be present and available for Testing on any given day in the relevant quarter during the 60-minute time slot specified for that day in your Whereabouts Filing, at the location specified for that time slot. The AIU therefore concluded that the assertion that you were present at the specified address was not sufficient to be able to demonstrate that you were not negligent. You were negligent in failing to make yourself available. In addition, the AIU considered your circumstances insufficient to explain why you failed to update your whereabouts information to include (i) the full details of your apartment number (including means of access) and (ii) your new mobile telephone contact details."

G. The Testing Regime

45. The Panel, Counsel for both sides and the Athlete herself agree that No Notice, Out-of-Competition Testing is a significant and fundamental element of the AIU's anti-doping programme to combat the threat of doping to the integrity of the sport of Athletics. To facilitate effective Out-of-Competition Testing, athletes are required to provide, and modify if need be, complete and accurate information to the AIU about their whereabouts for everyday in a forthcoming quarter, including for a defined 60-minute period where they will be available for testing. This is a demanding requirement and athletes are expected, and they accept it, to sacrifice a significant degree of their privacy on what can be called a *quid pro quo* between the

right of an athlete to privacy and his/her duty of integrity. It is the very essence of this No Notice Testing that the Athlete not be informed ahead of time that a test is forthcoming. This is not a hide-and-seek game. The Athletes inform the testing authority of their whereabouts ahead of time and undertake to be present at a certain location and available during a defined time-slot. The testing authority is expected to reasonably seek to make contact with the athletes and test them or her, but it is not expected to force its way into an athlete's designated location.

46. This Panel has been referred to the decision of a Tribunal of the ITF Independent Panel, issued in 2018, which is not in the public domain ("*the ITF Panel decision*"). Even though the Tribunal in that case ended up not being unanimous in the result, it was unanimous in its approval of the principles set out in the CAS decision of *Drug Free Sport New Zealand v Gemmel ,* CAS 2015 A/2 with respect to the importance of the testing regime.

47. *The ITF Panel decision* describes as follows the importance of the testing regime:

> "40. While the Whereabouts requirements are undoubtedly onerous, they are necessary in order to facilitate 'No Advance Notice' Out-of-Competition testing, and so to allow tennis players to claim with credibility that they are subject to testing at any time and so the public can have confidence that they are clean. In this context, *Gemmel* at [26] emphasizes the importance of the 'obligation of the athlete to be present and available at the specified time and location.'
>
> 41. Before us there was no dispute as to the importance of the Out-of-Competition testing regime. It is important to maintain the integrity of sport. It is important that the world can be confident that sport is drug-free. It is important to other athletes to be confident that their colleagues are not gaining an improper advantage over them by drug use. It is also important to athletes because if sport is riddled with drug use it has the potential to taint all who are elite athletes in the sport. We are all familiar with efforts made by a minority of athletes to evade or avoid doping control and the need for the sport to take stringent precautions to ensure this does not occur."

48. In *the ITF Panel decision,* the main issue, as defined in paragraph 33, was whether the testing authority had "satisfied the burden on them under 1.4.3 to show that during that specified 60-minute slot, the DCO did what was reasonable in the circumstances to try to locate the Athlete, short of giving the Athlete any advance notice of the test". In paragraph 36 of its decision, it approves the principle set out in paragraph 59 of *Gemmel*, that:

> "**The reasonableness of the actions of the DCO were to be assessed objectively, without reference to the particular situation of Mr. Gemmell.** Any consideration of the particular situation of Mr. Gemmel was only relevant to whether he can establish that he was not negligent in being unavailable for testing." (our emphasis)

49. This last quote is particularly relevant in the case at bar, where an important assertion of harassment and/or stalking is raised by the Athlete: the Panel has to be careful to assess the actions of the DCO objectively, without reference to the particular situation of the Athlete of which the AIU had not in any event been made aware at the time. In other words, harassment is not relevant in the analysis under Article 4(3)(c) of Appendix A, but is relevant in the analysis under 4(3)(e) of Appendix A and, eventually, under Article 10.3.2 of the Rules.

H. Issue No 1: whether the DCO made a reasonable attempt to try to locate the Athlete

50. Counsel for the Athlete at first challenged the conduct of the DCO with respect to the second and third Missed Tests. At the hearing, he conceded that Dr. Strehlow, the Doping Control Officer in the third Missed Test, had made a reasonable attempt to try to locate the Athlete on 25 November 2019. This issue is now raised only with respect to the second Missed Test, on 18 August 2019.

51. Pursuant to Para. 4.3(c) of Appendix A to the 2019 Regulations and Article 3.1 of the 2019 Rules, there can be no finding of a Missed Test against an Athlete unless the Results Management Authority (in this case the AIU) establishes "to the comfortable satisfaction" of the Panel that "the DCO did what was reasonable in the circumstances (i.e. given the nature of the specific location) to try to locate the Athlete, short of giving her any advance notice of the test."

52. The DCO was Mr. Willie Newman, who has been conducting doping tests for eleven and a half years. He was accompanied by a Doping Control Assistant (“DCA”), Ms. Dani Newman, his wife, who has an experience of two and a half years. Both testified. They were both credible witnesses. Mr. Newman had been to that building two or three times before to test a football athlete. They arrived at the Apartment Building early and at 5:00am, Mr. Newman searched the building directory to call to the Athlete's apartment. The Athlete's name was not listed in the directory. The door to the apartment building was locked and there was no attendant present who could let them in. He called the Athlete's mobile phone at 5:01, 5:10 and 5:30am, but was unable to reach the Athlete. Shortly after he had made his call at 5:30am, a lady arrived at the entrance to the building. They told her that they were looking to gain entry in order to conduct an anti-doping test on an Athlete, whom they did not identify. The lady allowed Mr. Newman and his wife to enter behind her in the building. The lady asked them which floor they were going to and, using her access card, she was able to get the DCO and DCA to the floor where the Athlete's apartment was located. They arrived outside the door to the apartment at 5:34am. He knocked on the door

but nobody answered. He knocked again at 5:49am, but still nobody answered. He knocked one final time and still no one answered the door. He then made a final call to the Athlete's phone number, but was not able to reach her. They waited until 6:00am and still no one answered.

53. Asked by counsel for the Athlete if he had seen a doorbell, Mr. Newman replied that he did not remember, but that if there had been one he surely would have rang it because it is the most effective way to reach an athlete. Ms. Newman had earlier said that if there was a doorbell they would certainly have started their attempt at the door by ringing the bell. In his Unsuccessful Attempt Report, he mentioned the phone calls and the knocks on the door, but he made no mention of the doorbell. He was very well aware of the Guidelines but even if he was of the view that he did not need to mention in his Report everything he had done, he repeatedly affirmed that he was 100% convinced that had there been a doorbell he would have rang it.

54. The Athlete, in her witness statement, says that she was at home, with her fiancé, in her apartment, on 18 August 2019, sleeping, and that neither she nor her fiancé heard the doorbell or knocking. She later found out that her phone had become disconnected from its charger at some time during the night and the battery had died. This is why, she says, she did not receive the calls the DCO made to her phone. She adds that until she received notice of the alleged 18 August 2019 Missed Test on 2 September 2019, she had no reason to suspect that the doorbell might not be heard from the bedroom. She then goes on to refer to the harassment that escalated after 2 September 2019. This, of course, is subsequent to the 18 August Missed Test. In her explanation concerning the 18 August 2019 incident, she did not mention harassment.

55. At the hearing, counsel for the Athlete jumped on the absence of a reference to the doorbell in the DCO's Report to argue that it showed the carelessness of the DCO.

56. With respect, the Panel cannot agree with Counsel.

57. First, this argument was not raised in the Athlete's Pre-Hearing Brief. The Brief includes a section, section V, entitled "The DCO did not do what was reasonably necessary to locate Ms. Stevens with respect to the asserted 25 November 2019 Missed Test". But there is no equivalent section with respect to the 18 August 2019 Missed test. Indeed, the Brief recognizes in para. 4.7 that "Ms. Stevens was not negligent in not answering the DCO's attempted rings to her doorbell and knocks on the door"; in para. 4.7.1, that "no one, including Ms. Stevens or the DCO had any control over the volume of the doorbell"; in para. 1.3.1.1 that Ms. Stevens "was unable to hear either knocking or the doorbell from her bedroom"; and in para. 2.8.1 that "neither Ms. Stevens nor Mr. Murphy heard either knocking or the doorbell from their position in Ms. Stevens' bedroom

at the back of the apartment". Furthermore, as noted earlier, in her written statement, the Athlete says in para. 13 that on 18 August 2019 "neither myself or my fiancé heard the doorbell or knocking" and adds, in para. 13, "Until I received notice of the alleged 18 August 2019 missed test on 2 September 2019, I had no reason to suspect that the doorbell might not be heard from the bedroom".

58. The argument raised by the Athlete's counsel at the hearing that the DCO had failed to ring the doorbell or had failed, if he did ring, to register the ringing in his Report, came as a total surprise. It appears to be a last-minute attempt to discredit the work of the DCO and transform the issue from whether the DCO "did what was reasonable in the circumstances to try to locate the athlete" (Para. 4.3(c) of Appendix A), to whether the DCO had failed to "provide a detailed account in the Unsuccessful Attempt report of exactly what he/she did during the 60 minute timeslot to try to find the Athlete" as recommended by Article 9.2.1 of the Guidelines. Last minute, also, was the attempt by counsel for the Athlete, at the very end of the hearing, when everyone else but the Athlete had testified, to introduce in evidence an unidentified and undated photograph on the web of a doorbell allegedly appearing in the building where the Athlete had been residing, but at the entrance to a different apartment, not the one occupied by the Athlete.

59. Second, and in any event, the Guidelines are not mandatory. They constitute recommendations and the failure to meet them -assuming for the sake of discussion that there is a failure- does not mean that the Testing attempt must be set aside. The Guidelines use the word 'should', which, as 'may', is optional, as opposed to obligatory language such as "shall' or 'must'. (see *Arashov v. International Tennis Federation (ITF)*, CAS 2017/A/5112, at para. 82.) The Panel, in *Arashov*, at para. 83, uses the words 'deviations from applicable standards' to qualify failures to meet standards and adds that "There is no general rule of strict compliance with International Standards". As noted in Art.1.1.1 of the Guidelines, the Guidelines are a document "subject to ongoing review and assessment to ensure it continues to reflect best practice moving forward" and Art.1.2 states that each section of the Guidelines "details related steps prescribed by the ISTI and **provides best practice recommendation...**" (our emphasis). What is at issue, here, really, is an alleged deviation from a best practice recommendation.

60. Third, the Panel is comfortably satisfied that the Missed Test was conducted by an experienced and very credible DCO who did what was reasonable in the circumstances to try to contact the Athlete. He called her on her phone, which is the last resort -even though the best if it were not for the obligation to avoid giving a notice to the Athlete- means to reach an Athlete otherwise unreachable, and he did so many times. He managed to get into the building, by pure chance as a resident was coming back to her apartment at that very early hour of the day, which gave

him a chance to knock at the door many times. The Panel is of the view that possible omissions by DCOs to explicitly record that they had both knocked, and rang any doorbell, should it be available, in the execution of their duties under the Guidelines should not obscure "the overriding principle" of the Guidelines, affirmed in Art. 8.3.1, “that the Athlete is responsible for making him/herself available for Testing. In particular, if the Athlete specifies a location for the 60-minute timeslot where he/she isn't easy to find...then he/she risks a Missed Test."

61. It is the responsibility of the Athlete to be 'available' and to make herself available. When an Athlete who lives in a closed gate community does not put her name on the directory, allows the battery of her phone to die and chooses to be available at times of the day where there is no access possible to her location through regular channels, the Panel is comfortably satisfied that the experienced DCO did what was reasonable in the circumstances in making four phone calls that were unanswered, in managing to get through to the apartment despite the security system and in knocking at three separate times on the door with no response from the Athlete. The obligation imposed on a DCO to try to locate an athlete is an obligation of means, not of result.

62. The Parties referred us to various decisions rendered in matters of Whereabouts Failures. These decisions go in all directions, as they should, because, as noted in Art.9.2.1 of the Guidelines, by the very words of the applicable regulations, "What constitutes a reasonable attempt to locate an Athlete for Testing during the 60-minute timeslot cannot be fixed in advance, as it will necessarily depend on the particular circumstances of the case in question, and in particular on the nature of the location chosen by the Athlete for that timeslot."

63. Counsel for the Athlete argued that the Athlete, a month earlier, had provided an Out-of-Competition sample in the same apartment. It was shown at the hearing that the circumstances of that test were remarkably different from those prevailing at the time of the 18 August 2019 attempt, notably that the test on 16 July 2019 was performed at around 8:00, when the building was much more accessible.

64. The AIU having satisfied its preliminary burden, the Athlete is presumed to have been negligent, we now move on to the second step of the process, i.e. to determine whether the Athlete can establish that no negligent behavior on her part caused or contributed to her failure to be available for Testing.

I. Issue no 2: whether negligent behaviour of the Athlete caused or contributed to her failure to be available for testing

65. The burden, this time, is on the Athlete. The standard of proof is that of balance of probability.

66. 'Negligence' is not a term defined in the Code, the Rules, the Regulations or the Guidelines. 'Fault' on the other hand is defined in the *Code* as being "any breach of duty or any lack of care appropriate to a particular situation". The two words are used together in articles 10.4 and 10.5 of the Code, but nowhere else as far as we could see. It is not clear whether there is any distinction between the two. (see *IAAV v. Ahye,* SR/Adhocsport/272/2019, at para. 30); it may well be a distinction without a difference. The Panel does not wish to dwell on this issue, as it has reached the view that whether described as negligence or fault, what the Athlete did (or did not do) in the August and November Missed Tests caused or contributed to her being not available for testing within the meaning of para. 4.3(e) of Appendix A.

67. With respect to the August Missed Test, the Athlete claims she let the battery of her phone die during the night. In the explanation she gave the AIU on 2 September 2019, she admitted that it was her fault "of not making sure the phone was fully charged before going to sleep. It died in the night." (Hearing Bundle p. 323-366) Where the Athlete acknowledges that she knew that there was no way for the DCO to reach her other than by telephone, her behaviour in failing to ensure that her mobile telephone was suitably charged (or to leave it on charge during the night) so that she could be contacted for Testing, is manifestly negligent. In addition, she recognized that even though she had moved in her apartment two months ago and had then asked that her name be put on the directory, the correction had still not been made and she admitted at the hearing that she had made at best intermittent efforts to follow up with her landlord. Whether that qualifies as negligence is not really relevant, as we have found negligence already, but it reinforces our conclusion with respect to her phone's battery: she knew the only way she could be reached by the testing authorities at that time of the day, i.e. between 5:00 and 6:00am, was by phone, and she had allowed that only means to die. Harassment was not mentioned in the Athlete's explanation.

68. With respect to the November Missed Test, the Athlete became for all practical purposes unreachable by not informing the AIU that she had changed her phone number. She was at the same address. Her name was still not in the directory. The door of the building was still locked between 5:00 and 6:00am. No concierge or leasing agent was around at that time of the day. The only way she could be reached (apart from the DCO being lucky enough to have someone letting him in, which did not happen this time) was through her phone. And she had changed her phone number, without modifying her Whereabouts Filing. The DCO's attempt to locate her was made six weeks after she had made the change.

69. The Athlete alleged, and testified to that effect, that the harassment she had been the victim of in recent months through text messages had made her very fearful and reluctant to give her new

phone number to anyone including her best friends. The Panel found her testimony to be genuine and moving. It was corroborated by two of her closest friends, by her agent and, but less convincingly, by her fiancé whose testimony was more confusing than helpful. Text messages were put in evidence, not many, but enough to convince the Panel that she had very good reason to be scared, that she had been going through some very tough and disturbing moments and that she was no longer her usual self in her relationship to her sport, socially and as a person.

70. The evidence is to the effect that after she had changed her phone number the Athlete stopped receiving the threatening calls. She relaxed a bit and gave her new phone number to her best friend about a week after the change, and a little bit later to other friends. But six weeks later, she still had not given it to the AIU. There was no attempt by the Athlete's counsel to establish through medical or other objective evidence that the Athlete had been so depressed or in such a mental state that her judgment was adversely affected, as was the case, for example, in *US Anti-Doping Agency v. Cosby*, AAA No. 77 190 00543 09 and in *The Football Association v. Livermore*, a decision dated 8 September 2015 by the Regulatory Commission. At the hearing the Athlete explained that her mind was simply not focused on her obligation to inform the AIU.

71. Despite our sympathy for the Athlete, we have not been satisfied on a balance of probability that her behaviour was not negligent and did not cause or contribute to her failure to be available for testing. She already had missed two doping tests in the last six months. She should have been on red alert and conscious that she could not miss the next one, even if she had not yet received the AIU's email of 28 November 2019 (Hearing Bundle p. 589) which confirmed her Whereabouts Failure with respect to that second Missed Test. Her reluctance to give her new phone number -which reluctance did not prevent her from giving it to close friends, albeit not immediately- does not, in the circumstances of this case, absolve her of negligence for her failure to not having given it, also in confidence, to the AIU, six weeks later, as there was no evidence that her judgment had been adversely affected.

72. Counsel for the Athlete made an argument based on the lateness of the confirmation of the second Missed Test. The 28 November 2019 email that confirmed the 18 August 2019 Missed Test reminded the Athlete, in bold and underlined words that a reader could simply not miss, "that a total of three (3) Whereabouts Failures in any twelve-month period may lead to you being charged with an anti-doping rule violation. In your case, this twelve-month period began on 21 February 2019 and shall expire on 20 February 2020." That reminder was received three days **after** the 25 November 2019 test was missed and more than three months after the date of the second Missed Test. Counsel argued that the Athlete had been led to believe that the second

Missed Test would not be confirmed and that she might have acted more diligently had she received that express warning **before** the third Missed Test was attempted.

73. The argument is seductive, but it does not resist the clear wording of Para. 4.2 of Appendix A and the Comment that relates to it. "To ensure fairness to the *Athlete*", that Paragraph says, “any subsequent unsuccessful attempt to test that Athlete...may only be counted as a Missed Test...against the *Athlete* if that subsequent attempt takes place after the Athlete has received **notice**...of the original unsuccessful attempt." The word "notice" is the important word here. As clearly appears from the Comment, the requirement is to give the Athlete notice of one Missed Test before a subsequent Missed Test may be pursued against him/her. But that is all that is required. In particular, it is not necessary to complete the results management process with respect to the first Missed Test before pursuing a second Missed Test against the *Athlete*. In the present case, the **Notice** of the Missed Test of 18 August 2019 was sent to the Athlete on 02 September 2019 (Hearing Bundle, p. 588), well before the 25 November 2019 Missed Test. The Athlete was therefore on notice that one more Missed Test could result in a Whereabouts Failure violation.

74. That being said, while the Panel is not entitled to take into consideration the lateness of the confirmation of the Missed Test on November 28 2019 in its assessment of the Athlete's behaviour in relation with the 25 November 2019 attempt, the very presence of Para. 4.2 in Appendix A, the reference to the concept of fairness in that paragraph and the conspicuous reminder in the confirmation letter, are a clear indication that it is in the interest of an athlete to have a Missed Test confirmed before being subjected to a new test. In that sense, the Panel is of the view, that the lateness of the confirmation may yet be considered for the purposes of the reduction of the period of Ineligibility in accordance with Article 10.3.2 of the Rules, which is the next issue.

J. Issue no 3: Reduction of period of Ineligibility depending on the Athlete's degree of Fault

75. Pursuant to Article 10.3.2 of the Rules, the period of Ineligibility of two years imposed for a first anti-doping offence is subject to reduction down to a minimum of one year, depending on the Athlete's degree of Fault.

76. "Fault", as we have noted earlier, is defined in the Definitions of the 2019 Rules and in Appendix 1 of the Code as "any breach of duty or lack of care appropriate to a particular situation."

77. "Degree of fault" has never been defined, leaving Panels in the unfortunate situation of having to exercise their discretion without any guidance as to what "degree of fault" means. The issue was squarely put to a CAS Panel in *Cilic v. International Tennis Federation* (“Cilic”), CAS 2013/A/3327. The context, admittedly, was different, but the Panel finds it particularly helpful to refer to the three 'degrees of fault' identified by the CAS Panel in *Cilic*: “a) Significant degree of or Considerable fault; b) Normal degree of fault; c) Light degree of fault". The CAS Panel in *Cilic* went on:

> "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.
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> 72. The Panel suggests that the objective element should be foremost in determining into which of the three relevant categories a particular case falls.
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> 73. The subjective element can then be used to move a particular athlete up or down within that category.
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> 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."

78. The degree of objective fault, here, is significant. The fist Missed Test was not contested. The second was based on a string of excuses that we have not found persuasive. The third was unambiguously negligent: the only way to contact the Athlete was via phone, yet the Athlete did not update her number, which she had changed.

79. The Panel, however, is of the view that there was also a significant subjective element. Our sympathies are engaged by the distress, fear, and distraction caused by the harassment she experienced during the time leading up to the third Missed Test. It is noteworthy that her cell phone number figured centrally in the harassment - it was the only way her harasser could reach her. It is no wonder that, having changed it and thereby cutting off the harasser, the Athlete held her new number very closely and was extremely reluctant to share it except with her closest friends and family. There was no claim that she changed her number AND consciously chose not to update it in her Whereabouts record.

80. In the circumstances, and considering further her clear record after years of testing, we have come to the conclusion that the period of Ineligibility of two years should be reduced by six months.

K. Issue no 4: Backdating the starting point of the period of Ineligibility.

81. Article 10.10(c) of the 2019 Rules allows the Panel to backdate the starting point of the period of Ineligibility "where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other person." Counsel for the Athlete alleges that there were substantial delays in this case and seeks to backdate the starting point to either the date of the third Missed Test, i.e. 25 November 2019, or the date of the Athlete's request for an expedited hearing, i.e. 17 February 2020. Counsel relies on the award of the North American Court of Arbitration for Sport Panel, AAA No. 77 190 00293 10, *USADA v. LaShawn Merritt*. The facts in that case were substantially different and, with respect, the Panel has not found it very helpful.

82. The third Test was attempted on 25 November 2019. The Notice of Apparent Whereabouts Failure was sent to the Athlete on 05 December 2019. In the Notice, the AIU requested the Athlete to respond at the latest on 18 December 2019. The Athlete did not respond. On 27 December 2019, in an email to the Athlete, the AIU, after noting that the Athlete had not answered its 05 December 2019 request, confirmed the Apparent Whereabouts Failure of the 25 November 2019 test. In that same email the AIU informed the Athlete that she had until 10 January 2020 to seek an administrative review and to forward a written submission to that effect. A Request for an administrative review was prepared by the Athlete's counsel on 09 January 2020 and sent to the AIU on 11 January 2020. The Administrative Review was denied by the AIU on 04 February 2020, at which time the AIU recorded the 25 November 2019 Missed Test and informed the Athlete that "a total of three (3) Whereabouts Failures in any twelve-month period constitutes an anti-doping rule violation pursuant to Rule 2.4..." and told her that she could "expect to receive further correspondence from the AIU in this respect in due course." On 17 February 2020, the Athlete requested the AIU to expedite the case in these words: " With the upcoming outdoor season and with this being an Olympic year, Ms. Stevens requests that the initiation of the formal case against her be expedited to the extent that this is possible". The formal Notice of Charge was issued by the AIU on 30 March 2020. The Athlete requested a hearing before the Disciplinary Tribunal on 09 April 2020. The Chair was appointed by the Tribunal a few days later. A Preliminary Hearing was held 23 April 2020, at which time the Parties

agreed to have the Hearing held two months later, i.e. on 25 June 2020. No request for an expedited hearing before this Tribunal was made.

83. The Panel notes that some of the delay is attributable to the Athlete's fault. She failed to respond to the 5 December 2019 Notice of Whereabouts Failure that was sent to her by the AIU and which had given her until 18 December 2019 to respond. On 27 December 2019, the 25 November 2019 failure was confirmed by the AIU, who informed the Athlete that she had until 10 January 2020 to file a request for administrative review. The Athlete waited until the very last moment, in fact a day late, to file her request. As a result, the Panel finds that the Athlete lost probably a couple of weeks because of her own tardiness. That being said, the fact remains that the Athlete was informed on 4 February 2020 that an anti-doping violation had been committed and that she could "expect to receive further correspondence from the AIU in this respect **in due course**."(our emphasis) That "due course" took some fifty days (the period between the 4 February 2020 confirmation of the anti-doping violation and the 30 March 2020 Notice of Charge), and this despite the Athlete's explicit request on 17 February 2020 to expedite the case in view of the upcoming outdoor season and the Olympic Games.

84. The Panel is of the view that this period of fifty days, in the circumstances, is a "substantial delay" which cannot be attributed to the Athlete. The AIU should have proceeded much faster with the issuance of the Notice of Charge under normal circumstances. The Panel understands that the COVID-19 pandemic may have disrupted the AIU's normal operation during this interval. The delay, therefore, may not be at all unreasonable, but the Rule requires only "substantial delay". The Panel therefore agrees with counsel's proposition that the period of Ineligibility be backdated to the date of the Athlete's request to expedite the case, i.e. 17 February 2020.

L. Decision

85. In view of the above, the Disciplinary Tribunal:

i. Finds that the Tribunal has jurisdiction to decide on the subject-matter of this dispute;

ii. Finds that the Athlete, Ms. Deajah Stevens, has committed an Anti-Doping Rule Violation in connection with Whereabouts Failures within the meaning of Article 2.4 of the IAAF Anti-Doping Rules (effective 1 January 2019);

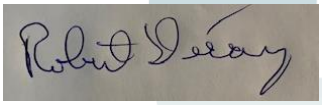
iii. Orders that the period of Ineligibility of two-years be reduced by six months;

iv. Orders that the commencement of the period of Ineligibility be 17 February 2020, ending at midnight on 16 August 2021;

v. Orders the disqualification of any results obtained by the Athlete after 17 February 2020, with all resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money pursuant to Article 10.8 of the 2019 IAAF Rules.

86. The Panel does not regard it as appropriate to make any award of costs, noting that no particular submissions were made by either Party in that respect.

87. Pursuant to the requirements of Article 8.9.2 (d) of the 2019 Rules, the Tribunal informs the parties that they have the right of appeal against this decision in accordance with Article 13 of the 2019 Rules.



The Hon. Robert Décary, QC
Chair of the Panel
London
09 July 2020