NST-E20-258261
Neil and Equestrian Australia v Hanna

DETERMINATION

NATIONAL SPORTS TRIBUNAL
General Division

sitting in the following composition:

Panel Member Mr John Chaney SC

in the arbitration between

Equestrian Australia *(Applicant Sporting Body)*

Represented by Mr Andrew Hamilton, A/g CEO, Equestrian Australia

And

Dr Kirsten Neil *(Applicant)*

Represented by Mr Jimmy Gill, ClarkeKann Lawyers

And

Ms Mary Hanna *(Respondent)*

Represented by Mr Paul Hayes QC, and Ms Anna Dixon, instructed by Mr John McMullan, McMullan Solicitors

SUMMARY OF TRIBUNAL'S DECISION

Equestrian Australia (EA) (the Applicant Sporting Body) together with the Head Veterinarian of EA (the Applicant) brought a complaint to the National Sports Tribunal (NST) concerning social media posts, text messages sent to the Applicant, and comments made to and quoted in an online news article, by an Honorary Life Member in the sport. The communications all dealt with an advertised proposal by the FEI Veterinary Committee, of which the Applicant was a member, to discuss possible mandatory vaccination for an equine disease known as Hendra virus which only occurs in Australia.

The issue of mandatory Hendra vaccination had been the subject of significant controversy some years ago, and was fiercely opposed by a number of people involved in the sport, including the Honorary Life Member the subject of this complaint (the Respondent). That opposition was based upon a belief that the available vaccine could be seriously harmful to horses.

Each of the impugned communications contained an incorrect assertion that the Applicant was "pushing" for the introduction of mandatory Hendra vaccination. There was also a suggestion that the Applicant was motivated to support mandatory Hendra vaccination by her own potential financial gain. There was no reasonable foundation for that assertion. When the erroneous nature of the communications was revealed to the Respondent, she posted an apology on the same social media platform as the original posts, took down the original posts, sent a text message to the Applicant apologising, and sought, with only partial success, to have her comments redacted from the online news article.

The publications caused a significant hurt to the Applicant. Her complaint to EA that the communications constituted a breach of the EA Member Protection Policy (EAMPP), the EA Code of Conduct (EACC), and the EA Social Media Policy (EASMP) was investigated and subsequently referred for arbitration to the National Sports Tribunal (NST).

The Tribunal heard the application over two days, and determined that three of the four communications complained about constituted breaches of various provisions of the EAMPP, the EACC and the EASMP. It considered the breaches to be serious and directed that the Respondent issue a written apology to the Applicant and pay a fine of $5000 and directed EA to issue a written warning to the Respondent in relation to her conduct.

The Tribunal also rejected the Respondent's objections to the jurisdiction of the Tribunal to deal with the matter and the standing of the Applicant to fully participate as a Party.

INTRODUCTION

1. Equestrian Australia (EA) (the Applicant Sporting Body) is a national sporting organisation as defined in s 5 of the National Sports Tribunal Act 2019 (Cwth) (the Act).

2. Dr Kirsten Neil is the Applicant Sporting Body's Head Veterinarian (the Applicant). She has held that position since 2015. In 2017, the Applicant was nominated to join the Federation Equestre Internationale (FEI) Veterinary Committee in her capacity as Head Veterinarian for Australia. There are seven people who make up that committee. There are no other Australian members of the FEI Veterinary Committee. Since April 2019, the Applicant has been its Deputy Chair.

3. Ms Mary Hanna (the Respondent) has a distinguished record as an Equestrian competitor. She has represented Australia at the Olympic Games in 1996, 2000, 2004, 2012 and 2016 and aspires to do so again in 2021 in the Tokyo Olympic Games.

4. In early November 2019, the Respondent posted statements on her Facebook page, participated in an interview which led to an online publication, and sent an SMS message to the Applicant. Dr Neil complained to the Applicant Sporting Body about those publications, asserting that they amounted to breaches of the EAMPP and other policies of the Applicant Sporting Body. That complaint led to an investigation by an independent investigator appointed by the Applicant Sporting Body which found the Respondent to have breached various provisions of the Applicant Sporting Body's policies. In circumstances which will be traversed in detail below, these proceedings were commenced seeking disciplinary sanctions against the Respondent in relation to those publications.

5. Both the Applicant Sporting Body, and the Applicant, urged the Tribunal to conclude that the Respondent's conduct amounts to serious breaches of the EAMPP and other policies, and to impose the full panoply of available sanctions including either a substantial suspension, or alternatively termination, of the Respondent's membership of the Applicant Sporting Body.

6. In response to the application, the Respondent admits to making the publications, but asserts that:

    - The NST lacks jurisdiction because the requirements for commencement of an arbitration under the Act have not been complied with. In particular, she contends that the Act requires that an application of the relevant provision of the Act can only be made by a sporting body, and that this application was made by the Applicant and not the Applicant Sporting Body.

    - The Applicant lacks standing to seek sanctions for breaches of the EAMPP; because she is not a party to the contract entered into between the Respondent

and the Applicant Sporting Body which incorporates by reference the various policies said to have been breached.

- If the Tribunal does have jurisdiction to determine the matter, she should not be found to be in breach of the relevant policies.
- If she is found to be in breach of any policy, the breaches are not serious breaches for the purposes of imposing a sanction.
- Having regard to the nature of any breaches, any sanction which is imposed should be minimal.
- The application should be dismissed.

NST JURISDICTION

7. The application was dealt with on the basis that it was brought pursuant to s 24 of the Act. S 24 provides:

> ***24 Disputes between 2 or more persons***
>
> *(1) If:*
>
> *(a) a dispute arises between 2 or more persons bound by one or more constituent documents by which a sporting body is constituted or according to which a sporting body operates; and*
>
> *(b) either:*
>
> *(i) one or more of those documents permit the dispute to be heard in the General Division of the National Sports Tribunal; or*
>
> *(ii) if none of those documents permits the dispute to be heard in the General Division of the National Sports Tribunal—those persons agree in writing to refer the dispute to the General Division of the National Sports Tribunal; and*
>
> *(c) either:*
>
> *(i) the dispute is of a kind prescribed by the rules for the purposes of this subparagraph; or*
>
> *(ii) the dispute is approved by the CEO, in writing, as a dispute to which this section applies;*
>
> *the sporting body may apply to the National Sports Tribunal for arbitration of the dispute.*
>
> *Note: See Division 7 for how applications are to be made.*
>
> *Parties to arbitration*
>
> *(2) The parties to the arbitration are:*
>
> *(a) the 2 or more persons; and*
>
> *(b) the sporting body; and*

(c) any other person or body:

(i) that is permitted by any of the constituent documents to participate in a hearing of a dispute of that kind; and

(ii) that advises the National Sports Tribunal in writing that the person or body wishes to be a party to the arbitration.

8. The form in which applications are to be brought is prescribed by s 37 of the Act. It provides:

37 Form of applications

An application under Division 2, 3 or 6 must:

(a) be made in accordance with a form approved, in writing, by the CEO; and

(b) be accompanied by the application fee (if any) prescribed by the rules; and

(c) contain the information that the form requires; and

(d) set out the reasons for the application; and

(e) satisfy any other requirement prescribed by the rules for the purposes of this paragraph.

9. The Respondent contends that the application was not properly brought, and accordingly that the Tribunal lacks jurisdiction to deal with the matter. Her submission was that there are four conditions which must be satisfied before the NST has jurisdiction:

10. First, a dispute must arise:[1] (a) between 2 or more persons', (b) 'bound by one or more constituent documents by which a sporting body is constituted or according to which a sporting body operates'.

11. The Respondent accepts that this pre-condition has been satisfied by the creation of an NST Agreement signed by the Respondent, the Applicant and the CEO of the Applicant Sporting Body indicating that a dispute of the kind referred to in the document arises between two or more persons.

12. The Respondent accepts that those persons are bound under the EAMPP, the EACC and the EASMP by reason of their membership of the Applicant Sporting Body (through, in the Respondent's case, her membership of Equestrian Victoria (EV), an affiliated body to the Applicant Sporting Body and the Applicant's membership agreement (if proved) with the Applicant Sporting Body or one of its sub-ordinate state organisations).

[1] *National Sports Tribunal Act 2019* (Cth), section 24(1)(a).

13. I am satisfied that the Applicant is bound by those policies by reason of her membership of the Applicant Sporting Body[2]. The Respondent correctly concedes that the first requirement of s 24 is satisfied.

14. Second, those persons (being the 2 or more persons between whom a dispute arises) 'agree in writing to refer the dispute to the General Division of the National Sports Tribunal'.[3] It is not in issue that this pre-condition has been satisfied by the Applicant, the Applicant Sporting Body and the Respondent executing the NST Agreement and returning it to the NST.

15. Third, the dispute is the kind of dispute prescribed by the rules for the purposes of sub-paragraph s 24(c)(i)[4] or is 'approved by the CEO, in writing, as a dispute to which this s 24 applies'. The Respondent correctly concedes that this pre-condition has been satisfied by the dispute being characterised as a disciplinary dispute (under a member protection policy of a sporting body),[5] and that the CEO has in writing approved the dispute as one which can be heard by the NST.[6]

16. Fourth, if the first three of these four pre-conditions have been met, 'the sporting body may apply to the National Sports Tribunal for arbitration of this dispute' (emphasis added).[7] It is this pre-condition that the Respondent contends has not been satisfied. She submits that the application filed with the NST has been brought by the Applicant and not the Applicant Sporting Body (described in the NST Agreement as the 'Sporting Body'). Thus she contends that, because the requirements of section 24(1) of the Act are not fully satisfied in this proceeding, the NST does not have jurisdiction to hear this dispute.

17. In order to consider those submissions, it is necessary to retrace the events surrounding the commencement of these proceedings.

18. On 11 August 2020, an email was sent by the CEO of the Applicant Sporting Body, Mr Andrew Hamilton, to the NST. The email read:

    To whom it may concern,

    Please find attached a signed:

    - *Application to refer a general sport related dispute to the NST.*
    - *Agreement to bring the dispute to the NST.*

[2] Hearing Bundle Vol 3 pp799 -800
[3] *National Sports Tribunal Act 2019* (Cth), section 24(1)(b)(ii).
[4] *National Sports Tribunal Act 2019* (Cth), section 24(1)(c)(i).
[5] NST Agreement, 26 July 2020, Part One; *National Sports Tribunal Rule 2020* (Cth), rule 7(1)(b).
[6] *National Sports Tribunal Act 2019* (Cth), section 24(1)(c)(ii).
[7] *National Sports Tribunal Act 2019* (Cth), section 24(1), footer.

The NST has already received a signed Agreement to bring the dispute to the NST from one of the respondents – Mary Hanna – and a further letter from her legal representation this morning.

Further emails will follow this email providing a copy of the investigator's report and links to our various and relevant documents.

Please let me know what else is required.

19. The following day the CEO of the NST emailed Mr Hamilton and the solicitors for each of the Applicant and the Respondent. He advised that the materials provided had been reviewed and the dispute had been provisionally assessed as eligible to be brought to the NST in accordance with its legal framework. He confirmed that to date the NST had received two forms (including two versions of the agreement form) regarding the application and an application form. The two versions referred to were an agreement form "received from Andrew Hamilton 11 August 2020" and an agreement form received from Mr John McMullan, the solicitor for the Respondent on 28 July 2020. It is apparent from that email that the NST was treating the application as having been submitted by the Applicant Sporting Body.

20. The application forwarded to the NST by Mr Hamilton was on the standard form approved for the purposes of s 37 of the Act. Part A of that form is headed "Contact details of the involved parties". An explanatory note under that heading reflects s 24(2) of the Act. It relevantly reads "*in a dispute between more than two people (athlete(s) and/or support person(s) or another organisation, like a state sporting organisation) under the sporting body rules, the involved parties to the dispute are those people/organisations and the sporting body*." There then follows provision for contact details for the "involved parties". The descriptions of the involved Parties are respectively "Applicant A", "Applicant B" and "Respondent (usually the sporting body)".

21. In relation to "Applicant A" and "Respondent", the form has checkboxes to identify whether the person is "an athlete", an athlete support personnel" (sic), a "representative of a sporting body" or an "other person". Somewhat strangely, the section identifying "Applicant B" does not call for those details. The form submitted by Mr Hamilton showed the Applicant as Applicant A, was blank as to Applicant B, and showed the Respondent as the Respondent. The details sought in relation to Applicant A included the sport involved and the sporting body, the latter being shown as the Applicant Sporting Body.

22. The agreement to bring a dispute to the NST, which appears to have been signed in counterparts by each of the Applicant Sporting Body, the Applicant and the Respondent, identifies the dispute as a disciplinary matter and, in part two, identifies the Parties to the dispute as the Applicant, the Applicant Sporting Body (through its representative Mr Hamilton) and the Respondent. Mr Hamilton's email of 11 August 2020 records that the Respondent had previously signed her agreement to have the

matter determined by the NST – no doubt a reference to the form of agreement that had been sent to the NST by the Respondent's solicitors on 28 July 2020.

23. On 14 August 2020, an officer of the NST Registry sent an email to Mr Hamilton and the solicitors for each of the Applicant and the Respondent. That email recites that an application had been "submitted by Dr Neil (the Applicant) and Equestrian Australia (the NSO Applicant) for arbitration in the General Division of the NST". It recited that the application had been assessed as validly made in accordance with the NST's legislative framework and would proceed in the General Division of the NST under s 24 of the Act. It identified the Parties to the dispute as "Applicants" being Dr Neil and Equestrian Australia and the Respondent as Ms Hanna. A preliminary conference was set for 17 August 2020.

24. At the preliminary conference on 17 August 2020, the CEO of the NST directed the Respondent to file and serve her response by 20 August 2020, and that "the applicants" are to file with the NST Registry and serve on the other parties any witness statements, evidence, submissions and all other documents they wish to rely on by 21 August 2020.

25. By response dated 19 August 2020, the Respondent, through her solicitors, filed her response in accordance with the CEO's directions. That document was also provided on the approved form. Part B of that form provides for identification of the case details. Section 4 under part B asks for "details of the person/representative that has lodged, or is in the process of lodging an application in the NST (the applicant)". In that section, Ms Hanna identified the applicant as "Equestrian Australia (attention: Andrew Hamilton)".

26. Part D of the response seeks a brief description of the response, to which the Respondent inserted:

"*The respondent awaits the Applicant Sporting Body to make the specific allegations in the form of its submissions and accompanying evidence which have been directed by the Tribunal to be filed and served by the Applicant Sporting Body on the Respondent, on or before Friday, 21 August 2020 and shall respond to this material, as directed by the Tribunal to be filed and served by the Applicant Sporting Body on the Respondent, on or before Friday, 28 August 2020.*"

27. In an annexure to the response, the Respondent inserted the following:

"Notwithstanding s 24 of the [Act] and the document entitled "Agreement to bring a dispute to the National Sports Tribunal" signed by the Applicant, the Applicant Sporting Body and the Respondent, the Respondent does not agree that the NST has jurisdiction for both the Applicant and the Applicant Sporting Body to jointly and severally prosecute the same allegation of a conduct violation under the Applicant Sporting Body's rules and regulations against the Respondent. The Respondent maintains that the only party with standing to prosecute an allegation of a conduct violation under the Applicant Sporting Body's rules and regulations (EA), is the

Applicant Sporting Body itself (notwithstanding the fact that the Applicant Sporting Body is acting on a complaint made to it by the applicant, against the respondent). Accordingly, the Respondent challenges the standing of the Applicant to actively participate in this proceeding and will make submissions to this effect in her written submissions to be filed with the Tribunal and by way of oral submissions before the arbitrator at the hearing. The Respondent acknowledges that the Tribunal is able to consider and determine the issue of jurisdiction by reason of regulation 18 of the National Sports Tribunal (Practice and Procedure) Determination 2020.

28. Although not pellucidly clear, the thrust of the Respondent's objection in her initial response document was as to the Applicant's standing to prosecute the complaint rather than an absence of jurisdiction on the part of the NST to deal with the proceedings to the extent that they were brought by EA. It was only much later when detailed submissions setting out the basis of the objection to jurisdiction (and in particular the contention that the Applicant Sporting Body was not an applicant) were raised, albeit that the Respondent's position on standing was reserved during the interlocutory stages of the proceeding.

29. The essence of the Respondent's contention as to jurisdiction is, as I understand it, that it is the application form which invokes the jurisdiction of the Tribunal, and is determinative as to who has made the application for the purposes of s 24 of the Act. I do not accept that contention. To uphold the Respondent's argument would be a triumph of form over substance.

30. I accept that s 24 requires that an application under that provision must be made by the sporting body, and not by one of the individuals who may be a Party to the relevant dispute. In this case, I find as a fact that it was the sporting body which submitted the application and sought to invoke the jurisdiction of the Tribunal. It did so, if not at the request of the Respondent, then certainly with her concurrence. Her response document dated 19 August 2020 demonstrates that she understood the applicant to be the Applicant Sporting Body.

31. Once the application was made, s 24(2) prescribes that the Parties to the arbitration are the two or more persons involved in the dispute and the sporting body. At all times after the commencement of the application, the Applicant Sporting Body has been treated as a Party to the application and variously described as the Applicant or the Sporting Body Applicant in various documents.

32. The fact that the Applicant Sporting Body was mentioned only as the relevant sporting body in the details of Applicant A is explicable in part by the somewhat confusing format of the standard form application insofar as it relates to an application under s 24.

33. Given that the Applicant Sporting Body has at all times conducted itself, and been treated by the other Parties to the proceeding, as a Party, it is a reasonable inference that its identification as the "relevant sporting body" in the Applicant A details was thought to be sufficient for the purposes of completion of the originating form.

34. The position is not analogous to a situation where a solicitor, or some other agent of the Party, lodges an originating process at a court, as Counsel for the Respondent contended. The difference is that, in this case, the Applicant Sporting Body was understood by all Parties, and by the NST itself, as being a Party to the proceedings, and an applicant in them.

35. I am satisfied that the Applicant Sporting Body, as the relevant sporting body, applied to the NST for arbitration of the dispute between the Applicant and the Respondent and that the requirements of s 24 were in substance satisfied so as to give the NST jurisdiction to deal with the matter.

STANDING

36. The Respondent contends that the Applicant does not have standing to prosecute an alleged breach of EA's rules and regulations on the part of the Respondent nor does she have the standing to seek the imposition of a sanction under the Applicant Sporting Body's rules and regulations.

37. That contention is based on the proposition that the obligation on the part of the Respondent to abide by the Applicant Sporting Body's rules and regulations arises from the contract entered into between the Respondent and EV, the rules and regulations being incorporated by reference into the Respondent's annual membership agreement with EV. The Respondent contends that, not being a party to that agreement, the Applicant has no legal standing to allege a breach of the relevant rules or bylaws or policies.

38. There are two principal reasons why the Respondent's contentions as to the Applicant's standing should be rejected.

39. The first is that the EAMPP clearly contemplates the active involvement of a complainant in the resolution of complaints arising under the EAMPP. In attachment D4 to be the EAMPP, the procedures applicable in tribunal proceedings, where a Hearings Tribunal is constituted under that policy, are set out in detail. Under those procedures, a complainant has an express right of appearance[8], and has an express right to describe the circumstances that led to the complaint, call witnesses and ask questions of the respondent and any witnesses called by the respondent[9].

40. The application of the EAMPP is set out in section 2.0 and is extremely broad. Clause 2.1 provides that "*This policy applies to all members of EA, employees, officers (including Board of Directors and Sub-Committee Members), administrators, volunteers, athletes, Officials (including Veterinarian officials), life members, team*

[8] EA MPP attachment D4 cl6
[9] EA MPP attachment D4 cl15 and cl16

managers, EA-affiliated organisations (Affiliates) and State Associations and associated interested persons who have some form of "duty" on behalf of EA".

41. It follows that a member of EA contractually binds themself to a process of complaint resolution which expressly includes the rights of a complainant to prosecute their complaint before a hearing tribunal. The breadth of the application of the EAMPP is such that it is possible that even a complainant who is not a member of the Applicant Sporting Body but who is sought to be protected by the policy could actively participate in a hearing. There is no doubt that the Applicant falls within the class of people to whom the EAMPP seeks to extend protection.

42. While it is true that, rather than the Applicant Sporting Body appointing a hearing tribunal under the EAMPP to determine the dispute between the Applicant and the Respondent, the Parties have agreed to have their dispute resolved before the NST. Given that the complaint arises under the EAMPP and other policies of the Applicant Sporting Body, it is appropriate that the same rights be extended to the complainant in these proceedings as she would have enjoyed in the matter being dealt with by a hearing tribunal constituted under the EAMPP.

43. The second reason why the contention as to standing should not be upheld is that s 24(2) expressly provides that the Parties to the arbitration are the two or more persons involved in the dispute and the sporting body. The reference to two or more persons relates back to s 24(1) which speaks of a dispute between two or more persons bound by one or more constituent documents by which a sporting body is constituted or operates.

44. The Applicant, as member of the Applicant Sporting Body, is bound by documents by which the Applicant Sporting Body operates, as is the Respondent. It does not matter that there is no direct contractual relationship between the Applicant and the Respondent. They are both Parties to the arbitration by virtue of s 24(2). There is no basis upon which the Applicant's status as a Party should be read down so that her capacity to participate is somehow more limited than that of any other Party.

45. The Respondent submitted that an outcome which limits the Applicant's rights as a Party "accords with common sense" on the basis that "convention prescribes that it is for a sporting body to enforce its own rules against a member rather than a member seeking to enforce the rules of a sporting body". Whether or not such a convention exists, it patently cannot prescribe (or proscribe) rights which are conferred through the Act and are consistent with the instruments by which the Respondent is bound.

46. The Applicant was entitled, as she has done, to participate fully in the proceedings and to give evidence and make submissions in relation all issues in the proceedings.

FACTUAL BACKGROUND

47. Hendra virus is a serious and potentially fatal disease that affects horses and humans. It has affected horses in Queensland and northern New South Wales as far south as Scone. It has led to the tragic death of two veterinarians. A vaccine was developed by a pharmaceutical company referred to in these proceedings as Zoetis. In or around 2014, the then board of the Applicant Sporting Body, led by Dr Warwick Vale, sought to make mandatory the vaccination of all sport horses in Australia with the Hendra vaccine. That proposal resulted in much controversy within the Equestrian community and the proposal was not ultimately implemented.

48. The Applicant was scheduled to attend a meeting of FEI's Veterinary Committee on 5 and 6 November 2019. She said that she had been asked to provide an update on the equine Hendra virus and its vaccine which she described as a straightforward update to educate the Veterinary Committee and Veterinary Department of FEI.

49. She said in evidence, and I accept, that she was not pushing for mandatory vaccination and that she had previously supplied to the FEI the relevant government Hendra policies as well as the Australian Pesticides and Veterinary Medicines Authority adverse reaction website information as it pertains to Hendra vaccination. She said that she had previously advised the FEI Veterinary Committee and FEI Veterinary Department (to which the FEI Veterinary Committee reports) as to the existence of a class action in Australia against the Hendra vaccine manufacturer and of the animosities in some parts of the Equestrian community about the Hendra vaccine[10]

50. In mid-October 2019, in preparation for the FEI General Assembly, the FEI published on its website the Veterinary Committee and Veterinary Department Report dated 14 October 2019 (14 October Report). Under the heading "bio security" the report made reference to several equine infectious diseases including a passage in relation to Hendra virus. That passage read:

"T*he Veterinary Committee and Veterinary Department has gathered information on the current situation in Australia in regards of Hendra virus. Hendra virus is a rare emerging zoonosis that causes severe and often fatal disease in both infected horses and humans. There is no specific treatment for human cases and there are major workplace risk mitigation procedures that must be implemented if it is considered that a horse may be infected. There is a registered Hendra animal vaccine and vaccination is considered an effective way to reduce risk of horses becoming infected and reducing the risk of human exposure. Currently there is no requirement for horses to be vaccinated to attend FEI events and this is making it difficult to find veterinarians willing to officiate and/or treat horses at FEI events. The Veterinary Committee will decide whether to propose that horses from Hendra virus affected areas must be vaccinated against the disease in order to attend FEI events.*"

[10] Statement of Dr Neil 9 February 2020, hearing bundle volume 3 page 535

51. That 14 October Report was prepared by the Chair of the Veterinary Committee and the head of the Veterinary Department and was not given to the Applicant or other members of the Veterinary Committee ahead of its publication. The Applicant was not given any opportunity to make changes to the report before the paper was publicly available.

52. The Applicant was cross-examined at some length about the extent of her involvement in the proposal in relation to Hendra virus going to the Veterinary Committee. In response to those questions the Applicant said that she had advised the Veterinary Committee on multiple occasions not to "go near it" by reason of the controversy surrounding the issue in Australia. She said that she had done so in writing.

53. In the course of questioning in relation to that issue, Counsel for the Respondent put to the Applicant that she was "concealing evidence". That aspersion is unjustified.

54. The Applicant asserted that she is contractually bound to treat her communications with the FEI Veterinary Committee as confidential and that she had not received permission to release the emails containing that advice. There is no reason not to accept that position.

55. At no time in these proceedings was the direction made in the nature of an order for general discovery, and given the informal procedures of this Tribunal, such an order would be most exceptional. In providing documents in support of the application, the Applicant simply provided, as did the Applicant Sporting Body, the bundle of documents which had been gathered in the course of the investigation of the complaints and which were appended to the investigator's comprehensive report. They were the documents upon which she sought to rely, and criticism that she did not produce other documents, which were apparently self-serving in any event, is unjustified.

56. It can also be noted that both in her statement provided to the investigator, and relied upon in these proceedings, and in her oral evidence, the Respondent readily accepted that the Applicant had not been promoting the compulsory vaccination of horses from affected areas, but rather had "behaved impeccably" (presumably in the sense of warning the Veterinary Committee as to the risks of and controversy surrounding, compulsory Hendra vaccination) in relation to the issue. That the Applicant did not see the need to obtain permission to release documents which supported that conclusion is hardly surprising.

57. The Applicant first saw the 14 October Report on the morning of 29 October 2019 when looking at the FEI website in relation to another matter. She immediately emailed a number of officers of the Applicant Sporting Body including the then CEO, Ms Lucy Warhurst. The opening paragraph of her email read:

As a work (sic) *of warning I just read the report online for the general assembly and Hendra is mentioned as being discussed by the vendor committee so you can expect*

some backlash once people realise (although maybe I'm the only one who reads those things!).

58. That email supports the Applicant's evidence, which I accept, that she was unaware of the proposal to discuss compulsory Hendra vaccination at the upcoming Veterinary Committee meeting until she read the 14 October Report.

59. It is apparent that on 30 October 2019, the Applicant had a discussion with Mr Alistair McKinlay, the then Chairman of EA concerning the vaccination proposal. She sent an email dated 30 October 2019 to Mr McKinlay and Ms Warhurst referring to that discussion and advising that she had emailed the FEI Veterinary Director, Mr Goran Akerstrom suggesting that the legal department of FEI, and its President, be present at the committee meeting when Hendra vaccination was to be discussed. She provided a summary of the information which she had previously provided to the FEI which was a comprehensive list of references to materials and accounts of the differing views and the controversy surrounding compulsory Hendra vaccination in Australia. The information comprised points both for and against the introduction of compulsory vaccination[11].

60. At the end of October 2019, the Respondent became aware of controversy on Facebook concerning the proposal to mandate Hendra vaccination for all FEI horses from affected areas in Australia. That was a matter of serious concern to the Respondent who believes that Hendra vaccination is extremely dangerous to horses, especially when their immune system is compromised after a trip around the world. The Respondent had been training in Germany, and had a great deal of experience transporting horses overseas especially between Australia and Europe.

61. On 1 November 2019, the Applicant Sporting Body published a statement from its Chair, Mr McKinlay. It read:

Dear valued members

I want to provide an important update to members and the broader equestrian community, and correct some misinformation that is currently circulating regarding Hendra vaccinations.

Equestrian Australia recognises that this is a contentious and emotive issue for our community, and that's why it's important to correct the record.

EA has only recently been made aware that the FEI's Veterinary Committee intends considering whether to propose Hendra vaccination as a prerequisite for attending FEI events in Australia, when they meet in mid-November. ***This does not mean that the proposal will proceed.***

[11] Hearing bundle, volume 1 pages 479 – 482

I can confirm that this matter has not been discussed with EA, nor were we consulted before the FEI Veterinary Committee papers were distributed.

This is a FEI Veterinary Committee proposal, not an EA proposal.

EA's position in relation to Hendra vaccination has not changed. Introduction of mandatory vaccination is not something that EA supports.

EA is in favour of continuing to work with bio security organisations and supporting cultural change to ensure community and member safety. EA does not believe that mandating action is the most effective way to change behaviour.

Our chair has written to the FEI today to make our position clear, and that wide ranging discussion with its members is critical before any proposal by FEI should be made.

We believe a thorough and consultative process that properly explores the science, the risks and impacts would need to be undertaken.

I urge EA members and supporters to not criticise or target our expert staff or hard-working volunteers on this matter. If you would like further information, please contact biosecurity@equestrian.org.au…

62. The Applicant agreed in evidence that this communication, to some extent at least, "threw her under the bus". That is true to the extent that readers of the statement who knew of the Applicant's role with the FEI Veterinary Committee might reasonably (but wrongly) assume that the Applicant had not been in contact with the Applicant Sporting Body about the proposal, and that she was a party to the proposal going forward.

63. On 2 November 2019, the Chair of the Applicant Sporting Body published an update to EA members. The update reported that he had written to the FEI President "in the strongest possible terms" regarding the 14 October Report. He reported that he had said to the FEI President:

- *What is most concerning is Equestrian Australia has not been consulted on the proposal.*
- *The perception from the FEI Veterinary paper for the GA is that EA has been a party to this action without consultation with the EA members.*
- *This reflects extremely badly on EA and the state branches who are entrusted with the governance of the equestrian sports in Australia, and*
- *as this issue has been in existence for a number of years without action by FEI it is reasonable to expect that any potential proposed changes to the rules would be with the appropriate consultation.*

64. The Chair reported that overnight the Applicant Sporting Body had had confirmation from FEI that Hendra vaccination was indeed a very sensitive matter and that they would approach it with the necessary respect and in collaboration with EA and other

stakeholders. He said that as Chair of the Applicant Sporting Body, he had said to FEI that the Applicant Sporting Body, the State Branches and "our participants" are extremely disappointed consultation has not taken place to date.

65. As the Applicant had foreshadowed in her email of 29 October 2019, a backlash did occur when news of the proposal got out to the Australian equestrian community. The Respondent said that she became aware of the issue through Facebook posts. She produced in evidence a Facebook page, the author of which is not disclosed, but which was dated 3 November 2019 at 8:40am.[12] That post asserted that on 19 November 2019, the Applicant would be "attending the FEI to push through mandatory Hendra vaccination for all Australian events that have an FEI class". On 3 November 2019, the Respondent posted the following statement (the 3 November Facebook post) on her Facebook page:

> *I really hope mandatory Hendra Vaccination for FEI events in Australia, as proposed to the FEI by our chief FEI vet Kirsten Neil's NEVER happens. This goes to the FEI this month. If it proceeds it will destroy our sport.*

66. On 5 November 2019, the Respondent posted the following statement (the 5 November Facebook post) on her Facebook page:

> *Attention: ALL FEI RIDERS!!!*
>
> *MANDATORY HENDRA VACCINATION*
>
> *Australian vet Kirsten Neil is vice-chair of the FEI Veterinary Committee. If you think EA can stop mandatory Hendra vaccination of all horses attending FEI events think again!!!*
> *Kirsten Neil is the one pushing this! The FEI General Assembly, will have an FEI subcommittee meeting to discuss this on 19th of November. Who will be trying to stop this???....No one*
> *The other 400,000 horses in Australia won't have to be vaccinated. No racehorses have to be vaccinated. Just those that might want to represent Australia at the Olympics! Previously vaccinated horses were not permitted to go to Japan. The future position on this is still unclear.*
> *I suggest you contact Kirsten Neil to make your position clear. Her phone number and email are…,*[and there followed Dr Neil's mobile phone number and email address, and a link to an article on EA's website that referred to the appointment of Dr Neil as Head Vet of EA and her Vice Chair appointment to the FEI Veterinary Committee].
> *THIS MUST NOT HAPPEN*

67. On 5 November 2019, the Respondent sent a series of SMS messages (the 5 November text messages) which included the following statements:

> *"…Hello Kirsten*
> *I am about to fly my Dressage horses home to Australia, in the hope of further qualifying for Tokyo. After having numerous flu vacs,*

[12] Hearing bundle, volume 3 page 723.

herpes vacs and travelling to Australia I will not be vaccinating my horses. Neither will the other shortlisted riders. If you push this through, the FEI meeting, we will not have a dressage team at Tokyo. Why do the other 400,000 horses including all racehorses not have to be vaccinated??? Because the racing industry don't want to shoot themselves in the foot, and have the balls to stand up for their industry. If you push this through you won't have a job in Australia as an FEI Vet. There is simply won't be any FEI events worth going to. We riders will not be attending! Please stop this happening. It's hard enough trying to represent your country, being Australian based without this. This will mean if you want to represent your country, it will only be possible if you base in the US or Europe. Not everyone can afford this and it will destroy the home-based sport. Regards Mary Hanna …"
"… Does the FEI want a class action against them as is currently happening in Australia"
"Oh… Now I see you have already had the meeting in Moscow and ...???"

68. On 5 November 2019, an article entitled 'Possible Compulsory Hendra Vaccination Through FEI Regulation Causes Uproar in Australia' (the Eurodressage article), was published in the international online publication *Eurodressage*. In that article, the Respondent was quoted as follows:

"This is an initiative by the head FEI vet to make money."
"The racing industry which is huge in Australia has totally refused to vaccinate horses, even though they move constantly around the country, and all the imported horses are here for the Melbourne Cup. The only people targeted here in Australia are those that want to compete in FEI events. All other horses do not have to be vaccinated. This is an initiative of the Australian head FEI vet Kirsten Neil. How can this be fair when thousands of racehorses and all other horses are not vaccinated."
"This will diminish or destroy our Olympic teams of all disciplines for Tokyo, and all future teams will have to be made up of competitors permanently based in Europe."
"Individual studs may request vaccination. Most stallions are not vaccinated, as insurance companies won't insure because of the ongoing class action against the drug company,"
"None of the racehorses at our huge international Spring Racing Carnival have to be vaccinated. There are millions of dollars worth of horses here from all over the world."

69. On 6 November 2019, the FEI published a document, signed by Mr Akerstrom, entitled "Clarification on Hendra virus". It advised that the FEI Veterinary Committee had now met and discussed the Hendra virus at its in-person meeting in Lausanne that day, and had agreed unanimously that there will be no proposal to impose the Hendra vaccination. It continued:

The FEI Veterinary Committee decisions were triggered initially by an incident at an FEI endurance event in Australia earlier this year. The FEI Veterinary Department is continuing to look into the circumstances surrounding this incident in order to ensure the fundamental requirements of the FEI Regulations can be met at FEI events.

As part of this review, the National Head Veterinarian was asked to share official Australian Government documentation and the summary of adverse experience report made to the Australian Pesticides and Veterinary Medicines Authority (APVMA) about Hendra virus vaccine with the FEI Veterinary Department, which was done. It is important to note that at no point did the National Head Veterinarian recommend mandatory Hendra vaccination to the FEI Veterinary Committee or the FEI Veterinary Department.

For the avoidance of doubt, the FEI Veterinary Department was not in contact with the office of Equestrian Australia on the matter until 1 November 2019 following the statement published by the chair of the National Federation. The Veterinary Department, together with the FEI Veterinary Committee, is fully committed to engaging with Equestrian Australia imminently on how to address concerns regarding the Hendra virus.

As soon as the review process is completed, Equestrian Australia will be given the opportunity to provide submissions on this issue. No decision will be made without full consultation with National Federations, including Equestrian Australia.

The FEI is aware of social media posts regarding individuals involved in this, but while everyone has a right to voice their opinion and we are aware of the sensitivities of this topic, we do not condone harassment of any sort and we ask people to be respectful when posting on this issue.

70. On 7 November 2019, the Respondent saw the release published by FEI the previous day. When responding to the complaints before the investigator, she said that, having seen that release, and from information also received by her at about that time, she then understood that the Applicant had at all times acted impeccably and had been communicating with the CEO of the Applicant Sporting Body about the events that were unfolding. She affirmed that evidence at the hearing before this Tribunal. On 8 November 2019, she published an apology on her Facebook page. The post read:

APOLOGY:

I apologise to Kirsten Neils, (sic) *Head Australian FEI vet. By the statement from EA that mandatory Hendra vaccination was a "FEI Veterinary Committee proposal, not an EA proposal" I wrongly concluded that being an Australian issue, she would have to be the one to put up the proposal.*

I understand I was completely wrong about this.

Clearly Kirsten is a hard-working volunteer, and does not deserve to be maligned in any way.

Mary Hanna

71. It is apparent that the Applicant did not accept that apology as being sincere. When questioned about that in cross-examination, she indicated that she was offended by the fact that her name was misspelled. I do not accept that response to the apology as being objectively reasonable. There is no reason not to construe the apology in its express terms nor to doubt that readers of the post would regard the apology as sincere.

72. After posting the apology, the Respondent took down her earlier posts asserting that the Applicant was promoting compulsory Hendra vaccination. She also contacted the editor of Eurodressage and sought unsuccessfully to stop publication of the Eurodressage article. She did however succeed in having online publication amended to remove the allegation that the Applicant was motivated by financial gain.

73. At about the time that she posted the apology on Facebook, the Respondent sent a text message to the Applicant. The text read:

Hello Kirsten

I apologise for saying the mandatory Hendra vaccination proposal to the FEI was your initiative. I now understand that after the FEI statement that this is not the case.

Kind regards

Mary Hanna

74. At some point, the Respondent also tried to telephone the Applicant when she was in Europe, but the Applicant did not receive the message that she had called or see the text message until she returned to Australia a few days later on 8 November 2019.

75. In her oral evidence, I understood the Respondent to be saying that she made that call to apologise for the posts she had made. If that understanding is correct, I do not accept that proposition.

76. In an email from the Applicant to Ms Warhurst on 8 November 2019 (a Friday), the Applicant said that the Respondent had left a message to contact her urgently at 8.51pm on “Tuesday” – which would have been 5 November 2019. The 5 November post was made at 6.11pm that day and before the publication by FEI of the clarification on Hendra virus which alerted the Respondent to the fact that her assertions as to the Applicant’s role were wrong. The attempt by ‘the Respondent’ to phone the Applicant was clearly in order to do that which, by the 5 November post, she was urging others to do.

77. The Applicant said that she did not respond to the telephone call because on 9 November 2019 she received an email from Ms Warhurst advising her that she was

collating all the information relating to breaches of the EAMPP and the EASMP and that there "may also be a breach of the Commonwealth Criminal Code s474.17 relating to the use of a carriage service to menace, harass or cause offence". In those circumstances the Applicant did not think it appropriate to respond to the Respondent.

PROCEEDINGS IN RELATION TO THE APPLICANT'S COMPLAINT

78. The Applicant first complained about misleading comments being made about her by the Respondent and other people on 5 November 2019 when she sent an email to Mr Andrew Hamilton at the Applicant Sporting Body.[13] Her email attached the 5 November Facebook post and a number of other social media posts by others dealing with the proposal in relation to compulsory Hendra virus vaccination and suggesting that the proposal was being pushed by the Applicant.

79. On 9 November 2019, Mr Carl Parkin, the Chair of EV, sent an email to the CEO and Chair of the Applicant Sporting Body referring to the treatment of the Applicant by "one of our most senior riders" and enquiring how the organisation was going to deal with the matter. A further letter was sent to the Applicant Sporting Body by Dr Sam Nugent, president of Equine Veterinarians Australia, on 22 November 2019 demanding action being taken by the Applicant Sporting Body in respect to the treatment of the Applicant by the Respondent.

80. In an email dated 11 November 2019, the Applicant provided a copy of the 5 November text messages to the Applicant Sporting Body.

81. The process which followed was not entirely clear from the materials submitted to this Tribunal. However, it is clear that an investigation was commissioned by the Applicant Sporting Body who engaged Ms Diana Taylor, a director of Diana Taylor Consulting (the Investigator), to investigate the complaint made by the Applicant against the Respondent and certain other people. It appears from the Investigator's report that a Member Protection Information Officer compiled a written report in relation to complaints dated 20 November 2019 which was submitted to the Chairs and CEOs of the Applicant Sporting Body and EV on 21 November 2019. It was then considered by the Applicant Sporting Body Executive and the Investigator was appointed before the Christmas and New Year break intervened. The Applicant was interviewed by the Investigator in early January 2020.

82. It was not until 20 February 2020 that a formal notification was sent by the Investigator to the respondents, including the Respondent in this case, setting out the nature of the complaint, the relevant policy documents and seeking a response.[14] The Respondent was then interviewed by the Investigator on 30 March 2020. That

[13] Hearing bundle, volume 3, p92

[14] Investigators Report, Hearing bundle V3 p7.

interview was delayed at least in part in order to accommodate the convenience of the Respondent's support person, a Queen's Counsel who apparently attended the interview of the Respondent by the Investigator[15].

83. The Investigator's report was completed on 22 April 2020. The Investigator concluded that the Respondent had breached various provisions of the EAMPP and the EASMP although she found some of the allegations made against the Respondent not to be substantiated. The matter was subsequently brought to this Tribunal in the circumstances outlined earlier in these reasons.

THE PARTICULAR COMPLAINTS MADE AGAINST MS HANNA

84. Given the informal nature of this Tribunal and the fact that, as I understand it, this is the first contested arbitration to come before the NST since its inception in late March this year, no document containing a crisp statement and particulars of the allegations against the Respondent has been provided. Attempts by the NST Registry to have the Parties execute an arbitration agreement, that were no doubt designed to clarify the details of the dispute that had been referred to the NST, were unsuccessful, in large part because of disagreement between the Parties as to the scope of the arbitration.

85. The Applicants approached the matter on the basis that, the Investigator having reached certain conclusions as to breach, the only matter remaining was the question of sanction. The Respondent, however, contended that all matters, including the existence of any breaches, were the subject of the dispute, and that the findings of the investigation report should be ignored.

86. In the end, the matter proceeded on the basis that it fell to this Tribunal to determine questions of breach, and if breaches were established, then the question of sanction. That approach had the effect of reopening the question as to whether there were breaches of provisions of the applicable policies that were not found to be established by the investigator.

87. While all Parties confined their arguments to the four communications set out above (being the 3 November post, the 5 November post, the 5 November text messages and the Eurodressage article), submissions were made by each of the Respondent and the Applicant as to whether there were breaches of provisions which had not been the subject of adverse findings by the Investigator.

88. While it is not desirable to introduce undue formality into proceedings in this jurisdiction, the absence of a clear statement of allegations gives rise to a risk that a respondent will not clearly know the case which she or he has to meet.

[15] Investigator's report, Hearing bundle. V3 p25

89. I am satisfied that, in this case, that risk was averted by a combination of the pre-existing Investigator's report and findings, and the submissions (including the submissions in reply) filed by the Applicant and the Applicant Sporting Body. The manner in which the case against the Respondent evolved did, however, affect the efficiency with which the proceedings were dealt with. It would be desirable if, in future arbitrations involving allegations of disciplinary breach, steps were taken in preliminary stages of the arbitration to ensure that there is a clear articulation and understanding of the precise nature of the allegations including the conduct complained of and the particular disciplinary provisions that are said to have been breached.

90. It was apparent from the written submissions filed by the Respondent and relied upon at the hearing that, while not accepting the findings by the Investigator, she took the case she had to meet as being whether, in relation to the four communications found by the investigator to have breached the EAMPP, the EACC or the EASMP, she had in fact breached any of those instruments. In meeting that case the Respondent addressed all the possible provisions that might be said to have been breached. The initial submissions filed by the Applicant were to the effect that the Investigator correctly found specified breaches to have occurred and that this Tribunal should accept those findings or alternatively should reach the same conclusions.

91. Although not clearly articulated, the submissions by the Applicant Sporting Body were implicitly to the same effect. In her responsive submissions, the Applicant, in a rolled up way which did not separately address the application of particular provisions to particular communications, asserted breaches of a number of policy provisions going beyond those found by the Investigator to have been breached in particular cases. Given the way the matter has been argued, the task that falls to the Tribunal is to find whether the Respondent was in breach of the provisions of the policies and EACC addressed by the Parties in their submissions in relation to the four communications said by the Investigator to have constituted breaches, and if so what sanction if any should be imposed.

92. The Investigator found that, by making each of the 3 November post and the 5 November post, the Respondent breached:

- cl 3.1.1 of the EA MPP - by failing to take care for the welfare of Dr Neil, another EA member and participant in the sport;
- cl 3.2.14 of the EA MPP - by making a posting that was offensive and provocative and was misleading, contained false information and injured the reputation of Dr Neil;
- various provisions of the EA Code of Conduct by
    (a) failing to respect the rights, dignity and worth of Dr Neil, a fellow participant in the sport of Equestrian;
    (b) failing to be fair, considerate, honest and to act appropriately in her dealings with Dr Neil;

(c) failing to refrain from acting in an intimidating way using her social media posts in respect of Dr Neil;
(d) failing in this instance to contribute to a respectful culture of EA.

- the EA SMP by
  (a) failing to respect the rights and dignity of Dr Neil,
  (b) posting material that is disparaging of Dr Neil and in doing so engaging in unethical behaviour towards Dr Neil,
  (c) failing to use common sense and to think before she posted the material.

93. In relation to the 5 November text messages, the Investigator described the allegation as being that the Respondent sent to the Applicant a text message that made several incorrect assumptions about her role in the FEI Hendra vaccination issue and made threatening statements which included "if you push through this through, you won't have a job in Australia as an FEI vet" and "does the FEI want a class action against them" and "now I see you have already attended the meeting in Moscow". The Investigator found that allegation to be partially substantiated in that text messages were sent based on incorrect assumptions about the Applicant's role but that, taken in context, the text messages were not threatening. The particular breaches said to have occurred by reason of that portion of the allegation which the Investigator found to be substantiated were not identified by the Investigator.

94. In her submissions, the Respondent addressed a response to any allegation that the 5 November text messages contravened clauses 3.1.1, 3.2.2, 3.2.3, 3.2.10, 3.2.13, and 3.2.14 of the EAMPP, and the general provisions of the EACC. In her submissions in reply, the Applicant identified the question for the Tribunal as being to determine whether those particular clauses of the EAMPP and the EACC were breached by each of the four communications by the Respondent set out above. The matter proceeded on the understanding by all concerned that the case to be met by the Respondent in relation to the 5 November text messages was an allegation that those messages amounted to a breach of those provisions.

95. In relation to the Eurodressage article, the Investigator concluded that by making the statements quoted in the article, the Respondent breached:

- clause 3.1.1 of the EA MPP by failing to care for the welfare of Dr Neil, another EA member and participant in the sport;
- clause 3.2.13 of the EA MPP – cyber bullying in that Ms Hanna's direct voluntary engagement with the online publication was the second online medium (after Facebook) that Ms Hanna used to "drive home" her point regarding the Hendra vaccination and her misrepresentations regarding the role and interests of Dr Neil;
- the EA Code of Conduct by
  (a) failing to respect the rights, dignity and worth of Dr Neil, a fellow participant in the sport of Equestrian;

(b) failing to be fair, considerate, honest and to act appropriately in her dealings with Dr Neil matter;
(c) failing to refrain from acting in an intimidating way by the use of social media posts in respect of Dr Neil;
(d) failing in this instance to contribute to a respectful culture of EA.

- the EA SMP by
  (a) failing to respect the rights and dignity of Dr Neil;
  (b) posting material that is disparaging of Dr Neil and in doing so engaging in unethical behaviour towards Dr Neil;
  (c) failing to use common sense and to think before she posted the material.

96. Solicitors for the Applicant submitted that, in approaching the question of breach, the Tribunal should not consider the four publications in isolation but rather as they would have been considered by those who read them - that is by noting that they were made over the course of two days "using the same medium, Facebook" and that as at 5 November 2019 they were all displayed contemporaneously on the Respondent 's Facebook account.

97. That submission obviously does not reflect the facts, namely that two of the four communications the subject of complaint were not made on Facebook, therefore undermining the factual basis upon which the submission is made. But in any event, the submission was not developed to explain how that approach might inform the question of breach, and in particular whether it was being submitted that reading any particular communication with one or more of the other communications might give rise to a different conclusion as to breach from that which might be reached reading a communication alone.

98. There are obvious considerations of fairness to the Respondent in inviting the Tribunal to embark on some unspecified and unparticularised analysis of how a breach might emerge from some unspecified combination of the communications. Save that it is necessary to construe each communication in its context, the appropriate approach is to have regard to each communication separately to determine whether or not it amounts to a breach of any of the identified policy obligations.

APPLICABLE RULES

99. The "Preamble" to the EAMPP commences with the following observation:

a. *Australian sporting organisations have legal obligations under Australian law with regard to harassment, discrimination and child protection. They also have moral obligations in relation to establishing standards of appropriate member*

behaviour and to provide safe, respectful and appropriate sporting environments for their activities to occur.[16]

100. The purpose of the EAMPP is "to describe the principles that the Equestrian Australia (EA) endorses in the general area known as 'member protection'." The principles are listed in cl 1.0 as follows:

1.1 EA wishes to protect the health, safety, and well being of all EA Employees, Officers, Members, National Squad and Team athletes/coaches and support staff, work groups (including Board/Committee/Sub-committee members), and seeks to provide a safe environment for riders participating in EA-sanctioned programs, competitions and activities.

1.2 EA will not tolerate harassment, discrimination or abuse of those, and by those, involved in their activities for and behalf of EA.

1.3 EA is committed to strong ethical values and requires all people involved in or on behalf of EA to comply with principles of responsible and professional behaviour.

1.4 EA believes that everyone involved in equestrian activities has a right to be treated fairly and with dignity and respect.

1.5 EA seeks to recruit and retain those people who commit to the above-mentioned principles and reject those people who do not uphold the same principles.

101. The relevant clauses of the EAMPP read as follows:

3.1.1 EA wishes to convey a message to all people responsible for the administration or conduct of EA equestrian programs and activities…to make every attempt to care for the welfare of others involved in the sport.

3.2.1 The abuse or harassment of people (particularly youth) by others is not acceptable. EA encourages all people to respect others and to behave in accordance with published EA Code of Conduct.

3.2.3 The vilification of others is not acceptable. EA encourages all people to respect others.

3.2.10 ***Anti-Discrimination and Harassment Policy****: EA aims to provide a sport environment where all those involved in its activities are treated with dignity and respect, and without harassment or discrimination.*

EA recognises that all those involved in its activities cannot enjoy themselves, perform to their best, or be effective or fully productive if they are being treated unfairly, discriminated against, harassed or bullied because of their age, disability, family responsibilities, gender identity, homosexuality or sexual

[16] Equestrian Australia's Member Protection Policy, Page 2

orientation, irrelevant medical or criminal record, marital status, political belief, pregnancy or breastfeeding, race, religion, sex, social origin and/or trade union membership/activity.

EA prohibits all forms of harassment, bullying and discrimination based on personal characteristics listed in the Dictionary – whether this is face-to-face, indirectly or via communication technologies such as mobile phones and computers. Discrimination, harassment and bullying are extremely distressing, offensive, humiliating and/or threatening and create an uncomfortable and unpleasant environment. In most circumstances discrimination and harassment or bullying are against the law.

3.2.13 *Cyber-bullying: EA regards bullying and harassment in all forms as unacceptable in our sport. Bullying has the potential to cause great anxiety and distress to the person targeted by hurtful or derogatory comments or statements.*

New technologies and communication tools, such as smart phones and social networking websites, have greatly increased the potential for people to be bullied through unwanted and inappropriate comments.

EA will not tolerate abusive, discriminatory, intimidating or offensive statements being made online. In some cases, bullying is a criminal offence punishable.

Frustration at an official, coach, sporting body or fellow athlete should never be communicated on social networking websites. These issues should instead be addressed – in a written or verbal statement or a complaint – to the relevant controlling club or sporting body.

3.2.14 ***Social Networking Websites**: EA acknowledges the enormous value of social networking websites, such as Facebook and Twitter, to promote our sport and celebrate the achievements and success of the people involved in our sport.*

We expect all people bound by this policy to conduct themselves appropriately when using social networking sites to share information related to our sport.
Social media postings, blogs, status updates and tweets:

- *Must not use offensive, provocative or hateful language.*
- *Must not be misleading, false or injure the reputation of another person.*
- *Should respect and maintain the privacy of others.*
- *Should promote the sport in a positive way.*

102. Clause 4.0 of the EAMPP provides a number of “Key Definitions”. These relevantly include:

> ***4.1*** ***Abuse*** *is a form of harassment. It includes: physical abuse (eg. assault), emotional abuse (eg. blackmail, repeated requests or demands), neglect (i.e. failure to provide the basic physical and emotional necessities of life), abuse of power (the harasser holds over the harassed*). *Examples of relationships in (4.1) that involve a power disparity include a coach/competitor, manager/competitor, employer/employee, vet/horse owner and Committee/competitor. People in such positions of power need to be particularly wary not to exploit that power*
>
> ***4.8*** ***Harassment*** *is any type of behaviour that the other person does not want and does not return and that is offensive, abusive, belittling or threatening. The behaviour is unwelcome and of a type that a reasonable person would recognise as being unwelcome and likely to cause the recipient to feel offended, humiliated or intimidated.*
>
> *……...*
>
> *It does not matter whether the harassment was intended: the focus is on the impact of the behaviour. The basic rule is if someone else finds it harassing then it could be harassment. Harassment may be a single incident or repeated. It may be explicit or implicit, verbal or nonverbal.*
>
> *……...*
>
> *Requesting, assisting, instructing, inducing or encouraging another person to engage in discrimination or harassment may also be against the law.*
>
> *……...*
>
> ***4.23*** ***Vilification*** *involves a person or organisation doing public acts to incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons having any of the attributes or characteristics within the meaning of discrimination. Public acts that may amount to vilification include any form of communication to the public and any conduct observable by the public.*

103. Discrimination is defined in clause 4.7 of the EAMPP and refers to direct discrimination which is treating or proposing to treat someone less favourably than someone else because of a particular characteristic in the same or similar circumstances in certain areas of public life, and indirect discrimination which involves imposing unreasonable requirements or conditions which are the same for everyone to have an unequal or disproportionate effect on individuals or groups with particular characteristics. Reference is made to the characteristics which are identified in discrimination law across Australia being such things as age, disability, gender, sexuality political beliefs and so on. There is no suggestion in these proceedings that any characteristic of the Applicant played any part in the communications the subject of complaint.

104. Clause 6.0 of the EAMPP incorporates the EACC by providing a link to it. The EACC specifies a number of general requirements that apply to all persons who are required to comply with the EAMPP including, relevantly, participants in the sport and officials. It requires that those persons meet the following requirements in regard to their conduct and behaviour in any way relating to the sport of Equestrian. Those requirements include:

- *Respect the rights, dignity and worth of all people involved in equestrian (including all participants, officials and administrators) regardless of gender, ability, sexual orientation, age, cultural background or religion.*

  …….
- *Be fair, considerate, honest and act appropriately in all dealings.*

  …….
- *Be professional in, and accept responsibility for, your actions.*

  …….
- *Be aware of, and comply with EA's standards, rules, regulations, by-laws and policies.*

  …….
- *Not use your involvement with EA, its member associations or affiliated clubs to promote your own beliefs, behaviours or practices where these are inconsistent with those of EA.*
- *Demonstrate a high degree of individual responsibility especially when dealing with persons under the age of 18 years, as your words and actions are an example.*
- *Refrain from any form of harassment, bullying, abuse, violence, intimidation or vilification of others, including via the use of social media.*
- *Refrain from any behaviour that may bring EA, its member associations, its affiliated clubs or the sport of equestrian into disrepute.*
- *Not engage in conduct that is (in EA's reasonable opinion) unethical, unbecoming or likely to cause harm to the reputation of EA, its member associations or affiliated clubs or the sport of equestrian.*

  …….
- *Comply with all relevant Australian laws (Federal and State), including anti-discrimination, occupational health and safety and child protection laws.*

  …….
- *Be a positive role model.*
- *Contribute to a safe sporting environment and respectful culture which is accepting of individual differences, and behave accordingly.*

  …….
- *Understand the consequences if you breach EA's standards, rules, regulations and policies.*
- *Condemn the use of violence or abuse in any form, whether it is by other spectators, participants, coaches, officials, volunteers or athletes.*

  …….

105. The EASMP applies to all members of EA, its employees and officers and a range of others associated with the sport. It deals with social media which is defined as any digital communication that can be used for public social communication.

Unsurprisingly, the list of examples of such communication does not include private text messages. The policy contains a number of social media guidelines including the following:

4(b) Your content is everywhere forever

Assume everything you put on the internet, even if in private, can be read by anyone and can never be deleted. This is why you need to take particular care when communicating on social media.
Information which is shared online can be difficult to retract. A person might be able to remove his/her original comments. However, the very nature of social media encourages people to share information which makes it difficult to know where the information they post finishes up.
……...
4(c) You represent you
……
You are personally responsible for your posts and comments on social media, including any impact on EA.

4(d) You reflect EA

Even if you don't identify yourself on social media as being associated with EA (whether as an employee, member or otherwise), you can still be linked to EA.
Think about what you say and how you're saying it.
Don't engage in any conduct on social media that could directly or indirectly damage EA's name or which may otherwise bring the reputation of EA or its member associations or affiliate's into disrepute.

Comments that are contrary to the spirit and integrity of the sport of equestrian will not be tolerated.

4(e) Be kind and respectful

Be kind when on social media. Consider your audience and adopt a communication style that is appropriate.

Be yourself, but do so respectfully. In particular, respect the rights, dignity and worth of others.

4(f) Don't engage in illegal or unethical behaviour

Do not engage in any illegal or unethical behaviour when using social media. Respect copyright, privacy, anti-discrimination and harassment and intellectual property laws.

Do not post or respond to any material on social media that is threatening, derogatory, obscene, offensive, sexually explicit, pornographic, abusive, disparaging, racist, sexist, discriminatory, hateful, harassing, bullying or defamatory.

4(g) Think before you post

Use common sense and think before you post on social media. You should be mindful that information shared on social media appears in public so give careful consideration to content before posting it.
Never forget that information shared within online communities could have implications for the sport of equestrian and those associated with it.

FINDINGS ON ALLEGED BREACHES

106. The Respondent admits, and I find, that she made each of the four communications the subject of complaint.

The 3 November post

107. The 3 November post can be read, subject to one problem, as simply an expression of concern on the part of the Respondent as the effect of mandatory Hendra vaccination for FEI events in Australia if it were to be introduced. In that sense, expressed as it is as a hope, the post would amount to no more than a comment on a topical issue and would not, in my view, transgress any of the policy obligations outlined above. The problem, however, is the attribution of the proposal to the Applicant who is mentioned by name.

108. A good deal of the Applicant's cross examination appeared to be directed to the proposition that the Applicant had in fact been promoting the proposal so that the suggestions in each of the communications complained about was not misleading. In her written submissions, it was asserted by the Respondent that "the statement is most likely true".[17] I reject that proposition. It is not only contrary to the Applicant's sworn evidence (which I accept) and the clear statement by FEI on 6 November 2019 saying that "at no point did the National Head Veterinarian recommend mandatory Hendra vaccination to the FEI Veterinary Committee", but also contrary to the sworn evidence of the Respondent.

109. As noted above, the Respondent said in her statement to the Investigator (which she confirmed on oath in these proceedings), that she realised on 7 November 2019 that the Applicant had acted impeccably and that she "realised that in fact no blame at all could have been attributed to the Applicant's actions" and that the events "were unfolding apparently at the request of a foreign vet who attended an FEI competition in Australia".

[17] Respondent's submissions [59(f)] and [61]

110. It was also submitted that, even if not true, at the very least it is fair comment or expression of honest opinion such as to give rise to defence in a defamation action. That is irrelevant to the present proceedings. Those defences have no application to the allegations made in relation breaches of the policies.

111. I accept that the Respondent formed the erroneous view that the Applicant was behind the proposal for mandatory Hendra vaccination by reason of membership of the FEI Veterinary Committee, the two public statements by the Chair of the Applicant Sporting Body asserting that there had been no consultation with the Applicant Sporting Body by FEI and the tenor of posts by others that she saw on Facebook. That she jumped to a mistaken conclusion does not alter the fact that her post was misleading.

112. The misleading nature of the post had a clear potential to cause damage to the Applicant's reputation within the equestrian community, especially among the apparently significant number of people who held strong views opposing the Hendra vaccine or at least mandatory Hendra vaccination. That potential must have been obvious to the Respondent.

113. Equally, it is clear that, given the strong views and emotions surrounding Hendra vaccination in Australia which had resulted in much controversy when the matter had been previously mooted, an assertion that the EA's Head Vet was pushing for mandatory Hendra vaccination was likely to evoke a reaction that would be (as it undoubtedly was) distressing to the Applicant. Even if that was not the Respondent's specific intention, she must have appreciated that that outcome was inevitable.

114. It follows that by making the first post, the Respondent failed to make every attempt to care for the welfare of others in the sport, contrary to clause 3.1.1 of the EAMPP.

115. The misleading nature of the 3 November post renders it a breach of cl 3.2.14 of the EAMPP.

116. By publishing a misleading post which was likely to damage the reputation of the Applicant, the Respondent also breached the requirements of the EACC to be fair and to act appropriately in all dealings and to contribute to a respectful culture within EA.

117. I also find that the Respondent failed to observe the requirements of cl 4(e) of the EASMP, in that she failed to be kind on social media and to consider her audience and adopt a communication style that was appropriate.

118. In her written submissions, the Respondent addressed the question of whether or not the 3 November post also constituted harassment contrary to clause 3.2.1. Harassment is any type of behaviour that the other person does not want and does not return that is offensive. Having regard to the purposes of the EAMPP including to protect the well-being of those covered by the policy, the requirement for all people involved in EA to comply with the principles of responsible and professional behaviour, and the object of protection of the right to be treated fairly and with dignity

and respect, the word "offensive" should be given a broad interpretation. The making of a false allegation which has the inevitable effect of damaging a reputation and causing distress to the subject of the allegation is properly described as offensive. It was clearly behaviour that the Applicant did not want and did not return. It was unwelcome behaviour which a reasonable person would recognise as unwelcome. It does not matter that the communication was a single incident.[18] In my view the 3 November post breached cl 3.2.1 of the EAMPP.

119. I do not consider that the 3 November post constituted vilification within the meaning of that word in the EAMPP. That is because it was not directed to any relevant characteristics of the Applicant. For the same reason, the posting of the comment cannot be categorised as discrimination.

120. I am also of the view that the 3 November post breached the EACC in that, in making that post containing as it did a false and damaging assertion, the Respondent failed to act fairly and appropriately.

121. Similarly, I am satisfied that the 3 November post was disparaging of and offensive to the Applicant in falsely asserting that she was promoting mandatory Hendra vaccination and was thus in breach of clause 4(f) of the EASMP.

The 5 November post

122. The 5 November post was a more blatant assertion that the Applicant was pushing for mandatory Hendra vaccination. Given the falsity of that assertion, I find that the 5 November post breached each of the same provisions of the EAMPP, the EACC and the EASMP, as did the 3 November post. It is not to the point that the Respondent was intending to make a protest about a matter that was causing her concern and about which she felt very strongly. That fact may inform the approach to sanction, but it does not amount to a defence to her publication of a false and damaging statement.

123. The EAMPP, the EACC and the EASMP all counsel caution in dealings with others involved in the sport and in the use of social media. The Respondent failed to exercise that caution and rendered herself liable to being found to be in breach of those policies.

124. The 5 November post had the added feature of publishing the Applicant's contact details and inviting members to contact her to express their views. By itself, I would not conclude that doing so amounted to a breach of policies. It seems to me that merely to invite interested persons to express a view on a controversial matter to a person in a position to affect the outcome of that matter is not by itself objectionable as amounting to provocation, abuse or offence.

The problem with the 5 November post is that that exhortation was coupled with the false assertion that the Applicant was pushing for mandatory Hendra vaccination so

[18] EA MPP cl 4.8

that the invitation to make contact can be reasonably construed as an invitation to criticise and possibly abuse. It is that context of the post read as a whole which makes it a more serious breach of the provisions I have identified.

The 5 November text messages

125. The Investigator found, and I agree, that the 5 November text messages and in particular the reference to the Applicant not having a job in Australia as an FEI vet, read in context, were not threatening. That suggestion was clearly based on the proposition expressed in the following sentence - that there would be no FEI events in Australia if mandatory Hendra vaccination was introduced, and therefore no role for an FEI vet.

126. It is necessary to bear in mind that this was a private communication from the Respondent to the Applicant. The Respondent cannot be criticised for expressing the view on a matter which was clearly important to the equestrian sport and about which she held strong opinions, to the person who was to be involved in any decision-making by the FEI Veterinary Committee.

127. The difficulty with the communication is that it was predicated upon the false assumption that the Applicant intended to “push this through” and that the forceful language used risked transgressing the requirement to treat others in the industry with dignity and respect. However, being a direct and private communication to the Applicant, the false inference that she was pushing the issue was something the Applicant knew to be false and which she could have easily corrected by responding to the text.

128. On balance, while the language used was robust, I do not consider that it is can be categorised as abusive or offensive, nor as a failure to treat the recipient of the communication with dignity and respect. The receipt of the text messages by the Applicant in a context where there had been significant social media discussion on the issue including significant express and implied criticism of her no doubt affected her subjective response to the 5 November text messages. Objectively construed, however, I am not satisfied that it can be said that the 5 November text messages constituted a breach of any of the EAMPP or the EACC provisions. The text messages do not constitute social media for the purposes of the EASMP, so it has no application in relation to these communications.

The Eurodressage article

129. The matters quoted in the Eurodressage article went beyond the erroneous assertion that the proposal to introduce mandatory Hendra vaccination was “an initiative of the Australian FEI head vet Kirsten Neil” making the seriously disparaging assertion that the motive for that initiative was to make money.

130. The evidence discloses that there are strongly held differing points of view as to the desirability of compulsory Hendra vaccination. Both sides of the argument have as

their basis opinions as to what is best in the interests of the welfare of horses, although the proponents of compulsory Hendra vaccination also have the welfare of veterinarians as well as horses at the forefront of their arguments.

131. To assert that a veterinarian supports mandatory Hendra vaccination is likely to be construed by a reasonable person as indicating that the veterinarian is motivated by their views as to the best way to protect the welfare of both horses and veterinarians. To assert that the motivation for a veterinarian's stance is not their professional view of the best interests of horses and people, but rather financial self interest is highly derogatory and offensive.

132. The Respondent said that she made the assertion that the Applicant was motivated by money because that suggestion had been made to her by others. If that was so it provides no justification for repeating the allegation without any sound factual foundation in an international forum with the likely result of severely disparaging the Applicant's reputation.

133. It brings no credit to the Respondent that, at the hearing of this arbitration, she sought through her Counsel's cross examination of the Applicant to establish that the Applicant stood to gain financially from vaccination of horses for Hendra virus.

134. While that cross examination established the self-evident proposition that, if called upon in her practice to administer Hendra vaccination, the Applicant would charge a fee, it also established that, her practice being in an area well separated from areas where Hendra virus has been known to occur, it would be a rare occasion that Dr Neil would be likely to be asked to administer the vaccine.

135. The cross examination was designed to establish that the Respondent was justified in attributing an improper and unprofessional motivation for the Applicant's approach to Hendra vaccination. A submission to that effect was made by the Respondent.[19] The evidence fell well short of achieving that objective.

136. It is a matter of serious concern that the Respondent continued at the hearing to attempt to disparage the Applicant by attributing financial motivation to her conduct. The attempt to do so is difficult to understand given the Respondent's sworn evidence that she accepts that she was wrong to suggest that the Applicant was pushing for the introduction of mandatory Hendra vaccination, and that when she realised that she was wrong she contacted Eurodressage to have it take down the article, including the reference to financial motivation.

137. That assertion was in fact subsequently deleted from the online article. This is a matter to which I will return in dealing with the question of sanction.

138. Clauses 3.2.13 and 3.2.14 have no application to the Eurodressage article because those clauses deal with social media use. The comments made to Eurodressage by

[19] Respondent's submissions [79]

the Respondent were not made through social media. The EASMP has no application in relation to this publication for the same reason.

139. The false assertion that the Applicant was pushing for the introduction of mandatory Hendra vaccination, and was doing so for own financial gain is clearly offensive and abusive. It is a clear failure to attempt to care for the welfare of others involved in the sport, contrary to clause 3.1.1 of the EAMPP. It is a breach of clauses 3.2.1 and 3.2.10 of the EA MPP, as it amounts to harassment by reason of its offensive nature.

140. It is not a statement that is fair, considerate, honest or appropriate in relation to dealings with the Applicant, and is thus contrary to the requirements of the EACC.

SANCTIONS

141. Disciplinary measures are dealt with in part 9 of the EAMPP. The introductory words to that part read:

Equestrian Australia may impose disciplinary measures on an individual or organisation for a breach of this policy.
Any disciplinary measure imposed will be:

- *fair and reasonable*
- *applied consistent with any contractual or employment rules and requirements*
- *be based on the evidence and information presented and the seriousness of the breach*
- *be determined in accordance with our Constitution, bylaws, this policy and/or the rules of the sport*

142. Clause 9.1 lists the forms of discipline that may be imposed where an individual is found to have breached the EAMPP. The available forms of discipline are:

9.1.1 A direction that the individual make a verbal and/or written apology;
9.1.2 A written warning;
9.1.3 A direction that the individual attend counselling to address their behaviour;
9.1.4 A withdrawal of any awards, scholarships, placings records, achievements bestowed in any tournaments, activities or events held or sanctioned by Equestrian Australia ;
9.1.4 A demotion or transfer of the individual to another location, role or activity;
9.1.6 A suspension of the individual's membership or participation or engagement in a role or activity;
9.1.7 Termination of the individual's membership, appointment or engagement;
9.1.8 A recommendation that Equestrian Australia terminate the individual's membership, appointment or engagement;
9.1.9 In the case of a coach or official, a direction that the relevant organisation deregister the accreditation of the coach or official for a period of time or permanently;

9.1.10 A fine

143. The potentially relevant forms of discipline for present purposes are those referred to in clauses 9.1.1, 9.1.2, 9.1.6, 9.1.7, 9.1.8 and 9.1.10.

144. Clause 9.3 of the EAMPP identifies the factors to consider in determining the form of discipline to be imposed. It provides:

The form of discipline to be imposed on an individual or organisation will depend on factors, such as:

- *the nature and seriousness of the breach*
- *if the person knew, or should have known, that the behaviour was a breach of the policy*
- *the person's level of contrition*
- *the effect of the proposed disciplinary measures on the person, including any personal, professional or financial consequences*
- *if there had been any relevant prior warnings or disciplinary action*
- *the ability to enforce disciplinary measures if the person is a parent or spectator (even if they are bound by the policy)*
- *any other mitigating circumstances*

145. Clauses 8.7and 12 of the EAMPP provide that Serious Complaints will be dealt with in accordance with the EA Disciplinary Bylaws. Clause 4.20 of the EAMPP defines a Serious Complaint as a complaint about conduct which contravenes the EAMPP and is likely to be a criminal offence, contravention of laws prohibiting discrimination, or sufficiently persistent or serious that it brings the Applicant Sporting Body or the sport into disrepute. In its submissions on sanction, the Applicant Sporting Body submitted that this matter is a Serious Complaint so as to invoke the EA Disciplinary Bylaws which in turn incorporate article 169 of the FEI General Regulations.

146. The findings I have made in these proceedings are not findings of conduct which is likely to be a criminal offence, or a contravention of laws prohibiting discrimination. Notwithstanding that I consider the Respondent's breaches in relation to the 5 November post and the Eurodressage article to be serious, because of the Respondent's prompt apology and removal of the posts from her Facebook page, I do not consider them sufficiently persistent or serious that they bring the Applicant Sporting Body or the sport of Equestrian into disrepute.

147. I therefore do not consider it open to invoke the provisions of the EA Disciplinary Bylaws for the purpose of guidance as to the approach to be taken to sanction. In my view, it is the provisions of the EAMPP which deal with the question of sanction for the purpose of these proceedings.

148. The Applicant Sporting Body urged the Tribunal to send a strong message to mitigate the likelihood of a repeat of the behaviour of the Respondent and to demonstrate that the Applicant Sporting Body is serious about providing an environment free from inappropriate behaviour.

149. It submitted that, in the circumstances, sanctions which should be imposed to reflect the seriousness of the conduct including:

- a substantial suspension of the Respondent's membership;
- a substantial fine;
- at the option of the Applicant, a public apology to the Applicant; and
- public apology to the Applicant Sporting Body and is participating members, the wording of which is to be agreed by the Applicant Sporting Body and then published on the Applicant Sporting Body's website on a suitable webpage.

150. The Applicant submitted that the Respondent's actions had had a detrimental impact on her both personally and professionally. She submitted that she is fearful to answer unknown telephone calls and does not feel comfortable accepting new clients, she submitted that this had affected her business operations on a day-to-day basis and that she had suffered financial loss as a direct result of the Respondent's conduct.

151. In addition, she said that she had suffered reputational damage by having her quote "character, values and standing challenged in a public forum". She noted that the Respondent has considerable standing in the equestrian community, being a five time Olympic participant and to that extent a role model in that community.

152. I accept that the Respondent's Facebook posts of 3 November and 5 November are likely to have materially contributed to the impact of the events of early November 2019 which the Applicant describes. It is clear however that there were a significant number of social media posts by others to similar effect as those by the Respondent around the same time. The Respondent cannot fairly be held responsible for the entirety of those impacts.

153. The Applicant submitted that the Tribunal should:

- require the Respondent to make a public written apology to the Applicant in a form acceptable to the Applicant;
- be issued with a written warning about her conduct;
- have their membership of the Applicant Sporting Body terminated; and
- have sanctions imposed in line with those handed down by the Court of Arbitration of Sport in two reported decisions in each of which a substantial period of suspension was composed.[20]

154. Counsel for the Respondent submitted that, if the question of sanction was reached, the Tribunal should view the matter as a "storm in a teacup".

155. I do not accept that submission.

156. The erroneous assertions as to the Applicant's role in relation to the proposed discussion concerning Hendra vaccination by the FEI Veterinary Committee had the

[20] Arbitration CAS 2017/A/5421 Bastiaan van Willigen v Nederladse Basketball Bond; Arbitration CAS 2018/A/6007 Jibril Rajoub v Federation Internationale de Football Association(FIFA)

obvious potential to cause damage to the Applicant's reputation within at least a significant portion of the equestrian community in Australia and internationally, and to cause distress to the Applicant as a result. The assertion that the Applicant was adopting a position on this highly contentious issue in order to gain a financial advantage is seriously disparaging.

157. The seriousness of the breaches is underlined by the Respondent's standing as a multiple Olympic representative. Her standing in the sport lends weight to the way that she conducts herself and her public statements and requires appropriate restraint and care. If she did not know she was breaching the EAMPP, she ought to have known given her senior status in the sport.

158. There are mitigating factors. At the time of these events, the Respondent had just returned from Germany where she had been training with a view to obtaining selection for the Tokyo Olympic Games which were then scheduled to take place in July 2020. She had returned to Australia because her daughter had been seriously injured and required her care.

159. She said, and I accept, that it was a time of considerable stress to her, and that she was further distressed by the prospect of mandatory Hendra vaccination being introduced. That distress arose because of her belief that the Hendra virus vaccination could result in serious adverse effects on her valuable horses, to the point where she was not prepared to expose them to that risk. The consequences of that decision could also potentially impact on her ability to prepare and gain selection for the Tokyo Olympics.

160. I also accept that the publications by the Applicant Sporting Body in response to the notice that the subject of mandatory Hendra vaccination was to be discussed by the FEI Veterinary Committee left open an inference that the Applicant had failed to communicate with the Applicant Sporting Body about the proposal. It did nothing to reveal that the Applicant had not proposed mandatory vaccination to the FEI veterinary committee.

161. By the Applicant Sporting Body saying that this was "an FEI proposal and not an EA proposal", the inference was open that, as the only Australian member of the FEI Veterinary Committee, the Applicant may have been a party to the proposal. While that may have influenced, and served to explain, the Respondent's actions, it did not provide a reasonable foundation for her promote her assumption in a way that had obvious capacity to damage the Applicant's reputation.

162. An important mitigating factor is the fact that when the Respondent learned that her assertions as to the Applicant's involvement were wrong, she immediately posted a public apology on her Facebook page, took down the earlier posts, and sent a direct, albeit somewhat peremptory, apology to the Applicant by text message.

163. The Applicant said in evidence that she did not consider that apology to be sincere. As I have already noted, I do not accept that the minor misspelling of the Applicant's name provided any reasonable basis to treat the apology as insincere.

164. Given the manner in which the Respondent's case was presented, and in particular the attempts to justify both the assertion that the Applicant was pushing the introduction of mandatory vaccination, and that she was doing it for financial gain, the subjective sincerity of the prompt apology on 7 November 2019, and thus the Respondent's level of contrition, is definitely questionable.

165. But that does not alter the objective fact that, in its express terms, the apology acknowledged that the Respondent was "completely wrong about this". That acknowledgement was made publicly and to the audience most likely to have seen the earlier misleading posts.

166. In my view, regardless of the Respondent's subjective sincerity, that significantly diminished the damage caused by the earlier posts which were taken down at the same time.

167. It is also significant that, at the same time as making the public apology, the Respondent contacted Eurodressage and sought to stop publication of the Eurodressage article. Although Eurodressage did not agree to take down the whole article, the passage concerning the assertion that the Applicant is motivated by financial gain was removed a short time after the Respondent contacted Eurodressage.

168. Clause 9.3 suggests that consideration should be given to the effect of disciplinary measures on the person concerned. I accept that, as the Respondent said in her statement to the Investigator, she has devoted all her time and resources over the past four years to attempting to qualify for the Tokyo Olympics. I accept that, were I to impose a significant period of suspension, or alternatively terminate the Respondent's membership of EA, that would have a devastating effect on the Respondent.

169. In response to the Respondent's submission that she had no record of previous disciplinary action or warnings, both the Applicant Sporting Body and the Applicant adduced evidence as to expressions of concern made by the Applicant Sporting Body to the Respondent in relation to communications made by her in 2015, also surrounding the Hendra vaccination Issue.

170. It is apparent that those expressions of concern do not lead to any disciplinary action although the Respondent was invited to exercise caution in relation to the communications. I do not consider that the events of 2015, which were raised late in the proceedings so that a full exploration of the circumstances was not fairly possible, and in any event appear to relate to a relatively minor matter, are material to the disposition of the question of sanction in this matter.

171. In her written submissions, the Respondent submitted that should the Tribunal reach the point of considering sanction, she should be given the opportunity to make further submissions on penalty. I do not consider that that course is necessary or appropriate.

172. The Respondent had full opportunity to, and did, make submissions on penalty in the event that she was found to be in breach of the relevant policies. Having regard to the fact that the Parties had adequate opportunity to be heard on the question of sanction, and having regard to the requirement of s40(1)(b) of the Act to conduct the arbitration with as much expedition and at least cost to the Parties as proper consideration allows, I consider a further hearing unnecessary.

173. I am of the view that the breaches of the EAMPP, the EACC and the EASMP which I have found to have occurred warrant a sanction which demonstrates the seriousness of the breaches and acts as a deterrent for repetition of such conduct both personally to the Respondent and generally to the equestrian community. The penalty should also demonstrate that the Applicant Sporting Body takes breaches of the EAMPP seriously so as to protect the image and reputation of the sport. It should also provide some level of vindication to the person who has been affected by the breach.

174. In my view those objectives can be achieved by requiring the Respondent to make a written apology to the Applicant in terms acceptable to the Applicant, directing the Applicant Sporting Body to issue a written warning to the Respondent and requiring the Respondent to pay a substantial fine.

175. I am of the view that the breaches do not call for suspension or termination of the Respondent's membership of the Applicant Sporting Body in light of the drastic consequences that that sanction would have on the Respondent, a matter to which I am required to have regard.

THE TRIBUNAL THEREFORE DETERMINES:

1. The Respondent is directed to make a public apology in terms acceptable to the Applicant within 28 days of the determination taking effect. Such apology is to be published on the Respondent's Facebook Account located at https://www.facebook.com/mary.hanna.7773, as follows:

    a. As a "Public" (that is, visible to anyone on Facebook or Messenger) static post (**Static Post**) for a period of not less than 21 days in the same size and font that usually appears on Facebook;

    b. As a "Public" (that is, visible to anyone on Facebook or Messenger) story (**Story**) for a period of not less than 7 days, using the "Headline" Font, in the same font size that usually appears on Facebook, using white text against a plain black background; and

    c. The Respondent must ensure that both the Story and the Static Post remain the most recent story and static post on her Facebook Account at all times during the respective time periods referred to in paragraphs 1a and 1b above.

2. The Applicant Sporting Body is to issue a written warning to the Respondent.

3. The Respondent is to pay to the Applicant Sporting Body a fine in the sum of $5000.

4. The orders will take effect on 5 November 2020.

Date: 5 November 2020

Signature

Mr John Chaney SC