Australian Government | NATIONAL SPORTS TRIBUNAL

Case number: NST-E22-211341

Case Title: Wendy Schaeffer v Equestrian Australia Limited

Determination

National Sports Tribunal

Appeals Division

sitting in the following composition:

Panel Members — the Honourable Steven Strickland KC (Chair)

Dr June Smith

Dr Larissa Trease

in the arbitration between

Ms Wendy Schaeffer *(Appellant)*

Represented by Mr John Daenke, Solicitor

And

Equestrian Australia *(Respondent)*

Represented by Ms Brooke Irvine, Integrity Manager

1. This is an appeal in which Ms. Wendy Schaeffer ("the Appellant") appeals against the "Preliminary Determination" on the "Merits Only" ("the Merits decision") delivered by the Disciplinary Tribunal of Equestrian Australia Limited ("the Disciplinary Tribunal") on 14 April 2022 and the "Final Determination" on the "Sanctions Only" ("the Sanctions decision") delivered on 2 June 2022.

2. The Appellant seeks to have these determinations quashed, the charges the subject of the determinations dismissed, and the return of the appeal fee paid by her to Equestrian Australia Limited ("the Respondent").

3. The panel appointed to hear this appeal comprises the following members:

   a) The Honourable Steven Strickland KC (Tribunal Chair).

   b) Dr June Smith (Tribunal Member).

   c) Dr Larissa Trease (Tribunal Member).

The parties

4. As can be seen the parties to this appeal are Ms. Wendy Schaeffer as the Appellant and Equestrian Australia Limited as the Respondent.

5. The Appellant was represented before this Tribunal by Mr John Daenke, Solicitor, and Ms. Brooke Irvine, Equestrian Australia Integrity Manager, appeared on behalf of the Respondent.

6. The Appellant is a very experienced horse rider and administrator. She has won an Olympic gold medal for Australia, and she trains and coaches in equestrian sport. She is also a qualified Dressage Judge.

7. The Appellant is a member registered with the Respondent, and prior to 1 February 2022 she was a Director and the Chair of Equestrian South Australia. She stood down from that position at that time in order to address the allegations made against her and which went before the Disciplinary Tribunal.

8. The Respondent is an Incorporated Company and the National Sporting Organisation responsible for all aspects of equestrian sport in Australia. It operates as well through its branches and affiliated organisations of which we understand that Equestrian South Australia is one.

Brief background

9. On 28 November 2021 the Appellant was engaged as a rider in an event known as the "Naracoorte Spring Horse Trials" conducted at Hallmark Farm near Woodside in South Australia.

10. On 9 December 2021 the Complainant sent a letter of Complaint about the conduct of the Appellant at that event to Equestrian South Australia which forwarded the letter to the Respondent. The Respondent issued a Notice of Charge on 25 February 2022 to the Appellant followed by an Amended Notice of Charge on 1 March 2022. The charge was issued by the CEO of the Respondent and read as follows: (as per the original)

"It is alleged by EA and me that you did engage in the Alleged Conduct, and that by reason of engaging in the Alleged Conduct that you did breach By Law 17(a). Specifically, it is alleged that you did, by engaging in the Alleged Conduct on 28 November 2021, engage in conduct constituting a cruel act or acts and/or an improper act or acts in connection with equestrian competition and/or the riding, management or handling of a horse.

I also draw your attention By Law 18, insofar as that By Law relates to the interpretation and application of By Law 17(a).

Further and in the alternative, it is alleged by EA and me that you did engage in the Alleged Conduct and that by reason of engaging in the Alleged Conduct you did breach By Law 17(q), in that you did by engaging in the Alleged Conduct engage in conduct which:

1. Is unbecoming of a member of EA and/or ESA; and/or

2. Is prejudicial to the interest of EA and/or ESA; and/or

3. Has brought EA or ESA into disrepute."

11. A Disciplinary Tribunal of the Respondent was convened and the charge was heard by that Tribunal on 10 and 11 March 2022.

12. On 14 April 2022 the Disciplinary Tribunal delivered its Merits decision. In doing so the Tribunal divided the course of conduct the subject of the charge into four separate incidents, namely:

a) Conduct immediately prior to becoming unseated from the horse (first incident);

b) Conduct immediately after becoming unseated from the horse (second incident);

c) Alleged attempted kick to the head of the horse (third incident); and

d) Conduct while leaving the arena (fourth incident).

13. The Disciplinary Tribunal found the Appellant in breach of the Respondent's Disciplinary By Laws only in relation to the third incident; it dismissed the charge in relation to the other three incidents.

14. With the third incident the Disciplinary Tribunal found the Appellant guilty of a "cruel practice" under By Law 18(j), and that was deemed to be a breach of By Law 17(a). The Disciplinary Tribunal also determined that if they were wrong, and the conduct was not a "cruel practice" for the purposes of By Law 18, it was at the very least an "improper act" for the purposes of By Law 17(a) such that the Appellant would still be guilty of a breach of By Law 17(a).

15. As for the alternative charge laid under By Law 17(q), the Disciplinary Tribunal was satisfied that the conduct was "unbecoming of a member of EA and/or ESA".

16. On 2 June 2022 the Disciplinary Tribunal delivered its Sanctions decision. The Sanctions were for the Appellant:

    a) to serve a suspension of three months; and

    b) to pay a fine of CHF 1,000 to the Federation Equestre Internationale (FEI) within thirty days of the issuance of an invoice.

17. The Respondent agreed to a stay of the payment of the fine pending the determination of this appeal. The suspension was not stayed and that ended on 1 September 2022.

National Sports Tribunal Jurisdiction

18. The jurisdiction of the National Sports Tribunal ("NST") is enlivened by s.35(2) of the National Sports Tribunal Act 2019 ("the Act").

19. Initially, on 6 June 2022 the Appellant lodged a Notice of Appeal from the decisions of the Disciplinary Tribunal to the Appeal Board of the Respondent in accordance with clause 43 of the Respondent's Disciplinary By Laws, and clause 2 of the Respondent's Appeal By Laws, and paid the requisite fee, but on 26 July 2022 the parties agreed, in writing, that instead, an appeal could be brought to the Appeal Division of the NST in accordance with s.35(2) of the Act. Consequently, on the same date, the Appellant lodged the required Application Form with the NST.

20. The NST conducted a preliminary conference on 3 August 2022 which resulted in an Arbitration Agreement signed by the parties on 12 August 2022.

21. Clause 6 of that Agreement provided for the Appeal to proceed by way of re-hearing, and for new evidence to be admitted in the Appeal.

22. That was consistent with clauses 95(5) and (6) of the National Sports Tribunal (Practice and Procedure) Determination 2021.

23. However, prior to the hearing of the Appeal it became apparent that there was a misunderstanding amongst the parties as to the meaning of a "re-hearing". For example, the Appellant appeared to proceed on the basis that the appeal would be a hearing de novo with all of the witnesses giving their evidence again including any updating of that evidence, as well as new evidence being called.

24. That misunderstanding was unfortunately fueled by s.36(1) of the Act. That provides that in an appeal the NST "must conduct an arbitration of the dispute" and note 2 to that subsection provides as follows:

> "In many cases, the arbitration of the dispute will be a re-arbitration of the dispute because of an earlier arbitration of the dispute."

25. The difficulty with this is that a re-hearing in the context of an appeal is **not** a hearing de novo. A re-hearing entails a review of the evidence given in the Court or Tribunal below to determine whether the decision is the result of some legal, factual or discretionary error, and the Appeal Court or Tribunal is able to substitute its own decision based on the facts and the law as they then stand (CDJ v VAJ (1998) CLR 177; Allesch v Maunz (2003) CLR 172).

26. Accordingly, the Chair of this Tribunal conducted a pre-hearing conference on 28 September 2022 to clarify this issue, and after discussion, without dissension from either party, a ruling was made that the Appeal Arbitration proceed as a re-hearing with only new evidence being permitted. Thus, the evidence that was before the Disciplinary Tribunal is before this Appeal Tribunal, and the witnesses will not be giving their evidence again.

27. That left the question of what new evidence would be before this Tribunal, given the requirements of clause 95(6) referred to above. That clause provides as follows:

> "The Tribunal may admit new evidence on appeal in the following circumstances:
>
> a) as permitted by the constituent document or separate agreement between the parties to the dispute referring the dispute to the Appeals Division of the Tribunal;
>
> b) where all of the parties to the appeal agree; or
>
> c) where the Tribunal is satisfied that exceptional circumstances warrant the admission of new evidence.

28. Here, (a) was not applicable and that left (b) and (c). In the end result, apart from some inconsequential documents initially included in the bundle of documents created for the purpose of the hearing of the Appeal the parties were not able to agree what new evidence could be admitted, and thus it fell to this Tribunal to decide.

29. We took the position that at the very least the well known criteria for the admission of new evidence informed the exercise of discretion under (c), and what might be an exceptional circumstance. That criteria includes that the evidence could not have been obtained by reasonable diligence for use in the Court or Tribunal below, and it does not permit for example further evidence from a witness after that witness has had the opportunity to reflect on the evidence given below.

30. Some of the "evidence" sought to be admitted, but which was objected to, was not in fact in the category of new evidence at all, and was before the Tribunal below. That included a statement of the Appellant, and a summation provided to the Disciplinary Tribunal by the Appellant.

31. There were also documents about which there could be no issue, such as the notes presented to NST for the purposes of the initial pre-hearing conference, and the entry conditions for Events such as the one conducted on 28 November 2021. We determined to admit those documents.

32. The most contentious of the new evidence proposed by the Appellant though was as follows:

    1. The report of W1, a neurological physiotherapist, dated 28 April 2022, namely after the delivery of the Merits decision;

    2. A further statement of the Appellant dated 30 September 2022;

    3. An Affidavit of the Complainant who gave evidence below, affirmed on 30 April 2022;

    4. A statement of W2, who provided a statement to the Tribunal below but did not given oral evidence, dated 1 May 2022;

    5. A statement of W3, a paramedic dated 30 September 2022 together with his "patient report form" prepared on 28 November 2021 at the event on that day.

    6. Email correspondence passing between the Appellant, members of the Disciplinary Tribunal, and staff of the Respondent, and a letter from the Chair of the Disciplinary Tribunal dated 20 April 2022, all after the delivery of the Merits decision.

33. This Tribunal determined to admit as new evidence item 5. The Appellant requested the Disciplinary Tribunal to call W3 as a witness because there had been no attempt by the Respondent to do so despite, as will become apparent later in these Reasons, that he was a critical witness in relation to the complaint made to the Respondent and which became the subject of the charge. However, the Disciplinary Tribunal did not call him as a witness either, and we consider that that failure is an exceptional circumstance that permits the admission of his statement and his report as new evidence. In that event, the Respondent requested that W3 be made available for cross-examination, and for that purpose a Notice to Appear was issued to W3 pursuant to s.42 of the Act. W3 duly complied and he gave evidence before this Tribunal.

34. With items 2, 3 and 4, the preliminary view of this Tribunal was that those documents should not be admitted having been created after the Merits decision under appeal, and being nothing more than further statements from witnesses after they had the opportunity to reflect on their evidence given before the Disciplinary Tribunal.

35. The solicitor for the Appellant urged that these documents be admitted on the basis of "fairness" to the Appellant, but of course fairness works both ways, and if admitted the Respondent would then be given the opportunity to have other witnesses present further statements, and the hearing would simply become unwieldy and unworkable, and would be anything other than a re-hearing. In any event, the Tribunal agreed not to finally rule on their admissibility and admitted them de bene esse.

36. The same position was taken in respect of items 1 and 6.

The evidence (including the documents) and the submissions before this Tribunal

37. As referred to above, we had before us all of the evidence (including the documents) that were before the Disciplinary Tribunal. In addition, and as also referred to above, we have admitted as new evidence a statement of W3 and his report, and of course his oral evidence given under cross-examination to this Tribunal.

38. The proceedings before the Disciplinary Tribunal were recorded and we had access to that recording. Helpfully though the Appellant prepared and provided a partial Transcript of the hearing before the Disciplinary Tribunal, taken from the recording, and primarily comprising those parts of the oral evidence relied on by the Appellant before us. By agreement that Transcript was received as an aide memoir.

39. Plainly, we also had before us the Merits and the Sanction decisions of the Disciplinary Tribunal.

40. Finally, we have the written submissions lodged by the Appellant on 24 August 2022, the written submissions lodged by the Respondent on 7 September 2022, and the

Appellant's written submissions in reply lodged on 21 September 2022. We also had the oral submissions made by the solicitor for the Appellant at the hearing, the Respondent choosing to rest on their Written Submissions.

The Grounds of Appeal

41. In clause 5 of the Arbitration Agreement the appeal grounds relied on by the Appellant are set out, namely:

    1. The complaint lodged on 9 December 2021 is invalid and should have been rejected by EA and not referred to a Tribunal;

    2. EA should have taken further steps to properly investigate the complaint and review, assess and consider the complaint and other information including obtaining and considering a response from Ms. Schaeffer, prior to issuing the Charge or Amended Charge;

    3. By reason of providing the members of the Disciplinary Tribunal with irrelevant, inadmissible and prejudicial material prior to the commencement of the hearing, the proceedings should not have continued;

    4. The provisions of By Law 18(j) are invalid because the provisions of the FEI Regulations and EA National Eventing Rules prevail.

    5. There was insufficient evidence for the Tribunal to conclude that Ms. Schaeffer had done an act on which the Tribunal could form an opinion that the act was clearly and without doubt would be defined as cruelty.

    6. The finding that Ms. Schaeffer had attempted to kick the horse in the head was against the evidence or the weight of the evidence.

    7. The Tribunal should have applied a discretion under Article 164 of FEI General Regulations to impose a lesser penalty than was imposed; and

    8. The procedural disadvantage and unfairness of Ms. Schaeffer in not being entitled to legal representation before the Tribunal.

42. In the end result, Grounds 3, 4, 7 and 8 were abandoned by the Appellant.

43. During the course of this matter the Appellant sought a summary determination of Grounds 1 and 2, on the basis that if successful there would be no need for any further hearing of the appeal. It was agreed between the parties that this Tribunal could determine those grounds on the papers, and specifically by reference to the written submissions made by each of the parties.

44. We agreed with that course of action, and undertook that task. At the pre-hearing conference on 28 September 2022, the Chair informed the parties that this Tribunal had considered those written submissions, and advised the parties that we were not persuaded of the merits of either of those two Grounds of Appeal, and that we would provide our reasons for that decision as part of the reasons we delivered on the entirety of the appeal. We will now provide those reasons in relation to Grounds 1 and 2.

Ground 1

45. The alleged abuse of the horse by the Appellant occurred during the event being conducted on 28 November 2021. On 9 December 2021 the Complainant sent a letter of complaint about the conduct of the Appellant to Equestrian South Australia, which forwarded the letter to the Respondent.

46. The Appellant's primary submission is that the complaint should have been lodged on the day the conduct took place, and because it wasn't, it was out of time and invalid and should have been rejected. The Respondent submits otherwise.

47. It is uncontroversial that:

1. The Respondent's Eventing Rules applied to the competition. Those rules were the Equestrian Australia National Eventing Rules 2021, and they stated as follows on the cover page:
   "These rules reflect the FEI Rules with special inclusions in grey for particular Equestrian Australia (National) circumstances.
   For the purpose of implementation, EA National Rule that is not covered by the FEI Rules 2020 or is not already included in a specific EA Rule in this rule book, the 2021 EA Eventing Rules will govern."

2. W4 acted in the role of Technical Delegate on the day of the competition in place of any Ground Jury.

3. Entry condition 1 for the event stated:
   "I confirm that the abovementioned riders understand and agree to abide to the Rules and Regulations of Equestrian Australia and the conditions of entry as stated on the official program."

4. Rule 526 of the Equestrian Australia Eventing Rules deals with the topic of "Abuse of Horse".

5. Rule 526.1 provides that, "If not directly witnessed by the Ground Jury, the incident must be reported **as soon as possible** to the Ground Jury through the

Secretary of the Organising Committee or Cross Country Control Centre as appropriate. **Where possible** the report should be supported by a statement from one or more witnesses" (our emphasis).

For the purposes of this matter "Technical Delegate" should be substituted for "Ground Jury".

6. Article 142 of the FEI General Regulations 2020 also addresses the topic of "Abuse of Horses", and provides in paragraph 2 that:

"Any person witnessing an Abuse must report it in the form of a Protest (Article 161) **without delay**. If an Abuse is witnessed during or in direct connection with an Event, it should be reported as a Protest (Article 161) to an Official. If the Abuse is witnessed at any other time it should be reported as a Protest (Article 161) to the Secretary General who, following a review of the Protest, shall take a decision as to whether or not to refer the matter to the FEI Tribunal" (our emphasis).

7. The Respondent's Disciplinary By Laws provide in the Introduction that the "By Laws follow as closely as possible the Rules laid down by the Federation Equestre Internationale (FEI). However if matters arise which are not covered in these rules then the FEI Regulations and rules apply. In the event of a conflict between these rules and the FEI Regulations and rules, the FEI rules will prevail unless they have been specifically excluded."

8. Rule 11 of the Respondent's Disciplinary By Laws provides for a complaint to be lodged within fourteen days, or it will not be considered.

48. In its simplest form, the argument of the Appellant is that there is a conflict between Article 142, paragraph 2 of the FEI General Regulations and Rule 11 of the Respondent's By Laws, and thus the former prevails requiring abuse "witnessed during or in direct connection with an Event, should be reported as a Protest... to an Official."

49. On the other hand, the Respondent argues that there is no conflict. It is said that Article 142 paragraph 2 does not exclude the making of a complaint about conduct witnessed during an event other than on the day of the event.

50. We agree with that submission. In this instance "should" does not mean "must" and indeed, it would be unreasonable if it did, given that there very well may be circumstances that prevent the lodging of the complaint on the day. In that regard it is relevant to note the opening words to Article 142 paragraph 2, which are the operative words, provide that the Complaint **must** be reported **without delay**. And that is consistent with Rule 526.1 of the Respondent's National Eventing Rules which provides for the reporting of an incident "as soon as possible" to the Ground Jury (to repeat, in this instance the Technical Delegate).

51. Then, there are the Respondent's Disciplinary By Laws which provide for a complaint to be made up to fourteen days after the incident.

52. As submitted by the Respondent, the relevant rules allow for the ability to lodge a complaint up to fourteen days after the incident to exist in parallel with the ability to lodge complaints or protests during the course of an event.

53. Here, the complaint was lodged within the requisite fourteen day period, and thus it was not invalid as being received out of time.

54. In these circumstances we are not persuaded that Ground 1 has any merit.

55. Before leaving Ground 1, we note that the Appellant has also submitted that the complaint should have been rejected by the Respondent because it did not have any witness statements. However, this can easily be addressed.

56. Clause 14 of the Respondent's Disciplinary By Laws provides that, "The NJPC may decline to deal with any complaint which is not supported by evidence furnished by the complainant."

57. We note that "NJPC" is neither defined nor identified in the By Laws, and it appears to be a typographical error that was intended to refer to the National Judicial Procedures Officer (NJPO).

58. In any event, as submitted by the Respondent it can be seen that the wording of the clause is permissive rather than mandatory, and more importantly the complaint in this matter comprised an eye witness account of the alleged abuse, and that clearly qualifies as supporting evidence. Moreover, it does not require that the complaint be **accompanied** by supporting evidence. That evidence can clearly come later, as was the case here, when a number of witness statements were subsequently provided.

59. In these circumstance we reject the submission of the Appellant in this regard, and we do not consider that By Law 10 which is also relied on by the Appellant, would lead us to find otherwise. That By Law provides as follows:

> "Officials or other persons reporting a case of cruelty must provide the EA CEO or the Branch Manager with the contact details of any witnesses to the incident, together with any evidence including any written statements from witnesses."

60. Again, like By Law 14, that By Law does not require the contact details to be provided with the complaint, and as was the case here they can be provided later.

Ground 2

61. The submission here is that there was a lack of a proper investigation of the complaint by the Respondent before laying the charge. It may have been desirable for the Respondent to investigate the complaint by speaking to and/or obtaining full statements from all of the witnesses, and obtaining from the Appellant her explanation of the allegations with a view to analysing the evidence and considering whether the matter should proceed. However, the Respondent is not obliged to do so under the Disciplinary By Laws.

62. By Law 4 simply provides that where a complaint is made, or the Respondent considers that a person or organisation has committed or may have committed a breach of the By Laws, the matter will be heard and dealt with by a Tribunal or the CEO.

63. Further, By Law 15 which is headed **"INVESTIGATIONS"** provides that the Respondent **may** investigate an alleged offence, but that is only where no formal Complaint has been made, unlike the position here.

64. Thus, we are also not persuaded that this Ground has any merit.

65. Now, turning to the other Grounds of Appeal, the only Grounds left to be considered are Grounds 5 and 6.

Grounds 5 and 6

66. These Grounds can conveniently be addressed together.

67. The first thing to note is the unsatisfactory way in which the complaint was handled by the Respondent and/or the Disciplinary Tribunal.

68. There was no clarity in the lead up to the hearing on 10 and 11 March 2022 as to which witnesses would be called, and full statements were not obtained from any of the witnesses and then provided to the Appellant. A list of possible witnesses was provided by the complainant to the Respondent on 14 February 2022, but it seems that it was only early on 10 March 2022 when the Appellant was sent the less than fulsome statements provided to the Respondent by those witnesses themselves over the previous few days. Further, it was only later on the morning of the hearing on 10 March 2022 that the Appellant received by email from the Respondent a statement from W5 having been received by the Respondent the previous evening.

69. Significantly, the list of possible witnesses provided to the Respondent on 14 February 2022 did not include W4 who acted in the role of Technical Delegate at the event. The Respondent made no arrangement for her to give evidence, and it was only the fact that the Appellant contacted W4 that she provided a statement and

was called to give evidence before the Tribunal. It will shortly become apparent that her evidence was crucial to the determination in this matter.

70. Even more significantly, as referred to above, the Appellant sought that the Disciplinary Tribunal call the paramedic, W3 who attended the Appellant after her fall, but that did not happen. It would have been readily apparent to the Respondent and to the Disciplinary Tribunal that the evidence of W3, like that of W4, was crucial to the determination of the charge laid against the Appellant. Again, the importance of that evidence which is now before us, will be demonstrated shortly.

71. It should also be understood that the Respondent did not present a case to the Disciplinary Tribunal, as one would have expected. The Respondent simply made arrangements for witnesses to give evidence, and even those witnesses who did not see the alleged conduct of the Appellant. The Respondent did not prosecute the charges before the Disciplinary Tribunal, or assist that Tribunal by questioning witnesses in relation to their evidence, and it was left to the Tribunal to adduce evidence from them.

72. The Appellant provided a statement, gave evidence, and was able to cross-examine witnesses. However, she was obliged to do that personally because under the Disciplinary By Laws she was unable to have a legal practitioner act for her and conduct her case.

73. The result of all that was that important issues were neither initially investigated nor explored fully at the Disciplinary Tribunal hearing. For example, it was not ascertained whether the alleged attempted kick was prior to, during or after the medical examination of the Appellant. There was no exploration of the apparent inconsistency between the statements of the Complainant and W5 as to the timing of the alleged attempted kick, and this vital issue was not raised with the Appellant. There was also no exploration of whereabouts on the horse's head the Appellant allegedly attempted to kick. Nor was there any consideration of the duration of the medical examination, who had charge of the horse while the Appellant was undergoing the medical examination, where in relation to the horse's head the Appellant was standing when it is alleged the attempted kick occurred, or as to which part of the horse's head the kick was aimed at.

74. This put the Appellant at a clear disadvantage in that the alleged cruelty was not fully explored and she was not alerted to all of the issues. As a result, we accept that as a lay person she was not necessarily equipped to properly respond to the allegations.

75. In these circumstances it behoves us to carefully analyse the evidence and the findings of the Disciplinary Tribunal.

76. As referred to above, a crucial issue was when the alleged attempted kick took place. In that regard a key witness for the Respondent was the Complainant, and her evidence

was both written, comprising her letter of complaint of 9 December 2021 and as adopted by her before the Disciplinary Tribunal, and her oral evidence before that Tribunal.

77. In her letter of complaint she relevantly said this as to what occurred after the Appellant fell from her horse:

"…several people ran over to check she was ok (as per standard procedure when there is a fall), including the medic, and while being questioned she continued to mistreat the horse, including at one point trying to kick the horse in the head when it put its head down towards the ground…"

78. In her oral evidence she said on a number of occasions that the attempted kick occurred whilst the Appellant, "was talking with the medic", and that she had used her "right leg".

79. Thus, it can be seen that the evidence of the paramedic would have been vital to the Disciplinary Tribunal's consideration of what had occurred and when, given his proximity to the Appellant at the time of the alleged conduct.

80. Then there is the evidence of W5, and her evidence also comprised a witness statement adopted by her before the Disciplinary Tribunal, and her oral evidence before the Tribunal.

81. In her written statement of 9 March 2022 she said this:

"…I did not see how she came off I only saw immediately afterward in which I saw her yank on the reigns profusely for a long period of time and could see the horse in a lot of distress. I also saw her pick her leg up to kick the horse when the horse moved its head down. Once the medic had finished talking to her she left the course…"

82. From that statement it is unclear whether the alleged attempted kick occurred prior to the paramedic questioning the Appellant or during. Importantly, there is no suggestion that it occurred after the paramedic had finished questioning the Appellant.

83. In her oral evidence though there were these exchanges between W5 and the Disciplinary Tribunal:

The Tribunal: '[redacted] you say you saw the horse put its head down at one stage. Can you just elaborate on what happened after that?

W5: The horse had put its head down, I believe Wendy was talking to someone. She picked her leg up to kick it in the head and it just moved its head away and picked its head back up again.

The Tribunal: Which leg did she use?

W5: Um, her left leg I believe but I wasn't paying attention as to which leg it was.

Next:

The Tribunal: How far did Wendy follow through with her leg?

W5: Enough to be to be where the horse was putting its head down to. I think the horse lifted its head up at it didn't make contact that I know of. I didn't actually hit, like the horse put its head up.

The Tribunal: Ok, that makes sense.

The Tribunal: Do you know where the medic was at this stage? With the alleged attempt to kick.

W5: I am not 100% sure, I think there was someone standing with Wendy but I am not sure if that was the medic or not. I know the medic came down to see Wendy, I am not sure if it was the medic standing with her. It's many months ago now.

The Tribunal: The person that was standing with Wendy at that time. Do you know where they were standing when Wendy was attempting to kick the horse.

W5: I am not too sure if they were there standing right next to her talking to her or were just reaching her. I don't have, I can't really remember."

84. Importantly though W5 later agreed in her evidence that the person with the Appellant would have seen the attempted kick.

85. Thus, it can be seen that there are inconsistencies in the evidence of the Complainant and W5. There is the question of which leg was used, but the more important issue was whether the alleged attempted kick occurred before or during the questioning of the Appellant by the paramedic. Given the oral evidence of W5, it would seem more likely than not that it was during the questioning, but there was clearly still some doubt, and yet that was not explored by the Disciplinary Tribunal, and it again made it crucial for the paramedic to be called to give evidence.

86. At this point it is noteworthy to record that the Disciplinary Tribunal in its Merits decision, albeit without any analysis whatsoever, commenced its discussion about the alleged attempted kick on the basis that it occurred, "while (the Appellant) was being questioned by the people that came to her assistance", namely W4 and the paramedic (see [36] of the Merits decision).

87. That again begs the question as to why the paramedic was not called as a witness.

88. Turning to the evidence of W4. In her written statement of 4 March 2022 she relevantly said this:

> "As I was in the immediate vicinity of the fall I approached Wendy to assess her welfare. I had a short conversation with Wendy. She was slightly agitated as riders in my experience often are following a fall. She was then checked by the Paramedic in attendance and cleared to leave the scene on foot leading the horse. I was speaking to the Paramedic with my back to Wendy as she left the site of the fall so I did not observe anything that occurred as she proceeded with the horse towards the parking area.
>
> At no time during the period I observed Wendy on this occasion did I consider she used excessive force or acted in any way that would attract a sanction at an official competition."

89. W4 was the Technical Delegate for the event that day. She was in fact training to obtain that qualification, but she is an accredited Equestrian Australia and Federation Equestre Internationale (FEI) Steward. As such her main roles are horse welfare, making sure that the horses are not being subject to abuse and to report any mistreatment, making sure the rules are being followed, and ensuring a level playing field.

90. In her oral evidence W4 said that she saw the Appellant fall off the horse and she approached her at or about the same time as the paramedic. She had a short conversation with the Appellant and then she held the horse while the Appellant was checked by the paramedic. Further, she said that she had the Appellant and the horse in her gaze from the point of the fall until the Appellant moved away to leave the arena.

91. In response to a direct question from the Disciplinary Tribunal as to whether she had seen the Appellant attempt to kick the horse in the head, she said, "no, definitely not". She then said that if she had done so she would have had strong words and probably reported it and taken it further as it was "pretty clearly horse abuse". She also stated that if during the period that the paramedic was with her and the Appellant, if the Appellant had brought back either of her legs to attempt to kick the horse or feigned to kick the horse she would have seen it, "if it was that deliberate and looked like she was going to kick the horse in the head".

92. As for the evidence of the Appellant, at all times she has denied attempting to kick the horse in the head. When questioned about this by the Disciplinary Tribunal the following exchange occurred as set out in the Merits decision at [44]:

> Q: Did you, at any point attempt to kick this horse with your right foot?
>
> A: Not aware of any time that I have been… [indecipherable]… and done that.
>
> Q: Did you, at any point, attempt to kick the horse?
>
> A: No, not as far as I can remember. This is my truth, that I can tell you. [The Respondent then refers to a recent injury she suffered and goes on to state] Standing on one leg and kicking the horse with another leg is probably not, is not something I'm physically capable of doing. My truth is I did not… [indecipherable]… in the head.
>
> Q: No recollection of attempting to kick the horse with either foot?
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> A: That is correct. I have no recollection of attempting to kick the horse in the head.

93. None of the other witnesses called before the Disciplinary Tribunal saw the alleged incident, but to repeat, neither the Respondent nor the Disciplinary Tribunal either sought a statement from the paramedic or called him to give evidence. We now have his evidence and we will address it shortly.

94. Given the evidence that was before the Disciplinary Tribunal, and as referred to above, we find it difficult to understand why the Tribunal preferred the evidence of the Complainant and W5 to that of the Appellant, as they did at [47] of the Merits decision and found at [51] of that decision that on the balance of probabilities the Appellant attempted to kick her horse in the head.

95. It is plain though that at least a partial explanation for that is the failure of the Respondent and/or the Disciplinary Tribunal to explore all of the relevant issues as referred to above.

96. In any event, to reiterate, the evidence of the Complainant was that the alleged attempted kick occurred while the Appellant was being questioned by the paramedic, and she used her right leg. The written statement of W5 was unclear, but it was either that the alleged attempted kick occurred before or during that questioning. To repeat, that was not explored by the Disciplinary Tribunal, but in her oral evidence W5 did say that someone else was there when the attempted kick occurred, and that it is certainly consistent with the evidence of the Complainant. We also note

again that there is no suggestion from W5 that the attempted kick occurred after the completion of the medical examination.

97. W4 was present at the scene, and indeed she was holding the horse while the Appellant was examined by the paramedic. However, the Disciplinary Tribunal did not accept her evidence about the sequence of events, saying in [41(d)] that she wasn't "continually observing the [Appellant] during this period of time". That was demonstrated in the Disciplinary Tribunal's view, by her evidence that "she was speaking to the Paramedic with her back to the [Appellant] as the [Appellant] left the site of the fall". However, if the Disciplinary Tribunal had explored the issue of the timing of the alleged attempted kick they would have realised that on the evidence of the Complainant, and ultimately to a certain extent on the evidence of W5, the alleged attempted kick could not have occurred after the medical examination when the Appellant was taking the horse from the arena. That was when W4 had her back to the Appellant, and clearly not during the examination. Indeed, as W4 said in her evidence when asked about having turned her back to the Appellant:

"That was ok, as Wendy left. I saw the fall, I saw Wendy getting checked by the medic and then it was like ok Wendy is heading back to the float. So, at that point after she'd, you know led the horse off, I was facing as she went past me to go back to the float by that stage I would have had my back to her. And I haven't been explaining that very well."

98. W4, apart from the paramedic, was the closest person to the Appellant and the horse at the time that the Complaiant said the attempted kick occurred, and she saw no attempted kick. The Tribunal has formed the view that her evidence, that she definitely did not observe the Appellant attempt to kick the horse in the head, and she would have reported it if she had seen that, should have been accepted in preference to that of the Complainant and W5, who were some way away and whose evidence revealed inconsistencies as referred to above. This finding is further supported by W4's significant expertise and training as a steward and the role she played at the event, as outlined in [89].

99. As for the Appellant's evidence, the Disciplinary Tribunal found it to be "equivocal", and that she did not "clearly" deny the allegation. However, that is patently not the case when the exchange set out above is analysed. Certainly she said she had no recollection of attempting to kick the horse, but she also denied it.

100. We also note that in her later evidence before the Disciplinary Tribunal, the Appellant denied that she had ever kicked a horse in the head or feigned kicking.

101. We find that the Disciplinary Tribunal erred in preferring the evidence of the Complainant and W5 to that of the Appellant, and in failing to recognise the purport of the evidence of W4 in the context of all the evidence.

102. We now of course have the evidence of the paramedic before us. He has clearly stated, and puts beyond any doubt, that an attempted kick did not occur when the Appellant was being examined by the paramedic.

103. The relevant evidence of the paramedic can be summarised as follows:

1. He saw the fall; he was 30 metres away.

2. He walked over to the Appellant and the horse and he noticed another person walk over as well.

3. The Appellant was agitated and upset following the fall but she eventually calmed down and was able to communicate with him.

4. The Appellant handed the reins to the other person who took them. That person stood with the horse less than 2-3 metres away while he examined the Appellant face to face including while holding her hand. At that time the horse and the other person were to his right and to the Appellant's left.

5. The medical assessment included a Neurological examination and took 5-10 minutes. He also completed a Patient Report Form which is before this Tribunal and checked on the Appellant later that day.

6. He was able to see the Appellant from the time of the fall, and as he walked over to her, except for when she was "briefly" obscured from his view by the movements of the horse.

7. He did not see the Appellant kick or attempt to kick the horse. He also had no recollection of the horse having its head near the ground.

8. On completion of the examination he returned to his vehicle. He did not make any observation of the Appellant after that time until he checked on her later, but nothing occurred that attracted his attention to anything wrong or untoward with the horse or the Appellant.

104. In conclusion then, at the very least it was clearly unsafe for the Disciplinary Tribunal to have accepted the evidence of the Complainant and W5 in preference to that of the Appellant and W4, and the Disciplinary Tribunal erred in doing so. That position is confirmed by the evidence of W3, and we find that there is merit in Grounds 5 and 6, and the appeal should be allowed.

105. Before leaving the Grounds of Appeal though, we need to mention one other matter that was raised with us.

106. The Appellant has suggested that she may have "toed" the horse's head after the medical examination had been completed, and in order to take the horse from the Arena.

107. "Toeing" is apparently a common practice to get a horse to lift its head. It entails a person standing in front of the horse, striking the ground with a foot immediately in front of the horse's nose causing the horse to lift its head.

108. The Appellant had no actual memory of doing that though, and it is apparent that she was only suggesting that something like that may have occurred to explain the evidence of the Complainant and W5. However, even if that had happened it could not have been what the Complainant saw because she said the incident occurred when the Appellant was being examined by the paramedic, and although unclear, the inference from W5's evidence was that the incident either occurred before or during the medical examination, but certainly not after.

109. Thus we do not need to take that issue any further.

110. Having found that the appeal should be allowed we do not need to further address the issue of new evidence. Also, having found that the evidence does not establish on any standard that the Appellant attempted to kick the head of the horse as alleged it is plainly unnecessary for this Tribunal to address whether there has been a breach of any By Law; the charges will be dismissed.

111. Our findings also obviate the need to address the sanctions imposed by the Disciplinary Tribunal; they will be discharged.

112. Clearly, as sought by the Appellant there should also be a refund to her of the appeal fee paid by her to the Respondent in relation to her initial appeal from the decisions of the Disciplinary Tribunal.

113. Finally, pursuant to paragraph 9.2 of the Arbitration Agreement, the cost of this appeal will be determined by the CEO of NST in accordance with Part 7 of the NST Rules 2020.

The Tribunal therefore determines:

1. The appeal be allowed.

2. The charges laid against the Appellant by the Respondent be dismissed.

3. The sanctions imposed on the Appellant by the Disciplinary Tribunal be discharged.

4. The appeal fee paid by the Appellant to the Respondent be refunded forthwith.

DATE: 16 NOVEMBER 2022

Signature
The Honourable Steven Strickland KC

June Smith

Signature
Dr. June Smith

Signature
Dr. Larissa Trease