

DECISION of the FEI TRIBUNAL

dated 7 December 2020

in the matter of

Ms Jaana Kivimaki

(FEI Case number: FEI 2019/HD05-Jaana Kivimaki)

FEI Tribunal Hearing Panel:

Ms Valérie Horyna one-member panel

FEI Tribunal Reference: C20-0054

Person Responsible/ID/NF: Jaana KIVIMÄKI/10046626/FIN

Event/ID: CPEDI3* - Lisbon (POR), 2019_CI_1220_PED_S_01

Date of Event: 1-3 October 2019

Prohibited Substance: Furosemide

Bar Code Nos.: 3138062

I. Factual background

- 1.** Ms. Jaana KIVIMAKI (FEI ID 10046626), the Person Responsible ("**the PR**"), is an experienced International-Level athlete participating in the discipline of Para Dressage and registered with the Equestrian Federation of Finland.
- 2.** The Fédération Equestre Internationale ("**the FEI**" together with the PR, "**the Parties**"), is the sole IOC recognised international federation for equestrian sport. The FEI is the governing body of the FEI equestrian disciplines (Dressage, Jumping, Eventing, Driving, Endurance, Vaulting, Reining, Para-Equestrian).
- 3.** The PR participated at an International Event: the CPEDI3* - Lisbon, Portugal held from 1 to 3 October 2019 (the "Event"). The PR is a member of the Equestrian Federation of Finland (the "**FIN NF**"), which is a member of the FEI and therefore is bound by FEI's Equine Anti-Doping Rules for Human Athletes (the "**ADRHA**"; based on the World Anti-Doping Code) which specifies the circumstances and conduct which constitute anti-doping rule violations.
- 4.** Urine samples (respectively A and B) were collected from the PR on 1 October 2019 for in-competition testing under the ADRHA. The Urine samples were sent to the WADA approved Laboratory in Cologne, Germany (the "**Laboratory**") for analysis. The PR's sample had the reference number 3138062.
- 5.** The Laboratory analysed the PR's sample and reported an adverse analytical finding of Furosemide in the PR's A sample.
- 6.** Furosemide is a diuretic and is listed in Class S5. Diuretics and Masking Agents are under the 2019 WADA Prohibited List. Furosemide is prohibited at all times, in and out of competition. The positive finding of Furosemide in the Athlete's Sample gives rise to an Anti-Doping Rule Violation under Article 2.1 of the ADRHA.
- 7.** Upon receipt of the Adverse Analytical finding from the Laboratory, the FEI carried out a review as stipulated in Article 7.2.2 of the ADRHA and determined that: (a) the Athlete was not granted a Therapeutic Use Exemption (the "**TUE**") for the use of Furosemide neither by FEI nor by her National Anti-Doping Agency; (b) there was no departure from the International Standard for Testing and Investigation or International Standard for Laboratories that detected the Adverse Analytical Finding.

II. Initial Proceedings

- 8.** On 2 December 2019, the FEI Legal Department officially notified the PR and the Equestrian Federation of Finland ("**FIN-NF**"), of a violation of Article 2.1 (The Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample) of the ADRHA based on the Laboratory's Adverse Analytical Finding of Furosemide in the Athlete's Sample collected at the Event and the potential consequences (the "**Notification Letter**").
- 9.** The Notification Letter included notice that the PR was not provisionally suspended since the substance found in the PR's sample was a Specified Substance.
- 10.** The PR was also informed in the Notification Letter of her right to request an analysis of the B sample. However, since the PR admitted to routine use of Furosemide (due to her medical condition) in various correspondences with the FEI, a B Sample analysis was not required.
- 11.** Following the notification letter, on 24 January 2020, the PR submitted a TUE request for the use of Furosemide to the Independent Testing Agency (the "**ITA**") TUE Committee.
- 12.** The ITA TUE Committee certified the approval of the TUE for the use of Furosemide by the PR with the following dates: 3 February 2020 until 2 February 2022. However, the Committee rejected the retroactive part of the TUE application (submitted to cover the date of the positive sample collection) as it did not meet conditions stipulated in article 4.3 of the International Standard for the Therapeutic Use Exemption.
- 13.** Following the rejection of the PR's retroactive TUE application by the ITA TUE Committee, the FEI resumed proceedings in the matter of the violation of Article 2.1 (The Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample) of the ADRHA based on the Laboratory's Adverse Analytical Finding of Furosemide in the PR's Sample.

III. Further Proceedings

- 14.** By email dated 2 November 2020, the FEI submitted its request to the FEI Tribunal for the appointment of a hearing panel for the adjudication and approval of a Settlement Agreement in accordance with Article 7.10.1 of the ADRHA.
- 15.** On 23 November 2020, the FEI Tribunal informed the Parties of the appointment of a one-person hearing panel to adjudicate and approve this

case. The Parties were asked to provide any objections to the constitution of the hearing panel by 26 November 2020.

16. On 23 November 2020, the FEI informed the FEI Tribunal that it did not have any objections to the constitution of the hearing panel.
17. Neither party requested an oral hearing.

IV. Considering

A. Articles of the Statutes/Regulations which are, *inter alia*, applicable:

Statutes 24th edition, effective 19 November 2019 ("**Statutes**"), Arts. 1.5, 38 and 39.

General Regulations, 24th edition, 1 January 2020, Arts. 118, 143.1, 159, 164, 165 and 167 ("**GRs**").

Internal Regulations of the FEI Tribunal, 3rd Edition, 2 March 2018 ("**IRs**").

FEI Anti-Doping Rules For Human Athletes, Based upon the 2015 WADA Code, effective 1 January 2015 ("**ADRHA**").

The World Anti-Doping Code - International Standard – Prohibited List – January 2019 ("WADA Prohibited List").

B. Person Responsible: Ms Janna Kivimaki.

C. Justification for sanction:

GRs Art. 143.1: "Medication Control and Anti-Doping provisions are stated in the Anti-Doping Rules for Human Athletes (ADRHA), in conjunction with The World Anti-Doping Code, and in the Equine Anti-Doping and Controlled Medication Regulations (EADCM Regulations)."

ADRHA Scope: "These Anti-Doping Rules shall apply to the FEI, each National Federation of the FEI and each Participant in the activities of the FEI or any of its National Federations by virtue of the Participant's membership, accreditation, or participation in the FEI, its National Federations, or their activities or Events. (...)"

Within the overall pool of Athletes set out above who are bound by and required to comply with these Anti-Doping Rules, the following Athletes shall be considered to be International-Level Athletes for purposes of

these Anti-Doping Rules, and therefore the specific provisions in these Anti-Doping Rules applicable to International-Level Athletes (as regards Testing but also as regards TUEs, whereabouts information, results management, and appeals) shall apply to such Athletes who:

(a) are registered with the FEI; and/or

(b) participate in an International Event.”

ADRHA Article 2.1.1: “It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.1”

ADRHA Article 7.10.1: “At any time during the results management process the Athlete or other Person against whom an anti-doping rule violation is asserted may admit that violation at any time, waive a hearing and agree with the FEI on the Consequences that are mandated by these Anti-Doping Rules or (where some discretion as to Consequences exists under these Anti-Doping Rules) that have been offered by the FEI. The agreement shall be submitted to the FEI Tribunal for approval and, where approved by the FEI Tribunal, the final agreement shall state the full reasons for any period of Ineligibility agreed, including (if applicable), a justification for why the flexibility in Sanction was applied. Such agreement shall be considered as a decision for the case and will be reported to the parties with a right to appeal under Article 13.2.3 as provided in Article 14.2 and published as provided in Article 14.3.2.

V. The Parties’ Submissions

A. The Submissions of the PR:

- 18.** Through the various exhibits (containing emails and doctor’s certificates) the PR has explained the reason for the adverse analytical finding of Furosemide. The latter being due to her medical condition which requires her to take Furosemide on a daily basis, as prescribed by her doctor.

19. Additionally, the athlete submitted in her emails to the FEI that she has been using Furosemide since November 2018 as there is no alternative medication that could replace it. She confirmed that it was never used for the purposes of obtaining a competitive advantage.
20. She also maintained that due to a lack of anti-doping education, she was unaware that she must apply for a TUE for Furosemide before competing internationally. She also informed the FEI that at the Event she told the Doping Control Officer present, she had been taking Furosemide which was prescribed by her doctor.
21. The PR admitted to the anti-doping rule violation and alleged that it was unintentional and apologised for her mistake.

B. Written Response of the FEI:

22. On 2 November 2020, the FEI provided its response to this case and considered the following particulars when evaluating the PR's level of fault or negligence:
 - (i) That the PR has been using Furosemide on a daily basis which was prescribed by her Doctor since November 2018;
 - (ii) The PR was granted a prospective TUE by the ITA TUE Committee which verifies that this medication is required for the PR's condition and that there is no alternative or equivalent medication to replace Furosemide which is not included on the WADA list;
 - (iii) The level of fault or negligence in this case relates to failure to apply for a TUE for the use of Furosemide rather than the use of it, before competing in the International Competitions as required by the ADRHA;
 - (iv) All the particulars of this case serve to demonstrate that should the PR have applied for a TUE in November 2018 no anti-doping rules violation would exist;
 - (v) The PR maintained that she had not received any anti-doping education despite her participation in high-level events;
 - (vi) Taking into account the entirety of the circumstances of the case, the FEI confirms that the PR has on the balance of probabilities established that she bears no significant fault or negligence for her first anti-doping rule violation and the applicable ineligibility period shall be based on Article 10.5.1. of the ADRHA (Reduction of the period of Ineligibility based on No significant Fault or Negligence

for Specified Substances).

- 23.** Article 10.5.1.1 of the ADRHA provides for a broad range of sanctions ranging from a warning to 2 years of ineligibility, depending on the athlete's degree of fault. In determining the proportionate sanction in this case, the FEI provided legal analysis taken from the *Cilic* Cas award¹ which highlighted the decisive criterion on which the period of ineligibility shall be determined within the applicable range of sanctions. In summary the CAS panel in the *Cilic* award, decided that:

*** Quote***

'The decisive criterion based on which the period of ineligibility shall be determined within the applicable range of sanctions is fault. There are three degrees of fault which can be applied to the possible sanction range of 0 – 24 months: (a) significant degree of or considerable fault, with a sanction range from 16 to 24 months, and a "standard" significant fault leading to a suspension of 20 months; (b) normal degree of fault, with a sanction range from 8 to 16 months, and a "standard" normal degree of fault leading to a suspension of 12 months; (c) light degree of fault, with a sanction range from 0 to 8 months, and a "standard" light degree of fault leading to a suspension of 4 months. In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities. The objective element should be foremost in determining into which of the three relevant categories a particular case falls. The subjective element can then be used to move a particular athlete up or down within that category. In exceptional cases, it may be that the subjective elements are so significant that they move a particular athlete not only to the extremity of a particular category, but also into a different category altogether. That would be the exception to the rule, however.'

End Quote

- 24.** The FEI highlighted that in the current case, the PR's Fault or Negligence relates to not applying for a TUE for Furosemide (as required by the ADRHA) rather than the use of the substance itself. If the PR had applied for a TUE in November 2018, no violation of the ADRHA would have

¹ ¹ CAS 2013/A/3327 *Marin Cilic v. ITF* & CAS 2013/A/3335 *ITF v. Marin Cilic*, award of 11 April 2014 (operative part of 25 October 2013)

occurred. The FEI also noted that the ITA TUE committee confirmed that the use of Furosemide is a valid form of treatment of PR's medical condition and the athlete did not obtain any additional enhancement of performance beyond what would be considered a return to a normal state of health following the medication. No evidence has been submitted that would deem such a substance performance advantageous for performance considering the medical condition of the PR. Accordingly, based on the above-cited legal analysis in the *Cilic* award, the PR's degree of fault can be deemed as "light" and this a period of ineligibility shall be assessed within the zero (0) and eight (8) months range of ineligibility.

- 25.** The FEI also argued that the subjective elements of this case (including a lack of anti-doping education of the PR notwithstanding her relatively high level of participation; alleged confirmation of using Furosemide to the Doping Control Officer at the time of the test; admission to the anti-doping rule violation in the proceedings in front of the FEI and co-operative and honest spirit in discovering all the circumstances of the present matter) enables the FEI to consider that the proper sanction situates in the lower range of the applicable sanction.
- 26.** The FEI also stated that the present matter has many similarities with the *Barrios* case² where the athlete also obtained a prospective TUE for a Prohibited Substance in question but was rejected a retroactive TUE. Equally, he was a high-level athlete with many years of experience. The difference between *Barrios* and the present case is that in the *Barrios* case the Athlete was allegedly aware of anti-doping rules and checked the medication before using it but due to various circumstances was misled in believing that it does not contain any prohibited substance therefore he did not apply for a TUE. *Barrios* was ultimately sanctioned only with a reprimand.
- 27.** The FEI submitted that given the totality of the circumstances of the case in question, the FEI is of the opinion that the PR has established on the balance of probabilities that she bears No Significant Fault or Negligence for her first anti-doping rule violation. The PR's level of Fault or Negligence shall be considered as "light" and it situates in the lower range of the applicable sanction. The FEI submitted that having considered all the latter facts as presented and set out in the Settlement Agreement, they are satisfied that the sanction of two (2) months of Ineligibility period will be proportionate for this anti-doping rule violation.

² FEI Tribunal Decision in the matter of Pablo Barrios (VEN) dated 23 October 2015

- 28.** The FEI also noted that bearing in mind the current financial situation of the Athlete, the FEI agrees to a fine of five hundred Swiss Francs (500 CHF) to be imposed on the Athlete in accordance with the Article 10.10 of the ADRHA.
- 29.** Finally, the FEI stated that the PR has to attend and complete an anti-doping education course such as the FEI Human Anti-Doping Course, WADA's ALPHA or equivalent, or an education course provided by the Finnish Anti-Doping Agency and/or by the Equestrian Federation of Finland. These education requirements must be fulfilled within one (1) year from the final decision of the FEI Tribunal and the completed certificate shall be sent to the FEI and the Equestrian Federation of Finland.

VI. The Decision

30. Agreement between the Parties:

Quote

3. NOW, THEREFORE, THE PARTIES HAVE AGREED (SUBJECT ONLY TO THE APPROVAL OF THE FEI TRIBUNAL) TO THE FOLLOWING TERMS FOR DISPOSAL OF THE ANTI-DOPING PROCEEDINGS:

- 3.1 In the matter of the Adverse Analytical Finding related to the Samples, which were collected from the Athlete at the CPEDI3* in Lisbon, Portugal held from 1 to 3 October 2019, the Athlete and the FEI agree in accordance with the Article 7.10.1 of the ADRHA on the following:
- (a) The Athlete admits the violation of Article 2.1 of the ADRHA (Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample);
 - (b) The Athlete established on a balance of probabilities how the Prohibited Substance (Furosemide) entered her system;
 - (c) The Athlete bears No Significant Fault or Negligence (in accordance with Article 10.5.1.1 of the ADRHA) for the rule violation and the applicable period of Ineligibility shall be two (2) months, commencing as of the date of the final FEI Tribunal decision;
 - (d) All results achieved by the Athlete at the Event CPEDI3* - Lisbon (POR), 2019_CI_1220_PED_S shall be disqualified with all resulting consequences, including forfeiture of any related medals, points and prizes pursuant to Articles 9.1 and 10.1.2 of the ADRHA,

- (e) The Athlete shall pay a fine of five hundred Swiss Francs (500 CHF) in accordance with Article 10.10 of the ADRHA;
 - (f) Each party will bear its own legal and other costs incurred in connection with these proceedings;
 - (g) The Athlete is required to fulfil the Education Requirement within a one (1) year from the decision of the FEI Tribunal;
 - (h) No other Sanctions will apply in this case;
 - (i) This violation of the ADRHA Rules shall be considered a prior violation for the purpose of Multiple Violations in accordance with Article 10.7 of the ADRHA;
- 3.2 This agreement is made in accordance with Article 7.10.1 of the ADRHA and is subject to the approval of the FEI Tribunal. The Agreement will be included in a Final Decision of the FEI Tribunal. Consequently, it will be communicated to the Parties with a right of appeal in accordance with Article 13.2 of the ADRHA.
- 3.3 The parties acknowledge and agree that, pursuant to Article 14.3 of the ADRHA, the Decision will be made public by the FEI. The terms set out in this agreement have been agreed as a full and final settlement of all claims relating to the subject-matter of these proceedings.

*** End Quote***

VII. Jurisdiction

31.

- (a) The FEI Tribunal has jurisdiction over this matter pursuant to Article 38 of the Statutes, Article 159 of the GRs, the ADRHA, as well as Article 18 of the IRs.
- (b) The PR is a member of the Equestrian Federation of Finland, and as such is bound by the ADRHA.
- (c) Article 7.10.1 of the ADRHA provides for agreements to be reached between parties.
- (d) As a result, the Tribunal has the requisite jurisdiction to approve and issue this Decision.

VIII. Approval of Agreement

- 32.** Having reviewed the Case Summary, the Full Reasoning for the Agreement and the terms of the Agreement, the Tribunal takes note that the FEI accepts – on a balance of probability – that the PR bears No Significant Fault or Negligence for her first anti-doping rule violation.
- 33.** Furthermore, the Tribunal also takes note that the level of Fault or Negligence shall be considered as “light” and it situates in the lower range of the applicable sanction and the FEI are satisfied that the sanction of two (2) months of Ineligibility period will be proportionate for this anti-doping rule violation.
- 34.** The Tribunal wishes to emphasise that it did neither evaluate whether the PR has met the burden of proof regarding the level of Fault or Negligence for this anti-doping rule violation. Furthermore, the Tribunal highlights that the present agreement does not constitute jurisprudence, and as such when reviewing it did not consider previous case law. The Tribunal emphasises that the decision in this case depends on the particular circumstances disclosed as set out above.
- 35.** To conclude, the Tribunal finds that the Agreement between the Parties could be considered as within the consequences that are mandated by the ADRHA Rules.
- 36.** Therefore, and in accordance with the mutual consent of the Parties, the Tribunal hereby directs the Parties to fully comply with all the terms of the Agreement, and to revise the results, including team results if applicable, of the Event accordingly. Further, this Decision shall terminate the present case 2019/HD05 JAANA KIVIMAKI.

IX. Decision

1. The Tribunal rules that the Agreement reached between the FEI and the PR, Ms Jaana Kivimaki concerning the case 2019/HD05 Jaana Kivimaki is hereby ratified by the Tribunal with the consent of the Parties, and its terms set out in Article 6 above are incorporated into this Decision.
2. This Decision is subject to appeal in accordance with Article 13.2 of the ADRHA Rules. An appeal against this Decision may be brought by lodging an appeal with the Court of Arbitration for Sport (CAS) within twenty-one (21) days of receipt hereof.
3. This Decision shall be notified to the PR, to the President of the NF of the PR, and to the FEI.

4. This Decision shall be published in accordance with Article 14.3 of the ADRHA Rules.

FOR THE FEI TRIBUNAL



Ms Valérie Horyna, One-Member Panel