



Arbitration CAS ad hoc Division (OG Rio) 16/014 Karen Pavicic v. Fédération Équestre Internationale (FEI), award of 6 August 2016 (operative award of 2 August 2016)

Panel: Mr Mark Hovell (United Kingdom), Sole Arbitrator

Equestrian (dressage)

Non-qualification of an athlete for the Olympic Games

Exhaustion of internal legal remedies

Urgency

1. Pursuant to the FEI regulations, the FEI Tribunal is to consider any appeals against decisions of FEI bodies. If an applicant elects to bring an appeal against the decision of a FEI body directly to the CAS, he or she does not exhaust all the internal legal remedies available to him or her, and the CAS must decline jurisdiction to entertain the matter.
2. Article 1 of the CAS Ad Hoc Rules contains a qualification: *“unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective”*. This qualification within the CAS Ad Hoc Rules is there for urgent cases, where the urgency is outside of the control of the parties. However, this qualification does not apply where the urgency was created by the applicant's inactivity, who chose to wait 2 weeks before turning to the CAS when she could have appealed to the FEI.

1 PARTIES

- 1.1 The Applicant is Ms. Karen Pavicic (“the Athlete”), an equestrian rider from Canada.
- 1.2 The Respondent is the Fédération Équestre Internationale (FEI), based in Lausanne, Switzerland, the organisation responsible for equine sports.
- 1.3 The First Interested Party is Equine Canada based in Ottawa, Canada, the organisation responsible for equine sports in Canada.
- 1.4 The Second Interested Party is the Canadian Olympic Committee based in Toronto, Canada, the National Olympic Committee for Canada.
- 1.5 The Third Interested Party is Ms. Megan Lane (“Ms Lane”), an equestrian rider from Canada.

2 FACTS

- 2.1 The elements set out below are a summary of the main relevant facts as established by the Panel by way of a chronology on the basis of the submissions of the parties. Additional facts may be set out, where relevant, in the legal considerations of the present award.
- 2.2 On 19 June 2016, at the final North American qualifying event at Cedar Valley for dressage at the 2016 Rio Olympic Games (“the Olympic Games”), the Athlete alleged that Judge Elizabeth McMullen gave artificially high scores to Ms Lane to ensure she qualified ahead of the Athlete for the Olympic Games.
- 2.3 On 7 July 2016, another Judge, William Tubman informed the Head of Dressage at the FEI that he had been told by two other Judges (Lorraine McDonald and Brenda Minor) that Elizabeth McMullen had told them both independently before the Cedar Valley event that she intended to mark Ms Lane up to the detriment of the Athlete.
- 2.4 On 7 July 2016, Lorraine McDonald, when asked about this by the FEI, stated “*I...can only confirm conversation from the night before the competition which is in since with comments outlined below*” in reference to William Tubman’s version of the events.
- 2.5 On 8 July 2016, the Athlete raised a complaint with the FEI Dressage Department.
- 2.6 On 13 July 2016, the Athlete appealed against the decision of equine Canada to nominate Ms Lane ahead of her for the Rio Games.
- 2.7 On 15 July 2016, the FEI Dressage Committee considered the results from the Cedar Valley event and Elizabeth McMullen’s judging there. The conclusion was that, following an analysis of the scoring and a review of the reports and facts, the Committee unanimously recommended that the original results should stand, as there were insufficient grounds for either annulling or changing the results. However, the Committee did also determine to make further enquiries into Mrs McMullen’s behaviour.
- 2.8 On 16 July 2016, arbitration was conducted through the Sport Dispute Resolution Centre of Canada (“SDRCC”), with Richard Pound as sole arbitrator. Mr Pound dismissed the Athlete’s challenge against the nomination of Ms Lane ahead of herself.
- 2.9 On 17 July 2016, the Athlete received Mr Pound’s Order, with the grounded decision being made available on 19 July 2016.

3 CAS PROCEEDINGS

- 3.1 On 2 August 2016 at 14.00 (time of Rio de Janeiro), the Athlete filed an application with the CAS Ad Hoc Division against the FEI Dressage Committee’s decision of 15 July 2016.

- 3.2 On 2 August 2016, the CAS Ad Hoc Division notified the Parties of composition of the Panel: Mr. Mark A. Hovell, United Kingdom, as the sole arbitrator.
- 3.3 In the same communication, the Panel directed the Respondents to provide their replies to the Athlete's application and the Interested Parties their amicus curiae before 2 August 2016 at 17.00 (time of Rio de Janeiro). Moreover, such communication informed the Parties that there would not be a hearing in this matter, as a decision from the Sole Arbitrator was required on 2 August 2016 by 18.00 (time of Rio de Janeiro) to enable the Athlete's horse to be able to comply with quarantine laws into to travel to Rio in time for the Rio Games, should her application be accepted.
- 3.4 On 2 August 2016 at 17.23 (time of Rio de Janeiro), FEI filed its Answer.

4 PARTIES' SUBMISSIONS AND REQUESTS FOR RELIEF

- 4.1 The Parties' submissions and arguments shall only be referred to in the sections below if and when necessary, even though all such submissions and arguments have been considered.

a. The Athlete

- 4.2 The Athlete maintained her arguments that she put before the arbitration conducted through the SDRCC and that she had raised with the FEI. Mrs McMullen had told two of her colleagues the day before the Cedar valley event that she was unhappy with the results the Athlete had received in a prior event and intended to award higher marks to Ms Lane in this event to ensure Ms Lane finished ahead of her in the standing for the Rio Games. The Athlete submitted that Mrs McMullen carried this out and analysed the scores of Ms Lane to further support her allegations that was match fixing and the FEI should have annulled the results from Cedar Valley, which would have left her ahead of Ms Lane and free to receive Equine Canada's nomination for the Rio Games.

- 4.3 The Athlete's requests for relief are as follows:

"...the score in question should be annulled and she [the Athlete] should represent Canada in the Olympics and not the affected party [Ms Lane].

...

The Applicant seeks to be named as Canada's second rider for dressage".

b. The FEI

- 4.4 The FEI, whilst maintaining that its Dressage Committee had correctly dealt with the matter, submitted that the CAS lacked jurisdiction to deal with the Athlete's application, as firstly the decision being appealed against was issued before the Ad Hoc Division of the CAS took

jurisdiction of such disputes and further, the Athlete should have brought any appeal to the FEI Tribunal, so she had not exhausted all her internal remedies before turning to the CAS.

4.5 FEI's requests for relief are as follows:

"...the FEI respectfully asks the CAS Panel to:

1. *rule that the Appeal is inadmissible on the grounds of lack of jurisdiction; or in the alternative*
2. *reject the Appellant's requests for relief in their entirety and to dismiss the Appeal in its entirety*".

5 JURISDICTION AND ADMISSIBILITY

5.1 Article 61.2 of the Olympic Charter provides as follows:

"61 Dispute Resolution

[...]

2. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration".

5.2 The Sole Arbitrator notes that FEI contested this jurisdiction in its written submissions on two grounds (1) the 10 day rule; and (2) non-exhaustion of internal remedies. The Sole Arbitrator refers to Article 1 of the CAS Arbitration Rules for the Olympic Games (the "CAS Ad Hoc Rules") to consider the position.

5.3 Article 1 of the CAS Ad Hoc Rules provides as follows:

"Article 1. Application of the Present Rules and Jurisdiction of the Court of Arbitration for Sport (CAS)

The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games.

In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective".

5.4 The Sole Arbitrator notes that the FEI Dressage Committee's decision was rendered on 15 July 2016. Whilst it is not clear when the Athlete was made aware of it, as it was discussed at her hearing before Mr Pound on 17 July 2016, it must have been on or before that date. The CAS Ad Hoc "window" opened, 10 days before the Opening Ceremony of the Rio Games, so the Ad Hoc was open for business on 24 July 2016. This gives rise to an issue of admissibility, which would need to be considered in the merits of this case. However, before the Sole Arbitrator can consider the merits, he must deal with the second jurisdictional matter raised by the FEI.

- 5.5 The clear wording of Article 1 of the CAS Ad Hoc Rules is that *“the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned”*.
- 5.6 The FEI has established the FEI Tribunal which, pursuant to Article 165.1 of the FEI General Regulations is to consider any appeals against decisions of FEI bodies such as the FEI Dressage Committee. The Sole Arbitrator notes that the Athlete had 30 days in which to bring such appeal to the FEI Tribunal. She was aware of the FEI Dressage Committee’s decision by 17 July 2016, yet waited until 2 August to bring an appeal, but then elected to bring this directly to the CAS.
- 5.7 The Sole Arbitrator further notes that Article 1 of the CAS Ad Hoc Rules contains a qualification: *“unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective”*.
- 5.8 The Sole Arbitrator again notes that the Athlete had 2 weeks before turning to the CAS when she could have appealed to the FEI. She chose not to, instead appealing to CAS and requesting a decision to be rendered within a matter of hours. This qualification within the CAS Ad Hoc Rules is there for urgent cases, where the urgency is outside of the control of the parties. Here the urgency was created by the Athlete’s inactivity for 2 weeks.
- 5.9 The Sole Arbitrator notes that it is within the parties’ remit to agree to by-pass the FEI Tribunal (see Article 39.3 of the FEI Statutes) and to bring the dispute straight to CAS, but there is no evidence on the file that the Athlete even discussed such a route with the FEI.
- 5.10 In conclusion, the Sole Arbitrator is satisfied that the Athlete has not exhausted the internal legal remedies available to her with the FEI and must decline jurisdiction of this matter.

6 CONCLUSION

- 6.1 The Athlete’s application filed on 2 August 2016 shall be dismissed, as the CAS Ad Hoc Division has no jurisdiction to entertain the application.
- 6.2 All other prayers for relief are rejected.

The ad hoc Division of the Court of Arbitration for Sport renders the following decision:

It has no jurisdiction to entertain the Application filed by Ms Karen Pavicic on 2 August 2016.