

**REPUBLIC OF KENYA**



**RESULTS MANAGEMENT PANEL  
ANTI-DOPING CASE NO. 08 & 10 OF 2021 (CONSOLIDATED)**

**IN THE MATTER BETWEEN**

**ANTI- DOPING AGENCY OF KENYA .....APPLICANT**

**-VERSUS-**

**JUDITH JEPNGETICH.....RESPONDENT**

**DECISION**

**HEARING:** 18<sup>th</sup> January, 2022

<b>PANEL:</b>	1. Mrs. Elynah Shiveka	Panel Chairperson
	2. Mrs. Njeri Onyango	Member
	3. Mr. Allan Mola	Member

**APPEARANCES**

**MR. BILDAD ROGONCHO - COUNSEL REPRESENTING ADAK- ADVOCATE  
RESPONDENT IN PERSON**

**ABBREVIATIONS AND DEFINITIONS**

The following abbreviation used herein have the indicated

ADAK –Anti-Doping Agency of Kenya

ADR-Anti-doping Rule

ADRV-Anti Doping Rule Violation

AK-Athletics Kenya

IAAF-International Association of Athletics Federation

RMP- Results Management Panel

WADA- World Anti-Doping Agency

All the definitions and interpretations shall be construed as defined and interpreted in the constitutive document both local and international.

## **THE PARTIES**

1. The Applicant is the Anti-Doping Agency of Kenya (hereinafter ‘ADAK’) A State Corporation established under *section 5* of the *Anti-Doping Act No 5 of 2016* (as amended)<sup>1</sup>.
2. The Respondent is a Female adult of presumed sound mind and a National Level Athlete<sup>2</sup>.

## **JURISDICTION**

3. The Sports Management Panel has jurisdiction under Section 55, 58, and 59 of the Sports Act No 25 of 2013<sup>3</sup> and Section 31 and 32 of the Anti-Doping Act No. 5 of 2016 (as amended)<sup>4</sup> to hear and determine this case.

## **APPLICABLE LAWS**

4. The Respondent is a Female athlete; therefore, the IAAF Competition Rules, IAAD Anti-Doping Regulations, the WADC, and the ADAK ADR apply.

## **FACTUAL BACKGROUND**

5. On 25<sup>th</sup> May 2021, during an out-of-competition testing, an ADAK Doping Control Officer (herein after referred to as DCO) collected a urine sample from the Respondent. Assisted by a DCO, the Respondent split the samples into two separate bottles which were given reference Numbers A **4510125** (the ‘A’ sample) and B **4510125** (the ‘B’ sample) in accordance with the prescribed WADA procedures.
6. On 27<sup>th</sup> May 2021, during the Athletics Kenya Pre-Trials for 2020 Tokyo Olympics, an ADAK Doping Control Officer (DCO) collected a urine sample from the Respondent. Assisted by a DCO, the Respondent split the samples into two separate bottles which were given reference Numbers A **4589668** (the ‘A’ sample) and B **4589668** (the ‘B’ sample) in accordance with the prescribed WADA procedures
7. The Samples were transported to the World Anti-Doping Agency (WADA) accredited laboratory in Bloemfontein, South Africa (‘the Laboratory’). The Laboratory then analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories (ISL). Analysis of the A Sample returned an Adverse Analytical Finding (“AAF”) for presence of a prohibited substance “*19-Norandrosterone, 19-*

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<sup>1</sup> Mr. Rogoncho appeared for ADAK.

<sup>2</sup> The Respondent appeared in Person

<sup>3</sup> The Sports Act No. 25 of 2013, Laws of Kenya.

<sup>4</sup> Anti-Doping Act No. 5 of 2016, Laws of Kenya

*Noretiocholanolone and Nandrolone(19-norandrosterone)*” which are listed as endogenous AAS under S.1.18 of the 2021 WADA prohibited list.

8. The findings were communicated to the respondent athlete by Japhter K. Rugut EBS, the ADAK Chief Executive Officer through a Notice of Charge and mandatory Provisional Suspension dated 4th August 2021. In the said communication the athlete was offered an opportunity to provide an explanation for the same by 24th August 2021.
9. The Respondent denied the charges and responded to the ADRV Notice vide WhatsApp and stated that she was on medication for common cold and indicated Amoxicillin and Flucodex as the medication ingested by her. She however did not produce any medical support documents to prove how the substances entered her body.
10. The Respondent Athlete’s AAF was not consistent with any applicable Therapeutic Use Exemption (TUE) recorded at the WA for the substances in question and there is no apparent departure from the WA Anti-Doping Regulations or from WADA International Standards for Laboratories, which may have caused the adverse analytical findings<sup>5</sup>.
11. The Respondent did not request a sample B analysis thus waiving her right to the same under WA rule 37:5 and confirmed that the results would be the same with those of sample A in any event.
12. The Response and conduct of the respondent were evaluated by ADAK and it was deemed to constitute an anti-doping rule violation and referred to the Results Management Panel for determination. ADAK, therefore, filed the current Charge; the Notice to Charge was filed on 21<sup>st</sup> September, 2021.

### **PROCEDURAL BACKGROUND**

13. On 21<sup>st</sup> September, 2021, the RMP Chairperson received the Notice of Charge in both RMPADK No. 8 & 10 of 2021 and issued the following directions:
  - i) The Applicant shall serve the Notice to Charge, the Notice of ADRV, the Doping Control Form, Direction no. 1 and all relevant documents on the Respondent by Thursday, 20<sup>th</sup> October, 2021.
  - ii) The Panel Constituted to hear RMPADK No. 8 of 2021 shall be as follows:
    - a. Ms. Njeri Onyango;
    - b. Mary N Kimani
    - c. Mr. Gichuru Kiplagat
  - iii) The Panel Constituted to hear RMPADK No. 10 of 2021 shall be as follows:

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<sup>5</sup> World Anti-Doping Agency

- a. Elynah Shiveka
    - b. Peter Ochieng
    - c. Gabriel Ouko
  - iv) The matters shall be mentioned on Thursday, 21<sup>st</sup> October, 2021 to confirm compliance and for further directions.
- 14.** The matters came up for mention on 21<sup>st</sup> October, 2021 Mr. Rogoncho was present for ADAK in both. There was no appearance for the Respondent. During the mention Mr. Rogoncho noted that the athlete **JUDITH JEPNG'ETICH** was also appearing as the Respondent in both RMPADK Nos 8 & 10 of 2021. He requested for the matters to be consolidated on the basis that the charges levelled against the Respondent relate to the same prohibited substance collected from the Respondent on 25<sup>th</sup> May 2021 and 27<sup>th</sup> May 2021 respectively. The Panel directed that RMPADK No. 8 of 2021 and RMPADK No. 10 of 2021 be mentioned together to determine the Respondent's position on the matter on 28<sup>th</sup> October, 2021.
- 15.** At the Mention on 28<sup>th</sup> October, 2021, both RMPADK No. 8 of 2021 and RMPADK No. 10 of 2021 were mentioned to confirm the Respondent's status. Mr. Rogoncho informed the Panel that the Athlete/Respondent wished to represent herself if the Panel was willing to take part in a circuit in Eldoret. The Panel noted that Mr. Rogoncho was to provide the Panel with a List of Matters relating to the circuit in Eldoret so that it could make arrangements regarding the number of members who may need to attend. The Panel directed Mr. Rogoncho to provide the Panel with a List of Matters relating to the circuit in Eldoret on or before Monday, 1<sup>st</sup> November 2021 to allow room for the Panel to make arrangements for the circuit. RMPADK No. 8 of 2021 and RMPADK No. 10 of 2021 were set for a further Mention on 4<sup>th</sup> November, 2021.
- 16.** At the Mention on 4<sup>th</sup> November, 2021, both RMPADK No. 8 of 2021 and RMPADK No. 10 of 2021 were mentioned to confirm the status of the matter. The Respondent had forwarded a request to be heard during the circuit in Eldoret. The matter was set for Hearing on 11<sup>th</sup> November, 2021 in Eldoret. the panel that attended to the hearing is as above.

#### **HEARING AND SUBMISSIONS**

- 17.** At the Hearing on 11<sup>th</sup> December, 2021 in Eldoret Mr. Rogoncho for ADAK was present. The Respondent appeared in Person.
- 18.** The Respondent opted to give sworn oral testimony. Her testimony is as follows:

*“My name is Judith Jepng’etich. National Passport Number AK0514850. I live in Kapsabet. I work for KDF. I have 4<sup>th</sup> form Education. I started athletics in school in 2016. I have participated in various competitions such as KDF races and National Championships since 2019.*

*I have never participated in an international competition and I have never won any competition so far.*

*I underwent my first doping test in May 2021 during the National Championship. I did not know what they looking for I was told they were from ADAK. I have heard about ADAK before and that they test athletes. I was also tested in June. In the race that took place on 27<sup>th</sup> May 2021 I took position 7.*

*I received a message from ADAK through WhatsApp that I tested positive for Nandrolone(19-norandrosterone). The message had the Doping Control Form attached. I agreed that the testing process was good.*

*ADAK personnel had visited my house on 25<sup>th</sup> May 2021 and requested for urine sample which I provided. Prior to collection of the sample on 25<sup>th</sup> May 2021 I had common cold and had taken Amoxicillin and Flucodex obtained from the chemist. I indicated Amoxicillin in the Doping Control form. I forgot to include Flucodex. I did not go to Hospital, I went to a Chemist and purchased the medication.”*

### **ADAK SUBMISSIONS**

- 19.** ADAK filed written submissions on 25<sup>th</sup> November 2021. It is ADAK’s position that under Article 3 the ADAK ADR and WADC Rules, it has the burden of proving ADRV to the Comfortable satisfaction of the Hearing Panel.
- 20.** ADAK further holds that under Article 3.2 facts relating to Anti-Doping rule violation may be established by **reliable means**, including **admissions** and the methods of establishing facts and sets out the presumptions. Which include;

- a) **Analytical methods or decision limits....**
- b) WADA accredited Laboratories and other Laboratories approved by WADA are **presumed to have conducted Sample analysis** and custodial procedures in accordance with the international standards for laboratories procedures in accordance with the international standards for laboratories.
- c) Departures from any other International Standards or other anti-doping rule or policy outlined in the code or these Anti-

Doping **Rules which did not cause an Adverse Analytical Finding** or other Anti-Doping rule violation shall **not invalidate** such evidence or results.

d) The facts established by a decision of a court or a professional disciplinary Panel of competent jurisdiction which is not a subject of the pending appeal shall be irrebuttable evidence against an athlete or other person to whom the decision pertained of those facts unless the athlete or other persons establishes that the decision violated principles of natural justice.

e) The hearing panel in a hearing.

21. ADAK submits that in this instance, an analytical method has established the presence of a prohibited substance. The Athlete did not challenge the process and outcome and did not request for testing of the 'B' Sample. ADAK thus poses that it has met its burden of proving the ADRV to the comfortable satisfaction of the hearing panel.

22. ADAK also submits that under Article 22.1 the athlete has a duty to;

- a. To be knowledgeable of and comply with anti-doping rules,
- b. To be available for sample collection always,
- c. To take responsibility, in the context of anti-doping, for what they ingest and use,
- d. To inform medical personnel of their obligation not to use Prohibited Substances and Prohibited Methods and to take responsibility to make sure that any medical treatment received does not violate these Anti-doping rules.
- e. To disclose to his or her International federation and to the agency any decision by a non-signatory finding that he or she committed an Anti-Doping rule violation within the previous 10 years.
- f. To cooperate with Anti-doping organizations investigating Anti-doping rule violations.

23. ADAK further submits that the Respondent as an Athlete is under duty uphold the spirit of sport as embodied in the preface to the Anti-Doping rules which provides as follows;

*"The spirit of sports is the celebration of human spirit, body and mind and is reflected in values we find in and through sports including;*

- **Health**
- **Ethics, fair play and honesty**

- *Excellence in performance*
- *Character and education*
- *Fun and joy*
- *Dedication and commitment*
- *Respect for the rules and laws*
- *Respect for self and other participants*
- *Courage*
- *Community and solidarity”*

24. It is ADAK’s submission that the Respondent be charged with presence of Prohibited substance, a violation of Article 2.1 of the ADAK ADR<sup>6</sup>. *19-Norandrosterone* which is a non-specified substance and attracts a period of ineligibility of 4 years.

25. ADAK submitted that where the use and presence of a prohibited substance has been demonstrated it is not necessary that intent, fault, negligence, or knowing use on the athlete’s part be demonstrated in order to establish an ADRV. Further, that under Article 10.2.1 the burden of proof shifts to the Respondent/Athlete to demonstrate *no fault, negligence or intention* to entitle him or her to a reduction of sanction.

26. ADAK submits that Rule 40.3 of the IAAF Rules, the term ‘*intentional*’ is meant to

**“Identify those athletes who cheat. The term therefore, requires that the athlete or other person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute an anti-doping rule violation and manifestly disregarded that risk”**

27. ADAK places reliance on the case of **CAS 2017/A/4962 WADA V. Comitao Permanente Antidoping San Marino NADO (CPA) & Karim Gharbi**, where it states that for an ADRV to be committed non-intentionally, the Athlete **bears the burden of proof of establishing that the anti-doping rule violation was unintentional and thus to establish how the relevant forbidden substance entered his/her body**. The same case went on to state under Par. 56 that the Athlete **bears the burden of establishing that the violation was not intentional and therefore must establish how the substance entered his or her body on the “balance of probability”**, a standard long established in CAS jurisprudence.

28. It is ADAK’s position therefore that CAS Jurisprudence is that the athlete bears the burden of establishing that violation was not intentional. And that in this instance the Respondent has failed to prove lack of intention to cheat based on her inability to prove her knowledge

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<sup>6</sup> Anti-Doping Agency of Kenya, Anti-Doping Rules, 2016.

on the overall fight against doping as premised by her participation in the Athletics since 2016.

29. ADAK further submitted that the Respondent further submitted that the Respondent failed to disclose the origin of the prohibited substance and thus origin of the offending substance has not been established.
30. On fault, negligence and Knowledge, ADAK submits that the Respondent is charged with the Responsibility to be knowledgeable and to comply with Anti-doping rules and take responsibility in anti-doping context for what they ingest and use. In this case the Respondent failed to do so thus breached rules 22.1.1 and 22.1.3 of ADAK ADR.
31. ADAK further submits that the Athlete has a personal duty to ensure that no prohibited substance enters their body.

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 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 to establish an anti-doping rule violation under Article 2.1.*

32. In support of the above ADAK relies on the decisions of **CAS 2012/A/5317 Aleksei Medvedev V. Russian Anti-Doping Agency (RUSADA)**, **CAS 2016/A/4676 Arijan Ademi V. Union of European Football Associations (UEFA)** and **CAS 2006/A/1025 Mariano Puerta V. International Tennis Federation (ITF)**
33. On Sanctions, ADAK proposes a period of ineligibility of 4 years on the basis that no plausible explanation has been given for the presence of a Prohibited Substance in the Respondent’s system.

**DECISION**

34. A review of the Doping Control Forms completed by the Respondent at the time of Sample collection dated 25<sup>th</sup> May 2021 and 27<sup>th</sup> May 2021 show that the Respondent did list that she was on Amoxicillin capsules, Centrum Vo2Max – Vitablits.
35. Upon notification of the AAF by the letter of 4<sup>th</sup> August, 2021, the Respondent responded through a message – she states

*“Concerning today’s message, I am really shocked and confused since I didn’t expect such news. During the period of testing that was on 25/05/2021, I had taken Amoxicillin and Flucodex since I had common cold*



*during the mentioned date of testing that is on 25<sup>th</sup> I indicated Amoxicillin on the Doping Control Form and forgot to indicate Flucodex. Besides that, I had developed minor rashes on my skin and I had to consume pork meat which helped me clear the rashes. On 27/05/2021 samples I didn't indicate any of the above drugs on the Doping Control Form. Therefore, am really innocent about Today's information, much shocked"*

### **ANALYSIS**

- 36.** The Panel in making its determination shall consider
- a) Whether the ADRV has been proved to the Required Standard of proof
  - b) Whether or not there was an intention to violate the applicable anti-doping regulations
  - c) What degree of fault and/ or negligence to be assigned to the athlete's conduct?
  - d) What period of ineligibility to be imposed?
- 37.** The Panel is of the view that the facts of the AAF as per the Laboratory results are not disputed, as far as the 'A' Samples results go and that there was no request for 'B' sample analysis.
- 38.** The Panel also notes that there was no applicable TUE at the time of Sample Collection.
- 39.** This Panel from the foregoing therefore finds that the fact of the AAF has not been contested. There being no contest, this Panel finds that the Charge regarding the presence of a Prohibited Substance "***19-Norandrosterone, 19-Noretiocholanolone***" and "***Nandrolone (19-norandrosterone)***" in the Respondent's Urine Sample has been proved to the required standard under both the ADAK ADR and WADC article 3.2.
- "The facts relating to the anti-doping rule violation may be established by any reliable Means including admissions and methods of establishing facts and set out the presumptions which include, results obtained by*
- a) Analytical methods or decision limits*
  - b) WADA accredited Laboratories approved by WADA...."*
- 40.** Based on the above, this Panel finds that in this instance there is an AAF from a WADA accredited laboratory which has not been challenged. The Respondent also failed to provide any explanation how "***19-Norandrosterone, 19-Noretiocholanolone***" and "***Nandrolone (19-norandrosterone)***" entered her system. ADAK submitted that the Respondent failed to

disclose the origin of the prohibited substance and thus origin of the offending substance has not been established.

41. The provisions of Article 10.2.3 of the WADC and ADAK rules provide that in order for a violation under the code to be deemed "intentional" the athlete should have known that the conduct constitutes an anti-doping rule violation and that there was a significant risk that the conduct could constitute or result in an anti-doping rule violation and that he or she manifestly disregarded that risk.
42. It is this panel's position that a failure to explain to a reasonable satisfaction the origin of the prohibited substance would mean that the athlete cannot prove lack of intent. In the words of **Arbitrator Yves Frontier** on page 77.

**77. " it appears to me that logically I cannot fathom nor rule on the intention of an athlete without having initially been provided with evidence as to how she had ingested the product which, she says contained clenbuterol; with respect to the contrary view I fail to see how I can determine whether or not an athlete intended to cheat if I do not know how the substance entered her body"**

43. In the present case, the Respondent failed to disclose the origin of the prohibited substance and thus origin of the offending substance has not been established as submitted by ADAK. It is notable that the Respondent has in the panel's view, made no efforts to establish the origin of the substance stated in the AAF. In the Panel's view the Respondent demonstrated deceit as she misled the Panel to believe that she did not know where the substance came from. *"She also demonstrated an evasive behavior in her testimony as she was economical with the truth thus her whole testimony was lies.* ADAK for that reason made submissions on the matter and submitted that the Respondent did not disclose anything about the origin of the prohibited substance.
44. Based on the foregoing, the panel having considered the circumstances as set out in the Charge document is of the view that the Respondent made no effort to counter ADAK's Claim against her. As a matter of fact, she failed to file any response, request for analysis of the '**B**' sample or any receipt from the Chemist where she purchased the medicine for Common cold. The burden of proof shifts to the Athlete to demonstrate *no fault, negligence or intention* to entitle him or her to a reduction of sanction.
45. The rule of thumb is that it is an Athlete's personal duty to ensure that no prohibited substance enters his or her body and that 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 by the analysis of the Athlete's sample which confirms the presence of the prohibited substance.

**46. In CAS 2018/A/4643 Maria Sharapova –vs- International Tennis Federation**, the panel therein set out factors for consideration in the assessment of the degree of fault on the part of the athlete as follows;

- i) Professional Experience
- ii) Age
- iii) Perceived and actual degree of risk
- iv) Any impairment
- v) Disclosure of Medication on the Doping Control form
- vi) Admission of the ADRV in a timely manner
- vii) Any other relevant factors and specific circumstances that can explain the Athlete's conduct.

**47. Article 2 of the WADC states that'**

**"Athletes or other persons shall be responsible for knowing what constitutes ADRV and the substances and methods which have been included on the Prohibited list"**

**48. Additionally, Article 2.1 WADC states that;**

**"It is each athlete's personal duty to ensure that no Prohibited Substance enters his/her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their sample. Accordingly, it is not necessary that intent, fault, negligence or knowing on the athlete's part be demonstrated in order to establish an ADRV under this Article.**

**49. Article 10.2 of the WADA Code states thus,**

**"The participant can establish how a Specified Substance entered his/her body or came into his/her possession and can further establish, to the comfortable satisfaction of the Independent Panel, that such Specified Substance was not intended to enhance the Player's sports performance or to mask the use of a performance-enhancing substance, the period of ineligibility established shall be replaced (assuming it is the participant's first anti-doping) offence with, at a minimum, a reprimand, and non-period of ineligibility and at maximum, a period of two years. To qualify for any elimination or reduction, the**

**participant must produce corroborating evidence in addition to his/her word that establishes, to the comfortable satisfaction of the Independent Panel, the absence of intent to enhance sports performance or mask the use of a performance-enhancing substance. Where the conditions set out are satisfied, the participant's degree of fault shall be the criterion considered in assessing any reduction of the period of ineligibility."**

**50.** In this instance, we find that the Respondent was grossly negligent having failed to;

- a. Failing to familiarize herself with the Anti-doping rules.
- b. explain the how “*19-Norandrosterone, 19-Noretiocholanolone*” and “*Nandrolone (19-norandrosterone)*” entered her system.
- c. take responsibility, in the context of anti-doping, for what she ingested and used.

**51.** This panel finds that:

- a. The ADRV has been established as against the Athlete
- b. The Athlete failed to establish no intention to commit an ADRV.
- c. The Respondent failed to establish the origin of the prohibited substance.
- d. The Respondent failed to give any explanation for her failure to exercise due care in observing the products ingested to and used and as such the ADRV was as a result of her negligent acts.
- e. The origin of the offending substance has not been established

**52.** The Panel notes that the Respondent has no known previous charge (s) or ADRV.

**53.** Under Article 2.1, Article 10.2.1.2 of ADAK ADR, regular sanction of a four-year period of ineligibility where the ADRV involves a specified substance “and the agency...*can establish that the ADRV was intentional...*”

**54.** Any period of ineligibility may be eliminated under Article 10.4 if it can be established that there was “*no significant fault or negligence*”

**55.** The period of ineligibility can be reduced to a maximum of 2 years if the ADRV is promptly admitted (Article 10.6.3) but contingent upon:

- i. The athlete's degree of fault and
- ii. Assessment of the seriousness of the ADRV, contrary to article 10.2 ADR

**56.** Considering the panel's finding on the degree of fault, further considering the substance leading to the AAF and lack of explanation on the manner of entry to the body, this panel is of the view that the Respondent cannot benefit on the basis no fault or negligence rules.

### **SANCTION**

**57.** Having reviewed the circumstances of this matter, the panel imposes the following sanctions

- a. The Period of ineligibility shall be for 4 years , with effect from 24<sup>th</sup> August 2021, being the date of the mandatory provisional suspension, pursuant to Article 10.2.2 of the WADC.
- b. The disqualification of the Athletics Kenya pre-Trials for 2020 Tokyo Olympics results of 27/05/2021 and any subsequent event pursuant to Article 9 and 10 of the WADA code.
- c. Each party to bear its own costs.
- d. Parties have a right to appeal pursuant to Article 13 of the WADC and ADAK ADR.
- e. Any other prayers and motions are dismissed.

Dated at Nairobi this 18<sup>th</sup> day of January 2022.

Signed:



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**Mrs. Elynah Shiveka, RMP Deputy  
Chairperson Panel Chairperson**



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**Mrs. J Njeri Onyango, Member  
Panel Member**



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**Mr. Allan Mola, Member  
Panel Member**

**Covid-19 Protocol:**

This decision has been delivered by the Panel remotely by circulation to the parties' representatives by email and subsequent release to eKLR. A copy of the fully signed decision will be available for collection by the parties from the Panel registry in due course.