RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI
ASSESSOR MR W ELLIS

EX TEMPORE DECISION

MONDAY 6 JULY 2020

APPELLANT LUKE MULLEY

AUSTRALIAN HARNESS RACING RULE 187(5)

SEVERITY APPEAL

DECISION:

1. Penalty varied to disqualification of 4 months and 2 weeks

2. Appeal deposit forfeited

1. Licensed trainer Luke Mulley appeals against the decision of the stewards of Harness Racing New South Wales of 4 May 2020 to impose upon him a period of disqualification of his licences for a period of six months.

2. That period of disqualification was imposed for a breach of Rule 187(5), which states, relevantly:

> "A person shall not be deliberately obstructive of the Stewards."

The stewards also set out Rule 187(7), which merely is one that provides for the penalty for a breach.

3. The particulars of the charge were set out by the stewards in writing on 30 January 2020 when they said:

> "On Saturday, 3 August 2019, you, Mr Luke Mulley, a person licensed by HRNSW as a trainer and driver, were deliberately obstructive of HRNSW steward Mr Jamie Hogan during a stable inspection at your registered training establishment in that you deliberately hid the unregistered products Bio Bleeder, Bio Blocker and Pentoflex Gold from Mr Hogan, preventing him from taking possession of those items."

4. The stewards' inquiry was finalised in writing. The appellant, Mr Mulley, had provided the stewards on 29 November 2019 with an admission of the breach of the rule and supplemented that with reasons on 14 February 2020. The stewards then after their deliberation imposed the subject penalty.

5. The appellant, therefore, has at all times maintained his admission of the breach of the rule and has done so on this appeal. The necessity to canvass the evidence in detail diminishes.

6. The evidence before the Tribunal has comprised the bundle of material that was before the stewards, the USB stick of the inspection by the steward Mr Hogan, the appellant's submission to the stewards and, in addition, references by Ainsley Hackett and Shane Hallcroft. The appellant has given evidence and been cross-examined.

7. The issue becomes, firstly, on a severity appeal, of assessing the objective seriousness of the breach and finding a starting point of penalty and then determining what deductions, if any, are available from the objective seriousness determination.

8. The stewards here rely upon a previous decision in particular of Gallagher of 12 June 2015 in which the Tribunal reflected upon the office of steward and the necessity for the maintenance of the office of steward, and also,

without going into detail as it was not necessary, referred to the numerous decisions over the years in which the Tribunal as presently constituted and previously constituted and, indeed, Tribunals throughout this country, have looked to the maintenance of the integrity of the office of steward.

9. As the Tribunal said in Gallagher, that appellant's conduct struck at the very integrity of the office of steward. And went on to say: "It is not just the office of steward that is needed to be protected here but it is the individual officers themselves." That does not arise for consideration but is a reflection of the breadth to which it is imperative for the regulator itself to maintain the office of steward and for the Tribunal to do likewise.

10. As other Tribunals have said, those that thumb their noses at the office of steward in the expectation that they will get away with it demonstrate by that conduct that they do not understand the privilege that a licence carries with it and of the ease with which that privilege can be lost when a licensed person does not meet the rules or respect the office of steward. The Tribunal remains in this matter of the opinion that the objective seriousness of this conduct must be viewed in that light.

11. The facts are of narrow compass. The appellant has been licensed for a period of time. He has licensed premises which he shares with two other trainers. Extraordinarily, the steward in question, Mr Hogan, formerly owned the premises upon which the appellant's licensed stables stand and, of a further extraordinary nature, that steward's family reside on the general property upon which the appellant's stables stand.

12. Interestingly as well, a rather extraordinary fact, the appellant has had a friendship of many years' standing with the steward. It is such that they would often share a coffee together, have a drink together and see each other with some frequency at the subject premises.

13. The friendly banter extended to the day of the stable inspection. What happened on that date was that Mr Hogan, the inspector, conducted a stable inspection of the two other licensed persons and in the course of that inspection looked at a fridge which was used by each of the three licensed persons, one of whom is the appellant. The effect of that was that Mr Hogan observed in that fridge two unregistered products. They were identified by the other two trainers as being products of the appellant. Those two products were unregistered. They were Bio Blocker and Bio Bleeder. The appellant in addition had a third unregistered product called Pentoflex Gold.

14. The appellant was not present when Mr Hogan commenced his inspection and when he concluded the inspection of the other two trainers went to the premises of his family member and there remained until the appellant returned from the gym. The appellant gave evidence to stewards – steward Mr Adams and Integrity Manager Mr Prentice – when they visited

the premises some days later that he, the appellant, had returned to his property in his motor vehicle, he now says, and observed Mr Hogan to be present.

15. The appellant knew, as he told Mr Prentice and Mr Adams, that he was aware he had those three unregistered products in his possession, two of which were in the fridge and the third elsewhere on the property. He knew they were unregistered because he had bought them. It is to be noted at this point in this decision that he is not charged with possession of unregistered products.

16. The appellant hid those three products behind other items in the stable area.

17. The appellant informed Mr Adams and Mr Prentice that the opening remarks made to him by Mr Hogan were:

> "I'm here to do a stable inspection."

To which the appellant replied:

> "We'll start at the fridge."

And they did.

17. The appellant acknowledges that Mr Hogan was wearing a recording device and that he activated it. The appellant describes Mr Hogan, other than as being a friend, as being casually dressed. He makes a strong point about that. That is, Mr Hogan was not dressed as a steward would normally be. He was, for example, not appropriately dressed as Mr Prentice and Mr Adams were when they visited the premises some days later.

18. It was known to the appellant after the words "I'm here to do a stable inspection" as to what was going to happen. There was no second-guessing. It was he who took Mr Hogan to his fridge, or the shared fridge. When the fridge was opened, the products which Mr Hogan had seen earlier and which had been identified to him were not present.

19. The appellant was questioned. The appellant says that he did not know that the recording was at some stage stopped or malfunctioned – it is not known – because the appellant gave evidence to the Tribunal that Mr Hogan appeared to be having trouble with the recording, it was beeping at him and he was pressing buttons. In any event, the critical factors about the actual inspection itself were not recorded. What was recorded and provided in evidence was the earlier inspection of the two other trainers and then subsequently the sealing of the exhibits bag into which the Bio Blocker and Pentoflex Gold were placed by Mr Hogan, sealed and signed for.

20. The appellant gave up the two products which were seized by Mr Hogan. The appellant left secreted the third product. Apparently, it was a brief conversation. He was asked where it was and, in blunt terms, he was told he was not going to get it because it was too expensive. There was no recording as to what happened.

21. The appellant's evidence is accepted that there was no other demand made by Mr Hogan. It is open to proceed upon the basis of conjecture that Mr Hogan knew he had the appellant caught cold because he knew there was the Bio Bleeder, which was not surrendered. It might be noted Mr Hogan has not given evidence to the Tribunal. And nor is there any statement of his in the bundle.

22. The appellant was asked by the Tribunal why, upon reflection, he subsequently did not turn his mind to the failure that he engaged in. He knew he was hiding the Bio Blocker from the steward. He knew he was required to surrender it. He chose not to. He has attempted to deflect his wrong conduct by reason of the personal circumstances summarised earlier of his relationship with Mr Hogan and the informality of Mr Hogan's dressing.

23. However, the Tribunal gives no credence to those matters by reason of the fact that he knew Mr Hogan was a steward, he knew he was conducting a stable inspection, he knew he had the unregistered products, he knew he was caught out with them as soon as it was put to him and he surrendered two intentionally not surrendering a third. There can be no clearer aspect consistent with his plea that he has breached the rule of obstructing the office of steward by reason of him not surrendering that third product. And he has been caught cold in it.

24. He was subsequently spoken to, as described, by Mr Prentice and Mr Adams. In respect of his full cooperation with those stewards, the appellant relies in mitigation, and he is entitled to that. In respect of that matter, he made ready admissions to those stewards that he had it at his home elsewhere and he went to that home, they went to that home, he went into it, he came out with the product and surrendered it to them and they seized it. Those aspects of cooperation stand in contrast to his foolhardy behaviour when confronted by Mr Hogan on the basis that he would not surrender a product because it was expensive, in the full knowledge just described.

25. The appellant has no prior matters.

26. The appellant calls in aid Ainsley Hackett in a reference of 2 June 2020. He has known him for six years, they previously worked together in another occupation on a full-time basis. The appellant is assessed as honest and trustworthy, willing to go above and beyond what is expected of him.

Dependable, responsible and courteous. That the referee assesses his conduct here, which has been told to him, as entirely out of character and for which the appellant is remorseful, and as a one-off event, it is to be implied, the reference says, it will not occur again.

27. The second is by Shane Hallcroft of 7 June 2020. He has known him for 25 years. The referee has been a driver and trainer licensed by HRNSW for over 20 years. He assesses this conduct as totally out of character for a person who is honest, reliable and trustworthy, very professional in caring for and concern for the welfare of the horse. A person with a strong work ethic who has selflessly donated his company's cleaning services for charitable events.

28. The appellant has been keen at all times in his submissions to the stewards and to the Tribunal and his grounds of appeal to point out his remorse for his conduct, his ready admission of the breach and his subsequent cooperation and, in addition, he is concerned to clear his name. As the Tribunal has said, his submission to the stewards placed great emphasis upon the reasons for his conduct on the day and his attempt to exculpate himself from his wrongdoing by reason of matters associated with Mr Hogan on a personal level. The Tribunal accepts and understands those, says they are highly unusual but they do not detract from the objective seriousness of his conduct.

29. The appellant relies upon aspects of parity. He sets out a matter of Williams and a matter of Leary in which monetary penalties were imposed but the appellant concedes they were for possession of unregistered products, not obstruction of stewards. The Tribunal finds no comfort in determining objective seriousness on those matters. He calls in aid Tabia and Preston, in each of which fines were imposed for other breaches of 187, but he is unable to provide any facts in respect of either of those matters upon which the Tribunal can find any comfort other than the fact that for other types of breaches of 187 fines were considered appropriate.

30. The respondent, HRNSW, calls in aid not only Gallagher for the principles enunciated, the fact that disqualification of 10 months was imposed there, but also the matters of, firstly, Oscar Gatt, in which a 10-month disqualification was imposed for a breach of a different rule, namely 187(3), but, more critically, of Robert Gatt, a 2013 decision under 187(5), the subject rule, where a four-month disqualification was imposed after a plea of guilty but with an unknown prior record, for deliberately obstructing a stewards' inspection by emptying the contents of a container onto the ground.

31. The stewards determined a starting point of 12 months. They have done so intuitively, not by basis of parity but by reasoning on their experience. That is that intrinsic consideration of an objective penalty or, in the criminal

law, as it is described, of a sentence based on that synthesis which arises by reason of a set of facts, likely penalties, possible precedents, but coming to a conclusion which must be made.

32. The easy part in respect of this determination is the subjectives.

33. In respect of that, the appellant immediately pleaded guilty to the stewards and has maintained that admission of the breach. He gets the full credit, as the stewards gave him, of 25 percent for his cooperation with them and the Tribunal. He received from the stewards a discount of 25 percent for his personal circumstances, and they include the past good record that he has and, in addition, the other subjective factors to which reference has been made.

34. The important factors on the subjectives are the remorse that has been reflected upon and also that it is conduct which is entirely out of character.

35. The Tribunal has given careful consideration to those submissions and has determined that a 25 percent reduction is of itself a substantial reduction for personal circumstances over a plea of guilty. And the reason for that is that remorse and acting out of character is often reflected in the admission of the breach to which a 25 percent discount has already been given, not just for the utilitarian benefit of the admission saving a case being proved, but also by reason of the fact that it carries remorse and contrition inevitably by persons of good character keen to protect their reputations.

36. That brings the matter back to the starting point. The stewards considered that 12 months was appropriate for the reasons outlined. The Tribunal itself must engage on that intuitive synthesis in determining penalty unaided by parity. To the extent that parity can be found, it is that a disqualification in the only other case was appropriate.

37. The first issue, therefore: is a disqualification appropriate or, as the appellant submits, should it be dealt with by way of fine or suspension?

38. The Tribunal indicates that it considers, as it outlined, as was submitted to it, that the necessity for the integrity of the industry by reason of protection of the office of steward and ensuring that licensed persons deal with that office properly and appropriately, recognising the privilege of a licence requires them to do so, is such that a fine on these facts for an obstruction is not appropriate.

39. The Tribunal considers that despite all of the strong subjective factors a starting point of a suspension is inappropriate.

40. That leaves a disqualification. A disqualification is consistent with the only other case of parity for which a 187 matter exists, limited on the facts

available to the Tribunal, but nevertheless a disqualification. It then becomes a question of a starting point against which a discount of 50 percent is appropriate.

41. The appellant has been at pains to point out that the reason for his failures was the relationship with Hogan and the way Hogan conducted himself. That is quite an extraordinary set of facts, as the Tribunal reflected upon, and diminishes very slightly the Tribunal's belief that a substantial disqualification is objectively required for the nature of the obstruction here. That obstruction is slightly tempered by the fact that he subsequently cooperated with stewards and that then is a question of the whole of his attitude towards the stewards generally consistent with his past good character.

42. In those circumstances, the Tribunal comes to a determination that a slightly less starting point is appropriate, not as a measure of acceptance of the relationship with Hogan but the fact that it had some impact upon his thinking as an otherwise proper-thinking licensed person, business person and member of the community.

43. The Tribunal has determined that a starting point of 9 months is appropriate.

44. Against that, the 50 percent discount which has been considered appropriate, both by the stewards and the Tribunal, is applied, and that leaves, therefore, a period of disqualification of four and a half months. To be clear, because of the doubts about the calculation of weeks in months, that will be a period of two weeks.

45. The period of disqualification is 4 months and 2 weeks. The commencement of that appears, as no stay was granted, to be the date of the stewards' decision of 4 May 2020.

46. The severity appeal is upheld.

APPEAL DEPOSIT DISCUSSION

47. There being no application for a refund of the appeal deposit, the Tribunal orders it forfeited.
