RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

THURSDAY 28 JANUARY 2021

APPELLANT JOSHUA FARRUGIA

RESPONDENT HARNESS RACING NSW

AUSTRALIAN HARNESS RACING RULE 190(1) and (2)

SEVERITY APPEAL

DECISION:

1. **Appeal dismissed**
2. **Penalty of 14 months disqualification imposed, commencing 3 January 2020, with variations to AHR 259(1)(a), (g) and (k)**
3. **50 per cent of appeal deposit refunded**

1. The appellant, Joshua Farrugia, previously licensed as an A Grade trainer and C Grade driver, appeals against a decision of the stewards of 27 October 2020 to impose upon him a period of disqualification of his licences for a period of 14 months, to commence on 3 January 2020.

2. The stewards charged the breach of the rule as follows:

> "AHRR 190. (1) A horse shall be presented for a race free of prohibited substances.
>
> (2) If a horse is presented for a race otherwise than in accordance with sub rule (1) the trainer of the horse is guilty of an offence."

The stewards particularised the breach as follows:

> "… that you, Mr Joshua Farrugia, being the licensed trainer of the horse Are You With Me, did present that horse to race at Maitland on Saturday, 28 December 2019, with a prohibited substance in its system, namely alkalinising agents evidenced by total carbon dioxide present at a concentration in excess of 36 millimoles per litre in plasma as reported by two laboratories approved by Harness Racing New South Wales."

3. The stewards had conducted an inquiry on 8 October 2020 and the charge was then read to the appellant and he immediately pleaded guilty. For completeness, the Tribunal notes two things: firstly, that there were two other charges, not subject to an appeal; and, secondly, that the appellant's licences had in fact lapsed on 20 August 2020. This is a severity appeal only.

4. The evidence has comprised the bundle of material before the stewards and the appellant's oral evidence. That bundle contains the stewards' penalty decision, the transcript of their inquiry, the record of interview of the appellant by the stewards of 31 December 2019, a number of references, a number of parity cases and the usual formal documents dealing with the establishment of the breach of the rule. In addition, a number of other exhibits were put in evidence dealing with such things as the appellant's prohibited substance testing results, the results for the subject horse, and a number of other matters which have not been the subject of concern on appeal and need not be summarised in a severity appeal.

5. The first matter to determine is objective seriousness. In determining objective seriousness, the Tribunal takes assistance from the Harness Racing Penalty Guidelines. It is now trite to say the approach adopted by the Tribunal in respect of those guidelines is one of assistance and not being bound on a de novo appeal in which it must make its own

determination. It is becoming repetitive to set out the principles that apply to that application and that summary only is given.

6. Firstly, in determining objective seriousness, it is necessary to have regard not only to the conduct of the appellant but to matters that relate to the industry generally. That arises because this is – and again the Tribunal has expressed it on numerous occasions – a civil disciplinary penalty in which a protective order of the industry is required having regard to the facts and circumstances of this case, and those facts and circumstances as they are established as of today, but assessing likely compliance by the appellant in the future. That is a brief summary only. Other matters such as level playing field, integrity generally and the like have been oft expressed and need not be repeated. The Tribunal takes those matters into its consideration.

7. The Harness Racing Rules provide an exemption for the presence of alkalinising agents at less than 36 millimoles. Once 36 is reached, a presentation is a breach. It might be noted at this stage, it being a severity appeal, that there is of course no issue that the horse was presented to race as particularised and that, as particularised, it had the subject alkalinising agent present in its system. But, as is not particularised, there were two readings, one of 38.4 – the first test – and the second of 38.2. 38.2 becomes the focus.

8. There is no evidence to indicate between 36 and 38.2 what difference occurs in the nature of the horse as presented. Studies have attempted that, they were referred to by Dr Wainscott, regulatory vet, in the stewards' inquiry. The evidence at the moment, established by him and consistent with other determinations by the Tribunal and the stewards here and elsewhere, is that there is no evidence of a performance-enhancing effect in respect of a reading such as 38.2. It might be noted, consistent with that, that this horse started at 101 to 1, it ran eighth in a field of 10. Hardly a reflection of a horse having its performance enhancement effected.

9. In addition, it might be noted on objective seriousness that other factors about the race are not in issue, such as betting by the appellant or by others. The respondent here, the regulator, does, however, point out, and the Tribunal takes into account, this was a Group 3 race carrying prize money of $30,600 for the participants.

10. The reading, nevertheless, is well above 36 and that must be taken into account. It is the evidence of Dr Wainscott at the stewards' inquiry that of 29,336 recorded TCO2 readings over a number of years up to the date of the inquiry, only 18 have produced readings in excess of 37.1. Dr Wainscott opined, but qualified that opinion, that the odds of producing 38.2 to 1 were some 270,000 to 1. But in cross-examination by the appellant's then solicitor, Dr Wainscott conceded that that was a speculative calculation. It

has not been the subject of any closer examination and is not taken into account. However, the figures that he did refer to of 18 above 37.1 does reflect that this is indeed in the upper scale of readings for which positives have been determined out of a considerable number of tests.

11. The horse's swab history indicates that it might have had a reading of around 34, unaided, from past readings. There have been no prior positives for this appellant.

12. The appellant was interviewed by the stewards immediately after the first laboratory test, and that took place on 31 December 2019. In essence, the appellant expressed surprise. He said he would not have, as it were, a clue. But the appellant did commence to assist and cooperate with the stewards at that interview by indicating his feeding regime and in particular that on the day prior to the race, consistent with his standard practice over a considerable period of time, the horse – and that was the only horse he had at the time; he was a hobby trainer – was given in the morning and in the evening 30 milligrams of bicarb of soda. In addition, on Saturday morning, on race day, it was given Carbelyte, which itself contains some bicarb of soda, and in addition it had been drenched with Carbine Chemicals on the Thursday prior to the race at around 5 or 6 pm.

13. That is the extent of the explanation advanced on behalf of the appellant. It has to stand in the face of the evidence of Dr Wainscott, and on numerous occasions at the inquiry Dr Wainscott stated that none of those treatment matters – that regime – taken individually or collectively could have caused the reading at the time of the sampling of 38.2. He expressed that, as said, on a number of occasions. He said that any administration would have been within 24 hours of sampling and it would have received some sort of bicarbonate of soda or alkalinising agent. It is not necessary to repeat his findings in which he, and whilst challenged in respect of it, was not found wanting in his rejection of anything that the appellant has admitted to as having caused the subject reading. No case to the contrary has been advanced on appeal.

14. The concern that thus arises is that there is on the evidence an unexplained reading. It is not an explanation that falls from the appellant by reason of his feeding or treatment regime. It is, therefore, that, in accordance with the McDonough principles, the Tribunal must find that it rejects the explanation of the appellant and is left in a position that it cannot find an explanation for the reading. Accordingly, on the McDonough principles, that would lead to a category 2 determination. It is not a category 1 where specific administration and positive is established. And it is not a category 3 where the appellant is found to be blameless.

15. The reliance by the appellant's former solicitor at the stewards' inquiry of Kavanagh v Racing New South Wales [2019] NSWSC 40 where His Honour

Justice Fagan determined that a blameless appellant could not be subjected to a subjective message or, indeed, nor could there therefore be any objective message for the industry or the public at large that would be protectively imposed upon a trainer who was blameless. It is, therefore, that the other parity cases to which the Tribunal will return provide guidance in respect of objective seriousness.

16. The Tribunal takes into account that the appellant, as just expressed, was a hobby trainer with only one horse, that the message to be given to him is not coloured by any prior misdemeanours. The message to be given to him has to be in the context that he has only been essentially associated as a trainer for some seven years. The Tribunal will return to his history in the industry.

17. The determination, therefore, is that the Tribunal finds on these facts, consistent with the parity cases to which it will return, that the Penalty Guidelines provide an appropriate starting point for objective seriousness. That provides a measure of certainty to the regulator and its participants and to those who are in the future considering this determination as against others. The guidelines provide for a first breach, which this is, for a Class 2 substance, which this is, a starting point of two years. The Tribunal is independently satisfied that a starting point of two years disqualification is an appropriate outcome for the objective seriousness, applying the McDonough category 2 principles, and guided, as said, by the penalty guidelines.

18. The next matter to determine is the subjective factors and whether they should lead to any reduction in that starting point of two years. It can be the case that objective seriousness is so great that no discounts are applied. That is not the case here and is not further examined.

19. As is the case, the discounts sought here, and as considered by the stewards as well, are twofold: namely, the plea of guilty, that is, the admission of the breach, and, secondly, his other subjective circumstances. The Tribunal will return to but notes his other subjective circumstances can be distinguished from others by reason of the business he conducts at the subject premises.

20. The first discount to be considered is the admission of the breach and, consistent with Tribunal determinations and as imposed by the stewards, where there is a ready admission of the breach upon charging – and that is the case here – and there has been cooperation with the stewards – and that is the case here – a discount of 25 percent should be imposed. It might be noted that in further support of cooperation with the stewards that there was a second charge that related to the administration on race day and the facts of that charge fell from the lips of the appellant himself at the interview on 31 December 2019 when he admitted to the race day treatment. That is

reflected upon here, as it is not the subject of the appeal, on the basis that it reinforces character to which the second set of matters on subjective circumstances require, but reinforces the full 25 percent discount.

21. Incorporated in that full 25 percent discount, but not as a separate matter, is remorse. That is, regret for the conduct in which he has engaged. That is reflected in that 25 percent discount. The facts here, acknowledging that the appellant has, on oath, indicated to the Tribunal his remorse and, secondly, that he did so at the stewards' inquiry, is not, however, sufficiently greater that it would elevate the second level of subjective circumstances.

22. The Tribunal turns to those other subjective circumstances. The stewards took all of those advanced into account and determined a further 15 percent discount to give, of course, on that mathematical approach, a 40 percent discount in total, and thus reduced the two year starting point to a disqualification of 14 months.

23. The appellant is 27 years of age, he lives with his family unit on a single property in his own accommodation; there is other accommodation on the property. On that property is also located a training facility for his father, and there was some sharing of that training facility by way of feed and intermingling of activities. The appellant has indicated to the stewards that he will, if back in the industry, take steps to remedy that to ensure that his operation is kept separate to that of his father. That change in husbandry practices, as proposed, is a subjective factor in his favour.

24. He has been associated with the industry with mini trots since he was five years of age and was first licensed as a stablehand at age 15. Having obtained his driver's licence, he, as he expressed to the stewards, did not feel he would be successful and effectively let it go and he remained a trainer. He had 150 starters since the 2011/12 season, which is not out of the ordinary for the limited operation he had. It used to be quite bigger. He took two years out of the industry. He had done so at a time when he had previously worked with AMP and also time out to establish the cattle business, to which reference has been made.

25. He returned to the industry. He had only been back a relatively short space of time. It is not in his favour that when he came back he took no professional advice, veterinary or otherwise, in respect of changes in the rules which had been effected whilst he was out of the industry and in essence continued to operate as he had before, and that led to his administration within the 24 hours of the race of the 30 milligrams of the bicarb of soda morning and night to which reference has been made, and, of course, the Carbelyte on the morning of the race.

26. That ignorance of the rules does not stand in his favour subjectively but in projecting to the future the Tribunal has no doubt that the salutary lesson

that has fallen upon him as a result of his transgressions by ignorance, it appears in part here, although the Tribunal has determined that his explanation does not provide an answer for the elevated reading, that he will not engage in similar ignorance of the rules in future. That, therefore, is not a cause of loss of future findings of favour on subjective considerations.

27. The Tribunal turns to aspect of character. The Tribunal has no doubt that he is a person of character, not only by the references. The Tribunal has regard to what he said in the interview, his cooperation and admissions and likewise in the stewards' inquiry and in evidence here. His character is otherwise reflected in his successful operation of his present cattle business, but also in respect of his previous operation as a representative with AMP.

28. There are four references.

29. The first is by Brad Eagleson of 6 October 2020, Head of Customer Engagement, AMP, who first met the appellant when he started work at AMP at age 17. He was managed by Mr Eagleson. He was an outstanding member of the AMP community, a blood donor and a volunteer assister at AMP-related functions. He is described as a person of great compassion to his customers, of great character, outstanding work ethic and a person of high principles.

30. The next is by Stephen Nutt, Branch Manager, Jim Hindmarsh & Co Pty Ltd, 6 October 2020. He has known him on a personal and professional level for 20 years, knows him as polite, honest and reliable, always dealing with the utmost of integrity, and notes his considerable frequency dealing with him as a buyer and seller of livestock.

31. The next is by Troy Williams of 7 October 2020, who has known him for over five years. Describes him as outstanding with animal welfare, of the utmost integrity and not a person who would intentionally break the rules. He says he has been missed at the local training track since he went out, initially voluntary. And a willing attitude to help and assist others. And he has never seen him do anything contrary to the rules of racing. A person of great character, kind and courteous.

32. The next is by Paul Burland of R W Langley Wholesale Meats Pty Ltd of 6 October 2020. He has known him for over five years, as an honest and regular supplier of livestock to the referee. And a person who is described as conducting his business professionally and ethically.

33. The appellant has given evidence. He describes principally in his evidence the operation of his cattle business. He described it in some detail to the stewards. The Tribunal notes that on 26 November 2020 it granted on an urgency basis a stay application in favour of the appellant, but it was a

limited stay in relation to permission for the appellant to carry out activities at his residence and place of business which would otherwise be prohibited by the terms of his disqualification under AHR 259.

34. The appellant has operated this business for some three years. He is a sole trader. He has set it up with considerable success, it appears. He has not, surprisingly, incurred financial commitments and, of course, carries on a rolling basis commitments for the purchase of stock pending income from sale. He trades, it appears, almost on a daily basis. And certainly on three or four times a week he is engaged in either receiving or disposing of cattle. And he also conducts a small sheep operation on the side. The extent of his operation will not be referred to for confidentiality reasons, nor the figures that he has given. Suffice it to say that he turns the cattle over, it appears, with considerable frequency on what is essentially a 50-acre property. He conceded in answer to the Tribunal that it is not dissimilar to a feedlot-type operation, but it is not just that, it is more than that. He has a commercial company to whom he supplies a certain number of cattle on a monthly basis under extremely strict guidelines which require his hands-on operation to ensure compliance with that corporate entity's rules. He is at risk of losing that contract should he not continue to supply or supply in accordance with the guidelines and, as stated, it requires his personal supervision.

35. The Tribunal finds that the requirement for him to be present at the subject property to conduct this business is such that it is a hardship factor that is to be taken into account. In many cases, and as long ago as 2011 in Thomas, the Tribunal has said that hardship of itself may be displaced by the necessity to impose a particular message upon a transgressing trainer. This operation of the cattle business is entirely separate to the operation of his training business, which was a hobby only with one horse only. Therefore, the impact upon him of loss of the opportunity to conduct his cattle business is so much greater than any parity case could possibly throw up of a hobby trainer with one horse, and potentially more, perhaps, in the future, that could lead to any comparison with others on hardship. That is a substantial and compelling factor. It distinguishes this appellant from any other Tribunal-related appeal.

36. The important factor is that he does not seek under hardship to indicate anything in relation to his harness racing training activities. It is not his sole source of income to the extent there is no evidence it provides him any income, and therefore it can also be distinguished on that basis as well.

37. It is necessary to turn to parity cases.

38. The Tribunal has eliminated Kavanagh from its consideration. The stewards in their inquiry listed the parity cases which they described as TCO offences between 11 January 2014 and 3 August 2020. For completeness, they included those for which there was a second offence or additional

matters or other variation reasons. Those are disregarded because this is a first breach matter.

39. They are, respectively, Commens, six months, and the Tribunal will return to that. Mulqueeney, 15 months, a reasonably limited number of starters over a period of eight years. Reynolds, 14 months, more starters over a period obviously with limited application of some 30 years. Kenna – and these are older matters now – two years; Jones, two years.

40. The matter of Commens has been referred to. Commens can be distinguished. Simply put, it involved a trainer of some 50 years' standing who had considerable assistance to the industry, considerable volunteering. He was penalised on the basis that his husbandry practices had failed to address appropriate levels of stable security, and that of itself became a substantial discounting factor. Commens was given a six-month disqualification. The subjective factors here are such that Commens can be distinguished.

41. The other matters to which reference has been made are Gatt of 29 August 2019, a similar matter. Disqualified for 2 years and 3 months. A reading of 36.6. Second offence. Again, a class 2. And various matters taken into account.

42. There was then Lindsay, 23 September 2020. The reading not set out in the stewards' determination. Disqualification of 3 years and 9 months. Training since 1999. Second offence. The report says levels recorded but not given.

43. Those matters, as is so often the case, there was no criticism of the contents of that decision, were in a standard form, do not provide a substantial element of comfort as to what is appropriate for this conduct because essentially here it remains, as said earlier, unexplained. The aspects of parity do not, therefore, raise matters when the Tribunal turns to consider subjective factors that should lead to substantial discounts in respect of this appellant.

44. The Tribunal determines that absent the cattle business his subjective factors are not of great weight. It is accepted he is a person of good character, as described by the stewards; hard-working and the like, and of assistance on a voluntary basis. The stewards felt a discount of 15 percent was appropriate for those. The Tribunal, having regard to its determinations on similar types of facts, does not see any reason why a greater discount of 15 percent should be given to this appellant than the stewards, with their greater experience on the number of matters with which they deal, found to be appropriate.

45. It is, therefore, that the discounts which the stewards found to be appropriate also accord with those which the Tribunal considers to be appropriate. That would lead to a disqualification of 14 months.

46. The Tribunal has reflected in its preparation, and having regard to the evidence given by the appellant to the stewards and on oath to the Tribunal today, as to whether those hardship matters in relation to his cattle business, to which the Tribunal has made reference, should lead to some lesser outcome. Before the stewards it was argued for the appellant up to that date that time served should be appropriate, and here it is submitted that that time served would otherwise have been appropriate, but certainly time served to the present time would be appropriate, perhaps coupled with a fine.

47. The Tribunal determines that the approach it considers appropriate is this: at the end of the day the objective seriousness contains a McDonough category 2 about which there is no knowledge of why this reading existed. That is troubling. The subjective factors are not great.

48. The Tribunal proposes to deal with it in the following way, and that is to alter the nature of the terms of the disqualification to which the appellant will be subject, but imposing it on the basis of a disqualification of 14 months, to commence on 3 January 2020. The Tribunal has not noted, but for completeness now adds, that there has been no submission that a disqualification is not an appropriate outcome, a view with which the Tribunal agrees.

49. The summary, therefore, of the following specific terms is that the Tribunal's view of what was appropriate on the stay is appropriate for the balance of 35-odd days to which he will be subject under this disqualification.

50. The Tribunal notes for description purposes that the expression "the property" means the property upon which the appellant lives and operates his cattle business, Farrugia Livestock Pty Ltd, at 505 Springwood Road, Yarramundi, NSW 2753. The Tribunal imposes the terms of disqualification contained in AHR 259, varied as follows:

(a) In respect of 259(1)(a), the terms of that provision do not apply to persons residing at the property.

(b) In respect of 259(1)(g), the terms of that provision do not apply to the property.

(c) In respect of 259(1)(k), the terms of that provision do not apply to the property.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

51. On completion of the appeal the Tribunal has to order whether the appeal deposit be forfeited or refunded in whole or in part. The appeal has been essentially unsuccessful in respect of the principal aspects, which were a seeking of a reduction in the period of disqualification of 14 months. On the other hand, there has been a partial success in that the actual terms of the disqualification have been limited.

52. In the circumstances, the Tribunal orders 50 percent of the appeal deposit refunded.