RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR DB ARMATI

EX TEMPORE DECISION

FRIDAY 3 NOVEMBER 2017

LICENSEE JOSHUA OSBORN

AUSTRALIAN HARNESS RACING RULE 173(1)

SEVERITY APPEAL

DECISION: 1. Appeal upheld
2. Penalty of 12 months disqualification imposed
3. Appeal deposit refunded

1. Licensed driver Mr Joshua Osborn has appealed against the decision of the stewards of Harness Racing New South Wales to impose upon him a series of penalties on 24 August 2017. The appellant, before the stewards, faced 78 charges. He received penalties in respect of all of those matters. In respect of some of them, he received monetary penalties, and in respect of nine, he received a total period of disqualification of two years and three months. His original appeal to this Tribunal is in respect of severity only in respect of all penalties.

2. At the commencement of the hearing, the severity appeal was only maintained in respect of the nine charges for which that period of disqualification was imposed. The appeals in respect of the remaining matters dealing with monetary penalties having been abandoned, it is not necessary to otherwise than indicate that the detail before the Tribunal by way of evidence etc canvassed all matters.

3. To further limit the issues for determination, the method of calculation of the period of disqualification was only challenged in two areas. To put that in context, in respect of each of the nine charges, the stewards imposed periods of disqualification of three months and ordered that all nine be served cumulatively, to come to a period of 27 months. The challenge is to the apparent lack of application of the totality principle in respect of that penalty and also in respect of whether the penalties should be cumulative or concurrent.

4. The issues are therefore reduced. Each of them relates to a breach of 173, which is in terms that prohibits certain betting. It is as follows:

> "173. (1) A driver shall not bet in a race in which the driver participates."

5. The nine matters occurred between 18 October 2012 and 19 November 2016. To put that in context, of the matters for which he faced the stewards, the period of offending conduct was 28 January 2011 to 4 February 2017. In each of the matters that remain on foot, it is not necessary to specify the precise dates nor the bets that were effected, nor the names of the horses in question.

6. The breaches involved betting on horses which he did not drive. On those nine, there were four occasions on which he also bet on his own horse in the same race. Those four matters relating to his own horse were the subject of financial penalties and are not the subject of appeal.

7. The stewards in their decision set out in respect of these nine matters a starting point of six months for each. In determining that, they had regard to a number of matters to which the Tribunal will return. In respect of the appellant's subjective circumstances, they allowed a 50 percent discount.

That was 25 percent in recognition of an early plea of guilty and 25 percent in respect of his record and certain mitigating factors and general subjective matters. The six months was therefore reduced to three months. They then determined that each should be served cumulatively.

8. The respondent today, Harness Racing NSW, maintains that that is an appropriate starting point, an appropriate discount and an appropriate penalty for each matter. The submissions for the appellant do not take issue with those calculations. The two points in contention have been identified. As the Tribunal expressed to the parties at the conclusion of submissions, that practical approach to the matter has substantially reduced the exercise to be considered. Whilst it is a late indication, it nevertheless is a further factor in the appellant Mr Osborn's favour.

9. The first issue is whether the Tribunal, in a de novo hearing, can be satisfied that having regard to the objective seriousness of the breaches, a six-month starting point is an appropriate penalty.

10. The objective seriousness is to be viewed particularly in regard to integrity. The integrity that is relevant in a driver betting on a horse other than his own in a particular race is patent. It leads to a question in the minds of any rational person, whether regulator other participant or a member of the betting or general public, that something mischievous could well occur to cause that driver, alone or in conjunction with others, to not ensure that their own horse runs to the best of its ability. Here there is some diminution, as has been said, because in four of these matters he at least bet on his own horse as well. But it is that integrity issue, the damage it does to the image of harness racing, particularly post the green light scandal, that is, as said, patent.

11. There is also relevantly – and it has arisen and been canvassed strongly in the thoroughbred industry appeals – the issue of safety. It arises because drivers here may be tempted to drive other than in accordance with the rules to ensure that the outcome will be that which they wish to have from their betting and not by reason of the other normal contingencies of a race. Corners may be cut, safety may be jeopardised – an important objective factor on seriousness.

12. Objectively viewed, therefore, these offences are serious. They warrant that a message be given in the most clear and unambiguous terms to this driver that his privilege of a licence is such that he is not to engage in this conduct again. As he has not done it prior to his first misdemeanour in January 2011, he having been licensed well before that, and he having undergone this exercise, there is reason to anticipate that he will not breach again and there can be some limiting of the personal message to be given to him.

13. It is the general message to be given to the broader community, as just described, that is imperative. The industry cannot survive if appropriate penalties are not imposed. And, that those who wish to look at the industry will understand that that approach is adopted. There is no issue here that this is serious. It is conceded by the appellant that he must be disqualified. Indeed, quite fairly, it is put on behalf of the appellant, for parity reasons to which the Tribunal will return, that a penalty of disqualification of some nine months would be appropriate. It is necessary to express that in this matter, there being nine separate charges, the Tribunal must come to a penalty based upon each matter. It cannot simply give an in globo penalty.

14. In respect of the offending in particular here, it occurred over a long period of time, it occurred with some frequency, it was a conscious and deliberate decision in the full knowledge of the prohibition against him that he engaged in this breach of the rules. He did it knowing his licence was a privilege, he did it knowing that each of the objective factors to which the Tribunal has referred would be enlivened.

15. As it is not submitted that a different starting point should be considered, and despite the seriousness of these matters, the Tribunal will not disturb the starting point of six months for each matter.

16. His subjectives were referred to in the decision. There is no issue that he should receive a 25 percent discount for his cooperation with the stewards – and it was a substantial cooperation – both prior to and in the course of their inquiry and in respect of his cooperation with the Tribunal, and the reduction in the time taken for the Tribunal to dispose of the matter is again a strong factor.

17. As to his other subjectives, for which a further 25 percent was considered appropriate, no additional submissions have been made and the Tribunal will not canvass those further and agrees that they are appropriate.

18. Accordingly, the discount of 50 percent on that starting point of six months for each matter is considered appropriate.

19. The next issue for consideration is whether they should be cumulative or concurrent. Rule 257 requires they be cumulative unless the Tribunal otherwise orders. No other guidance is given. This Tribunal has given a number of decisions over the years as to the principles to be considered on cumulation of penalty.

20. This is a civil disciplinary hearing in which the criminal law principles of sentencing do not apply and in which the Tribunal must look to the future and to the appropriate message, as described, to be given in determining what is an appropriate penalty. Criminal law principles about cumulation have been embraced over the years in numerous civil penalty decisions

about cumulative or concurrent. In essence, they are not greatly different. This Tribunal has expressed on a number of occasions that when there are a series of breaches and there has been no intervening act between the first and the last of those actions which might have caused a miscreant licensed person from stopping their conduct, or something may have caused them to reflect upon their conduct, and they elected not to do so, that cumulation is inevitable.

21. Absent that, however, there is a reason to consider why matters should be cumulative other than the expressed view of the rule-makers, which must be respected, that they should be cumulative. But does it lead to a fair outcome?

22. That is where the totality principle comes into consideration. There is no issue that it is applicable – the stewards applied it. They did not express it in respect of these nine matters, but it is a simple principle. It is that at the end of the day the totality of the conduct should be considered not just by applying a mathematical formula for an appropriate penalty for each matter.

23. To put that in context, the application of a simple mathematical formula would be nine times three equals 27, and that's the penalty. Is it a fair penalty, both in respect of the facts and circumstances of this matter and in respect of issues of parity?

24. Guidance is appropriate on issues of parity in respect of other matters, as it was in respect of the starting point for the appropriate penalties.

25. The stewards referred to a number of cases.

26. The ones that have been referred to today, in essence, are Painting, a purported extract of decision is here from Monday, 4 September 2012, in which Mr Painting was the subject of a number of allegations; three in question related to him betting on horses he did not drive. He pleaded guilty, had a good driving history, and received a six-month disqualification for three matters, each to be served concurrently.

27. There is the matter of Vernon, Queensland Racing Disciplinary Board, 9 March 2015. In the end, five charges, for which a period of disqualification of six months concurrent was imposed, in respect of betting on horses other than the horse he drove. Again, a guilty plea, cooperative, readily admitted matters, nothing untoward about the rest of the races, very good record of 30 years' standing, but importantly a series of conduct over only 54 days. In addition, he was a hobby trainer.

28. Great weight is placed upon the matter of Lambourn, Queensland Racing Disciplinary Board, 18 August 2015. With respect to the Racing Disciplinary Board, it is a little difficult to discern from their decision precisely

what they have done, suffice it to say that they imposed a monetary penalty of $2000 and a disqualification of nine months in what appeared to possibly be two charges which relevantly involved betting on other horses on some 73 occasions. Whether it was charges 1 and 2 is where today this Tribunal struggles to understand their decision. Suffice it to say that there could have been – and it is difficult again to discern from their decision – 20 bets of those 73 that he put on either horses from his own stable, which he was not driving, or from other stables, which he was not driving. In any event, a disqualification of nine months. That was why the submission was referred to earlier that nine months' disqualification could be an outcome the Tribunal found favour with.

29. In response, the respondent clearly points out that this conduct occurred over a long period of time, it was conscious and deliberate and accordingly cumulation is appropriate.

30. The balance in the submissions on that is that from or about 2013 the frequency of the betting diminished and the size of the bets dramatically diminished.

31. A counter balance in all that is, however, that regardless of less betting and regardless of smaller bets, the conduct continued in the same fashion, the same modus operandi, as before. Little weight, therefore, is given to the reduction in frequency and quantum.

32. The Tribunal has reflected on what it believes, for nine bets over a period between 2012 and 2016, some of which were large bets, and on four occasions in which he drove and bet on his own horse, is an appropriate total penalty, back from which a calculation of cumulation and concurrence can be applied.

33. The Tribunal is of the opinion that the totality point is the first one to address. It considers that these matters warrant a period of disqualification of 12 months. The period of two years and three months, in the Tribunal's opinion, does not adequately address the fact that there was no intervening act. This gives adequate weight to the fact that it occurred over a substantial period of time and continued and was deliberate.

34. In determining that period, the Tribunal considers that the more recent conduct should be cumulated. The earlier conduct is to be concurrent.

35. Accordingly, the appeal as to severity is upheld.

36. The Tribunal imposes the following penalties: in each of charges 15, 18, 23, 27, 37, 42 and 44, a period of disqualification of three months is imposed. Each of those will be served concurrently.

37. In respect of charge 50, a period of disqualification of three months is imposed. That period will be served cumulatively on those seven matters numbered between 15 and 44.

38. In respect of charge 69, a period of disqualification of three months, to be served cumulatively on the penalty of three months for charge 50.

39. In respect of charge 78, a period of disqualification of three months, to be served cumulatively on the period of disqualification of three months for charge 69.

40. To be clear, therefore, the period of disqualification is 12 months. Consistent with the order of the stewards, there being no submissions to the contrary, in respect of matters 15 to 44 inclusive, as read out, they will commence on 10 February 2017.

41. This has been a severity appeal which has been successful. I order the appeal deposit refunded.
