RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR DB ARMATI

EX TEMPORE DECISION

MONDAY 11 MARCH 2019

APPELLANT MARY-JANE MIFSUD

AUSTRALIAN HARNESS RACING RULE 190(1)

SEVERITY APPEAL

DECISION:

1. Appeal upheld
2. Disqualification of 14 months and 2 weeks to commence 6 October 2015
3. Appeal deposit refunded

1. Former licensed trainer and driver Mary-Jane Mifsud appeals against a decision of the stewards of 16 December 2015 to impose upon her a period of disqualification of seven years and six months to date from 6 October 2015.

2. The stewards dealt with a single breach of the prohibited substance rules and it was on the basis of Rule 190, which relevantly provides:

> "(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 particulars were:

> "that you, as the registered trainer, did present Mister Bellisimo to race in Race 6 at the Albury harness racing meeting on 10 July 2015 when a urine sample taken subsequent to that horse winning the above-mentioned race, upon analysis by two approved laboratories, has reported a cobalt level in excess of the threshold prescribed by Australian Harness Racing Rule 188A(2)(k)."

3. The matter comes before the Tribunal in an unusual way. The appellant did not appeal against that decision. In late 2018 she made application to appeal out of time and for a stay of the stewards' decision. On 10 October 2018, in a written decision, the Tribunal granted leave to appeal out of time on the basis of special circumstances – and it is noted not exceptional circumstances – but refused the stay application.

4. The facts have not been analysed in any detail in this appeal. The appellant had pleaded guilty before the stewards and the stewards' inquiry was dealt with on the papers, and in lodging her appeal to this Tribunal she has admitted the breach.

5. This is a severity matter only. There is, therefore, no dispute that the ingredients of the 190 breach of presentation and existence of prohibited substance have been established. The prohibited substance in question was cobalt at a level of 260, the threshold being, at the time of the commission of the breach, 200.

6. The essential reason for the lodgement of the appeal, the out-of-time application and the prosecution of the appeal is on the basis of the classification of cobalt. In addition, and unsurprisingly with the passage of time, further subjective matters are relied upon.

7. The issue is the classification of cobalt relevant to a presentation in 2015 and the then existing penalty guidelines as against how it should be classified by this Tribunal today.

8. The science, the issues of integrity to some extent, and the classification of cobalt were dealt with in the Tribunal's reserved decision of Hughes v HRNSW of 31 August 2018. At the time of the presentation the penalty guidelines were essentially in the same terms as they are today, with the exception of the addition of cobalt in a list which is in Category 1. There are three categories, the worst of which is Class 1. There is then Class 2 and then Class 3. The effect of the decision in Hughes was to find that in that case cobalt was in Class 1 because it had been specifically added to Class 1. At the time of this appellant's breach, it was not so listed.

9. Hughes dealt at considerable length with the evidence in that case and the science analysed in that case. On numerous occasions in Hughes it was emphasised that that decision in Hughes was based upon the evidence in that case. As the Tribunal said, and as it has said in subsequent cases, further evidence, further research might indicate that the decision in Hughes, the conclusions reached, were not correct. However, that has not yet happened. Hughes remains the determination upon which this Tribunal will proceed for the present time.

10. The respondent to the appeal here fairly conceded prior to the hearing that cobalt has no measurable effect upon a horse. In addition, during this case it was indicated that it was a concession also that at a level of 260, the cobalt in the subject horse would not have had an adverse effect upon its welfare.

11. The respondent submits that the Tribunal should maintain a finding of cobalt in Class 1. The respondent says any other approach would be to put matters into artificial context, it would require a reconsideration of matters today as against the science and the integrity approach of 2015, there would be cherry-picking the various matters, that in the broader context Hughes does not affect the fact that today cobalt is a Class 1 and this Tribunal should treat it that way for this appellant.

12. The appellant says that whilst it is not specifically captured by Class 3, it has to be dealt with in Class 3.

13. This appeal is not a rehearing of an appeal which itself determined the correctness or otherwise of the categorisation of cobalt by the stewards in their inquiry. This is the appeal. There are new facts. Those facts are critical. In the Tribunal's opinion, it must assess the evidence here on the basis of the decision in Hughes. It matters not that Hughes was decided after the conduct here and after the stewards' determination on the penalty guidelines as they then existed in 2015. Whether it is described as a matter

of justice or fairness, the Tribunal is of the opinion that this appellant is entitled to say that in determining this appeal, the science as it is to this Tribunal today must be that upon which the determination is made.

14. There is no legal principle that says that this case must be determined solely upon the facts as they existed in 2015. This is a de novo appeal. There are many areas of law in which such an approach is required, but here the Tribunal is of the opinion that it must determine the question of whether cobalt was a Class 1 substance in 2015 based upon its knowledge today. It is quite apparent that the stewards, having proceeded on the basis of Tribunal decisions prior to their decision in 2015 and upon the basis of their belief as to the science, reinforced by regulatory veterinarians and other research known to them at the time, quite properly categorised it in their decision as a Class 1. The simple fact of the matter is that, however, it is not to be so categorised in 2015 because it was not then listed as a category 1 substance. The Tribunal therefore does not proceed on the basis that it must apply as a matter of law the determinations as they then existed in 2015 to the facts of this case in 2019.

15. The effect of that is this: that the Tribunal, without revisiting all of the matters in Hughes, is satisfied that cobalt, as Class 1 it was defined in the categories in that time, was not of the potential to positively or negatively affect performance. Therefore, there is nothing that places it within Class 1. There is no listing specifically of cobalt which now exists. As the Tribunal determined, the remaining part of Class 1, which introduced concepts such as a reference to out-of-competition testing in Rule 190A(2), which required an analysis of matters such as haematopoietic effect, hypoxia inducible factor -1 stabiliser, and the like, as analysed in Hughes, has not been established on the science as found in Hughes, to raise cobalt in this matter, to be within Class 1.

16. As was analysed in Hughes, the difference essentially between Class 1 and Class 2 was a reference to the words “highest” affectation against “high”. As was said there, because it did not fall into Class 1 it did not automatically default, as it were, to Class 2 by an analysis of highest and high. It meant, therefore, a consideration in Hughes that it was in Class 3.

17. Class 3 is perhaps not aptly worded so far as it embraces cobalt because cobalt is not a medication registered in Australia for veterinary use, and which has an accepted therapeutic use in the racing horse and it is not an Australian-registered human preparation with an accepted therapeutic use in the racing horse. It is not a therapeutic substance.

18. But where else is it going to fall? It is not for this Tribunal to speculate as to whether or not there should be perhaps a category between Class 2 and Class 3 as a new Class 3, which might embrace substances such as this,

and moving what is now Class 3 down to Class 4, but that is speculative and a matter for the regulator.

19. Because of the inclusive nature of the definition in the class, it is open to conclude it is therefore a Class 3. In any event, should it be that the classification in that way would be incorrect, what it means is that the Tribunal would ignore the penalty guidelines because they do not embrace this substance and determine for itself what is an appropriate starting point for the objective seriousness of these facts. That has not been analysed as an approach because the respondent says it is Class 1 and the appellant has put the matter on the basis that an otherwise inclusive consideration of Class 3 would enable it to fall into that category.

20. Is it, on the facts of this case, that a starting point as provided for in Class 3 of one year for a first offence and two years for a second offence is an appropriate starting point? Or is it that some greater starting point is necessary on the facts and circumstances, with a further alternative of possibly an application of a starting point considered by the Tribunal? As was recently said in the decision of Kavanagh v Racing NSW [2019] NSWSC 40, for the Tribunal, as it were, to analyse something upon which the parties did not make a submission would be to fall into fundamental error and therefore the Tribunal will not do that; it stays within the classifications.

21. The facts here need a determination of which of the three sets of wrong conduct apply. This was considered by this Tribunal in Amanda Turnbull v HRNSW, 12 March 2018, when it analysed the decision of McDonough – and that analysis is found from paragraphs 30 following – where in McDonough, Judge Williams in Victoria – and the date of that decision still remains unknown – determined three categories, it being noted that in Scott [2018] QCAT 301, 3 September 2018, a decision of Member Gordon, where he considered that a fourth category might be appropriate, need not be analysed for the present purposes because it would not meet these facts.

22. But here, at the end of the day, the stewards were unable to determine the cause of the presentation and therefore this Tribunal is not able to do so either. Therefore, it would fall into a Category 2, which in essence means that the appropriate starting point on a penalty guideline approach would remain undisturbed. Therefore, finding it is a Category 2 means that the starting point the Tribunal determines to be appropriate based upon the objective seriousness remains, not elevated by a reason of a finding of blameworthiness and not reduced by a finding of no culpability at all.

23. The Tribunal notes here that there is a prior matter from 2009. In fact, in 2009 there were two presentations, both proximate to each other, for aminocaproic acid, two matters in which the stewards determined that fines of $6000 be imposed. In this case, the stewards quite fairly proceeded on

the basis that those two matters would be treated as one prior, and this Tribunal is invited by the respondent today to proceed on that basis. There is one prior matter. Therefore, on an application of the penalty guidelines, the starting point becomes two years.

24. In considering issues of integrity, does that two years remain still an adequate starting point and should there be reduced reduction for subjective circumstances by reason of matters of integrity? Integrity here is advanced by the respondent on the basis that in 2015, to paraphrase the submission, there were cobalt presentations with drenches and the like. There were a number of matters. And to summarise again the submission, it is that the effect of the work of the stewards in imposing heavy penalties was to cause a reduction in the number of cobalt presentations. Facts have not been given but the effect of that submission, in any event, is to the effect that there have been numerous decisions, both by the stewards here and in other jurisdictions, by tribunals here and in other jurisdictions, to treat cobalt in a serious way and to impose commensurate penalties.

25. It is that, as the Tribunal said in coming to its conclusions in paragraph 229 in Hughes, the following:

> "issues of integrity, message to industry and trainer, level playing field, privilege of a licence, husbandry practices and welfare of the horse have been repeatedly set out in past determinations by this Tribunal, the equivalent entities in the states and territories and applied by the stewards throughout the country under uniform rules.
>
> This decision does not require repetition."

26. It is to be noted, of course, that welfare of the horse has come out of the equation here and that husbandry practices, or lack thereof, are an unknown quantity for this appellant.

27. Issues of integrity do remain and the Tribunal is of the opinion that any penalty that it determines must, despite the passage of time since 2015, and despite any benefits to the industry, still require a clear message to individual trainers and to the industry at large that cobalt and presentation with prohibited substances generally will be treated in a way that ensures not only that there is a level playing field, but there is that most public perception that there is a level playing field.

28. Having analysed issues of integrity relevant to this matter, the Tribunal does not move from a starting point of two years.

29. What then of the subjective facts?

30. Firstly, the appellant has admitted at all times the breach of the rule. She did her best in her written submissions to the stewards, and there were several of them because the stewards quite fairly returned to her on a number of occasions to invite supplementation, that she has cooperated fully with them. The full discount that the stewards considered appropriate, which this Tribunal has reflected upon for some years, of 25 percent will be applied.

31. Turning then to her personal circumstances. She has been, up to the time of her loss of her privileges, a licensed driver for 13 years and a licensed trainer for 12 years. She was a hobbyist. She had some six horses in training for three owners. Not surprisingly, at the time she had the usual financial commitments of a trainer as well as personal commitments. Those matters are not elevated to a level that require any particular consideration; they are taken into account. She had to put off a single employee. Her history, other than the one prior matter of 2009, is unremarkable and is in her favour.

32. Strong emphasis been placed upon her personal circumstances. The circumstances were more acutely relevant at the time the stewards dealt with her. The Tribunal notes the medical certificates that were made available at the time. For privacy reasons, those matters will not be read onto the record but are taken into account. It appears she has been able to move on and updated medical issues are not identified of any substantial nature which might otherwise have a more beneficial consideration on a reduction for subjectives.

33. As is the case with the loss of a privilege of a licence, when a family is involved in the industry, as this appellant's family has, there is a loss of family communication, contact and the like. This appellant describes how she has been affected by those matters. In particular the submissions touched upon the impact at Christmas time and the like. It appears again on the submissions that a concession was made for, that she could be at her parents' house, some four kilometres away, between 10 am and 3 pm on a daily basis and for three and half years she has done that.

34. Unfortunately, the impact of a loss of a privilege of a licence is that those types of benefits go with it, such as the right to attend races and to enjoy the company of horses while training them. Here there are some unique family circumstances. They can be described, again for the privacy of the other family members for whom the appellant is concerned, in only superficial terms because they are highly personal.

35. Suffice it to say she has a brother who requires acute care. That is carried out by her mother, who now has some difficulties. Over the period of her disqualification the assistance, that she was providing up until that time, has had necessarily to be reduced and that has occasioned elsewhere

within her family substantial hardship. Those matters will not be referred to in greater detail. She has suffered that difficulty, as has the family, for some three and a half years.

36. She has provided referees.

37. Dr Burke, 18 June 2018, known her for 17 years, and a veterinarian, did work for the family over the years, and the stables, when she was entitled to the privilege, were always clean and tidy with well-maintained working areas, and the horses have always been presented in good condition.

38. The next is by James Van Gemeren, undated but part of the material on the stay application, will be treated as 2018. A harness racing owner, and has had many of his horses in the appellant's care. He described her stables as pristine and in good order, and her track in good condition. That the appellant would try numerous methods to improve horses but always ensure vets were involved when necessary. Other owners have complimented the appellant to him. She was always affordable but would do extra things at no charge. He found her to be honest and a person who put the long-term welfare of the horse before her own personal considerations. He then goes on to describe – and it shall not be repeated – her personal circumstances and her family circumstances and that he is of the view that the appellant would not have engaged in any intentional wrong conduct. He would wish to return his horses to her immediately should she be privileged to do so.

39. The next is a further undated reference by Daniel Jack, who has a harness racing background for the whole of his life. He would occasionally drive for her and she would always ensure he did the right thing. She was a person who "knows her stuff". He again refers to family circumstances, which are not repeated, and refers to the appellant's strong desire to get back into racing. He believes in a strict integrity regime and as a licensed person would be comfortable if she was to be allowed back onto the track.

40. The stewards, in the absence of detail, did not increase the discount beyond the 25 percent for the admission. It would have been, in the Tribunal's opinion, should those facts have been advanced at the time they existed to them, to perhaps give an increase over and above that which they thought appropriate.

41. The Tribunal here has determined that based upon all of the facts and circumstances it will allow a further 15 percent discount for subjective circumstances, making a total discount of 40 percent. The Tribunal also indicates that it increased the amount of the discount for the subjective circumstances by reason of the additional hardship occasioned in a time which she might otherwise have not have been subjected to that should this

matter have been dealt with in the way in which the Tribunal has dealt with it.

42. The Tribunal started with a disqualification for objective seriousness of two years – and it might be noted at this point no other submission than a disqualification has been made by either party – that there will be, therefore, a discount of 40 percent discount.

43. That discount means that, when applied, it leaves a balance of disqualification of 14 months and 2 weeks. The Tribunal notes that that disqualification will commence on 6 October 2015.

44. The appeal is upheld. It is a severity appeal only.

45. The Tribunal imposes a period of disqualification of 14 months and 2 weeks to commence on 6 October 2015.

46. The Tribunal orders the appeal deposit refunded.