RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

RESERVED DECISION

16 AUGUST 2023

APPELLANT PAUL RUSSO

RESPONDENT HARNESS RACING NSW

AHR 190(1)

SEVERITY APPEAL

DECISION:

1. **Appeal dismissed**
2. **Penalty of disqualification of 3 years and 9 months to commence 20 April 2029**
3. **Time served pending stays to be calculated by the respondent and notified to the appellant**
4. **Directions on appeal deposit**

INTRODUCTION

1. The appellant, former licensed B grade trainer Paul Russo, ("the appellant") appealed on 6 August 2020 against the decision of the stewards of Harness Racing NSW, ("the respondent") of 6 August 2020 to impose upon him a disqualification of 3 years and 9 months for a breach of AHR 190(1).

2. The charge was in respect of rule AHR 190(1), which states:

> "A horse shall be presented for a race free of prohibited substances."

The stewards particularised that breach as follows:

> "You, being the licensed trainer of the horse A Passion For Aces, did present that horse to race at Menangle on Tuesday, 17 September 2019, with a prohibited substance in its system, namely cobalt, at a concentration in excess of the threshold of 100 micrograms per litre in urine, as reported by two laboratories approved by Harness Racing NSW."

3. Upon presentation of that charge at the stewards' inquiry on 7 July 2020, the appellant pleaded guilty and has maintained that admission of the breach of the rule upon appeal. This therefore is a severity appeal only.

4. In February 2022, the appellant filed grounds of appeal which, summarised, are as follows:

(a) the impact of vitamin B12 in the sample going to objective seriousness

(b) the cause of the cobalt level being in excess of the threshold going to objective seriousness

(c) the penalty is too severe, including subjective material and parity issues.

5. With the passage of time, those issues were distilled down to:

(a) the allegation that, when one applies the cobalt threshold in AHR 188A(2)(k), one must only include cobalt that is inorganic cobalt and exclude other cobalt and

(b) the alleged impact on the cobalt reading due to a missed injection that took place allegedly 10 days prior to the race.

6. At the Tribunal hearing, in opening and closing submissions, the appellant narrowed the issues down to consideration of:

"(a) the weight to be given to Dr Wenzel's evidence and

(b) the proportion of cobalt derived, which the Tribunal ought to find is high, derived by way of origin in that reading from B12."

ISSUES NOT IN DISPUTE

7. Being a severity appeal, the appellant does not contest that each of the ingredients of the charge and the particulars are established against him.

8. He does not dispute, therefore, that cobalt is a prohibited substance under the rules and that the laboratories each provided readings of 120 micrograms per litre in urine as against a threshold of 100.

9. The appellant does not contest the legal principles to be applied by the Tribunal in determining a penalty. The only legal principle raised by the appellant for consideration is Jones v Dunkel.

10. The appellant does not dispute the fact that a disqualification must be imposed upon him.

11. In closing submissions, the appellant submitted that a disqualification of 6 to 9 months would be appropriate and imposed partially cumulatively to an existing disqualification. The respondent maintains that the period of disqualification of 3 years and 9 months should be imposed and that would be generous and that it should be totally cumulative to the existing disqualification.

12. The appellant concedes that his personal circumstances do not benefit him.

13. The appellant does not dispute that he has three prior prohibited substance matters to this one and a subsequent prohibited substance disqualification incurred by him as a result of the breach of the prohibited substance rules while on a stay in these proceedings.

14. A great number of issues have fallen away and the Tribunal will now only deal with those issues which are enlivened on the submissions.

THE ISSUES FOR DETERMINATION

15. Whether a period of disqualification imposed for this breach should be cumulative to the penalty currently being served, or partially so.

16. The starting point on penalty when determined for objective seriousness in this matter. That is the key issue that the appellant invites the Tribunal to

consider. All of the remaining issues go to that point. The Tribunal will not set out the numerous matters no longer in issue.

17. Whilst it will be described in more detail in due course, the respondent accepts that the cobalt from B12 identified in this case as being part of the total cobalt reading of 120 did in fact exist in the subject urine sample but it is a question of what weight is to be given to Dr Wenzel's evidence in relation to that actual proportion of cobalt from B12, and in addition, it is necessary to decide the impact of what is said to be a big neck injury to the horse at some time prior to it racing.

THE EVIDENCE

18. The evidence now before the Tribunal comprises: the transcript of the stewards' inquiry of 7 July 20; the exhibits before the stewards and, relevant to the issues here- the transcript of the stable inspection of 23 October 2019 and the appellant's log book. The remaining 33 exhibits do not require analysis as they in essence go to the formal proofs or are no longer pressed, for example, reports of Dr Major.

19. In addition, in evidence is an agreed bundle of expert material of 725 pages. Removed from that bundle are five reports of Dr Major dated 30 June 2020, 1 July 2020, 1 July 2021, 7 September 2021 and 19 September 2022. The remainder of the bundle is in evidence and comprises: Dr Wenzel test results of 19 July 2021, 25 August 2021 and 14 July 2022; a document entitled Wenzel ARCHITECT B12 results; various emails from him; documents produced to the appellant by the respondent's first nominated laboratory, ARFL; and emails relating to the Turner appeal.

20. The key expert reports now contained in that bundle are: for the appellant -reports of Dr Cole of 1 March 2022 and 21 September 2022; for the respondent - letter of instructions to Dr Wainscott and his report of 13 June 2022; report of Prof Hibbert of 17 June 2022 and his report in the appeal of Turner of 17 January 2020; letter of instruction to Dr Cawley of 17 May 2022 and his report of 15 July 2022, together with his report in the Turner appeal of 3 July 2020.

21. Additional evidence has comprised the appellant's offence report and the stewards' reports of his three prior prohibited substance breaches and the subsequent prohibited substance breach.

22. Oral evidence was given before the Tribunal by Prof Hibbert, Mr Keledjian, Dr Cole, Dr Wainscott, Dr Cawley, the appellant and Dr Wenzel.

23. The reports of Drs Cole, Cawley and Wainscott and Prof Hibbert essentially arose as a result of various reports by Dr Major. Dr Major's reports

were not put in evidence, however, the Tribunal was not advised about those parts of the other reports which were no longer read.

The basic facts and Tribunal history

24. The appellant has been a licensed B Grade trainer since 1982 and up until the stewards' inquiry had had 1070 starters. At the time of the stewards' inquiry he had two horses in work.

25. The subject horse was presented to race on 17 September 2019 and the post-race urine sample led to a first certificate from ARFL certifying at 120 but also led to subsequent email correspondence from Mr Keledjian to Mr Prentice of 2 October 2019 which referred to the presence of cobalt but also set out in red the words "vitamin B12 detected".

26. In a later email of 10 August 2020, Mr Keledjian said that:

> "when vitamin B12 is detected in a urine sample we could provide a good estimate against a QC spiked sample"

and further:

> "I would not have great confidence in providing any estimate, only the presence which we would only currently see at elevated levels."

27. The confirming laboratory certified the presence of cobalt at 120.

28. On 22 October 2019 the subject horse was tested and returned a cobalt reading of 3.5. The Tribunal was not taken to, but notes, that the appellant's treatment records show intravenous administration of the two subject substances of relevance here, namey, Coforta and Enerselen. Those were administered on 12 October 2019 for Coforta and Enerselen, 19 October 2019 for Coforta and 22 October 2019 for Coforta and Enerselen. Those were within the 10 days of that testing but did not lead to elevated cobalt levels. No submissions were made on any possible relevance of these facts.

29. It is common ground in these proceedings that the respondent did not invite Mr Keledjian's laboratory to carry out any further estimate nor any further clarification of the presence of B12, whether at elevated levels or otherwise.

30. A stable inspection was carried out on 23 October 2019 and the stewards proposed an interim suspension and invited submissions and then determined not to impose an interim suspension.

31. An interim suspension was subsequently imposed after further information and the appellant appealed to the Tribunal against that determination and that appeal was upheld on 24 January 2020 when the Tribunal stayed the interim suspension.

32. The stewards conducted their inquiry on 7 July 2020 with the appellant present and legally represented and at which he entered a plea of guilty to the one charge.

33. On 6 August 2020, the stewards published their penalty decision imposing the disqualification of 3 years and 9 months.

34. The appellant appealed against that decision on 6 August 2020 and the Tribunal granted a stay of that decision on 25 August 2020- that continues.

35. This hearing was delayed by numerous interlocutory procedures and the gathering of expert evidence. For example, on 2 June 2021, the Tribunal, in a contested hearing, ordered that the seized urine sample be sent to a laboratory for testing. There was a subsequent 16A application which was withdrawn and a further 16A application which was effectively resolved between the parties.

36. In May 2021, the stewards imposed a period of disqualification of 8 years and 3 months dated from 19 January 2021 in respect of two levamisole prohibited substance charges arising from presentations on 1 December 2020 and 15 December 2020. It is noted that each of these presentations occurred at a time when the appellant was enjoying a stay relating to the conduct the subject of this appeal.

THE FACTS GOING TO THE DETERMINATION OF A STARTING POINT FOR A DISQUALIFICATION

37. The Tribunal again emphasises that it is only dealing with the issues enlivened by the parties at the hearing.

Stable inspection 23 October 2019

38. Noting that this took place after the first laboratory positive, the stewards were given considerable detail over a lengthy inspection of the feeding regime for the subject horse, in circumstances where the appellant stated at the outset that he did not really have any recollection of the race and leading up to the race. That is a period of six weeks earlier. Having remembered he went to the races, he expressed the fact he was gobsmacked by the positive. He stated his feeding regime for the two horses he had in work was much the same and had not changed. Early on, he referred to the existence of a log book, which was produced. The appellant then described the IV routine which was recorded in his treatment records, (the log book). In particular, he

referred to, as transcribed in the record of the conversation, Alamycin – the Tribunal accepts this was a reference to Enerselen. In addition, he referred to the IV provision of Coforta. Each of those products was recorded in his log book and he stated they were administered on 7 September 2019 by IV.

39. On page 13 of the stable inspection transcript of 42 pages, the appellant himself raised the issue of the "big neck". Precisely, he said:

> "Actually, I think he had a big neck."
>
> He explained this to mean:
>
> "Well (inaudible) something slipped out. … might have slipped out and give him a bit of a neck, and then I did if I wasn't giving him any needles."

40. The appellant at that stage was uncertain whether he was away or not, although he was present on race day. He did not think he was away. He then clarified that he was saying the horse might have had a big neck, and later:

> "Well, I reckon he did. He did at one stage that he had a big neck." …
>
> "But I – I don't know what date it actually was, but he did have a big neck at one stage where I didn't give him anything for a few days. Because you know that, well, it's up. I might not have given him nothing for a week, you know."

41. The interview continued dealing with other substances and feed provided.

The appellant's evidence at the stewards' inquiry of 7 July 2020

42. The appellant told the stewards that he did not have any concern about the horse having a big neck and it was something that happened plenty of times. He referred to the treatments set out in his logbook.

43. He conceded that he did not obtain any veterinary advice in respect of the forms of treatment he was giving, even though he had a regular vet. It must be implied he did not seek advice about this big neck.

The appellant's evidence before the Tribunal

44. The appellant confirmed that he had told the truth at the stable inspection and at the steward's inquiry and maintained that he had not administered anything to the horse within 48 hours of the presentation.

45. He remained without an explanation for the positive except for the possibility of the big neck.

46. He gave evidence that over his career (some 46 years) he had detected big neck some 50 times. He said, however, it was irregular and perhaps one or two times a year.

47. However, he stated to the Tribunal that as this incident occurred some four years ago he could no longer remember what he had injected the horse. He could not remember his log book entry.

48. He did agree that on 22 October 2019, when this subject horse was again tested, it produced a cobalt reading of 3.5.

49. In respect of Dr Wainscott's theory of a race day administration of B12, he opined that he did not agree and thought that Dr Wainscott was incorrect.

50. He gave evidence that his current occupation was at Flemington markets.

51. He advised that the latest disqualification with a positive for levamisole was as a result of him administering a wormer.

Dr Wainscott at the stewards' inquiry on 7 July 2020

52. Dr Wainscott stated:

> " … if you've got a therapeutic administration of cobalt, depending on the time of sampling in relation to the administration of the therapeutic substance, you could get a mixture of cobalt in the form of straight cobalt or as part of the vitamin B12 molecule. It all depends on the form of cobalt administered and the time and the amount, of course."

53. The Tribunal notes that right from the outset the issue of the role played by vitamin B12 was on the table.

54. Dr Wainscott then gave a non-controversial explanation of cobalt and where it comes from, the fact that some of the substances administered by the appellant namely Coforta and Enerselen contained cobalt but that all of the other substances fed or administered by the appellant did not.

55. Dr Wainscott then opined that the positive here was as a result of the therapeutic administration of vitamin B12 and/or cobalt-containing vitamin products. Critically, he stated, to breach the threshold it would have to have been given on race day. He dealt with certain formalities not in issue, namely the fact it is a prohibited substance and a class 1 under the respondent's penalty guidelines.

56. He also stated that the husbandry and management of the horse would not have produced the positive.

57. As to the two products administered on 7 September 2019, he was of the opinion that with a time lag of 10 days, they would not have had an effect on cobalt levels on 17 September 2019.

58. He was asked questions about the big neck and stated that the injection would have been subcutaneous, that is, between the vein and underneath the skin. A little bit could have got into the wall of the vein. It would not have been a piercing of a muscle in that area. He stated that big necks are an inflammatory reaction to the substance under the skin.

59. Notwithstanding those matters, he said the balance of the B12 will be voided ultimately through the urine and even if under the skin it is going to be absorbed and then excreted.

60. He stated that the subject area under the skin is quite richly supplied with blood vessels and absorption from there is reasonably rapid and accordingly he opined that there was little difference between an intramuscular injection and a subcutaneous injection in terms of absorption times.

61. For a subcutaneous injection, he thought that the timeframe for the substance to appear in the urine would be several hours. He then said that absorption from a subcutaneous site is relatively rapid and over a period of hours. He agreed that there may be a longer timeframe in eliminating a substance from a missed injection.

62. He maintained, in questioning, that the positive here was a result of administration on race day. He conceded that that was probably from a therapeutic dose involving vitamin B12.

63. He did state that there was no logical reason for anyone to give vitamin B12 on race day for any benefit.

Dr Wenzel's reports and evidence before the Tribunal

64. Dr Wenzel is a laboratory scientist at RNSH Pathology.

65. His test results are in evidence.

66. Those tests were carried out as a result of the Tribunal ordering the respondent to produce the A and B samples to his laboratory. Part of his results are from the use of the ARCHITECT B12 Chemiluminescent Microparticle Intrinsic Factor Assay for the qualitative determination of vitamin B12 in human serum.

67. He determined in the A sample, cobalt in vitamin B12 at 7 and in the B sample at 83. He had determined, respectively, total cobalt of 135 and 129.

68. He opined that the A sample was degraded and there was evidence about the cause of that for both parties. No submissions were made on this and it is not further examined.

69. In oral evidence before the Tribunal, after acknowledging that the particular test was for humans, he opined it was quite capable of assessing horse urine. He said that the test results were from a performance of the test as he would expect. He has seen a United Kingdom scientific paper where this same product was used for an equine test.

70. He carried out certain dilutions of the urine to produce his results.

71. He acknowledged that the test was unaccredited but that he had used it for other clients. He was not dissuaded by the criticisms of his methodology by Dr Cawley and Prof Hibbert.

72. One of his results document contains handwriting by different people. Dr Cawley opined that this demonstrated poor laboratory practice. Dr Wenzel was cross examined on this. This issue was not the subject of submissions and the Tribunal does not need to determine whether this alone, or combined with other criticisms, means the results should be rejected. It seems to the Tribunal to be a very minor possible concern only.

Dr Cole's report of 1 March 2022

73. Dr Cole is a consulting clinical pharmacologist in Florida.

74. In her first report, Dr Cole reported upon advice to her that there had been a perivascular administration of vitamin B12 on 7 September 2019, which led to a big neck. The substances administered were advised to her.

75. Dr Cole had Dr Wenzel's test result of 83 for the cobalt in the B sample containing vitamin B12 molecules.

76. Dr Cole set out her understanding of the cause of swelling near an injection site by a missed vein injection. One of the results, she stated, could be an inflammatory response.

77. She opined that such an occurrence can have an effect on absorption of the administered product but that is difficult to predict.

78. Dr Cole reported upon injections into the nuchal ligament, but noting Dr Wainscott said that was not possible, and this was not the subject of further evidence or submissions, it is not further examined.

79. Dr Cole conceded Dr Wainscott's opinion that the level of 120 detected could have been caused by administration of B12 on race day. She said that was one possible explanation but not the only explanation.

80. She opined that if there was a deposit in the fascial planes and nuchal ligaments, there could be a result of a prolonged absorption period which led to the subject detection.

81. Dr Cole continued that the perivascular injection of vitamin B12 could have resulted in the subject detection.

82. Dr Cole referred to studies to support that opinion.

83. Dr Cole opined that there may have been a large deposit in a poorly vascularized space resulting in a delay or more prolonged absorption period.

84. She said such a result was possible.

85. However, Dr Cole was not able to give an estimate of how likely this was to have occurred. She relied upon personal experiences.

86. Her final conclusion in this report was that if the trainer is believed that he did not treat on race day, then the perivascular injection likely had a material effect on the amount of B12 and therefore cobalt in the sample.

Dr Wainscott's report of 13 June 2022

87. The Tribunal notes that the majority of Dr Wainscott's report was in response to various reports of Dr Major which themselves are no longer in evidence. However, the Tribunal not having been advised that these parts, as with other experts for the respondent, were not relied upon, takes those matters into account.

88. Having set out studies that he relied upon, Dr Wainscott was of the opinion that peak levels of cobalt following an injection of Coforta occur two hours post-administration.

89. He agreed with Dr Major that a perivascular injection may result in an altered absorption period but would not lead to a prolonged excretion pattern.

90. It might be noted that the injections administered by the appellant were done in accordance with industry practice.

91. Again, it was noted by Dr Wainscott that nothing else that the appellant did would account for the positive reading by examination of other treatments or feeding regimes.

92. Dr Wainscott agreed with Dr Cole that the effect on absorption of a perivascular injection can be difficult to predict. This was particularly so when the amount of product injected, and where, was not precisely known.

93. Dr Wainscott was of the opinion that notable swelling may have been as a result of a shallow and subcutaneous tissue injection in areas which have good vascularisation.

94. It was particularly noted that it was not known how much of the vitamin B12 was administered outside the vein.

95. Importantly, Dr Wainscott stated:

> "Even if the entire amount of both products was injected perivascularly, then in order to account for the positive swab, the entire amount would have to have sat in the perivascular space for 10 days and undergone no absorption until approximately two hours prior to sampling. Then, in this two-hour window (some 10 days post-administration), the entire amount would have had to have been completely absorbed. I do not believe this to be plausible in any way."

96. Dr Wainscott then seized upon Dr Cole's concessions of the use of anecdotes, which he did not support.

97. He continued by stating that regardless of the route of administration, once vitamin B12 is absorbed, it is rapidly excreted.

Dr Wainscott's oral evidence before the Tribunal

98. Dr Wainscott confirmed that the respondent did not require laboratories to be accredited in their methods of testing nor as laboratories themselves. That is, the respondent acted on certificates issued by approved laboratories.

99. Dr Wainscott acknowledged that the respondent did not undertake the further testing suggested by Mr Keledjian.

100. Dr Wainscott agreed that the subject horse had been administered vitamin B12 and accepted that cobalt can originate from vitamin B12.

101. Dr Wainscott would not say that Dr Wenzel's numbers were incorrect, but was not qualified to dispute them. He saw no reason to disagree with them. Although, in re-examination, he stated he did not think the results were correct.

102. He acknowledged that various studies had worked on the presumption of absorption and regular excretion. Nevertheless, he remained of the opinion

that the subject horse was given an injection on race day as being the most likely explanation for the positive.

103. Dr Wainscott was not prepared to say that Dr Cole was wrong in her opinions or conjecture.

Prof Hibbert's report of 17 June 2022

104. Prof Hibbert is a Professor Emeritus of Analytical Chemistry.

105. He had provided a detailed report in the appeal of Turner and remained of the opinions he expressed in that report. There was nothing relevant about the appellant's evidence that went to those statements.

106. In essence, Prof Hibbert's report and oral evidence now have reduced weight in the proceedings by reason of the narrowing of issues.

107. Prof Hibbert was of the opinion that laboratories should be accredited and believed they were here and was surprised that they were not. That disposes of one of his key criticisms of Dr Wenzel's methods and results.

108. Prof Hibbert analysed the total amount of cobalt given to the subject horse by various treatments of the appellant and concluded that that meant 0.5873 mgs of cobalt was administered on 7 September 2019 but that, on sampling, 0.120 mgs/l of cobalt was detected.

109. He then opined that after administration there must be a release into urine which will peak and then decline as the cobalt is eliminated. Accordingly, he could offer no sensible mathematical model that has 0.4568 mgs of cobalt administered on day zero and 0.120 mgs/l be measured on day 10, considering a horse will urinate about 15 litres per day.

110. The Tribunal notes that the figure of 0.4568 is the amount of cobalt contained in the two injections.

Prof Hibbert's evidence before the Tribunal

111. Professor Hibbert again referred to his report in Turner being unaffected by evidence in this case and maintained his belief that accreditation was appropriate and was surprised it was not. He noted in particular that a laboratory is accredited to carry out a particular test, but the test itself is not the subject of accreditation in any event.

112. The Tribunal notes that the two laboratories used by the respondent here are both NATA accredited for these tests.

113. Critically, he acknowledged that his opinions in his report on levels relied upon a standard rising and falling, and his opinions would not be the same if the intravenous injection had missed the vein and gone into the neck rather than being absorbed naturally after injection in the vein. Accordingly, he had no opinion on the big neck theory.

114. In re-examination, he emphasised that what is important is that a laboratory be able to demonstrate evidence of accuracy, ability and the reproducibility of its results rather than accreditation.

Dr Cawley's report of 15 July 2022 and evidence before the Tribunal

115. Dr Cawley's report is of 29 pages involving 50 paragraphs. The majority of Dr Cawley's report is now not required to be analysed because of the narrowing of the issues.

116. Dr Cawley remained highly critical of Dr Wenzel's laboratory and his approach.

117. In particular, Dr Cawley remained of the very strong opinion that the use of the ARCHITECT B12 sample testing regime, which was designed for humans, was not appropriate for use in horses.

118. Dr Cawley essentially repeated the criticisms of Dr Wenzel's methods that he advanced in the Turner appeal.

119. In addition, Dr Cawley criticised the dilution of urine approach adopted by Dr Wenzel.

120. In oral evidence before the Tribunal, Dr Cawley maintained his criticisms of Dr Wenzel's material. The remainder of his cross-examination does not advance any issue

Prof Hibbert and Dr Cawley's reports in Turner

121. Each of these is in evidence, but again, because of the narrowing of the issues, do not require further analysis.

Dr Cole's second report of 21 September 2022

122. In response to Prof Hibbert, Dr Cole remained of the hypothesis that some of the substances were deposited in the perivascular tissues which would prolong absorption and elimination.

123. In response to Dr Wainscott, Dr Cole remained of the opinion that sometimes quite delayed as well as slow and erratic absorption can occur

with slow elimination when there has been a perivascular injection, although she conceded this was based on conjecture.

124. Dr Cole again referred to the nuchal ligament possibility, but it is not the subject of submissions.

125. Dr Cole responded to Dr Wainscott's opinion that it was not plausible that this perivascular injection could have caused the positive, by indicating she did not have access to the studies that he relied upon but that no opinion could be absolute.

126. Dr Cole conceded the anecdotal nature of her report but considered her personal experiences were relevant.

127. Dr Cole remained of the opinion that there could be very long absorption periods and concomitant excretion and detection periods from a perivascular injection.

Dr Cole's oral evidence before the Tribunal

128. Dr Cole remained of the opinion that a perivascular injection would cause phased absorption compared to an injection into the vein which would cause immediate absorption. She was of the opinion that a number of factors could affect that rate of absorption. They included where, time and the vascularized area injected.

129. Dr Cole conceded that nevertheless it was very difficult to predict a rate of absorption in these circumstances.

130. Dr Cole conceded she had not seen test results or evidence herself to support her theory. This notwithstanding that her laboratory saw some 10,000 horse samples per annum and a number of those must have involved perivascular injections but none had the equivalent of a 10-day post-perivascular injection positive.

131. Dr Cole remained of the opinion that the possibility that she opined was very difficult to substantiate and it was very difficult to put a number on the rate of absorption delay.

132. Dr Cole conceded that a race day administration was nevertheless possible. Dr Cole was not able say which was more likely but both her scenario and race day administration were possible.

Mr Keledjian's evidence before the Tribunal

133. Mr Keledgian is the general manager of ARFL, one of the testing laboratories here.

134. Mr Keledjian was unable to recall other occasions on which he might have highlighted a statement in his report in red but could use other colours.

135. He is of the opinion that if the test that was referred to by him had been carried out, it would not involve a limit of detection, only a response in the B12 “window”.

136. He conceded that it was very rare to detect vitamin B12 as it was here.

137. His laboratory had carried out some 100 cobalt screenings of which at most five involved a B12 determination as well.

138. Mr Keledjian conceded that any testing of the type he had referred to would not be accredited. His laboratory did not have such an accreditation.

139. Mr Keledjian was aware that Dr Wenzel’s laboratory was not so accredited.

140. He conceded that if he had been asked to have his laboratory carry out the subject test, that a result would have been obtained, but the range would not have been known. That is, that the test could be done and a result could be obtained.

141. On the other hand, they had never done the test, so he did not know if a result similar to that obtained by Dr Wenzel would follow.

SUBMISSIONS

Respondent’s opening written submission

142. The respondent opened by setting out the factual scenario, the grounds of appeal, the issues abandoned and the issues identified and then gave a brief factual background. The submission then canvassed the expert evidence, including large parts which are no longer relevant.

143. The testing methodology used by Dr Wenzel was said to be a methodology that cannot be relied upon. A number of those matters no longer require consideration.

144. It was noted that Dr Cawley said that Dr Wenzel’s testing method was non-validated, non-traceable and incorrect use of the ARCHITECT B12 assay for human serum.

145. It was noted Prof Hibbert was of the opinion that no validated methods were demonstrated because there was no measurement certainty, no statement of traceability, but that Dr Wenzel was using the first step in a long

process to a usable and validated method. But at this stage his results could not be relied upon.

146. The submission continued on accreditation necessity, which has now fallen away.

147. The next challenge was to the fact that Dr Wenzel's laboratory should not be carrying out such work as it was not authorised by NSW Health. This issue has not been pursued and is not further examined.

148. The use of the ARCHITECT B12 test designed for humans and not horses was again emphasised.

149. There were then criticisms advanced by Dr Cawley of the way in which results were noted by handwriting and the like, and lengthy submissions canvassing this evidence were adopted, but nothing appears to turn on this issue and it is not further examined.

150. There was then examination of the dilution factors used by Dr Wenzel but the Tribunal is of the opinion that his result should not be rejected on the basis of the totality of the evidence before the Tribunal, whilst it may involve a non-validated method of analysis, because the dilution factor was excessive, is such that, in the absence of further assistance, the Tribunal does not make an adverse finding against Dr Wenzel's methodology because of that criticism.

151. All of those criticisms are noted.

152. In relation to the missed injection and the big neck issue, substantial submissions have been made.

153. In particular, Dr Cole was criticised because her evidence is based upon pure speculation and is based upon presumptions that were given to her. The nature of those speculative comments has been set out earlier and are not repeated.

154. The submission continues by emphasising Dr Wainscott's criticisms of Dr Cole and the conclusions he has otherwise drawn.

155. It is emphasised that Dr Wainscott's opinions are based on previous studies and not speculation.

156. In particular, Dr Wainscott's opinion, set out in full earlier, that the absorption would have to have taken place in a two-hour window 10 days after administration was such that it could not lead to the conclusion that the appellant advances.

157. Prof Hibbert's criticisms of Dr Cole's opinions, were based upon normal elimination as said earlier, bbut he had not turned his mind to a possible different form of absorption.

158. Therefore, Prof Hibbert's view that the mathematics of administration compared to detection are based upon normal elimination are only relevant if the big neck theory falls away.

159. The respondent submits that the big neck contention is not supported by corroborating evidence and is not corroborated by scientific and mathematical results.

Appellant's opening submissions

160. Much of the opening submissions for the appellant have been canvassed above. It was conceded that it was necessary for the Tribunal to accept the scenario advanced by the appellant, of course he carries no burden (except under McDonough principles) , that, firstly, vitamin B12 has to be taken into account and, secondly, that the big neck theory should be accepted.

161. In particular, it was emphasised that the respondent had failed to carry out a test that it could have taken out to compare its results with those obtained by Dr Wenzel.

162. The opening also touched upon the fact that accreditation for Dr Wenzel was not required. It was conceded that it was necessary to determine what weight should be given to Dr Wenzel's results.

Respondent's opening oral submissions

163. The respondent agreed that this was a simple case. The reasons for the appellant's case were identified.

164. The respondent accepted the proposition that there was B12 in the sample and noted that even the stewards had accepted that and it had been an agreed fact throughout.

Appellant's closing submissions

165. The appellant then stated again that this was a simple case.

166. It is said there was no motive for anyone to give vitamin B12, let alone on race day.

167. It was submitted there was no direct evidence of administration on race day.

168. It was submitted this was an unusual positive.

169. Jones v Dunkel was called in aid on the basis that the respondent could have carried out the testing identified by Mr Keledjian to contradict or support the results of Dr Wenzel and it had not done so and, accordingly, the appropriate inference against the respondent should be drawn.

170. It was said that Dr Wenzel is diligent, honest and has a reliable methodology and his reading should be accepted.

171. The lack of accreditation for Dr Wenzel was again said to be a furphy.

172. It was emphasised that there is no contradictory evidence to that of Dr Wenzel and it should be accepted.

173. It was also pointed out that this case would not provide any form of precedent because of the introduction of a rule which renders injectables of this type an offence. This was not further expanded upon.

174. It was conceded a disqualification is appropriate but that it should be in months, later submitted to be 6 to 9 months, and that should be partially cumulative, to the existing disqualification, in the context of totality with one-third or two-thirds being concurrent.

175. The appellant's prior offending was accepted and not the subject of further submission.

Respondent's closing submission

176. Reliance was placed upon the written submissions.

177. It was emphasised that the disqualification of 3 years and 9 months was then generous and more than generous now having regard to the subsequent offending.

178. The penalty guidelines were stated to provide a starting point of 5 years.

179. The presence of vitamin B12 within the 120 micrograms of cobalt was accepted.

180. Again, it was emphasised that Dr Wenzel's report contains uncorroborated, un-validated test results. Accordingly, it was said that the appellant's case that all of these findings should cause a reduction in the stewards' penalty determination was not appropriate.

181. The requirement for the respondent to carry out further testing in the terms Mr Keledjian referred to was rejected. It was said that would have made

no difference. That was particularly so as it would make no difference in the terms of penalty whether the reading of 120 was a result of organic cobalt or as a result of inorganic cobalt. Particularly as there was agreement all along that there was B12 in the sample.

182. The fact that this is a fourth prohibited offence means the starting point of 5 years is generous.

183. The lack of subjective circumstances, particularly referees and the fact that no subjective evidence was given to the Tribunal at all, was emphasised.

184. The oral submission concluded on the basis this was a McDonough category 2.

185. Criticism of Dr Cole was maintained on the speculative nature of her evidence and the fact that her own laboratory had not been able to produce any equivalent results to support her theory.

186. It was emphasised that the appellant should not obtain the benefit of any offending while he is on a stay to lead to any reduction in the appropriate penalty in this case.

Appellant's oral submissions in reply

187. Again, it was emphasised that the issue here is not culpability but starting point.

188. It was emphasised that his subsequent breach has no part to play in the appropriate penalty for this breach.

189. It was conceded his personal circumstances attract no benefit for him at all.

190. It was emphasised that this case is about the proportion of cobalt derived, which the Tribunal should find is high, derived by way of origin in that reading from the B12 and that that arose in the way that Dr Cole has speculated and her speculation is supported by Dr Wainscott.

Respondent's submission on penalty

191. The respondent opened by quoting the cases of Turner, which drew on the two-step process identified by the Tribunal, and the McDonough categories identified by the Tribunal and re-emphasised in Turner, and the Pike principles requiring a penalty based upon the actual conduct of the appellant.

192. The Tribunal's determination on the approach to a civil disciplinary penalty set out in Turnbull was again adopted, as were other principles to be taken into account.

193. The Tribunal will assess those in its determination and as the appellant did not demur on these matters they do not require setting out under this heading.

194. The respondent states the penalty guidelines provide for a 5 years' disqualification for a first offence.

195. It was then said this was a McDonough category 2 as he is not free of blame and cannot establish he has done all he could be expected to do to prevent the breach.

196. Accordingly, it is said there was an illegal administration and the penalty should reflect that.

197. The submissions continued on issues relating to threshold, which are no longer required to be determined in this matter.

198. It was emphasised that the penalty determination should be based upon a finding of 120 and not some reduction by reason of the presence of cobalt from vitamin B12.

199. The submission continued that 3 years and 9 months was in the appropriate range because of the seriousness of the drug, the appropriate starting point, a third prohibited substance at that time with a lack of credible reason and a lack of subjective circumstances.

200. On the issue of parity, a number of cases were called in aid. In particular, that of Hughes.

201. Hughes involved a starting point of 5 years, reduced by reason of the acceptance the positive swab was caused by the administration of VAM. There, there was a first offence and accordingly a starting point of 2 years was adopted.

202. Nevertheless, it was said that Hughes was not applicable because of various differences. The approach adopted in Turner was referred to.

203. On the issue of subjectives, it was noted that none were compelling and that hardship was not an issue that should lead to any reduction in penalty.

204. At the time of the written submissions, and at the time of the Tribunal hearing, it was noted that there was no further evidence on subjective circumstances and no expression of remorse.

205. It was also submitted that the appellant could not get any reduction by suggesting any change he would adopt in husbandry practices.

206. It was noted he had no industry involvement and that would not lead, therefore, to any reduction, particularly in the absence of referees from the industry.

207. The written submission continued by emphasising his circumstances were now made worse by the May 2021 disqualification.

DISCUSSION

208. The evidence establishes that the appellant's known feeding and other known husbandry regimes did not cause the positive result.

209. That leaves for consideration the relevance of the evidence of Dr Wenzel and the reading obtained by him and the possibility that the big neck theory has been established in a way to satisfy the Tribunal the appellant was not at fault by a race day administration.

210. While the appellant has to establish he was not blameless (McDonough) , the respondent needs to comfortably satisfy the Tribunal that the appellant's culpability (objective seriousness) is not diminished by amount of cobalt from B12 and the likely source being the big neck.

Dr Wenzel's results

211. There is no issue that Dr Wenzel's tests produced a result of a reading of 83 ug/l of cobalt in vitamin B12 and a total cobalt reading of 129 (B sample). The issue is accuracy and reliability of the reading. The respondent accepts that the total cobalt reading, said to be 120 by the respondent but 129 by Dr Wenzel, includes cobalt from vitamin B12.

212. That is the "origin" part of the appellant's issues is established.

213. As the Tribunal understands the respondent's position, it still challenges that reading and the methodology which led to it, notwithstanding that it accepts the presence of cobalt in vitamin B12 in the subject sample.

214. The Tribunal agrees with the criticisms advanced by the appellant that the respondent could have engaged ARFL to test the samples to determine whether the reading found by Dr Wenzel was correct. The respondent did not do that, although on notice that there was B12 present in the sample.

215. Regardless of that, the Tribunal does agree with the respondent that any such further testing, and presumably the result, would make no difference to the outcome of these proceedings.

216. The Tribunal does not have to be satisfied that Dr Wenzel's laboratory was capable of and used tests which were able to produce the result that he did.

217. The Tribunal does not reject the criticisms advanced by Dr Cawley and Prof Hibbert of the methodology used by Dr Wenzel. They have been set out earlier.

218. As Prof Hibbert said, what has to be established for the acceptance of a result is the ability to produce accurate and reproducible results. As stated, accreditation has no importance in these proceedings.

219. The Tribunal makes those remarks because at the end of the day it does not have to decide whether it accepts the accuracy of the results of Dr Wenzel's testing or not.

220. The reason for that is that the parties have not established that the reading, whether 83 or otherwise, has any relevance to the issues required to be determined.

221. That is, neither party has led evidence to say that a reading of 83 means something. It has been entirely left up in the air.

222. The appellant says it is high therefore the big neck theory explains the result. But high against what scale?

223. That is, neither party has addressed the issue, for example, if the reading came out at say 1 or say 128. The Tribunal asks, "What does it make of that?"

224. Would that reading of 1 or 128 as compared to 83 have any relevance to the rate of absorption and excretion from the big neck or rate of absorption and excretion absent a big neck?

225. Neither party has expressly stated that the reading of 83 proves their respective cases on the basis that it must have been a race day administration or it might not have been a race day administration but caused by delayed absorption and excretion for some reason, for example the big neck. There is no scientific correlation in the evidence of a reading of 83 having anything to do with the fact that the injections took place on 7 September 2019.

226. Again, all this in the context that the respondent accepts that cobalt from vitamin B12 was present.

227. In particular, there does not appear to be any correlation of the reading to rates of absorption and excretion in circumstances of a perivascular injection or a standard in-vein injection.

228. Having removed the necessity to consider whether there was inorganic or organic cobalt in the total cobalt reading, and if so, in what amounts, then the Tribunal remains of the opinion that Dr Wenzel's test results are irrelevant.

229. The Tribunal finds that the respondent establishes that the reading of 83 does not prove a possibility that delayed absorption and excretion occurred.

230. In any event, the Tribunal is of the opinion that that reading of 83 of cobalt from vitamin B12 has no weight in the determination of objective seriousness and, therefore, penalty. The "high" part of the appellant's case is overcome by the respondent.

The big neck issue

231. The Tribunal accepts the appellant's case that this horse had a big neck. That determination is made notwithstanding the paucity of the oral evidence of the appellant at certain times and the lack of corroboration of his evidence on this issue.

232. The Tribunal is prepared to find there was a big neck by reason of the fact that the appellant advanced it at a very early stage in all of these proceedings during the unannounced stable inspection on 23 October 2019. The respondent has not submitted that the theory should not be accepted at all. That total vagueness in his evidence means that it is not possible to determine precisely where the injection was given other than in the neck. The precise nature of the big neck, as a physical description, is not available.

233. The appellant's treatment records and his other evidence otherwise establish that he injected the Coforta and Enerselen on 7 September 2019.

234. Interestingly, the Tribunal notes the evidence that the test result of 22 October 2019 of 3.5 was after various occasions on which Coforta and Enerselen had been injected to this horse, but in respect of those three occasions there is no evidence that a big neck resulted. That means that an injection of Coforta and/or Enerselen prior to a test but in a vein does not lead to a positive.

235. The Tribunal finds that injections of Coforta and/or Enerselen 10 days before a test will not lead to a positive result if the injections were made into a vein of the horse.

236. The Tribunal accepts the evidence of Dr Wainscott, particularly in the absence of any specificity from the appellant, that the more probable result of this injection, accepting that it was not entirely into a vein, was subcutaneous and not muscular.

237. The totality of the evidence satisfies the Tribunal that Dr Wainscott's rejection of the relevance of the nuchal ligaments is established.

238. The Tribunal accepts that if there was indeed some swelling that that would be consistent with a missed vein injection and the swelling would be from an inflammatory response.

239. Accordingly, the totality of the evidence is such that the Tribunal is satisfied that Dr Wainscott's evidence that the area injected generally would still have led to a rapid absorption and thus excretion because of the presence of sufficient blood vessels in or about that area. Therefore, there would be an absorption and excretion action in hours although longer than an injection into the vein.

240. The Tribunal is satisfied that Dr Cole's evidence was, as she accepted, highly speculative.

241. The Tribunal accepts and understands Dr Cole's experience and expertise and it is highly persuasive, but is not persuaded by her evidence in this case because it is so speculative and based on anecdotes and not based on studies or test results. There is further reinforcement in that conclusion that her speculation arises notwithstanding the vast experience that she has demonstrated by the fact that her laboratory sees some 10,000 horse samples a year and yet none of them have established the existence of perivascular injection sites nor the fact that some 10 days after a perivascular injection a positive to cobalt was found.

242. The Tribunal further finds that Drs Cawley and Wainscott's evidence contains references by both to the many variables and unknowns which would have had to apply to support Dr Cole's theory.

243. The Tribunal particularly notes that each of Drs Cole and Wainscott agreed on the difficulty of producing and substantiating the theory that Dr Cole advanced.

244. The Tribunal notes that Dr Cole conceded that race day administration was also a possibility.

245. There is no doubt that if better evidence could have been obtained that may have established the perivascular injection theory with delayed absorption and excretion advanced by Dr Cole and accepted by Dr Wainscott. It may have assisted to establish that the cobalt from B12 may well have remained in the horse's system for the period the appellant suggests.

246. In this case, the evidence to support Dr Cole's theory is of insufficient weight to overcome the evidence of Dr Wainscott even though he conceded

that it was difficult to predict absorbion and excretion rates after a perivascular injection.

247. To the contrary, the evidence of Dr Wainscott essentially is unchallenged.

248. The Tribunal is particularly persuaded by the fact that Dr Wainscott expressed the following:

> "Even if the entire amount of both products was injected perivascularly, then in order to account for the positive swab, the entire amount would have had to sat in the perivascular space for 10 days and undergone no absorption until approximately two hours prior to sampling. Then, in this two-hour window (some 10 days post-administration), the entire amount would have had to have been completely absorbed. I do not believe this to be plausible in any way."

249. The Tribunal is particularly persuaded by the statements by Dr Wainscott at the stewards' inquiry as follows:

> "… firstly, the level that was found, and also the report from the Australian Racing Forensic Laboratory that vitamin B12 was found in the urine sample, it would be my opinion that it's the result of a – the administration of a therapeutic form of cobalt and/or vitamin B – well, a therapeutic administration of vitamin B12 and/or cobalt-containing vitamin products – vitamin and cobalt-containing products, with a proviso of the results of a number of administration trials which have been conducted over the years, which show that to breach the threshold level it would had to have been given on race day."
>
> And later:
>
> "… it appears that the horse had – it would be my opinion that the horse received a form of cobalt probably involving B12 – involving B12, and the evidence of the administration trials is that to be in breach of the threshold it would have to be given on race day."

250. Further comfort in that conclusion is drawn for the evidence of Prof Hibbert that the mathematics of administration and detection with normal peaks and declines means that it could not have been done 10 days before the sample. Such a finding of course flows form the fact that the big neck theory is not established.

251. Accordingly, the respondent satisfies the Tribunal that the administration of cobalt was on race day.

252. The Tribunal acknowledges in making that determination that there has been no motive to do so established and that there is no direct evidence of such an administration and there appears to be no logical reason why this would be done.

253. The respondent, therefore, establishes that the Tribunal should not accept the big neck theory advanced by the appellant, which would indicate a delay in absorption and excretion and thus provide an explanation for the positive reading.

254. There is nothing about the Dr Wenzel results and the reading established by him that would support the big neck theory in any other way.

255. Accordingly, the appellant, upon whom the onus lies, fails to establish to the satisfaction of the Tribunal that he was blameless or that there was no other actions he could have taken to prevent the occurrence. He therefore fails to establish he should be assessed under category 3 of McDonough but that the respondent establishes he should be assessed under category 2 of McDonough.

PENALTY DETERMINATION

256. The respondent has helpfully set out the principles that must be applied to the penalty determination that now must be made.

257. The Tribunal does not propose to refer to those helpful submissions in great detail as the appellant has not demurred.

258. The key points applicable to this case are the need for the Tribunal to find a civil disciplinary penalty, not by way of punishment, but for the purposes of the promotion of the public interest by the deterrence of others.

259. The respondent here advances that the penalty guidelines should be considered and that under the 2016 penalty guideline, which was in operation at the time of this breach, cobalt is classified as a class 1 prohibited substance. That is not an issue.

260. The stewards determined, and the respondent advances here, that there is a not less than 5 year disqualification starting point under that guideline for a first offence.

261. The Tribunal does not understand why that approach is advanced. This is not a first offence.

262. For a class 1 first offence, not less than 5 years, and second offence, not less than 10 years' disqualification is set out. There is no provision in the guideline for a third or subsequent offence and patently that would necessarily

invite a starting point greater than that appropriate for a second offence, let alone a greater starting point, as advanced here, for a first offence. Assuming the facts and circumstances of the actual conduct justify that starting point.

263. However, the stewards ran their penalty determination and the respondent has advanced a penalty determination based upon a starting point of 5 years.

264. No suggestion was made to the Tribunal, other than the suggestion that the stewards' determination was generous, that a greater starting point should be adopted. No other figure was given.

265. The only reference to, perhaps, some consideration being given to a higher penalty was because of the subsequent breach.

266. No Parker-type direction was invited to be given to the appellant and was not.

267. The Tribunal is satisfied that procedural fairness would be denied to the appellant if the Tribunal was to embark on a consideration of a starting point for a second or subsequent offence leading to a starting point greater than 5 years.

268. Notwithstanding the Tribunal's opinion that a starting point greater than 5 years would be appropriate, for those reasons, the Tribunal will not do so. It puts such a consideration entirely out of its mind.

269. The Tribunal is aided in the ultimate determination by the fact that the appellant does not dispute that he must be disqualified.

270. On the issue of objective seriousness, it is apparent that the appellant has not succeeded in having the starting point reduced by reason of the arguments advanced on this appeal. Nevertheless, it is necessary to determine what is an appropriate starting point for the facts and circumstances of this case and the actual conduct against which penalty must be determined.

271. At this stage, it is noted that the Tribunal, having determined that the penalty is to be based on McDonough category 2 principles, that the imposition of anything less than a disqualification would be inappropriate in any event, and because he could not establish he was blameless or there was nothing more he could do, then under McDonough category 2, the penalty appropriate to the facts and circumstances must itself be the starting point.

272. The Tribunal has determined that there was a race day administration and has found that the respondent has overcome the appellant's case to

reduce culpability on the basis of an innocent explanation or an explicable innocent cause.

273. The Tribunal accepts that a reading of 120 is low compared to other cases it has dealt with and the evidence of ranges explored in those. It is noted to be the same as Turner.

274. The Tribunal notes that in other cases it has not found cobalt to be performance enhancing and that goes to motive.

275. The Tribunal has earlier set out there is no direct evidence of race day administration.

276. On the issue of subjective deterrence, the Tribunal notes the cooperation of the appellant with the respondent at all times and accepts his endeavours to try and find an explanation for the positive reading in the circumstances where he said he cannot explain it.

277. On specific deterrence, therefore, there is nothing the appellant can establish that he would change in his husbandry practices that would ensure this conduct would not occur again. He is not helped by the fact that he did not obtain any veterinary advice on the big neck and the possible negative outcome that might have flowed form it - of course his evidence is that big necks occur once or twice a year so that is not a substantial negative on husbandry practices.

278. There is reinforcement in that conclusion in any event by the fact that the appellant continues to breach the rule and accordingly any subjective message must reflect the fact that he has not received that message in the past. This is a repeat cobalt offence.

279. The Tribunal is satisfied that a strong subjective message must be given to this appellant.

280. On the issue of general deterrence, the message to be given on the facts and circumstances of this case must be at a high level. There are no detailed submissions by either party which go to the issue of general deterrence and it does not require substantial examination. A message of substantial weight on objective deterrence must be given.

281. A number of parity cases have been raised.

282. The first is Mifsud a 10 July 2015 breach, which meant that at that time cobalt was classified as class 2. There, there was a level of 260 with an unknown cause and a prior presentation matter and this led to a starting point of 2 years' disqualification.

283. The next is Hughes with a presentation in 17 March 2017 and with the current guideline in operation meant a classification of class 1, and there a reading of 168, with acceptance that the cause was a race day drip. Hughes had no prior matters and there were substantial subjective factors in her favour in any event but a two-year disqualification starting point was adopted.

284. Next is Turner, a presentation on 19 January 2019, again now classified as class 1, with a level of 120 but an unknown cause. Turner had four prior matters, as long ago as 1993 in one case, and there a starting point of 5 years was determined appropriate.

285. Before the stewards, the appellant advanced the principles in Kavanagh going to the inappropriateness of penalty where a trainer was blameless but the Tribunal is satisfied that that case is not applicable on the facts of this case.

286. Having regard to those matters of parity but, more importantly, focusing on the facts and circumstances of this case, the Tribunal considers that a starting point of 5 years has to be adopted by it for the reasons set out earlier. The Tribunal again states that it would otherwise have considered a higher starting point.

Subjective matters

287. In this case, the appellant has conceded that there is nothing about his subjective circumstances which assist him.

288. That reduces the necessity to examine his evidence in greater detail.

289. The appellant has called in aid no referees, and, more critically, no referees from the industry, being licensed persons, who are prepared to stand beside him and support him.

290. No hardship argument is advanced.

291. The Tribunal takes into account the submissions made on a 183 determination early in these proceedings. Those key points related to a lack of criminal record and the appellant is a person whom those in the industry in fact can approach because he is friendly and able to be of assistance and exceptionally generous. No evidence to establish these was called.

292. The only subjective factor advanced by the appellant before the Tribunal was that he works at Flemington markets. He has done that in the past, where apparently he has a good reputation in the fruit and vegetable industry.

293. The Tribunal again notes that there are no husbandry changes which could be effected to stand in his favour.

294. The Tribunal discerns no expression of remorse at any time and particularly not to the Tribunal.

295. In consideration of reductions for subjective circumstances, the appellant can find no joy in his offence record.

296. Despite his some 46 years in the industry, he has spent a considerable period of time out of it by reason of disqualifications.

297. In 2010 he was disqualified for a presentation breach. No other particulars are available.

298. In 2013, he was disqualified for a period of 18 months for presentations for a form of vicarious liability in his role as a trainer when his brother and a steward engaged in corrupt conduct involving horses of the appellant.

299. On his first presentation of a horse after being relicensed from that disqualification, he had a positive to cobalt, leading to a disqualification of 3 years from 30 April 2014 to 29 April 2017.

300. He was relicensed on 1 March 2018 and, within what would really be a relatively short period of time, committed this breach on 17 September 2019.

301. Those matters mean that he receives no reduction for a prior good record.

302. That only leaves the standard reduction of 25 percent for his immediate plea of guilty before the stewards, his cooperation with the stewards and the regulator at all times during the process, and his admission of the breach before the Tribunal.

303. No other deductions are enlivened.

304. From a starting point of 5 years, a 25 percent reduction leads to a reduction of 1 year and 3 months.

305. This means a period of disqualification of 3 years and 9 months.

Cumulative or concurrent

306. This breach occurred on 17 September 2019. The appellant was granted a stay of the 3 year 9 months' disqualification imposed by the stewards and that stay took effect on 25 August 2020.

307. As set out above, on 1 December and 15 December 2020, the appellant again breached the prohibited substance rules and a period of disqualification

of 8 years and 3 months commencing on 19 January 2021 was imposed upon him.

308. The respondent submits that this period of disqualification found to be appropriate by the Tribunal should be entirely cumulative to that penalty for that later breach.

309. It was particularly emphasised that that later breach occurred whilst he was on a stay.

310. The appellant, having submitted a period of disqualification of 6 to 9 months, advanced that it should be partially concurrent with that May 2021 penalty.

311. The Tribunal finds that the fact that the appellant was on a stay when he committed those subsequent breaches means that this penalty must be served separately to that latter penalty. To do otherwise would be to give a message that a person on a stay can go out and commit breaches in an expectation that they will not receive a full penalty for the conduct they earlier engaged in. That would be a wrong message.

312. On any consideration of a totality principle, these are each separate and distinct breaches for which separate and distinct penalties should be served.

313. The Tribunal determines that the appellant should serve the whole of the penalty that it considers appropriate for this breach. That penalty is not to be reduced by any period he is presently serving for a latter breach.

314. Accordingly, the Tribunal determines that this penalty of 3 years and 9 months commence on 20 April 2029.

315. The Tribunal is further reinforced in that conclusion by reason of the fact that if he had been dealt with for this offence first, there is no apparent reason why the latter offence should have been concurrent with this offence in any way whatsoever.

ORDERS

316. The severity appeal is dismissed.

317. The appellant is disqualified for a period of 3 years and 9 months to commence 20 April 2029.

318. Time served pending stays can be calculated by the respondent and the appellant advised accordingly.

APPEAL DEPOSIT

319. The parties were not invited to make submissions on the appeal deposit and accordingly no application for a refund has been made.

320. If the appellant wishes to make an application for a refund in whole or in part of the appeal deposit, then such an application with supporting reasons must be lodged with the Tribunal within 7 days of the appellant receiving written notice of this decision.

321. If no such application is made, then without further order, the appeal deposit will be forfeited.

322s. If such a further application with supporting submissions is made, then the respondent will be invited to make a reply submission and then the Tribunal will determine the further conduct of that application.