RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

RESERVED DECISION

25 JANUARY 2021

APPELLANT REBECCA BROWN

RESPONDENT HARNESS RACING NSW

SEVERITY APPEAL

AHR 190

DECISION:

1. **Appeal dismissed**
2. **Penalty of disqualification of 5 years to commence 14 March 2017**
3. **Directions issued on appeal deposit**

INTRODUCTION

1. On 25 February 2019 the appellant, a licensed trainer and driver, lodged a severity appeal against a decision of the stewards of 11 May 2017 to impose upon her a period of disqualification of 5 years to commence 14 March 2017.

2. The appellant faced one charge under AHR 190, which relevantly reads as follows:

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

The stewards particularised the charge as follows:

> "That you, Rebecca Brown, a trainer licensed by Harness Racing New South Wales, being the trainer of the registered horse Gargzdai Girl and the person responsible for presenting that horse to contest race 8 at Newcastle on 28 January 2017, following which a prohibited substance, being cobalt at a level above 100 micrograms per litre, was detected in the post-race urine sample."

3. When confronted with that charge before the stewards, the appellant pleaded guilty and has maintained that plea of guilty on this appeal. This is therefore a severity appeal.

4. The Tribunal notes that the first laboratory determined a reading of 1590 and the second laboratory, 1700.

5. On 25 February 2019 the appellant lodged an out of time application and the Tribunal granted this, against objection, on 2 April 2019.

6. The Tribunal refused a stay application on 20 September 2019.

7. After a number of interlocutory proceedings, the appeal came on for hearing on 27 and 28 May 2020. The appeal was heard, by consent, together with the severity appeal of Rodney Pike. A separate decision is issued in the Pike appeal.

8. On 14 July 2020, the appellant made submissions on penalty. On 31 July 2020, the respondent lodged closing submissions. On 21 August 2020, the appellant made an application to exclude evidence and that, if admitted, the evidence sought to be excluded was otherwise irrelevant and made limited penalty submissions.

9. The parties made submissions on the application to exclude evidence and on 29 September 2020 the Tribunal issued a written decision on that application. Amongst the submissions made on the exclusion application were matters relevant to penalty.

10. After the exclusion application decision, the parties then made submissions on the application that part of the subject evidence was irrelevant. The Tribunal issued a decision on that issue on 18 November 2020.

11. The parties then made final submissions on penalty, including the respondent on 4 December 2020 and the appellant on 23 December 2020.

12. The evidence on the appeal principally is contained in a hearing bundle of 1272 pages. The documents in this appeal also incorporate the documents lodged in the Pike appeal. As this is a severity appeal, it is only necessary to summarise the evidence lodged.

13. Many of the documents relate to the establishment of the original charge. Included in the bundle are the various pleading documents on appeal, a transcript of interview with the appellant, various studies into cobalt, decisions before VCAT in Demmler of 3 May 2017 and before this Tribunal in Hayward 28 January 2015 and Carroll 27 November 2015. Included are references to which the Tribunal will return. The bundle incorporated some 314 documents which related to the Hughes decision of 31 August 2018, including various expert reports and research reports and studies. Also incorporated was the Tribunal decision in Mifsud 11 March 2019. The expert evidence for the respondent involved reports of Dr Scollay of 11 August 2019 and 14 January 2020, Dr Burns 11 September 2019, Dr Wainscott 20 December 2019 and 3 January 2020. The report of Dr Major of 27 September 2019, on behalf of the appellant, was also in the bundle.

14. The evidence described in the appeal bundle as the respondent's circumstantial evidence and to which the application to exclude, in part, and the application on grounds of irrelevance, in part, related are the offence report of the appellant, the offence report of Mitchell Reese, a newspaper article on Brown's disqualification, the appellant's logbook, telephone records of Nathan Carroll, a transcript of an inquiry with Nathan Carroll on 26 November 2018, interviews with Mitchell Reese of 12 November 2018 and 7 December 2018 and a printout of various SMS and telephone messages.

15. Whilst set out in detail in its two decisions of 18 November 2020 and 23 December 2020 on the circumstantial evidence, the Tribunal notes that

not all of the evidence sought to be tendered was allowed to be used. Those parts allowed to be used will be referenced in this decision.

16. The oral evidence comprised that of Drs Scollay, Burns and Major.

17. The Tribunal notes that the appellant did not give evidence before it.

ISSUES

18. The appellant proceeded on her grounds of appeal of 1 October 2019, which are in the following terms:

> "i. the applicant was incorrectly sentenced based upon various erroneous views held by the stewards at the time of stewards' inquiry in relation to the substance 'cobalt', inter-alia; and/or
>
> (a) is a haematopoietic in a horse
> (b) is a hypoxia inducible factor (HIF) -1 stabiliser
> (c) stimulates EPO production in the horse
> (d) has a positive effect on the performance of the horse
> (e) is a substance that has the highest potential to positively affect the performance of the horse
> (f) affects the level playing field of the industry due to increased performance of the horse; and /or
>
> ii. the stewards failed to take into account appropriate discounts, including subjective factors; and /or
>
> iii. parity in relation to the 'appeal of Hughes' and the 'appeal of Mifsud'
>
> iv. the penalty is too severe in all the circumstances."

19. In its closing submission of 31 July 2020, the respondent invited the Tribunal to consider an increased penalty to that appropriate by the stewards and to impose a penalty of 10 years disqualification.

PENALTY PRINCIPLES

20. This is a civil disciplinary matter requiring a penalty which is protective and not punitive and arrived at by the application of civil rules not criminal sentencing procedures.

21. The appellant has submitted to the Tribunal the application of the following from Hughes of 31 August 2018:

> "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 the uniform rules. This decision does not require repetition of the appropriate principles.
>
> The most important factor in assessing a starting point on an objective seriousness test is, of course, to focus upon the actual conduct of the appellant and the facts and circumstances surrounding that conduct. The message to be given to the industry on these facts is a substantial one."

22. It is important to assess the appellant on all the facts and circumstances available to the Tribunal at the time of this determination, noting that the conduct occurred in 2017.

23. Having determined objective seriousness, which itself will require considerable focus upon the severity of the conduct and the message to be given, the Tribunal then has to consider what discounts, if any, should be given for subjective circumstances which relevantly in these proceedings relate to the admission of the breach of the rule and personal circumstances. As is always the case, objective seriousness may mean that the discounts for subjective circumstances are reduced to nil or otherwise reduced.

24. Whilst it is for the Tribunal to determine penalty for itself, the parties have focused upon the HRNSW Penalty Guidelines ("guideline/s").

25. The applicable guideline for this appellant and her conduct in 2017 is that which was published on 14 November 2016.

26. Critically, and relevant to these proceedings, that guideline provides as follows:

> "PENALTY GUIDELINES FOR THERAPEUTIC SUBSTANCES AND TCO2 POSITIVES.
>
> CLASS 1
>
> This category of drugs has the highest potential to affect performance and have no generally accepted medical use in the racing horse.
>
> It includes …. all substances specifically referred to in AHRR 190A(2) and any other substance not registered for use in equines and/or Humans.

The list below is some of those substances, but is not limited to:

…
Cobalt
…

First offence
No less than five (5) years disqualification

Second offence
No less than (10) years disqualification".

"CLASS 2" – not relevant to these proceedings.

"CLASS 3

This category includes those medications registered in Australia for veterinary use which have an accepted therapeutic use in the racing horse.

Australian registered human preparations with an accepted therapeutic use in the racing horse may also be included in this Class.

Includes all therapeutic substances.

First offence
Twelve (12) months disqualification

Second offence
Two (2) years disqualification
…"

27. The Tribunal has ruled since the introduction of the HRNSW Penalty Guidelines that it will treat them as guidelines and not tram lines. In appropriate cases, the application of those guidelines may not accord with the determination of a penalty that the Tribunal considers appropriate for the facts and circumstances of the case. However, as stated by the Tribunal on numerous occasions, the application of those guidelines provides a measure of certainty for the stewards, the regulator, the industry and a measure of understanding for the public as well as importantly providing a measure for parity purposes.

Ground of Appeal (i) The applicant was incorrectly sentenced…

28. The ground of appeal identifies issues from the determination in Hughes.

29. The appellant says that the decision of Mifsud of 11 March 2019, which followed Hughes, is supportive of those same findings in Hughes.

30. In addition, the appellant submits that the evidences of Drs Scollay and Burns confirms the Tribunal's findings in Hughes.

31. The critical relevant findings relied upon are those that there is no evidence of a performance enhancing/ limiting effect and, in addition, that welfare of the horse considerations do not arise.

32. Accordingly, the appellant submits that ground of appeal (i) is established.

33. The respondent submits that, consistent with Hughes, Class 1 substances do not have to satisfy all of the words of paragraph 1 and substances will be Class 1 if the regulator lists them as such.

34. On the facts and circumstances of this case and the submissions made, the Tribunal finds no reason to go behind its decision of Hughes in this matter, and in particular, that performance enhancement/ limitation is irrelevant.

35. On the facts and circumstances of this case, cobalt is, without doubt, named as a Class 1 substance and the Tribunal so finds that it is.

36. That is the prohibited substance cobalt here places the penalty determination in Class 1 of the guideline.

37. Under the Penalty Guidelines, therefore, the starting point for a first breach is a disqualification of 5 years and for a second breach, a disqualification of 10 years.

38. On 13 July 2014 this appellant was found to have breached the prohibited substance rules as they then existed and was disqualified for a period of 6 months. The substance in question was then classified as a Class 3 substance, being caffeine.

39. The Tribunal has dealt with its application of the guideline when dealing with a Class 1 breach when a prior breach was not a Class 1 breach.

40. In the decision of Hayward of 28 January 2015 the Tribunal said, at page 7:

> "The conclusions the Tribunal reaches in respect of the guidelines and how a third breach of the 190 rule should be applied essentially are these: that it is appropriate that in respect of a second or third

breach of a Class 1 in circumstances where the prior breaches related to Class 2 and/or Class 3, that there be a starting point of a penalty greater than that which is appropriate for a first Class 1. The Tribunal will not bind itself by indicating a precise mathematical calculation by which a third breach of a Class 1 with prior classes 2 and/or 3 arise. It would be wrong to do so for the reasons that the guidelines are not tram lines. The industry, through its regulatory body, has elected not to provide such specificity and, importantly, each case must be dealt with on its own facts and circumstances."

41. In the decision of Joshua Carroll of 27 November 2015, the Tribunal said this:

> "14. The guidelines have been in operation since 2012. They exist in an environment which at the present time continues to throw up prohibited substance cases with a regrettable frequency. They were introduced at a time when the industry was subject to the green light scandal. They were introduced at a time when this Tribunal had reflected that the stewards had been unduly lenient in respect of prohibited substance matters, not only in this code but the other codes. They are embraced by a draconian prohibited substance regime that has been referred to in a number of cases, and the nature of it is not repeated. They are harsh. The regulator, in drafting them, intended them to be harsh. The reasons for that need not be examined. The Tribunal has accepted that that is the approach the regulator wishes to take and not only is a period of disqualification, which is not opposed in this case by the appellant, appropriate, but it is one of the few tools available to the regulator to try and provide a level playing field.
>
> 15. It is the fact that, despite the efforts of the regulator, trainers continue to present with prohibited substances. It is therefore that this Tribunal must take strong steps to provide support to the regulator in its endeavours to find a regime in which all associated with the industry can enjoy the appropriate level playing field that is desired.
>
> 16. Consistent with that harsh regime in a draconian system, to which reference was made, the guidelines provide for this Class 1 prohibited substance for a first offence a starting point of 5 years and for a second offence under the prohibited substance rules a starting point of 10 years. In a number of recent decisions, in particular Gillespie and Hayward, this Tribunal reflected at length in respect of how prior matters are to be dealt with. To summarise both Gillespie and Hayward, and applicable to this case, there cannot be a starting point, nor was it suggested, of less than 5 years. As to whether it is for a second breach as high as 10 years would depend on the facts and circumstances of the case."

42. In Carroll there was a 1996 prior which the facts did not enable a determination of whether it was a prior Class 1 or Class 3. In Carroll a penalty of disqualification of 6 years was imposed by the Tribunal.

43. In Hayward a 10 year disqualification was imposed.

44. On the facts and circumstances of this case, the Tribunal has determined that for a second breach of the Penalty Guidelines with a prior Class 3 breach that in determining the appropriate starting point for this Class 1 breach that it be greater than 5 years but less than 10 years.

45. The stewards determined a starting point of 7 years disqualification from which they gave a 25 percent reduction for the plea of guilty and a further 3 months for subjective circumstances to come to a final determination of a disqualification of 5 years.

46. The appellant relies on Hughes for parity and therefore there should be a starting point of 2 years with an increase for the prior, which might lead to a starting point of 4 years disqualification.

47. The respondent, having noted the appellant's reliance upon Hughes, says that Hughes is not relevant and nor is Mifsud for the following reasons: second prohibited substance offence; reading of 1700; likely administration of an unregistered product connected to illegal activities; no explanation of the circumstances giving rise to the positive; no self-reporting; no attempt to offer a reasonable explanation; silence in the wake of comprehensive evidence of an extensive supply operation of prohibited substances operating out of her stables and a likelihood that the positive here arose from that conduct; there are serious welfare issues in this case.

48. The Tribunal will return to welfare issues.

49. The Tribunal agrees with the respondent that Hughes' facts and circumstances are not applicable to the facts and circumstances of this case.

50. Of course, the Tribunal, regardless of prior cases and parity arguments, needs to assess the facts and circumstances here to determine the objective seriousness.

51. On that issue, this is a presentation allegation and not an admission case.

52. A breach of the rule occurs in absolute circumstances when the appropriate certificates exists, as is the case here, and thus of course an appropriate admission of the breach, or plea of guilty.

53. Critically on objective seriousness are the very high readings of 1590 and 1700 on analysis by laboratories.

54. The submissions for the appellant adopt the appellant's evidence to the stewards in which she denied any knowledge of the source of the cobalt. It is submitted the appellant had endeavoured to find an explanation by reason of the fact that the subject horse was kept in a paddock unattended at times, and that when she was not available, her partner, Mr Mitchell Reese, about whom further evidence will be set out, would be left in charge. Importantly, she said that her supplementation regime was and remained unchanged both before and after the subject positive test. In essence, the appellant could offer no explanation for the elevated cobalt detection. The Tribunal notes that sampling of six horses from the stable at other times were all negative.

55. In a further submission, the appellant's case was summarised on the basis that neither she nor anyone else used cobalt with her horses. She expressed that she "wished she knew" how the cobalt became present. Again, she explained her feeding regime and the fact that members of the public could possibly feed carrots to her horse over the fence.

56. Importantly, in that further submission it was emphasised that the appellant had said that Mitchell Reese would never do anything without consulting her and without talking to her about it.

57. The respondent's submission emphasised her evidence about changes to her husbandry regime and practices on the basis that "she possibly would have changed brands" but that in essence nothing changed.

58. The respondent submits on causation that the evidence of Drs Wainscott and Colantonio, regulatory and former regulatory vet for HRNSW, is critical.

59. It is submitted that Dr Wainscott's evidence is that the positive was inconsistent with the reported supplement regime described by the appellant and was consistent with the administration of a concentrated form of inorganic cobalt at some time prior to the race. Those matters were contained in Dr Wainscott's report of 20 December 2019.

60. Dr Colantonio, as the then regulatory vet, gave evidence at the stewards' inquiry. It is submitted his unchallenged evidence was that the levels above the threshold are inconsistent with legitimate products being administered in accordance with the rules of racing and that a level of 1700 µg/L is consistent with a high administration of cobalt.

61. The respondent also relies upon administration studies to support the findings of Drs Wainscott and Colantonio. The Tribunal has seen many of these over the years and the respondent extracts only from a few of them.

62. Those relied upon are: a single dose of a registered vitamin B12 product will result in a peak level of about 135-550; peak levels of cobalt resulting from administration of legitimate products would likely be achieved between 2 and 6 hours of administration; and administrations of legitimate substances may result in readings in excess of 100 for a maximum of 11.6 hours after administration.

63. The respondent notes that the subject swab was taken at 10:08 pm on the day of the race. The respondent therefore submits that there was a likely window of at least 24 hours between the administration and the swab.

64. The submission continues that any cobalt reading in urine will peak somewhere between 15 minutes and 4 hours. Dr Colantonio gave evidence that cobalt will excrete rapidly and that the process may take 24 hours.

65. The subject facts here on the administration studies, it is submitted, lead to a conclusion that the high reading of 1700 was the result of a much higher dose of cobalt than that which was given in the study of Knych at 49 micrograms of cobalt.

66. Under the McDonough principles, which the Tribunal has applied now for some time, this unexplained result would lead to the matter being categorised as a 2 and therefore the appropriate penalty on the facts and circumstances must be applied.

67. The respondent has run a circumstantial evidence case to provide further reasons for a finding of objective seriousness.

68. In essence, that case is to demonstrate a husbandry failure by the appellant.

69. That husbandry failure is said to be an inadequate supervision of her stables and allowing the actions of her partner Mitchell Reese to contribute to the positive swab.

70. The admissible actions of Mitchell Reese were the subject of the Tribunal's earlier determination on the possible exclusion of that evidence and then the further determination on its relevance.

71. In its decision of 18 November 2020, the Tribunal determined as follows:

> "28. The Reese offence report is relevant to the Brown appeal on the issue of her association as a licensed trainer with a person who has previously been disqualified for prohibited substance offences.
>
> 29. The Tribunal will apply the principles in Waterhouse v Bell 25 NSWLR 99 which, summarised, and relevantly here, are that there can be no tendency imputed to Ms Brown as being susceptible to the corrupt conduct of Mr Reese. It is necessary to establish wrong conduct in Ms Brown. The fact of marriage or relationship with a previously disqualified person cannot of itself lead to a determination that she should have certain characteristics of a contrary nature imputed to her.
>
> 30. The Reese offence report considered alone does not establish that Ms Brown breached the rules.
>
> 31. The Reese offence report has the appropriate probative weight in respect of issues of husbandry practices by Ms Brown."

72. Next in that decision the Tribunal had referred, at 40, to numerous SMS messages in which Mitchell Reese was involved as being:

> "absolutely damning. They contain numerous references to various people apparently engaging in breaches of the rules and criminal conduct."

73. The Tribunal determined as follows in respect of this appellant on those messages:

> "48. The evidence is relevant against Ms Brown so far as it involves transmissions to and by Mr Reese and none of the others.
>
> 49. The Tribunal must take into account the husbandry matters between Ms Brown and Mr Reese. They are documented in the submissions and not repeated. Ms Brown knew that Mr Reese was working in her stables and the issue of her husbandry practices with him are in issue."

74. And later in that decision, in dealing with the transcript of an inquiry by the stewards with Nathan Carroll, the Tribunal ruled as follows:

> "57. Admissions, if any, by Mr Carroll relating to Mr Reese and what the SMS messages related to are of sufficient weight to confirm the conduct of Mr Reese and relate to the SMS messages. They are relevant to the husbandry practices of Ms Brown but no more."

75. The Tribunal notes for completeness that there were interviews by the stewards with Mitchell Reese and the Tribunal determined in respect of those that that evidence did not enable the drawing of any inferences against the appellant.

76. The appellant was interviewed by the respondent on 10 March 2016 prior to her inquiry and some of the key statements were as follows:

> "Question: And you had full control of the stable?
> Appellant: Yes…
>
> ….
>
> Question: Is there anything that you would have given the horse or any treatments that wouldn't have been recorded in the logbook?
> Appellant: No…
>
> …
>
> Question: … You are obviously the trainer of the stable?
> Appellant: Yes. I know for a fact that Mitch wasn't even with me that night because I'm sure I had (inaudible) in, and I had another driver – I had a junior on, so Mitch wasn't even with me, if that's what you are implying.
>
> …
>
> Question: Does Mitchell – do you ever get him to administer any treatments to the horses?
> Appellant : Oh, I mean, of course…
>
> …
>
> Question: Okay. So, essentially, it is at your direction or –
> Appellant: Of course.
>
> Question: … Under your guidance that that would occur?
> Appellant: … We have a system …"

77. It is the case for the respondent that this positive arose from the administration of illegal and unregistered products in circumstances where consideration must be given to the relationship between the appellant and Mitchell Reese.

78. The submissions for the respondent identify that Mitchell Reese and the appellant have been in a relationship since 2008 and Mitchell Reese is

involved with the sale, transfer, care, husbandry, training and racing of horses where the appellant is listed as the trainer.

79. The respondent's submission continues to identify the following key factors: they live together at stables where the horses are trained; the appellant draws up treatment regimes for him; he assists the appellant in administering stomach tubes; he makes up drenches while the appellant watches; he jointly negotiates for horse purchases; they share finances as a couple; he liaises with persons in relation to the sale and transfer of the appellant's horses; others offer pre-training services to him; he negotiates training fees for her horses; he gives instructions to others about spelling horses; he manages the transfer of her horses; after the appellant was stood down he was responsible for sourcing potential purchasers for her horses; he monitors TCO2 readings for her horses; the appellant uses his email address.

80. The numerous 2016 SMS messages establish that Mitchell Reese and Nathan Carroll in 2016 were engaging in illegal acts contrary to the rules of racing by supplying and purchasing and administering illegal products. That conduct included injections, drenching and the like. Of concern is the following SMS exchange between Mitchell Reese and Nathan Carroll on 13 March 2017:

> "Reese: Nah, just bec which ain't fair, I would prefer for me to be getting outed than her; honestly dnt no, how it went high for cobalt only had a shot of biobuilder the same one Jackson sells because I had none of mine, but I dnt think it's that so scr my f… head.
>
> Carroll: That one Jackson cells is full of cobalt, mate. I'm quite sure that's what Pikey went on.
>
> Reese: Yeah, well, then that's wat it was because they all normally get my builder but I had none, so I used it."

81. The respondent submits that there is no evidence adduced here to contradict those facts.

82. Accordingly, the respondent submits that in respect of the husbandry issues the following: the appellant has never denied knowledge of the illegal activities; the above reference to "just bec going…"; that Mitchell Reese would not have used the word "just" if the appellant had not been involved with him; there is no evidence that it was only Mitchell Reese involved in illegal activities; there is no evidence of anyone not suggesting that the appellant be kept out of any knowledge of the activities.

83. Certain references in the submissions to other people, including relatives, are not helpful.

84. The respondent continued that the illegal activities of Mitchell Reese could not have gone unnoticed by the appellant because: they are married and live together; he was manufacturing drenches on a large scale and the appellant had a practice of overseeing him making up drenches; he would supply drenches at the races; regular administrations via IV and/or stomach tubing were being completed within hours of racing; the appellant is responsible for administering injections and drenches at the stable; that it would have been extremely difficult for him to have hidden from the appellant his illegal activities in proximity to races; large amounts of money were being transferred as a result of his illegal activities and they shared finances; he was supplying illegal drenches in lieu of payment of training fees for her horses.

85. Accordingly, the respondent submits that the appellant and Mitchell Reese were closely involved in the training of her horses and that the positive swab arose as a result of illegal activities in which she was complicit and/or knew or ought to have known about.

86. In reply, the appellant's submission is that if the animal husbandry practices of the appellant are relevant, it is not open to conclude that the appellant had culpable knowledge or that her lack of supervision is relevant.

87. On the issue of the appellant's silence, it is the submission for the appellant that the principles in Jones v Dunkel do not apply, and that silence cannot lead to adverse inferences.

88. In any event, the appellant submits that this circumstantial evidence is bereft of any probative weight because there are no incriminating statements by her or about her.

89. The respondent replies that those principles are relevant only to the issue of guilt and not to penalty. The submission continues that this is a regulated industry and the appellant seeks a right to participate in it. Further, it is submitted that the circumstantial evidence is left unexplained.

90. On this discrete issue, the Tribunal determines that the evidence for the respondent is left unchallenged and not explained. It is accepted that there was no obligation upon the appellant to answer this evidence, even when the Tribunal is considering whether the privilege of a licence is to be lost.

91. The next issue on objective seriousness is welfare of the horse. The respondent has raised this.

92. The appellant submits there is no evidence for the death of any horse after the administration of cobalt. Dr Major's report confirms that that is his opinion.

93. The appellant continues that the evidence of Dr Scollay in cross-examination was that when a threshold is set by a regulator, it is set with welfare of the horse in mind, therefore that threshold is conservative on the issue of welfare. There is no evidence that the threshold here was fixed with that issue considered.

94. The respondent submits that the experts agree that large doses of cobalt can be toxic in a horse and that this was so determined in Hughes at paragraph 220.

95. In this appeal it is not known what dose was given and it is also the fact that it is not known what product was given. Accordingly, the respondent submits those facts establish a welfare issue.

96. The Tribunal accepts the evidence of Dr Burns that in her study:

> "All horses at all doses displayed signs of discomfort like nostril flaring, pawing, treading, some degrees of sweating, diffuse diaphoresis. They were more severe in the horses at higher doses, but they were observed in all horses."

And later Dr Burns said:

> "When we first administered the dosage of 4 milligrams per kilogram, we had very real concerns that the administration may result in fatality of the horse. The horse displayed paroxysms (runs) of ventricular tachycardia immediately after each dose that was administered to her, and this observation supported a real concern that administration may result in spontaneous cardiac death. There was also significant increase to blood pressure observed at all dosages. If the sample size of horses were larger, we would expect there to be a real possibility of fatality."

97. Noting again that the evidence in this case does not establish what was given and when, it is therefore that consideration must be given to the possibility that very high doses were given proximate to presentation and that would account for the higher reading in the charge at 1700.

98. There is equal concern as to what dose was given before presentation because of the rate of excretion. That is because readings return to baseline levels within 24 hours and therefore it is possible that toxic doses were given.

99. The evidence from the cross-examination of Drs Scollay and Burns relevant to the issue of welfare and the subject readings demonstrates the following matters. Each of the following matters is qualified by the fact that it

is not known when a dose was given, how many doses were given and what was the strength of each dose.

100. It is speculative that at a reading under 5100 there will be documented or observable side-effects because there is no evidence of that. It is submitted, it cannot be concluded it is more likely than not there will be an adverse health effect.

101. Speculation on doses under 5100 arises only to the potential affectation. However, likewise, there is no evidence lower doses do not have an adverse effect. The speculation is that there are immeasurable effects such as blurred vision, headaches and nausea. There is, therefore, the further qualification that these things do not mean that adverse effects are not there.

102. In the context that readings have been as high as 96,000, a reading of 24,000 has demonstrated adverse effects.

103. It is established that high readings, for example 24,000, would lead to an expectation of adverse effects, but those effects would be transitory.

104. Noting that Dr Burns' test gave one horse 125 milligrams over 5 weeks a peak reading of 24,494 was found.

105. The Tribunal again notes it was Dr Burns' evidence in cross-examination that the particular symptoms set out above were observed in all horses. In that study a very high dose was given.

106. The Tribunal concludes, based on that evidence, that a reading of 1700 could only lead to speculation there were adverse effects and therefore welfare issues.

107. The lack of evidence of how, when, why and wherefore a dose was given is such that the Tribunal is not able to elevate the evidence to find that the necessary higher readings, to go beyond speculation, at a possible reading of 24,494 or above, where adverse effects are likely, occurred here.

108. Welfare of the horse is paramount and the Tribunal should be slow to disregard possible welfare issues especially when there is uncertainty on the evidence. Here the speculative evidence does not translate to actual evidence . On the issue of objective seriousness, welfare of the horse is not established on these findings and is disregarded.

109. In any event the only evidence in this case is that welfare considerations are incorporated in the threshold and the classification of cobalt as Class 1.

110. On the issue of objective seriousness generally, and penalty in particular, the respondent submitted in correspondence as early as 16 June 2020 that there be an increased penalty to that considered appropriate by the stewards.

111. The respondent submits that the fresh evidence adduced is compelling and raises the objective serious to the higher end of a scale. That submission is based on the administration of unregistered products, the illegal activities at the stables and the failure of the appellant to respond to any of the fresh evidence or to deny a connection with illegal activities. It is also submitted that the appellant has not assisted the regulator in investigating the illegal activities that have been demonstrated. It is submitted that there is a strong inference that the appellant was involved with illegal activities.

112. In particular, it is submitted that a 10 year penalty is appropriate based on the Hayward principles, which established that the penalty must be higher than a first Class 1 breach, and that an unregistered product was administered to the subject horse, and by engagement in extremely serious activities.

113. The appellant submitted that the respondent had failed to invite the Tribunal to apply the Parker principles and accordingly during the hearing the Tribunal gave no indication that any consideration was being given to that principle.

114. The respondent replied that the Tribunal is not bound to give such warnings or directions and the Tribunal is empowered to vary the decision that was imposed by the stewards. That variation can include a higher penalty.

115. The Tribunal notes that it has considered Parker-type directions in other matters and those principles are applicable to this jurisdiction.

116. As confirmed in Vasili v Racing New South Wales [2018] NSWSC 451, it is proper for the Tribunal to indicate a possible increased penalty so the appellant can consider whether or not to apply for leave to withdraw the appeal. The Tribunal rejects the respondent's submission that these principles are not applicable.

117. The issue is one of procedural fairness and that requires that the appellant be on notice at an appropriate time of the possible outcome of an increased penalty.

118. The appellant replied that the approach advanced by the respondent would require the improper use of the additional evidence, that Vasili does

apply, and that there are no preconditions for an increased penalty in this matter.

119. On this issue, the need for consideration of a Parker-type direction and when it should be given, having regard to the state of the proceedings, will only arise for consideration when all other matters have been analysed in this decision.

120. The Tribunal comes to the following conclusions on objective seriousness and an appropriate starting point for penalty.

121. The breach is serious. The reading is very high. The cause is unexplained. The Tribunal does not accept the appellant's vague denials or ignorance.

122. There has been a husbandry failure in the operation of the stables on behalf of the appellant and in her engagement with Mitchell Reese in a failure of considerable magnitude with gravely serious consequences. Those failures extend to the conduct of criminal activities as well as breaches of the subject rules by Mitchell Reese on the appellant's stable premises. These activities occurred over a considerable period of time and were effectively continuous.

123. However, those husbandry failures must be relevant to the case here, which is a presentation with cobalt in 2017.

124. At the end of the case, the reason for the breach is unexplained. The circumstantial case, as compelling as it is, does not establish a blind eye to events or that they must have been obvious to the appellant. That notwithstanding the appellant gave no explanation in answer to the fresh evidence.

125. There is no actual direct evidence of the appellant's complicity in Mitchell Reese's conduct. The messages are not to and from her.

126. The Waterhouse and Bell principles are applied.

127. As stated, the circumstantial evidence does not establish the necessary link between the conduct of Mitchell Reese and the appellant on the actual presentation facts.

128. But that evidence does mean that a closer scrutiny is required when considering the appellant today and projecting to the future. The appellant does not adduce anything in her favour on that issue.

129. There is no evidence that the actions of Mitchell Reese will not be continued if the appellant is relicensed. That means that this type of breach

could occur again because the appellant does not know what is happening at her stables.

130. The Tribunal considers that the above findings on husbandry failures are very generous to the appellant.

131. The necessary message to be given to the appellant must be framed on the finding that she has not satisfied the Tribunal that the objective seriousness of her breach is lessened by anything she advances.

132. The evidence of Drs Wainscott and Colantonio satisfies the Tribunal that there must have been an administration of something with cobalt in it and that in circumstances where the how, when, why or wherefore are unexplained. The unchallenged evidence is that the reading is consistent with the administration of a concentrated form of inorganic cobalt at some time prior to race.

133. That places the facts and circumstances of this case in category 2 of McDonough. That is, that the Tribunal does not accept the explanation of the appellant and is unable to determine the cause. Accordingly, the appropriate penalty for the conduct must remain and be imposed.

134. The Tribunal notes that the appellant has eliminated welfare as an extra consideration, as found earlier.

135. The Tribunal also notes that the seriousness of cobalt as a prohibited substance is already embraced by its classification as Class 1 in the guideline.

136. On the message to be given to the appellant, the fact of a prior breach of a prohibited substance matter is also covered by the guideline, which provides an increased penalty for subsequent breaches. In any event, that would not be a subjective factor in favour of the appellant.

137. Noting that cobalt raises a breach of the guideline as a Class 1 matter, that guideline does not go on to distinguish between presentation and administration breaches. As stated, a presentation breach is less serious than an administration breach when objective considerations are given to the guideline.

138. A first Class 1 breach attracts a starting point of a 5 year disqualification.

139. No submission has been made that a disqualification is not appropriate.

140. As set out in the references in Hayward and Carroll earlier, that starting point is raised by the fact of a prior Class 3 breach.

141. That prior Class 3 breach led to a 6 month disqualification.

142. The appellant was not long back in the industry from serving that period of disqualification when this breach occurred.

143. The Tribunal determines that a Class 3 prior breach, as applied here, leads to a further period of disqualification on these facts and circumstances of 1 year and 8 months, which takes the appropriate starting point for this breach to 6 years 8 months.

144. That increased period of 1 year and 8 months is in respect of a Class 3, and it might be anticipated that in facts and circumstances similar to these in the future, the Tribunal might determine that if it was a prior Class 2, the increase on a 5 year starting point might be 3 years 4 months.

145. The Tribunal is satisfied that that starting point correctly reflects the circumstances when the McDonough category 2 principles are applied and is appropriate to the facts and circumstances of this case and the objective seriousness of the breach. The Tribunal is also satisfied that independent of the guideline that is an appropriate starting point.

146. The facts and circumstances do not justify a starting point, or final penalty, of 10 years.

147. The parity case arguments of Hughes are clearly distinguished on the facts and circumstances of this case as submitted by the respondent.

148. In further conclusion, the Tribunal notes that the guidelines provide three discretionary factors of “not administer or cause to administer”, “did not know or have reason to believe it was administered” and “taken all reasonable steps to ensure administration was not possible”.

149. The respondent satisfies the Tribunal that none of those guideline factors are in favour of the appellant.

Ground of Appeal (ii) Appropriate discounts, including subjective factors

150. The issue is for the Tribunal to determine discounts, if any, and it does not have to find any error in the determination of the stewards.

151. Two areas are identified on the submissions. Plea of guilty and other discounts.

152. The appellant submits there should be a 25 percent discount for the plea of guilty and a 20 percent discount for the other discretionary factors.

153. The Tribunal notes that for some years it has given a 25 percent discount for an immediate admission of a breach and cooperation with the authorities.

154. Here there was a plea of guilty before the stewards and there is no evidence that the appellant did not cooperate with them on the face of the evidence available to the Tribunal. At the stewards' inquiry, immediately on the charge being read, the appellant pleaded guilty.

155. Therefore, the 25 percent discount which the stewards found appropriate, is enlivened. The Tribunal notes that the guidelines provide a reduction on compelling evidence for an admission of an offence.

156. The respondent submits that no discount should be given because of the fresh evidence which relates to husbandtry activities and the fact that the appellant did not assist the respondent with matters relating to those activities.

157. The respondent also submits that the plea of guilty was a superficial one.

158. The respondent relies upon Kerridge of 11 September 2009 where the Tribunal stated:

> "If it is merely a plea of guilty without cooperation, the Tribunal would not give a 25 percent discount."

159. The appellant replies that such an approach would not distinguish the stewards' investigative and curial functions.

160. The appellant particularly asserts that the fresh evidence has not led to any charge of the appellant or her being interviewed.

161. In closing submissions, the respondent submits that there is no mandatory requirement to give a discount for a plea of guilty and it is a matter of discretion. The respondent accepts that ordinarily some discount will be allowed for the utilitarian benefit of a plea of guilty. But it is not the fact that a discount must always be applied. The respondent continues that there is no "statutory" sentencing provision applicable to this matter. Accordingly, it is submitted that criminal law principles can be disregarded.

162. The appellant concluded submissions on the basis that the criminal law's statutory provisions are applicable and a discount must be given.

163. The Tribunal finds that there was some utilitarian value in the early plea of guilty, despite the fact that the matter has raised an absolute offence breach. A fully contested case was not run by the appellant.

164. The Tribunal determines that the appellant has pleaded guilty and cooperated to the extent required. Therefore, a 25 percent discount is appropriate on the facts and circumstances of this case and consistent with numerous Tribunal determinations.

165. Future cases may well require consideration of whether in absolute offence matters a full 25 percent discount is always appropriate. However, each case will be considered on its own facts and circumstances.

166. The Tribunal turns to the other subjective factors that must be considered.

167. The appellant gave no evidence to the Tribunal and called no fresh character references.

168. The appellant has a prior prohibited substance presentation. This has been taken into account on issues of objective seriousness and there is therefore no further loss of appropriate discounts because of that fact.

169. The only real evidence that is available on her subjective circumstances was that given to the stewards at her inquiry, which was over 3 years and 7 months ago.

170. The respondent's then submission identified these then subjective factors as: the appellant then worked at the Vineyard Hotel 5 to 6 days per week; she was undertaking a 12-month course in aged care; she lives with family members and Mitchell Reese at her parents' property; 90 percent of her friendships are in the industry; she shares finances with Mitchell Reese; she does not pay rent; she owned her car outright; she had expenses of $200 per week and earned a bit more than $20,000 per annum from harness racing.

171. There is nothing in those facts, and no others have been identified, that would justify any further discretionary discount.

172. The Tribunal notes the references are from 2017 and none are from industry representatives.

173. The first reference is from Keiran Knight of 10 May 2017, who states that she had known the appellant personally for 10 years and finds her very likeable and a person who has based her life around horses. The referee has never witnessed anything illegal around the appellant's stabling complex and the referee fully supports her.

174. The next is by veterinarian Dr Robson of 9 May 2017, who states that he has known the appellant for more than 15 years and has carried out veterinary work on her horses. He says she was a very hard worker, very friendly and cooperative and honest. He had discussed the racing rules with her and she had never made any inquiries or requests of him regarding illegal substances.

175. Those references are entirely unhelpful in assessing the appellant today and enabling the Tribunal to look to the future.

176. No direct hardship is identified as current.

177. The appellant did not reply to the respondent's submissions on these deficiencies.

178. The Tribunal concludes it is entirely bereft of current evidence of a subjective nature. The old evidence is taken into account.

179. The Tribunal notes that the appellant's offence report dates from 2009 for driving offences. There is no other evidence of her licence history. There is nothing to find that elevates these facts to a discount.

180. For example, there is no evidence of any assistance to the industry by the appellant and, as stated, no licensed person has spoken for her.

181. The Tribunal does not find that the 20 percent discount which the stewards found to be appropriate is available to the appellant on those facts and circumstances.

182. The only discount is for the admission of the breach.

DETERMINATION

183. The Tribunal determines a starting point of penalty of 6 years 8 months and applies a 25 percent discount for the admission of the breach. That is a discount of 20 months, leaving a disqualification of 5 years.

184. No further discount is given for subjective circumstances.

185. The Tribunal noting that that is the same penalty, however achieved by different reasonings, as the stewards found appropriate, that no Parker direction is required.

186. That finding disposes of ground of appeal (v).

187. The severity appeal is dismissed.

188. The Tribunal notes that the stewards commenced the disqualification on 14 March 2017 and no submission is made that a different starting point should be applied.

189. The Tribunal imposes a period of disqualification of 5 years, to commence on 14 March 2017.

Appeal Deposit

190. As the proceedings have concluded on the basis of written submissions and no submissions have been made on the appeal deposit, it is necessary for that to be considered.

191. The Tribunal notes that upon finalisation of an appeal orders must be made in respect of the appeal deposit.

192. The Tribunal notes that this was an appeal on severity and that has been entirely unsuccessful. In ordinary circumstances, that would lead to an order for forfeiture of the appeal deposit. However, the appellant has not been given an opportunity to be heard on this issue.

193. Accordingly, unless the appellant makes an application for a refund of the appeal deposit, in whole or in part, within seven days of receiving this decision, then the Tribunal will order the appeal deposit forfeited. If such an application is made and reasons are provided, then the respondent will be invited to reply.