RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL DB ARMATI

EX TEMPORE DECISION

WEDNESDAY 20 DECEMBER 2017

LICENSEE REX SPENCER

AUSTRALIAN HARNESS RACING RULE 231(1)(d) X 2
Charge 1- All grounds
Charge 2- Severity Appeal

DECISION:

1. **Charge 1- Appeal dismissed**
2. **Charge 1 - Penalty of disqualification of 1 month**
3. **Charge 2- Penalty of disqualification of 21 days**
4. **Penalties to be served concurrently**
5. **50 percent of appeal deposit refunded**

1. Licensed stablehand Mr Rex Spencer appeals against decisions of the stewards of 15 November 2017 which resulted in him receiving concurrent periods of disqualification of three months.

2. The stewards dealt with him for two breaches of Rule 231(1)(d), which is in the following terms:

> "A person shall not abuse anyone employed, engaged or participating in the harness racing industry or otherwise having a connection with it."

The first particulars were that:

> "you, Mr Rex Spencer, did abuse Mr Robin Hosking at Newcastle Harness Racing Club on Saturday, 5 August 2017, in which you used words to the effect of, 'you fucking dog'."

The second particulars were that:

> "that you, Mr Rex Spencer, did abuse Mrs Christine Hosking at Newcastle Harness Racing Club on Saturday, 5 August 2017, in which you used words to the effect of 'don't stalk me, you bitch' and 'don't ever stalk me, you fat piece of shit'."

3. In respect of each of those matters he pleaded not guilty before the stewards. In lodging his appeal, he maintained that he did not breach the rules. At the commencement of the hearing, it was indicated to the Tribunal that in respect of the first allegation he maintained that he did not breach the rule. In respect of the second allegation, the pressed particulars remained as "don't stalk me, you bitch" and, "don't ever stalk me, you fat piece". The reason for that was that an audio recording was taken and it was not possible to hear all of the words on that short audio recording, and the concession made. he admitted those amended particulars.

4. In respect of the first matter, therefore, the hearing has proceeded as a defended matter. In respect of the second matter, it is to be a penalty decision, but there is a contest on facts and, for the purpose of practicality, the Tribunal will make its findings of fact in respect of both matters. To summarise it, therefore, in respect of the second matter, there is an admission of the breach of the rule in the term particularised. The issue for decision is whether certain words were uttered prior to the incident escalating. The Tribunal will explain that more in due course.

5. The evidence has comprised the record of interview which was conducted with various participants on 5 August 2017, the day in question, together with the stewards' inquiry on 15 November 2017, and oral evidence has been given by witnesses Mrs James, Mr Hosking, Mrs Hosking, the appellant, the appellant's daughter Ms Laura Spencer, and Mrs Smith.

6. To put the matters in context, there has been a history of issues between Mr Spencer and each of the Hoskings. The way the case has unfolded, the Tribunal has

not gone into those previous matters as it was an agreed fact that there was a history.

7. The first matter requires a determination whether the appellant said the words "you're a fucking dog" to Mr Hosking.

8. The appellant's case is simple on this matter. Because of the past history he says he does not talk to Mr Hosking. If he wished to say the words alleged against him, he would say it to his face. It is a simple and blank denial.

9. The incident arose at a race day meeting. At that point the relevant people were at or about the marshalling and/or betting area. Mr and Mrs Hosking were walking a distance apart of probably five or six feet, as it was described in the evidence. The appellant was walking adjacent to a Mrs James. Mr Smith was in a different area watching a race with the appellant. The Tribunal will return to that finding.

10. Mrs James cannot be described as an independent witness as she is a friend of Mr and Mrs Hosking. The issue becomes, as Mrs James walked next to the appellant with Mr Hosking some eight feet or so away and Mrs Hosking in front of him, did he utter the words "you're a fucking dog", and those words directed to Mr Hosking? Mrs James was in a position to hear those words uttered and she says that is what happened. Bearing in mind a total denial from the appellant.

11. The issue involving the two matters led to another incident, which is charge two. After that, the appellant had immediately gone to the stewards to report Mrs Hosking's behaviour. Ms Spencer gave evidence in relation to that inquiry, but in relation to charge two. The stewards were talking later in that first inquiry to Mrs Hosking, as the appellant had been unhelpful about what he said Mrs Hosking said to him. Mr Hosking was present with Mrs Hosking. The stewards were questioning Mrs Hosking about what had happened. Mr Hosking volunteered another incident- the first incident.

12. At this point the stewards had not known anything about it. It is apparent that nothing about it has been reported to the appellant or Ms Spencer. Mr Hosking volunteered to the stewards that the appellant had said, "Oooh, you fuckin' dog", and had kept walking. He described it as out of the marshalling area and that each of them was walking. Mr Hosking said he ignored him. That was reported by Mr Hosking soon after the incident is said to have occurred.

13. At the stewards' inquiry it is apparent that the appellant had been given no notice that this possibility would arise for him. It was an inquiry. He had not been charged. There is no criticism. Mr Hosking on this occasion described it as walking back through the betting area and with the appellant walking the other way with Mrs Smith. With the transcript corrected, Mr Hosking told the stewards that the words "you're a fucking dog" were uttered to him. It might be noted that in oral evidence today Mr Hosking maintained that version, and in oral evidence the appellant maintained his denial.

14. Mrs James had not been put on notice that the inquiry was taking place nor that she would be spoken to. The expression used in the addresses was she was cold-called. Not having refreshed her memory in respect of the matter, she gave her evidence. She has changed her evidence from that which she gave to the stewards' inquiry to that which she gave in oral evidence to the Tribunal. The change is instead of the words "he's just a dog", it became "a fucking dog", the difference being the obvious word that has been added.

15. To deal with that point quickly, Mrs James was cross-examined as to the reasons for her change of evidence. Having been cold-called, she gives evidence to the Tribunal today that when she took that call she was out at lunch with friends in a hotel. She is not a person that uses the "fucking" word, it appears, and in the course of her conversation with the stewards at their inquiry, she was not prepared to utter that word before her friends and therefore to the inquiry. There was much questioning about that and as to when she formed that opinion and who she told and what conversations took place.

16. In simple terms, to be brief, the Tribunal accepts the explanation she has given for that change in her evidence. It was the only fashion in which her evidence was in any way subject to question and it of itself was not a reason, or taken in conjunction with anything else, to reject her evidence.

17. She was quite adamant that immediately afterwards she stood with the Hoskings and each of the Hoskings said they had not heard what was said. That leaves the corroborative evidence of Mr Hosking, his direct evidence, at risk. At the end of the day, however, if Mrs James is accepted, it does not matter whether she was corroborated or not. The case is capable of being established on the basis that the appellant uttered the words based upon an acceptance of Mrs James' evidence. In that regard she was quite clear in her oral evidence, she not having been asked about it, nor did she volunteer it, at the stewards' inquiry, that is what happened. She told Mr Hosking the words that were directed towards him. It therefore provides a reason why Mr Hosking, when he first spoke to the stewards on 5 August, had a reason to know what was said even though he did not hear it as is suggested.

18. Mrs Hosking, in questioning today, could not definitively rule out that that was a correct state of affairs, namely that Mr Hosking did not hear what was said. She did not recall Mr Hosking saying that he did not hear it. Quite fairly, in accordance with the usual cross-examination, she was not prepared to advance that Mrs James was wrong about that.

19. As to Mrs Smith's evidence, she was simply in a different place. It is quite apparent from the evidence of Mr and Mrs Hosking and Mrs James and the appellant that they were all walking when these words were said to have been uttered. It is quite apparent that they were walking at or about a marshalling area and/or the betting ring and precision is not necessary. All of them say that. Mrs Smith stands alone. She was adamant that the appellant said nothing, let alone the words alleged against him. But her evidence was highly coloured:

> "You said apparently they walked past you. Do you remember them walking past or?"
>
> "Um, no, I don't. And I can't remember it because I didn't think I would have to remember it."

That is not the only reason why her evidence carries no weight. She also said:

> " … apparently they were walking back … I don't know. They walked past."

20. That is Mr and Mrs Hosking walked past. Because she had herself and the appellant standing on the grass watching a race together. At no time was she walking, on her evidence, with the appellant, or walking with him at a time he might have uttered the words. For that reason, whilst her evidence is not rejected, it simply has no weight because, whilst it leaves open the question was she at any other time walking with Mr Smith, she is not able to say.

21. Therefore, there is the evidence of Mrs James. Is it to be accepted against the direct denials of the appellant?

22. There is no medical evidence before the Tribunal about the appellant. He gives oral evidence that he suffers from a medical condition and that he takes medication. He had had three beers. There is no evidence that three beers alone over a period of time, or three beers on unknown medication, may have caused any adverse affectation in the appellant.

23. But there is an issue with the appellant's own evidence about his capacity of recall. As he himself said to the stewards (page 5), as to whether he had spoken to Mrs Hosking – and this is the second matter that is relevant because it all occurred on the same day:

> "I don't believe I did, but if I did – see, I've had a bit of trouble, I'm off work, I'm on medication" –

and I delete the following words, then he said –

> "and if I've said something, I don't remember saying it, but I try not to speak to them."

24. That, to the Tribunal, provides a substantial qualification about Mr Spencer's recall of issues on the relevant occasion. The Tribunal accepts the evidence of Mrs James for the reasons of credit previously outlined, in particular her capacity to promptly recall without any prior warning an incident, and, for the reasons expressed, a subsequent correction of that recall.

25. In those circumstances, uncorroborated on the Tribunal's ultimate determination by Mr Hosking, that evidence is sufficient to satisfy the Tribunal to the Briginshaw standard that the appellant uttered the words alleged against him to Mr Hosking. In

relation to charge one not being an issue, the Tribunal is satisfied that that is abusive language and the breach of that rule is found established.

26. The second matter is in respect of, as described, the penalty issue and a requirement to make a finding of fact as to the grounds upon which penalty would be determined, it not being in dispute, as read out, that the balance of the particulars as now pressed have been established. That of itself is sufficient, and is not contested again, to comprise abusive language. The issue is did the appellant utter the words, “here comes the fucking bitch” to Mrs Hosking before the second matter escalated?

27. To put the escalation in context, there is no doubt that Mrs Hosking said, “Are you talking to me?” and at the time was holding a phone which she was using to record, by attempting to use a camera unsuccessfully but producing some 10 seconds of audio, the behaviour of the appellant towards her because she described knowing about the history of it, she had had enough of his behaviour and wanted some evidence to prove it.

28. At that time the appellant was walking in a car park area. The appellant was walking with his daughter. They had walked past the vehicle of Mrs Hosking but had not seen her. She was adjacent to a driver’s door. There was a lot of evidence about where cars were parked and where their doors were and so on. It is not necessary to canvass that in view of the other admissions.

29. The evidence establishes that the appellant and Ms Spencer were either together or one was in front of the other. It does not matter, because they were sufficiently close together to both have heard and observed all that they said they did. It is the fact that the appellant denies uttering any words at all and he is corroborated by Ms Spencer. In that regard, each of them gave consistent versions at all times.

30. In particular, Ms Spencer was questioned about it by the stewards on 5 August because Mr Spencer, the appellant, had declined to tell them anything, having got himself in a cranky mood and attended the stewards to report Mrs Hosking. Mrs Hosking was either a couple of metres behind them and walking towards them, and they either stopped or kept walking – again, it does not matter. It is a question of whether, prior to Mrs Hosking speaking the words earlier set out, the appellant uttered his words.

31. There is no doubt that the appellant and Ms Spencer were talking. They were discussing a horse that had just raced. There is nothing that might be gleaned from such a conversation which would have any equivalent of might have been overheard etc in respect of the words for which a finding is required. It is, therefore, a direct conflict between the two Spencers and Mrs Hosking. There are no other witnesses.

32. Mrs Hosking spoke to the stewards on 5 August and referred to being called “a fat dog”, not close to the words that she subsequently informed the stewards about, namely, “oh, here’s the fucking bitch” or “here comes the fucking bitch”, as she said transcript page 12 stewards’ inquiry. It is interesting her response was, “Are you speaking to me?”. Because if the words she alleged were uttered at her – and it is not in dispute they are abusive – it is rather a strange response to such abusive

language. “Are you talking to me?”, or not, “Why are you abusing me?”, or, “Why have you used words like that?”, or anything. But in any event, that is what he apparently said.

33. There is the fact that he had, on the findings now made, abused Mrs Hosking’s husband earlier and without provocation other than the past history. And on the aspect of history, there is a history between them. Apparently it caused him to react to Mr Hosking. Why would it not cause him to react to Mrs Hosking in a similar way on the same occasion? What he said to Mr Hosking was not entirely unequivalent to what he said to Mrs Hosking. It could be that a combination of his general demeanour, to put it in imprecise terms, on the night caused him to again react in the way he did.

34. The Tribunal makes no adverse finding because of the appellant’s apparent reluctance to accept what patently obviously was on the tape in the witness box today. Having denied that he said certain words, he recanted on that when questioned by the Tribunal. Nothing turns on it in the end.

35. The issue really becomes the acceptance of the evidence of Mrs Hosking as against the corroborated evidence of Mr Spencer, the appellant, because of the evidence of Ms Spencer, his daughter. Firstly, she is not an independent witness, obviously. And, secondly, she has a reason to, perhaps, assist her father. However, her evidence has been consistent throughout. She has not been shown to be either untruthful or failing. She has not done other than concede that the appellant subsequently abused Mrs Hosking. She was quite open about that. In those circumstances, there is no reason that the Tribunal discerns to reject her evidence. Allowing for the limitation of corroboration of a relative, the Tribunal is nevertheless satisfied that it provides to the appellant a degree of corroboration.

36. The evidence of Mrs Hosking is not rejected. But on a Briginshaw test, particularly on a matter of a breach of a rule which can carry a loss of a licence privilege, the Briginshaw standard for that greater degree of scrutiny is activated.

37. In those circumstances, the Tribunal cannot be satisfied to the Briginshaw standard that the words said to be uttered by the appellant to Mrs Hosking before he reacted are established.

38. Those then are the findings. That leaves for decision the aspect of penalty on both matters.

SUBMISSIONS MADE IN RELATION TO PENALTY

39. The Tribunal has found the appellant has breached Rule 231(1)(d). The range of penalties provided for in the rules are enlivened. The Tribunal has given reasons in respect of the first matter in making an adverse finding. It is necessary to comment upon some of the submissions made. The abusive conduct, which has been found, is, as the word “abuse” dictates, one of utterance of words. Those words, expressed at a race meeting in the presence of licensed persons and possibly others, is such that a censure is required in respect of it.

40. The second matter involved conduct directed towards a licensed person which involved, again, intemperate language. There is no evidence of others being possibly affected directly by it. They arose in circumstances where, whilst the word "provocation" has not been used, it might be said that the actions of Mrs Hosking, whether reacting as she might have believed to abuse towards her or otherwise driven by a history with the appellant, has caused her in a somewhat invasive fashion to seek to film him or at least record him.

41. That has caused him, particularly having regard to his past history and his personal circumstances, to use the Tribunal's words, lose it. It was more than just becoming cranky. The tirade of abuse that he engaged in was unacceptable for a licensed person towards another licensed person at a race meeting.

42. As the submissions have touched upon for the appellant, in each case his conduct desisted. Rather extraordinarily, after the second instance he took himself to the stewards' room to report Mrs Hosking. It is quite apparent from his crankiness, as it might be described, and his demeanour, that his attempt to report Mrs Hosking's conduct was an miserable failure. In fact, he was almost thrown out of the stewards' room because of his failure to do anything other than not answer their questions.

43. The continued conduct is the issue in this matter. The appellant's history is relevant for two reasons. One, it has some substantial factors in its favour but, secondly, it has a regrettable recency in relation to similar conduct. In November 2016 he was suspended for six months for conduct directed towards a steward. That only expired on 25 May 2017. In addition, as recent as 19 May 2017, he was the subject of three series of breaches of the same rule for which he is to be dealt with today, for conduct towards licensed trainers. In those matters he received monetary penalties, parts of which were suspended. It is acknowledged that those matters will require him now, as he has breached the terms of the suspension, to pay the balance of fines. In addition, he has a trackwork driving breach in November 2016 in which he was subject to penalty.

44. The parity cases, principally that of Germon, which has been handed up and which involved an appeal decision by the Tribunal, can, in the Tribunal's opinion, be distinguished on the basis that the facts are different. In relation to the national breaches under the rule which have been handed up for matters between August 2016 and the present time, they mostly involve this appellant. But setting those aside, there have been fines only imposed.

45. This is a civil disciplinary penalty, not a criminal matter. The criminal law does not apply. The Tribunal has to assess the appellant as it sees him today and project into the future. Whilst it is important to recognise that he is not to be the subject of a penalty on his conduct here because of his conduct in the past, it is necessary to reflect on what message he has to receive as to whether or not he will change his ways. It is apparent from his past and recent conduct that his falling into disfavour again so soon after he was last dealt with, and while subject to suspended penalties, is not an indicia of him having reformed his ways or understood of a need to do so.

46. There is, on the positive side of the equation for him, the fact that he has admitted, late as it is and partial as it was, one of the two matters. He is entitled to a discount for that and shall receive it. The Tribunal assesses the discount, it having only been an admission on the day of the hearing, at 10 percent.

47. The other aspect is that of character. In that regard, licensed person Mr Smith, who has had substantial involvement for many years with the Maitland Harness Racing Club and has known the appellant for 15 to 20 years, speaks well of him. In particular, his work as a former director, now lost to him as a result of penalties, of the local racing club, and the voluntary work he has carried out in a selfless and at-own-cost basis for a substantial period of time for that club. Those matters are again taken into account as matters in his favour.

48. There is also the fact of his medical condition, which will not be read into this record, and an understanding, based on the medical report of Dr Hariharan of 7 April 2017, whilst dated, which reflects upon need for association with horses as part of his ongoing return to good health.

49. At the end of the day, these matters are not set aside as being of no consequence. They are not matters which would warrant, in the Tribunal's opinion, any penalty possibly less than an aspect of fine, nor is the suggestion made. Those other matters are set aside.

50. The question then becomes, having regard to this conduct, having regard to a projection to the future, is it appropriate that he maintain the privilege of a licence having regard to his continued breaching of the rules for similar conduct? The Tribunal reflected on the need to give him a personal message. It is also important, in the Tribunal's opinion, to make it quite clear to licensed persons at large and to those outsiders who view this industry that if a person continues to breach this particular type of conduct-related rule, that their privilege to be associated with it must be questioned.

51. Is it that this conduct activates that questioning? In the Tribunal's opinion, it does. He is on a suspended penalty, he has just completed a suspended penalty, at the time of this conduct, for conduct-related matters. These are conduct-related matters. There are two of them. In those circumstances, the Tribunal is of the opinion that the message that must be given to him is a period of disqualification. Having regard to the lower end scale of these matters, the Tribunal does not agree with the stewards' assessment that a period of three months is appropriate.

52. In respect of this matter, the Tribunal has determined that a period of disqualification in respect of the first matter of one month is appropriate. In respect of the second matter, a period of disqualification of 21 days is appropriate. Having regard to the conduct occurring on the same occasion and within reasonable proximity to each other, even though they were separate incidents, those matters should be served concurrently.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

53. An application is made for partial refund of the appeal deposit. Whilst this was an all-grounds appeal, in respect of one matter he has been unsuccessful but partially successful on penalty. In respect of the second matter, he has admitted it. Having been partially successful on penalty, in those circumstances, 50 percent of the appeal deposit is ordered refunded.