IN THE RACING APPEALS TRIBUNAL

SCOTT WADE
Appellant

v

HARNESS RACING NEW SOUTH WALES
Respondent

REASONS FOR DETERMINATION

Date of hearing	**3 February 2025; 6 February 2025 (further submissions); 12 February 2024 (further submissions).**
Date of determination	**4 March 2025**
Appearances	**Mr P Morris for the Appellant**
	Ms C Chua for the Respondent

ORDERS

1. **The appeal is dismissed.**
2. **The disqualification imposed by the Appeal Panel of 1 year and 10 months is confirmed.**
3. **The disqualification is to commence on 21 May 2024.**
4. **The appeal deposit is forfeited.**

INTRODUCTION

1. By a Notice of Appeal filed on 1 November 2024, Scott Wade (the Appellant) has appealed against a decision of the Appeal Panel (the Panel) of Harness Racing New South Wales (the Respondent) to disqualify him for a period of 1 year and 10 months for a breach of r 190 of the Harness Racing Rules. That decision was a confirmation of the penalty imposed at first instance by Stewards.

2. The charge brought against the Appellant, to which he pleaded guilty, was in the following terms:

> *That the Appellant, licenced trainer of the horse Change of Mind, did present that horse to race at Penrith on Thursday, 5 January 2023, not free of a prohibited substance, namely Levamisole, as reported by two laboratories approved by Harness Racing New South Wales.*

3. The Appellant maintained his plea of guilty on the hearing of the present appeal, such that the only real issue is that of penalty. However, as will become evident, there are a number of other matters which have emerged from that issue which go to the question of how that penalty should properly be assessed.

4. For the purposes of the appeal the parties prepared a Tribunal Book (TB) containing all relevant documentary material. No further evidence was tendered.

THE FACTS OF THE OFFENDING

5. I am grateful to the parties for providing me with a Statement of Agreed Facts in the following terms.[1]

> 1. *The Appellant, Mr Scott Wade, was at all material times licensed as a B grade trainer with Harness Racing New South Wales (HRNSW).*
>
> 2. *On 11 August 2020, the Appellant presented the horse Better Bragger to race at Tabcorp Park Menangle with levamisole in its system (First Offence). Better Bragger placed second in that race.*

[1] TB 52 – 53.

3. *On 31 August 2020, the Appellant presented the horse Manchego to race at Tabcorp Park Menangle with levamisole in its system (Second Offence). Manchego won that race.*

4. *On 20 August 2021 a Stewards Inquiry was conducted in relation to the First and Second Offences.*

5. *On 20 August 2021 the Appellant was disqualified by Stewards for a period of 9 months for each of the First Offence and the Second Offence, to be served concurrently.*

6. *On 25 August 2021, the Appellant appealed from the 20 August 2021 Decision to the Racing Appeals Tribunal in respect of breach and penalty and applied for a stay of proceedings.*

7. *On 7 September 2021, the Tribunal granted the Appellant a stay of the proceedings.*

8. *On 14 December 2022, the Tribunal heard the appeal in relation to the First and Second Offences.*

9. *On 5 January 2023, whilst operating in the industry on a stay:*

    (i) the Appellant presented the horse Change of Mind to race in Race 6, the SKY RACING ACTIVE PACE (2125 metres), at Penrith (Relevant Race);
    (ii) Change of Mind won the Relevant Race; and
    (iii) a post-race urine sample (N268389) was obtained from Change of Mind (Swab).

10. *On 16 January 2023, the Tribunal issued the breach decision (Wade No. 1).*

11. *On 1 March 2023, the Australian Racing Forensic Laboratory (ARFL) confirmed the presence of levamisole in the Swab taken from Change of Mind at the Relevant Race.*

12. *On 2 March 2023, the Tribunal handed down its decision on penalty in respect of the First and Second Offences and disqualified the Appellant for a period of 9 months (Wade No. 2).*

13. *On 8 March 2023:*

    (i) the Respondent notified the Appellant of the detection of levamisole by the ARFL in the Swab obtained from Change of Mind at the Relevant Race (Third Offence); and
    (ii) a stable inspection was conducted at the Appellant's property in respect of the Third Offence.

14. *On 20 March 2023, Racing Analytical Services Limited (RASL) in Victoria confirmed the detection of levamisole in the Swab obtained from Change of Mind, and issued a Certificate of Analysis bearing Certificate No. RS23/04419.*

15. *On 31 January 2024 and 15 April 2024, the Respondent conducted an inquiry in relation to the Third Offence (Inquiry). At the conclusion of the Inquiry, the Appellant pleaded guilty to the charge.*

16. *As at 31 January 2024, the Appellant's performance as a trainer had him see 1,284 starts, with stakes totalling $496,625.*

17. *On 21 May 2024, Stewards disqualified the Appellant for a period of 1 year and 10 months for the Third Office (Stewards' Decision).*

18. *By Notice of Appeal dated 23 May 2024, the Appellant appealed from the Stewards' Decision in respect of penalty only, to the Harness Racing New South Wales Appeals Panel (Panel), (HRAP Appeal).*

19. *A hearing was conducted before the Panel on 15 October 2024 at the conclusion of which the Panel reserved its decision.*

20. *On 25 October 2024, the Panel dismissed the HRAP Appeal (HRAP Decision).*

6. It is necessary for me to supplement these agreed facts by reference to three further matters arising from the evidence.

7. The first, is that on 23 February 2023 (i.e. after *Wade No. 1* but before *Wade No.2*), the Appellant made a Statutory Declaration, obviously for the purposes of having its contents taken into account on the issue of penalty for the first and second offences. In that Declaration[2] he set out the steps he had taken in an effort to ensure that there was no repetition of the offending, including ensuring that:

    (i) any wormers he used did not contain Levamisole;
    (ii) the wormers were not stored in the same location as the horses, or their treatments;
    (iii) neighbours took steps to keep sheep away from his property and his horses;
    (iv) the fences around his property were properly maintained to prevent sheep entering from neighbouring properties;

[2] TB 168 at [18].

(v) steps were taken to minimise the chances of cross-contamination;

(vi) he wore double gloves when treating horses;

(vii) the store room and feed room were kept separate;

(viii) substances were maintained in a secure cupboard or refrigerator that was secured with a padlock;

(ix) substances were correctly labelled;

(x) no human medication was left at the stables;

(xi) there was a correct record of treatment administered to horses;

(xii) horses would not be wormed within 7 days of competing; and

(xiii) he consulted his treating Veterinarian about substances and their withholding periods.

8. The second matter is that in *Wade No. 2,* this Tribunal (differently constituted) took into account that evidence when determining penalty. Although the Tribunal did not refer to each and every one of the matters enumerated by the Appellant in his Declaration, it summarised such evidence as follows:[3]

> *Critically, [the Appellant] refers to the numerous changes he has effected in his husbandry practices, and they include: no wormers to contain levamisole; wormers not in the same location as horses; spoken to neighbours to ensure they keep their sheep away from his property; fenced his property to ensure other animals cannot get near the stable; implementation of clean and [sic] decontamination areas; double-gloving when treating horses; separate storing room from feed rooms and swabbing areas; no human medication in the stables; correctly recording all treatments; not worming within seven days of competition and speaking to his vet about substances and withholding periods.*

9. In assessing penalty, the Tribunal had regard to the fact that:

(i) the Appellant's husbandry failures were substantial;[4]

(ii) they were exacerbated by the fact that he failed to take into account the Notice to Industry published in 2012 about Levamisole;[5]

[3] TB 245 at [75].
[4] TB 251 at [118].
[5] TB 251 at [119].

(iii) the Declaration set out the matters which he had put in place with a view to reducing the possibility of the commission of a further offence;[6]

(iv) it was necessary, in assessing penalty, to give primacy to general deterrence;[7]

(v) the "*objective message*" was reduced by the Appellant's changes to his husbandry practices, because those changes reflected his understanding of his *"possible wrongdoing"* and it reduced the need to ensure that he did not repeat such conduct in the future.[8]

10. I should say that the matters to which the Tribunal alluded in (v) above arguably conflate considerations of general deterrence with those of specific deterrence. I also do not understand the reference to the Appellant's *"possible"* wrongdoing, given that in *Wade No. 1* the Tribunal had found that the offending was established.

11. The third matter is that the evidence before me includes (at least notionally) footage taken from the Appellant's stables two weeks after he made the Declaration.[9] Ultimately, that footage was not played in the course of the hearing. This was principally because Mr Morris, who appeared for the Appellant, conceded that the footage confirmed that there was no padlock on the refrigerator or the cupboard (although it appears that the storage room in which they were contained was able to be locked).[10] Mr Morris also appeared to concede that at least one label of a substance was partially obscured.[11] At least some of matters set out by the Appellant in the Declaration are not consistent with those concessions.[12]

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[6] TB 251 at [121].
[7] TB 251 at [122].
[8] TB 251 at [123].
[9] Transcript 22.31.
[10] Transcript 24.46 – 25.19.
[11] Transcript 10.29.
[12] At [6](viii) above.

THE ISSUE ON THE PRESENT APPEAL

12. The sole issue on the present appeal is that of penalty, the essence of the Appellant's position being that the penalty imposed is too severe.[13] In support of that position, the Appellant relied upon four Grounds of Appeal[14] which asserted that the Panel erred in:

    1. adopting a 5 year starting point;
    2. finding that personal deterrence was a relevant consideration;
    3. finding that the Appellant's offence history was relevant to his subjective case; and
    4. finding that the fact that the offence was committed during the period of a stay was a relevant factor.

13. In circumstances where this appeal proceeds before me *de novo,* filing grounds of appeal in those terms is arguably otiose. That is simply because in order to succeed on the appeal, the Appellant is not required to demonstrate that the Panel fell into error. Consistent with that, it is no part of my task to determine whether or not the Panel did so. My task is to analyse the evidence and determine the appropriate penalty. However, in circumstances where a considerable amount of time was devoted to the matters raised in [1] – [4] above, I have addressed them below.

SUBMISSIONS OF THE PARTIES

Submissions of the Appellant

14. The written submissions of the Appellant[15] addressed each of the matters raised in the grounds of appeal.

[13] Transcript 2.37.
[14] TB 27.
[15] Commencing at TB 28.

15. As to [1] above in relation to the starting point adopted by the Panel, it was submitted that:[16]

    (i) it was evident that the Panel had regarded the Appellant's disciplinary history as an aggravating factor, an approach which was contrary to authority (although it was accepted that the offending fell into the mid-range);

    (ii) as a consequence, the objective seriousness of the offending had been impermissibly increased.

16. As to [2] and [3] above, it was submitted that:[17]

    (i) the Appellant's disciplinary history was not relevant to an assessment of the objective seriousness of the offending;

    (ii) there was no correlation between the Appellant's history of offending, and the promotion of the public interest; and

    (iii) principles of specific deterrence had no application.

17. As to [4] above, it was submitted that:[18]

    (i) the fact that the Appellant had offended whilst a stay was in place was irrelevant to the question of penalty, because there was no evidence of any intention, knowledge or recklessness on his part in the commission of the offence, given that such offence was one of absolute liability;

    (ii) taking into account the fact that the offence was committed whilst a stay was in place amounted to the *"inappropriate use of a criminal penalty in a civil regime"*.

[16] TB 28 [1.1] – TB 29 1.7].
[17] TB 29 [2.1] – TB 30 [2.7].
[18] TB 30 [3.1] – TB 31 [3.8].

11. It was submitted[19] that in all of these circumstances, the appropriate course was for me to:

    (i) adopt a starting point of 15 months;
    (ii) apply a discount of 25% to reflect the plea of guilty and the Appellant's subjective case; and
    (iii) impose a disqualification of 10 months.

12. Mr Morris also made a number of oral submissions. They included what was, in effect, a submission that it was a necessary element of the process of assessing penalty that a notional starting point be adopted.[20]

13. Mr Morris also made a number of submissions as to how repeated offending is to be taken into account. On the one hand, he appeared to accept that prior offending was (as he put it) not "*entirely irrelevant"* to an assessment of penalty.[21] However, he submitted that because the Appellant's prior offending was for offences of absolute liability, it was of limited or no weight.[22]

14. Mr Morris further submitted that it would be an error in approach to increase the objective seriousness of offending by reference to the Appellant's history of offending. In this regard, he relied upon what he referred to as *"significant criminal principles"* which he submitted ran contrary to such an approach.[23]

15. In terms of the Appellant's subjective circumstances, Mr Morris cited:[24]

    (i) the Appellant's age;
    (ii) his service to the community as a firefighter, which resulted in a diagnosis of PTSD;

[19] TB 32 at [4.1].
[20] Transcript 6.14 – 6.25.
[21] Transcript 4.32; 7.25.
[22] Transcript 4.43; 7.35.
[23] Transcript 6.36 – 7.9.
[24] Transcript 8.11 and following.

(iii) his role as carer of his daughter-in-law and her three children; and

(iv) the early plea of guilty which had been entered and which entitled the Appellant to a discount of 25%;

Submissions of the Respondent

16. In written submissions, it was submitted on behalf of the Respondent that:

(i) generally speaking, principles derived from the criminal law had no role to play in proceedings of the nature;[25]

(ii) prior offending was necessarily relevant to the issue of specific deterrence,[26] and equally relevant to the need for protection of the harness racing industry;[27]

(iii) there was nothing in the decision of the Panel which indicated that prior offending played any part in its assessment of the objective seriousness of the offending;[28]

(iv) general deterrence was a relevant consideration;[29]

(v) the Appellant had failed to establish that he was blameless in respect of the offending;[30]

(vi) it was relevant that the offending occurred at a time when the Appellant had the benefit of a stay, which had a direct bearing upon assessing the level of any protective order which needed to be made;[31]

(vii) the objective seriousness of the Appellant's offending was further heightened by the fact that he did not implement, adequately or perhaps at all, at least some of the steps set out

[25] TB 37 [31] – TB 38 [35].
[26] TB 38 [37].
[27] TB 40 [44].
[28] TB 39 [40].
[29] TB 41 [50].
[30] TB 44 [61].
[31] TB 45 [62] – [63]; TB 46 [70].

in his Declaration which was made following the commission of the first and second offences;[32] and

(viii) the offending was, in all of the circumstances, within the mid to high range of objective seriousness.[33]

17. Finally, the Respondent's written submissions argued that it would be "open" to me to consider imposing a penalty greater than that imposed by the Panel. The submissions urged that I adopt that course, primarily on the basis that the assurances given by the Appellant in his Declaration were not matters which were previously taken into account, either by the Panel or the Stewards.[34] If I were to accept the Respondent's submission and increase the penalty, no issue of a denial of procedural fairness would arise. The Appellant was clearly on notice of the Respondent's position and chose to proceed with his appeal in any event.[35]

18. In oral submissions, Ms Chua advanced the following further propositions:

(i) questions of a notional starting point were of limited relevance, given that they stemmed from the Respondent's penalty guidelines by which I was not bound;[36]

(ii) assessment of penalty was not a mathematical exercise in any event;[37]

(iii) the Appellant's complaint that the Panel had increased the objective seriousness of the offending by reference to his disciplinary history was of no consequence, as it was based upon principles that had no application in matters of this nature;[38]

[32] TB 45 [64].
[33] TB 47 [76] – [77].
[34] Submissions at [79].
[35] *Ings v Racing New South Wales* [2022] NSWSC 1127 at [85] – [89] per Basten AJ.
[36] Transcript 12.30 – 12.34.
[37] Transcript 12.44.
[38] Transcript 13.30 – 13.47.

(iv) repeat offending remained relevant to the issue of specific deterrence;[39]

(v) the fact that the offending was committed during a period when the Appellant had the benefit of a stay was relevant to an assessment of objective seriousness;[40]

(vi) the offending was of the same nature, and involved the same substance, as the earlier offences, which was a further basis on which to conclude that the Appellant's history of offending it was relevant to an assessment of penalty;[41] and

(vii) it was evident that in previously imposing a penalty, for the first and second offences, this Tribunal had had "*critical regard"* to the steps set out by the Appellant in his Declaration, some of which were clearly not implemented.[42]

CONSIDERATION

19. As I have said, given that this matter proceeds before me *de novo,* it is not part of my task to determine whether the Panel erred in its determination. However, in light of the time that was occupied in the written submissions, and in the hearing of the appeal, in addressing the grounds which are relied upon by the Appellant, it is appropriate for me to make the following observations which arise from them.

20. In *Australian Building and Construction Commissioner v Pattinson*[43] the High Court determined that the primary, if not sole, purpose of a civil penalty of the kind imposed in a case such as the present, is the promotion of the public interest in compliance with, amongst other things, statutory and other provisions governing the industry in question (in this case, the Harness Racing industry). In reaching that conclusion, the Court cautioned[44] against being distracted by principles

[39] Transcript 14.18 – 14.22.
[40] Transcript 15.26 – 15.45.
[41] Transcript 17.11 – 17.35.
[42] Transcript 22.22 – 23.13; 26.11 – 26.28.
[43] (2022) 274 CLR 450; [2022] HCA 13 at [9].
[44] At [10]; [14].

drawn from the criminal law, and emphasised that civil penalties are imposed with the necessity for deterrence firmly in mind.[45]

21. These observations are of particular significance, given that a number of the submissions advanced on behalf of the Appellant drew upon principles which stem from the criminal law. That said, the High Court did recognise[46] that *some* principles found in the criminal law, including principles of totality, parity and course of conduct, may be relevant to determining penalty, in the sense that such principles may assist in assessing what might be considered reasonably necessary to deter further contraventions of the relevant legislation . All of these observations were referred to in the decision of this Tribunal in *Elder v Harness Racing New South Wales*[47] in which I sought to set out how they are applied in determinations made by this Tribunal.

22. It was effectively submitted on behalf of the Appellant that there is a requirement for this Tribunal, when assessing penalty in a matter of this kind, to adopt a starting point. It appeared to be suggested, in particular, that such a requirement arose, at least in part, from the Respondent's penalty guidelines. It has been said on many occasions that the guidelines are just that – a guide. Whilst those guidelines may well be adopted by Stewards, I am not bound by them. An assessment of penalty which is made by this Tribunal is not a process which is akin to a mathematical calculation. On the contrary, an assessment of penalty by this Tribunal is a discretionary decision which is made in light of firstly, the circumstances of the individual case, and secondly, the purposes which are intended to be served by such a penalty as set out in *Pattinson*.[48] To the extent that Mr Morris sought to argue that the adoption of a starting point was a necessary (or perhaps even mandatory) step in that process, I am unable to agree. Such an approach has the clear tendency to advocate the undertaking of an

[45] At [15].
[46] At [45].
[47] 17 July 2024.
[48] See *R v Engert* [1995} NSWCCA, 20 November 1995 unreported; *Markarian v The Queen* (2005) 79 ALJR 1048 at [27].

almost purely mathematical exercise in which there are increments to, or decrements from, a predetermined starting point or range. It has been observed that such an approach is apt to give rise to error, is and is one which departs from principle.[49] Whilst those observations were made in the context of criminal proceedings, it seems to me that they necessarily have some role to play in the approach which is to be taken when this Tribunal is assessing penalties. Such approach must be one of instinctive synthesis in which all relevant matters are taken into account, the appropriate degree of weight is ascribed to each of them, and a determination is then reached. Some general support for that approach, and for the proposition that I am not bound by any guidelines, is to be found in the decision of Walton J in *McCarthy v Harness Racing New South Wales.*[50]

23. I turn to the issue of previous offending and its role in the process of assessing penalty. The decision in *Pattinson* makes it clear that deterrence is a relevant consideration to such an assessment. Importantly, deterrence may be relevant in a general and/or a personal sense. In the case of the former, it may be relevant to promoting and protecting the public interest in the conduct of the Harness Racing industry. In the case of the latter, it may be relevant to the necessity to discourage a person from committing the same offence again, as well as to a determination of whether the offence in question is an uncharacteristic aberration on the one hand, or a manifestation of a continuing attitude of disobedience on the other. If the latter is the case, *both* protection of the public interest (i.e. general deterrence) as well as personal deterrence, may indicate that a more severe penalty is warranted than might otherwise have been the case.[51] Whilst these propositions are drawn from the criminal law, they fall into the category of those considerations which the decision in *Pattinson* makes clear are relevant.

24. For all of these reasons, I am unable to accept the proposition that a participant's history of offending is of no relevance at all. If that were correct, it would follow

[49] *Wong v The Queen* [2001] HCA 64 at [74]; *Markarian v The Queen* [2005] HCA 25 at [30] – [34].
[50] [2024] NSWSC 865 at [216]
[51] See *R v McNaughton* (2006) 66 NSWLR 566 at [26] and following.

that a participant could repeatedly offend with complete impunity. Such a proposition is contrary to principle, and equally contrary to common sense. The fact that in the present case the Applicant's previous offending was in respect of offences of absolute liability is not to the point.

25. Accepting that a history of offending is relevant, I am also unable to accept the proposition that it should be afforded limited weight. What weight will be ascribed to it will depend upon the circumstances of the case. As a general proposition, it might reasonably be expected that the more substantive the history, the greater the weight which will be attached to it, particularly if, as here, the history is for the same offending. In the present case, the Appellant's history tends wholly against the proposition that the offending was an aberration, and wholly in favour of the proposition that it manifests a continuing attitude of disobedience. For the reasons I have explained, that is a factor which is relevant to deterrence in both a general and a specific sense. It follows, in accordance with the principles I have cited, that a more substantial penalty is warranted than might otherwise have been the case.

26. With these matters in mind I turn to the assessment of penalty.

27. Viewed objectively, the seriousness of the present offending is high. Cases of this kind generally into one of three categories, namely:

    1. where there is evidence of positive culpability (for example, where there is evidence of the participant knowingly and intentionally administering the prohibited substance);
    2. where the participant provides no explanation for the presence of the prohibited substance, or where such explanation which is proffered is rejected, such that the Tribunal is left in a position of having no real idea as to how the substance came to be in the animal's system;

3. where the participant provides an explanation for the presence of the prohibited substance which the Tribunal accepts, and which supports a conclusion that there is no culpability at all.

28. The present case falls into the second category. It has been observed that cases of that kind may be regarded as being similar to cases in the first category, depending on the circumstances.[52]

29. A particular factor which supports my assessment of objective seriousness is the fact that as long ago as September 2018, a Notice to Industry issued by the Respondent warned participants of the dangers of stable contamination and made a series of recommendations regarding the steps to be implemented by participants to avoid it.[53] All industry participants have an obligation to familiarise themselves with, and adhere to, such Notices. Clearly, the Appellant did not do so.

30. For the reasons I have stated, the Appellant's history of offending renders both general and personal deterrence relevant. Further, the fact that the offending was committed when the Appellant had the benefit of a stay is relevant to deterrence generally, and to specific deterrence in particular. Put simply, the Appellant did not take the opportunity to ensure that he did not breach the rules while having the benefit of that stay. It follows that any protective order must be more significant.[54]

31. Subjectively, there is no issue that the Appellant's plea of guilty attracts a discount of 25%. I am also prepared to conclude that it demonstrates some evidence of remorse. The Appellant's work as a firefighter is to his credit, as is his role as carer for his daughter in law and their children. All of these matters have been taken into account.

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[52] See *McDonough* [2008] VRAT 6.
[53] TB 214.
[54] See *Simiana v Harness Racing New South Wales* at [29].

32. I have given careful consideration to the Respondent's submission that the penalty should be increased. In light of all of the circumstances, I have determined not to adopt that course. Equally, I am not persuaded that the penalty should be less. The offending was serious, and represents a repetition of previous conduct, committed whilst the Appellant had the benefit of a stay. For the reasons I have set out, both general and specific deterrence are of particular significance in determining penalty. The penalty properly reflects all of these matters, along with the subjective circumstances advanced on his behalf.

33. The final issue is when the period of disqualification should commence. It was submitted on behalf of the Appellant that the commencement date should be 3 December 2023. The basis for that position, in part, was that there was a subsequent delay of some 10 months before any inquiry was commenced by the Respondent. It was submitted that in that time, the Appellant chose not to participate in the industry, and did not make an application for a licence.

34. The position taken by the Appellant is a somewhat artificial one. It is also arbitrary, in the sense that it appears to be dependent upon estimates as to when it is said that an inquiry should have taken place. As the Respondent has pointed out, the simple fact is that the Appellant became a disqualified person in respect of this particular matter on and from 21 May 2024. That is the appropriate date for the commencement of the disqualification.

ORDERS

35. I make the following orders:

    1. The appeal is dismissed.

    2. The disqualification imposed by the Appeal Panel of 1 year and 10 months is confirmed.

    3. The disqualification is to commence on 21 May 2024.

    4. The appeal deposit is forfeited.

THE HONOURABLE G J BELLEW SC **4 March 2024**