RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

MONDAY 25 OCTOBER 2021

IN THE MATTER OF AN APPEAL BY STACIE ELLIOTT AGAINST THE DECISION BY HRNSW TO SUSPEND HER LICENCE UNDER AHRR 183

RESPONDENT HRNSW

DECISION:

1. **Appeal upheld**
2. **Order under Rule 183 set aside**
3. **Appeal deposit refunded**

1. The appellant, licensed trainer Ms Elliott, appeals against a decision of the stewards of 22 October 2021 to suspend her licence under Rule 183.

2. Summarised, that provides that pending the outcome of an inquiry, investigation, or where a person has been charged, their licence may be suspended. There is an associated 183A matter which is not before the Tribunal.

3. By agreement of the parties, the Tribunal is hearing the actual appeal against that order,. It was to be a stay hearing in respect of that order. And, secondly, it was not necessary to take formal evidence. It is common ground what the narrow compass of evidence is.

4. In summary – and very summary terms – the appellant has been a trainer for a long period of time. She has set out through the submissions that are made and are taken as facts – for both parties– that she has been a trainer for many years, that she has taken out of her stable anything that might be cobalt-related, that she is entirely unable to explain why, when two horses were presented to race on 3 September 2021, that those horses each produced positives to cobalt, one at 110, the other at 170, on first analysis. The confirmatory analysis has been called for but has not yet been received. A stable inspection was conducted and an interim call for submissions was made on a 183 suspension. Those submissions were made. On 22 October the order was made.

5. The matter, of course, is one at which at the present stage there is a prima facie certificate upon which a charge could be laid. No charges have been laid. Consistent with the way in which this regulator approaches matters, there is an inquiry stage after the investigation stage. There will, it is anticipated, be an inquiry and either prior to or in the course of that inquiry, or part way through it, if it was to be adjourned for any reason, charges may well be laid.

6. There is no mystery, in the Tribunal's opinion, about what likely charges could flow from this conduct, and they are presentation with a prohibited substance, cobalt, on two occasions.

7. The case law that has touched upon the fact that a party such as this has not been charged, in the Tribunal's opinion, and in the reality of this jurisdiction, falls away and does not require further analysis. It is not an important point. It is, of course, a correct one. But it is an inquiry stage and the suspension can be appropriate under 183 because it quite clearly reflects that it can be done before any charges are laid.

8. The issue first is whether there is an arguable case.

9. It is fair to say that this appellant is, not surprisingly, struggling. She is entirely unable to explain why. She can only anticipate or, as the submissions for the regulator are, speculate that there must be contamination. It can be no higher.

10. The Tribunal reflects upon the fact that the readings at 110 and 170 have been the subject of a number of cases in recent times, some of which are still on foot, as to what readings at that level as against a threshold of 100 mean.

11. It is now that the regulator and the Tribunal are generally approaching cobalt in a different way than they did originally. And it is, in the Tribunal's opinion, still an evolving science. It is still an evolving field in which there is some doubt, certainly in some minds, as to what readings of 110 and 170 might mean. It is not necessary to determine that on an application such as this, the Tribunal merely reflects. The reason it reflects is that it will be almost an inevitability in an absolute liability case, if the confirmatory analyses come back similar to the first analysis of 110 and 170, that there will be presentation with prohibited substance charges laid. That is not to go beyond speculation but it is just the reality of the way this industry works.

12. If, however, they come back with some other reading which is less, particularly with a reading of 110, there may be a reflection of whether or not, unlikely as it is, in allowing for measurements of uncertainty, that the first matter may not lead to a charge. The second matter, measurements of uncertainty and differences are not likely to bring it below 100, but that is speculative also. But there could be something. It is uncertain. The rule can be enlivened if there is a first analysis, and it has been used quite often.

13. It is that there is no explanation as such beyond "I can only think", would be the words of the appellant if she was to give evidence, "that there must have been something that was contaminating".

14. As has been said – and it is a two-edged sword – there is nothing in her stables which would have caused this. She was, however, not present at the race. It is hard to imagine what might have been done immediately prior to, and with relevant withholding periods, and on the day that might have led to these readings because of anyone those handling the horses, in the absence of the appellant, might have done.

15. An arguable case has to be established. It is very thin. This has all happened, in the Tribunal's opinion, very quickly. That is to the credit of the regulator, it is not a criticism. But what it has meant is that in a relatively short period of time of some 12 days the appellant has gone from a degree of certainty about her future to no doubt absolute turmoil. The Tribunal understands that and the regulator, out of fairness, understands it in its submissions. Those are balance of convenience matters, however.

16. The issue of whether there is something able to be argued has to be established by the appellant. In a number of recent decisions the Tribunal has not found in favour of an appellant on a 183 and the submissions for the respondent here today draw in detail from the recent decision of Walters v HRNSW RATNSW 16 January 2019 where the Tribunal turned its mind in considerable detail to the types of issues that are being agitated here.

17. This matter has been brought on very quickly and the reasons for those actions by the parties – and they are commended for the expedition with which they have approached the matter – go to issues again of balance of convenience and not to the case itself.

18. There might be something here. It is speculative. The Tribunal has determined that in view of the history of this appellant and the suddenness with which these matters have arisen in the circumstances in which they have, that under the McDonough principles a third category could possibly be one which is enlivened, and it cannot be put any higher, that raises an issue then of an arguable case.

19. On balance of convenience, integrity is critical. Inevitably in these cases, there will be hardship. The speed with which this matter has come on and the time within which the appellant has had an opportunity to truly investigate the matter do lessen those otherwise integrity-based determinations on balance of convenience that the regulator's approach to integrity must outweigh aspects of hardship and the like.

20. Having regard to those matters, the Tribunal is satisfied there is a balance of convenience argument. This was a thin case, to be quite frank.

21. But, having regard to the totality of the matters, the Tribunal determines that the appeal be upheld and that the 183 interim suspension of 22 October 2021 be set aside.

22. The Tribunal orders the appeal deposit refunded.
