# RACING APPEALS TRIBUNAL NEW SOUTH WALES

## TRIBUNAL MR DB ARMATI

## EX TEMPORE DECISION

## MONDAY 12 MARCH 2018

## LICENSEE AMANDA TURNBULL

**AUSTRALIAN HARNESS RACING RULES 190(1), (2) and (4)**

## SEVERITY APPEAL

**DECISION:**

**1. Appeal upheld**

**2. Penalty of disqualification of 16 days to commence 14 February 2018**

**3. Appeal deposit refunded**

1. Licensed trainer and driver Amanda Turnbull appeals against a decision of the stewards of 14 February 2018 to impose upon her a period of disqualification of three months to operate from that date for a breach of the prohibited substance rules, and that is, as is usually the case, a breach of Australian Harness Racing Rules 190 (1), (2) and (4) and it was particularised as follows:

> "that you Ms Amanda Turnbull, being the licensed trainer of the horse Taihape Sunset (NZ), did present that horse to race at Dubbo on Wednesday, 15 November 2017, with a prohibited substance in its system, namely triamcinolone acetonide, that was certified by 2 laboratories approved by the controlling body."

2. When confronted with that charge, the appellant pleaded guilty. The stewards then proceeded to penalty. She has maintained that admission of the breach of the rule before this Tribunal. This is a severity appeal only and accordingly the facts to be canvassed can be reduced.

3. The evidence has comprised the transcript and exhibits before the stewards.

4. The key matters in respect of this are that the very experienced appellant identified that the horse was not racing well and on 31 October 2017 took it to the Central West Equine for veterinary examination. The horse was there examined by an experienced and knowledgeable vet who diagnosed a grade 2/5 lameness and effusion of the right-hand stifle joint. The treatment was injection of the subject drug triamcinolone, otherwise known as cortisone, and it was done via intra-articular injection.

5. The appellant was advised at that time that there was a withholding period of about eight days for racing purposes. In a subsequent conversation it was suggested that she should wait 10 days before racing.

6. On the same day as the treatment, 31 October 2017, the appellant contacted the stewards by telephone and advised of the procedure and treatment that the horse had been given and that it would not race for approximately 10 days.

7. The stewards immediately published a follow-up report, which is described in those terms because at the conclusion of the subject race they had published a report that the horse may need some follow-up, and this was a response to that, and, to paraphrase it, it said that the appellant had contacted stewards and advised that the horse had had treatment of the stifles and that it would not race for 10 days.

8. The appellant immediately recorded the treatment in the appropriate treatment logbook.

9. The horse was then presented on 15 November 2017 and a positive swab of the prohibited substance described detected.

10. Being an absolute matter, the appellant correctly admitted the breach of the rule before the stewards and maintained that before the Tribunal.

11. The substance itself is not new. Treatment with corticosteroids and the like for diagnosed conditions such as this is very common and long-standing. It is a permissible and professional treatment of a veterinarian-prescribed substance. It is therapeutic. And accordingly, under the penalty guidelines to which the Tribunal will return, is a Class 3.

12. Dr Wainscott, regulatory vet, who gave evidence before the stewards, gave evidence that the treatment by the vet was, to quote, "textbook". He also gave evidence about the difficulty of treating a stifle joint, particularly one that was right up and high such as this, and the difficulty of ensuring that injected product actually went into the stifle and did not go into the surrounding tissues or other parts of the horse's leg.

13. It is documented, because it has been referred to by Dr Wainscott, and was referred to in the case of Frisby, where the regulatory vet was Dr Colantonio, that leakage from injections generally, and leakage from injection to the stifle in particular, can occur. Dr Colantonio, in the matter of Frisby – and to identify that, that was an appeal case dealt with by this Tribunal on 1 April 2016 where, as has been said, regulatory vet Dr Colantonio gave evidence (paragraph 9 of the decision) that a withholding period of 50 days is appropriate. There, the treatment was the same as here.

14. Dr Wainscott was not asked in this case before the stewards whether 50 days was an appropriate withholding period, but he did say, after having been questioned about his knowledge of the report of John Vine, former head of RASL, in a paper in 2007 that expressed an action period for the drug of approximately 7 days when given into the joint, that it might be longer of 7 to 10 days – possibly 10 days.

15. When questioned about the extended time period by the chairman of the stewards, he said that that time period could be extended, but importantly this:

> "But what sort of time length?"
>
> "I don't have that information available to me."

16. There is, therefore, on the facts of this case, no support for a possible withholding period of 50 days, and the precise withholding period, relevant to this industry, harness racing, is not otherwise set out.

17. It might be noted that Racing NSW published a notice to participants, and in particular, importantly, directed to trainers and veterinarians on 8 June 2017, in relation to the use of corticosteroids and similar drugs, that there is an enforced stand-down period under the rules of racing, which is 8 days, but importantly, depending on the time of the intra-articular injection before racing, that calculation could be longer than the mandated period depending on the drug used and where it was administered.

18. And it might be noted also that the Queensland Racing Integrity Commission, in an undated document but obviously post the Racing NSW document, essentially repeated that advice in a notice to trainers, that is, that there is a stand-down period but there is also an additional withdrawal time. That was in the harness racing industry.

19. The other key facts in relation to the matter are that in this jurisdiction the regulator, Harness Racing New South Wales, has not, on the evidence available, published a similar type of warning to trainers about stand-down periods, none being specified in the rule as mandatory, or additional withholding periods, which might be important by way of recommendation. Whilst it was not the subject of submissions, it occurs to the Tribunal, for example, that there has been no recommendation by the regulator that after injections of corticosteroids to stifles, because of the possible leakage issue and therefore an unknown withholding period, that prior to resumption of racing an out-of-competition test might not be a prudent exercise. As has been said, that is a thought of the Tribunal, not the part of the submissions.

20. Veterinarians are not licensed by Harness Racing NSW as they are for Racing NSW, and therefore the publication of the notice in Racing NSW to both trainers and veterinarians is done for a reason. Here, there appears to be no evidence that Harness Racing NSW has engaged with the veterinarian industry, or veterinarians, in respect of the nature of the advice they are giving to trainers after treatment with corticosteroids and the like. There is no evidence before the Tribunal, by way of suggestion or otherwise, as to whom this appellant might have turned by way of further inquiry in respect of the advice given by the treating vet on this occasion.

21. It is to be noted that the experienced appellant, having sought the advice of a vet, having taken the advice of the vet and having listened to the advice of the vet, complied with it. It is to be noted also that she chose voluntarily to notify the stewards of that treatment. It is to be further noted that the stewards, on the evidence, do not appear to have advanced any recommendations. The evidence is completely silent as to whether it might have been something the appellant should have considered or whether it is something that the stewards might have considered, it is not in evidence. Suffice it to say that it is apparent to the Tribunal that the stewards, being aware of Frisby, and being aware, therefore, it must be implied, of the

potential leakage, might – and it can be put no higher, they had no burden to do so – have said to the appellant words to the effect of, “Be careful on that 10-day withholding period you are using because, for example, in Frisby there was evidence you should wait 50 days”, or many other permutations and combinations of that type of advice. It didn’t happen. There is no criticism directed to the stewards. But it is that when the appellant is criticised for not making inquiries that experts, as the stewards are, did not guide her. No blame is attached to the stewards or steward to whom the report was made by the appellant.

22. The subjective facts need to be referred to, to put them into context of the remaining assessment of the objective seriousness of this matter.

23. The appellant has grown up in this industry. Her family has been associated with it. All her family, it appears, might presently be associated with it. The appellant is, as the evidence has established at the time of the stewards’ inquiry, 28 years of age. She is a highly experienced trainer with a considerable number of horses in training, both in New South Wales and Victoria. She is presently aiming to prepare horses for upcoming major races, and six in particular have been set for that. She is a professional trainer and a professional driver. She has no other sources of income. She has the usual everyday expenses to meet. She was first licensed at age 15. Her stables are one of the larger ones in Australia and they have five other staff. She has been highly successful as a trainer and is doing well in the current season. She is a highly successful driver. She has been champion driver in a number of years in New South Wales. Until the time of her disqualification, the current evidence is not available, she was the leading driver in New South Wales. She averages at least 100 winners a year. Horses that she has driven have returned prize money of some 11 million dollars and her training returns are some 3.3 million dollars.

24. She has no prior prohibited substance matters. She has an extremely lengthy offending record, but nothing serious on it. They are driving-related matters. There are no major offences, no other periods of disqualification.

25. Much weight has been placed on her contributions to the industry. Suffice it to say that in summary they have, up to her present age and in that time she has been associated with the industry, been of a highest standard. In summary, it was put to the stewards that she is a substantial contributor to charitable matters, despite the fact that she works exceptionally hard. There is a fundraising for cancer prevention purposes and, by way of promotion, a charitable harness racing-related activity called Teal Pants. She has participated actively in that for some years and has been its NSW ambassador. She has been, to some extent, the face of racing. She is interviewed regularly, it appears, or when asked to be, by Sky Channel, Trots TV and in print media. She has been a harness racing ambassador. She often drives in invitational races and she has represented

the State and Australia in driving championships. She contributes to children's charities and to various business activities.

26. The case for the respondent essentially is based upon precedent and parity.

27. In respect of precedent, the numerous decisions of this Tribunal to the effect that prohibited substance presentations mandate a disqualification is relied upon. And, indeed, in the precedent case of Frisby, the Tribunal said at 15:

> "This Tribunal has said on many occasions that the necessity for a level playing field, the necessity for all those who wish to have the privilege of a licence and present a horse to race must be done on the understanding that a horse will compete equally with all others and the betting and sporting public is entitled to expect nothing else, is not met by a presentation with a substance such as this."

28. To distil some matters from that: the level playing field. As to whether that was not met on this occasion is not able to be established on the evidence. It appears that the evidence of Dr Wainscott is that after the 8-day period this drug would not have had any enhancing effect so far as performance is concerned, having regard to the withholding period of some 15 days. But the respondent points out that the horse did compete after this administration by the vet and that it won. The question whether there was, therefore, a level playing field needs to be considered as it cannot be discounted. As to whether, therefore, the horse competed equally, is difficult to determine. But importantly, the public to whom the integrity matters are so strongly focused would expect that, consistent with the admission of the breach, there must be a consequence for not complying with the level playing field test.

29. There was also the precedent that again was repeated by the Tribunal in paragraph 8 in Frisby as follows:

> "Numerous cases in the past over many years have dealt with the fact that the trainer cannot stand behind the actions of a veterinarian in carrying out treatment and providing advice on withholding periods. As harsh as it may be seen, the absolute nature of the rule covers that. However, those types of issues, namely, reliance upon professional advice, are relevant on the issue of penalty."

30. The Tribunal will turn to those matters. The question of the approach to be taken by the Tribunal in New South Wales is one which, as a result of the decision of Justice Garde in the Victorian Civil and Administrative Tribunal, Administrative Division, Review and Regulation List in the matter of Kavanagh and O'Brien v Racing Victoria Limited of 27 February 2018 raises

for consideration some older cases in New South Wales, and it is in particular the matter referred to by His Honour in paragraph 15, an undated case of New South Wales Authority v Graeme Rogerson, where His Honour Mr Barry Thorley referred to a number of matters. But His Honour quoted at length from the Victorian decision of the Racing Appeals Tribunal, constituted by Judge Williams, of McDonough v Harness Racing Victoria. His Honour adopted Judge Williams' assessment of the way in which presentation matters might be considered, and to deal with that adoption he said at paragraph 50:

> "As a case within the third category described in McDonough's case, there is little or no personal culpability, and it is reasonable to expect any penalty to reflect this fact. It is also important to uphold the integrity of the racing industry, and for the Tribunal to be seen to do so."

31. He came to that conclusion and that two-pronged test by assessing the three matters identified by Judge Williams. Firstly, where a presenter has a positive culpability; secondly, were at the end of the day the explanation which is given by the presenter is not accepted by the decision body or the presenter concedes that there is no explanation and, thirdly, the presenter provides an explanation which the decision-maker accepts and which demonstrates that the presenter has no culpability at all.

32. In respect of that third category, Judge Williams said that the culpability is at its lowest level and it could be that it is not appropriate that the sentence expressed denunciation or general deterrence and it is possible there be no penalty at all. It will not surprise those who follow this Tribunal's decisions that it does not adopt those criminal law principles which drove Judge Williams in referring to a sentence. No sentence is passed in a civil disciplinary matter. And that there is no place for deterrence, general or specific, in a civil disciplinary matter, but it is a question of the message for the individual presenter or for the community at large to be considered. Otherwise, of course, what Judge Williams said is entirely apt.

33. Justice Garde's decision is not binding but it is persuasive. It provides an indication that in cases where there is absolutely no culpability, in Victoria, in dealing with thoroughbred matters, that the third category may be activated and may lead to no penalty or, as His Honour determined there, on the second matter to which the Tribunal referred, that despite the lack of culpability in the two appellants, that because of the need to maintain integrity he imposed monetary penalties.

34. That raises the issue of parity. What of parity in New South Wales. The case of Frisby is, to some extent, on all fours with this matter. It was, of course, nearly two years ago but the principles essentially, subject to what is a third category of matter to which the Tribunal need return, is current

today. It is perhaps more apt to look at the differences rather than summarise the similarities in respect of Frisby. Frisby, on the presentation of the same type of drug, after a 35-day withholding period rather than 8 to 10, received a three month disqualification.

35. The differences essentially are that he was a hobby trainer, whereas this appellant is very much a professional trainer and driver. The other difference, of course, is that Frisby did not have the benefit of the decision in his case, whereas this appellant had available to her, by way of self-education, the capacity to have taken cognisance of Tribunal decisions in respect of matters such as she now finds herself in trouble for and what likely consequences might follow and what can be done to avoid it.

36. The substantial differences, however, with Frisby are that here this appellant notified the stewards. That has been referred to as a factual matter. Here also, the Tribunal notes, as it has referred to in some detail, that post Frisby no warnings have been given to the industry. Frisby, it might be noted, had a slightly longer association with the industry. Other than that, essentially the facts are the same. That is, the key ones: the horse was taken by the subject trainer to a reputable veterinarian who provided proper diagnosis, treatment and advice. And that advice was followed by Frisby on a withdrawal period of 35 days and here, 15 days. Each of them followed professional and, within harness racing, what to a veterinarian might have been an appropriate piece of advice.

37. The other parity case referred to and handed up today is a matter of Garland, 28 May 2015, Queensland Racing Disciplinary Board, an administration of a substance and every possible step taken to comply with the rules of racing, but it turned out that the horse had certain disabilities which meant that the particular drug was not excreted as might have been expected. There, despite the belief that disqualifications were appropriate to such matters, a fine was imposed.

38. In the course of the stewards' inquiry a number of other cases were referred to. They all involve other codes or other jurisdictions. They all involve the subject drug and they all involve fines only. They were Thompson (NSW Racing), Clarke (NT Racing), Loos (Racing Victoria) and Craven (Victorian Harness).

39. Essentially, the decision becomes one of whether, having regard to the subjective facts of this appellant – and they are of the highest level – having regard to an assessment of the objective failures that are identifiable, but balancing that with the unusual steps taken here, is this a case that would require no penalty or minimum penalty within this Tribunal's considerations or, if the move towards the three categorisations and no culpability test be applied, it falls within the most lenient, the third category of no culpability.

40. That requires an assessment of whether there is culpability. The Tribunal disagrees with the submissions for the appellant that the publication of a reason by a racing tribunal is not something that should be expected to be in the mind of, or be the subject of a source of research by, a licensed person. Certain licensed persons would not in anyway be expected to be perusing the website for precedents, but this is an appellant who holds herself out to be of the highest standards in the industry and, critically, to be a professional at the highest level. This Tribunal is of the opinion that a person standing with those qualifications and attributes is expected to do more to inform oneself of what is happening in the industry, such that traps do not open up into which a professional might fall. To the extent there is publication of these matters, it would appear to be, solely in respect of harness racing, on the website.

41. This Tribunal is of the opinion that this appellant in particular cannot say – and she has not put it herself – that she should not be informing herself of matters such as the decision in Frisby. It is, therefore, that the Tribunal does not assess her as blameless.

42. As to the making of other inquiries, another failure the respondent attributed to her, the Tribunal has dealt with that and, in the absence of the matters earlier expressed, cannot find that as a matter of blameworthiness.

43. Otherwise, this appellant has done all that would be expected of her and, indeed, by reason of her self-reporting, done more. The Tribunal has analysed the effect of the conversation when she self-reported and the fact that nothing was brought to her attention. That seems to be a substantial differentiation on cases of precedent, both directly on Frisby and in respect of other cases with which the Tribunal and the stewards have dealt on many occasions. If nothing else, it is a reflection of her professionalism.

44. This Tribunal has said for a long time that prohibited substance presentations warrant a disqualification. In certain circumstances, that is not an appropriate or just outcome. The integrity of the industry is paramount and that is, as expressed, the level playing field requirement. The Tribunal has determined that this is not the case for it to divert from its inevitable decisions in respect of an outcome for a presentation matter. That is not to say that the outcome in other cases may not be different.

45. Based upon the precedents to which reference has been made and that principle of integrity, the Tribunal has determined that the imposition of a fine is not an appropriate outcome of its own. The Tribunal has determined that a period of disqualification is appropriate.

46. In the course of these proceedings, confidential figures were given about the taxable income of the appellant. No hint is given in this reasoning as to the figures given, because of confidentiality. Suffice it to say that this

appellant was disqualified for a period of 16 days from the time of the stewards' decision until a stay was granted. A mathematical calculation would indicate that any likely penalty would be one in which to now impose upon her an additional fine would put the matter at a greater level of civil disciplinary outcome than the facts justify. The Tribunal cannot reverse the fact that she has already served a period of disqualification.

47. In those circumstances, the Tribunal determines that the period of disqualification which she has served of 16 days, whether by way of an equivalency to monetary penalty or otherwise, is an appropriate penalty in respect of this matter.

48. The appeal is upheld.

49. The Tribunal imposes a period of disqualification of 16 days, to commence on 14 February 2018.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

50. In respect of the appeal deposit, the appeal is a severity appeal only. It has been successful.

51. I order the appeal deposit refunded.

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