RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR DB ARMATI

EX TEMPORE DECISION

WEDNESDAY 16 JANUARY 2019

APPELLANT PHILLIP WALTERS

AUSTRALIAN HARNESS RACING RULE 183(d)

DECISION:

1. **Appeal dismissed.**
2. **Orders for the appeal deposit**

1. Licensed trainer/driver Mr Phillip Walters appeals against the decision of the stewards of Harness Racing New South Wales to impose upon him a suspension of his licences under the provisions of Rule 183(d) of the Australian Harness Racing Rules. Relevantly, that rule is in the following terms:

> "183. Pending the outcome of an inquiry, investigation or objection, or where a person has been charged with an offence, the Stewards may direct one or more of the following -
>
> > (d) that a licence or any other type of authority or permission be suspended."

2. To distil down those already summarised provisions, the key issues for determination here are firstly, the expression "pending the outcome of an inquiry". Secondly, "the Stewards may direct" and, thirdly, "that a licence or other type of authority be suspended". In relation to that latter point, the appellant is an A Grade trainer and driver and holds a licence. He falls, therefore, within subparagraph (d).

3. The evidence is that there have been swabs taken, they are positive. The usual course of conduct in respect of that is for the stewards to conduct an inquiry. It is quite apparent from all of the evidence available to the Tribunal that this matter falls within the expression "pending the outcome of an inquiry".

4. The next issue is the provision in the rule of a discretion to suspend. The commencement of an inquiry in relation to a licensed person does not mean that the licences must be suspended; it is a discretion. That discretion cannot be fettered It must be exercised having regard to all of the facts and circumstances. Importantly, it must not be exercised unless the appellant has been afforded procedural fairness.

5. The key facts in relation to the matter can be distilled from a bundle of material that is here. The bundle itself has comprised the formal documents, as it were, relating to the sampling processes and the certification of the results of sampling, the personal circumstances of the appellant and submissions that touch upon the issues that might be broadly described as integrity. The appellant has given brief evidence and, of course, all of the factual matters that he has put in his submissions, both to the stewards and in respect of those put on by his lawyers, are here to be considered.

6. The key points are these: that the appellant is based in Victoria. It appears on the evidence that as a result of sampling of horses he presented to race on 25 August and 26 August 2018 a drug acetazolamide has been detected in one particular horse, Fan Tays Ya, on those two occasions.

7. In addition, he presented a horse to race in New South Wales on 28 September 2018. That horse is Playing Arkabella. In pre-race blood and post-race urine samples taken on that date the horse returned positives to the drug acetazolamide. In addition, the horse has been presented to race on 5 October 2018 and has produced a positive to the same drug.

8. There is evidence that in respect of the presentation on 5 October that the peptide VNFYAWK, and subsequently known as an erythropoiesis- (or EPO) stimulating agent was detected by a Hong Kong laboratory. However, on laboratory certification by ARFL the presence of that substance was noted but the certificate was returned as negative because it did not reach a level at which it could be certified as present in the horse.

9. For the purposes of this decision, the Tribunal accepts that the presence in one certificate can be prima facie evidence under the rules. However, for the purposes of this decision the Tribunal will not place any weight upon the presence of EPO, or its various derivatives and the like, because to do so would place an unfair burden upon the appellant. The matter will be dealt with based upon the acetazolamide.

10. The appellant has accepted that by racing in NSW he is bound by the rules of racing. He accepts that in respect of those rules he can be suspended pending the outcome of an inquiry because the rule provides that. It is not open to him to put his case, in the Tribunal's opinion, on the basis that he cannot be suspended until he has had an opportunity to have a full hearing of the matter. The point of an interim suspension is that until all the evidence is available, if there is the appropriate reason to exercise the unfettered discretion, then it can be exercised. In the Tribunal's opinion, the submissions in respect of procedural unfairness are misplaced factually and legally.

11. The case of Day v Harness Racing New South Wales [2014] NSWCA 423 factually dealt with the fact that the regulatory body – Harness Racing NSW – had not given the appellants there an opportunity to be heard or present submissions or evidence in respect of the application of Rule 183. The NSW Court of Appeal determined that the law – and I use that expression to cover all of the matters that their Honours considered – did not displace the entitlement to procedural fairness in respect of that determination under 183.

12. In determining whether procedural fairness for that limited purpose was given, the right to call evidence, the right to cross-examine, the right to make submissions, the right to be heard were all found to continue to be available to those appellants. The Court of Appeal did not say that no such application for discretion in 183 could be exercised because those matters had not been dealt with to finality before the equivalent of an inquiry.

13. Factually here the regulator, Harness Racing NSW, gave the appellant the opportunity to make submissions in writing as to why his licences should not be suspended under 183. The appellant in his submissions basically pointed out that he, as he has at all times and continues to do so, is innocent of any wrong conduct, that he is unable to explain what happened, that he will suffer financial hardship, he is proposing to engage experts to assist him, he is happy to assist HRNSW, as he is happy to and is in fact assisting the HRV integrity team in respect of its consideration of those matters in Victoria.

14. The necessity for the stewards to actually conduct a hearing and permit the appellant here to call witnesses before that 183 consideration and to cross-examine those witnesses at an oral hearing was given. In the Tribunal's opinion, in any event, should there have been procedural issues about how the integrity team in HRNSW approached the matter, that has been cured in respect of this hearing. It was open to this appellant before this hearing to produce any evidence that he had available to him, to cross-examine those who had made statements in the matter, and himself to give evidence and be heard. And, indeed, he has given evidence. No factual reports have been placed before the Tribunal of an expert nature, and the Tribunal will return to that. The evidence appears to be that they are or will be prepared for the purposes of the stewards' inquiry.

15. Therefore, it cannot be said that despite the fact that a possible hardship will follow, despite the fact that there may be a substantial period of disqualification, despite the fact that there may be no disqualification, suspension or action in respect of the licence itself, that the appellant has had every opportunity to be fairly heard procedurally to date in respect of this matter. It is not the case that the rules indicate that this discretion under 183 cannot be exercised until all of those aspects have been dealt with to finality before a stewards' inquiry. Otherwise there would be no work to do for Rule 183. The issue of Rule 183 is the exercise of an unfettered discretion after procedural fairness has been given. As has been indicated, the procedural fairness argument is not accepted.

16. What then of whether the discretion should be exercised? There is, of course, the possibility that Rule 256(6), which is a no penalty outcome, is a possible outcome in respect of this matter. It is not the only possible outcome. The Tribunal cannot ignore the nature of the rules themselves in respect of this particular drug and the presentation and the certification.

17. In respect of the possible outcomes in respect of this matter – and to date no allegations of breach have been proffered or, as it might otherwise be described, charges have been proffered – that it is open to the stewards, before, after or during the course of their inquiry, to determine a range of possible breaches of the rules. It is quite apparent to this Tribunal, from its experience in dealing with prohibited substance matters, that there is a possible presentation breach. Under the rules, if there is a

presentation and there is a prohibited substance present, then it is an absolute offence, not a strict liability offence. Aspects of mens rea and defences of a reasonable mistake of fact do not arise for consideration on the question of liability. That has been this Tribunal's opinion for many years and it has been confirmed in another case, Day v Sanders [2015] NSWCA 324, as an absolute matter. It is an absolute offence. It is therefore that there is no defence to a presentation with a prohibited substance matter. The relevance of all of the personal circumstances of an appellant and the relevance of all of the facts that go to how, why, when or wherefore, as it were, or what conduct the appellant engaged in or did not engage in, or what others may have done, only go to the issue of penalty.

18. This Tribunal has expressed for many years that the probable outcome in respect of a presentation with a prohibited substance may well be a disqualification. Indeed, the penalty guidelines which exist in New South Wales provide in respect of a matter such as this, it being on the facts presented a Class 2 substance, a period of disqualification of two years. That possible outcome, of course, accelerates the need for careful consideration of matters of hardship and the subjective circumstances and a balancing of those matters against the integrity issues upon which the respondent relies.

19. This appellant is not unique. It is the Tribunal's experience, it having dealt with a number of 183 appeals, and it having dealt with a number of appeals in which 183 has been applied and a suspension effected, but there was no appeal against that interim suspension, that it is not, as it is said, a unique outcome for an appellant with these facts. He has not been singled out. He has not been, as it were, unfairly dealt with by a consideration of the imposition of a suspension.

20. In respect of aspects of his personal circumstances, it is noted that he is at the present time unable to give any explanation for the presence of the subject drug in his horses either in Victoria or New South Wales. There is no material flaw in the testing process indicated as a possible reason why the certificates should be set aside. That is not to say that those matters might not arise, but at present they have not.

21. The Tribunal is unaware of when the appellant was put on notice of the positives in Victoria. But in respect of New South Wales, he has been on notice since 13 November that there were positives to the subject drug. There was no evidence adduced on this 183 appeal which might cause any factual finding to be made which would assist the appellant in any form of explanation or diminution of possible liability in respect of his conduct or misconduct, or any explanation for the presence of the drug. Therefore, the matter remains at the present time, in respect of issues such as penalty guidelines, as a possible outcome of a disqualification. That is not to fetter any discretion as to any possible penalty that might be necessary on the facts, because the facts to finality are not known, but it merely indicates

that a loss of the privilege of a licence is not an impossible outcome. The likelihood of a 256(6) discretion being exercised, of course, cannot be discounted.

22. But at the present time, if the Tribunal is to consider a recent consideration of the way in which penalties are considered, namely - where it is quite obvious that the trainer has been culpable in respect of the conduct, or a second category where the Tribunal is unable to determine at all, or in respect of the acceptance of any explanation advanced by a trainer, a second category or, lastly, a third possible category, namely, that there is complete exculpation of any wrongdoing by an appellant - simply cannot be determined. The Tribunal also notes a recent decision of the matter of Scott v Queensland Racing Integrity Commission, [2018] QCAT 301 where the Tribunal member there found a fourth category of carelessness. But that does not need further analysis here because nothing of a careless or other nature is being analysed for the purposes of this decision.

23. In relation to his personal circumstances, it is noted that his prior history is not known. However, he is a full-time trainer, that at the time of the detection in NSW he had 8 to 10 horses in training, that it is his sole source of income, that he has no other industry that he can fall back upon and that accordingly the imposition of any loss of his privilege or the continuation of it, as his stay application on this 183 appeal was refused, that there will be hardship. In that sense, it is not unique.

24. This Tribunal has said in determining actual outcomes to finality as long ago as Thomas v HRNSW in 2011 that hardship, of course, is a matter to be taken into account. But if the rules are breached and the consequences of the conduct are such that a penalty of the loss of a privilege is an outcome, then that is what must be done regardless of the outcome creating hardship. In other words, to put it in a criminal law context – and this is not a criminal law proceeding, it is a civil disciplinary matter – that the objective circumstances outweigh the subjective circumstances and a penalty is appropriate. A similar analogy, of course, is available in civil disciplinary penalties.

25. As to when or where this inquiry may be heard, having regard to the submissions that have been made, there is a suggestion that the delay may only be a month before an inquiry commences. The inquiry may not finish in that period of time, but there is no evidence why an inquiry cannot be commenced in any event and this rule applies pending the outcome of that inquiry. It could be that in the exercise of a discretion that 183 decision might be set aside once the appellant is able to produce matters which might cause the stewards to consider its application as possibly not leading to a loss of a privilege pending the finalisation of the matter, but those are matters for the future.

26. Actual delay, therefore, is not a factor which causes the Tribunal to come to any different consideration in respect of the application of the rule generally, the integrity of the industry in particular, or the likely hardship that will flow.
27. That then deals with the principal issues agitated on the stay application. It is accepted that the appellant has no explanation for his conduct and that he will protest his innocence. However, the Tribunal is of the opinion that, for the reasons expressed and analysed, his appeal must be dismissed.

28. The appellant's application that the provisions of Rule 183 not apply to him is considered to be not sustainable.

29. The Tribunal, in dismissing the matter, is satisfied that the integrity issues outweigh the personal circumstances.

30. The appeal is dismissed.

APPEAL DEPOSIT.

31. The Tribunal did not deal with this issue at the hearing. The appeal Regulation provides that it be forfeited, refunded or something in between.

32. In the ordinary course the failure of an appeal will usually lead to a forfeiture of the deposit. However no application has been made.

33. If the appellant does not make application for a refund of the appeal deposit , or part thereof, within 7 days of receiving this written statement of reasons then the Tribunal will order the deposit forfeited. If an application is made then the Tribunal will invite and consider submissions on the application.
