

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANTS: MR KYLE HARPER

APPLICATION NO: 24/2772

PANEL: MR ROBERT NASH (CHAIRPERSON)

DATE OF HEARING: 6 June 2024

DATE OF DETERMINATION: 27 June 2024

IN THE MATTER OF an appeal by KYLE HARPER Against a determination made by the Racing and Wagering Western Australia Stewards of Harness Racing to impose a \$100 fine for breach of Rule 170(2) of the Rules of Harness Racing

Mr Tom Percy KC and Mr Jack Young represented Mr Kyle Harper.

Mr Konrad Der Kerloy and Mr Stephen Waddington represented the Racing and Wagering Western Australia Stewards of Harness Racing.

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1. Mr Kyle Harper was found guilty by the Stewards of a breach of Rule 170(2) of the Rules of Harness Racing for driving with part of his body protruding beyond the sulky in Race 4 at Gloucester Park on 31 October 2023. The Stewards imposed a \$100 fine.
 2. Rule 170(2) provides: *'A driver shall not drive in a race with part of the driver's body protruding beyond the sulky.'*
 3. Mr Harper appeals against the conviction and the fine imposed.
 4. The grounds of appeal are as follows:
 1. *The Stewards erred by failing to afford the Appellant procedural fairness by:*
 - (a) *failing to give any reasons for their decision to find him guilty, and*
 - (b) *having found him guilty, by failing to allow him the opportunity to of making submissions on penalty.*
 2. *The Stewards (as far as it is possible to say in the absence of reasons) applied an incorrect interpretation of the rule in question.*
 3. *The decision to convict the Appellant was (in so far as it is possible to say in the absence of any reasons or known findings of fact) not reasonably open or supported by the evidence.*
 4. *The penalty imposed was (in so far as it is possible to say in the absence of any reasons) excessive in all the circumstances of the case.*

5. The video vision of Race 4 shows Mr Harper for most of the race leaning well back on his sulky to the point, as the Stewards observed, that Mr Harper's body was 'basically' 'horizontal'.
6. Following the Race, the Stewards issued Mr Harper with a document titled 'Acknowledgement of Breach of Rules of Racing and Acceptance of Penalty' in which the Stewards' alleged Mr Harper had breached Rule 170(2) and set a penalty of \$100. The document gave Mr Harper the option of accepting or not accepting the contravention of the Rule and the proposed penalty.
7. The infringement document has been developed in consultation with industry participants to deal with what are lower level infractions of the Rules where penalties are not more than \$500. The system is similar to the issuing of a motor vehicle infringement notice. It allows minor rule infractions to be expeditiously dealt with unless the person the subject of the notice wishes to challenge the alleged rule infringement. If they do, then a Stewards Inquiry is held.
8. In this case, Mr Harper disputed the charge in the infringement document and as a result, on the same evening, Mr Harper attended before the Stewards to address them in respect of the alleged breach of Rule 170(2).
9. It is apparent from reading the transcript of the Stewards hearing that there has been an ongoing issue between Mr Harper and the Stewards about how Rule 170(2) should be applied and interpreted. At T4, there is a reference to Mr Harper having previously been fined twice and reprimanded four times for how far back he leaned when driving. There is also a reference to how much leeway the Stewards had been giving to Mr Harper in order to take into account the way he drives.
10. At the Stewards' hearing, Mr Harper expressed the view that Rule 170(2) is outdated in that with modern sulkies the driver's body naturally protrudes beyond the confines of the sulky (T2), whereas in the past the sulkies had a 'bar around the back' of the driver's seat.
11. The design of the modern sulky means that a driver's body will to some degree protrude beyond the confines of the sulky, as Mr Harper observed at T2.
12. Simple observation of the video footage shows Mr Harper's body lying backwards protruding well beyond the sulky.
13. It is apparent that the Stewards, in enforcing Rule 170(2), have had to exercise a degree of judgment about the limits to which a driver can allow his body to lean out from a sulky. Allowing the body to protrude too far out from the sulky obviously presents as a safety issue.
14. During the Stewards hearing, Mr Harper was endeavouring to get a better understanding of how the Rule will be applied and enforced by the Stewards in a practical sense.
15. It is clear that the wording of the Rule is in need of revision given the design of modern sulkies where even in the normal seated posture, parts of the driver's body will naturally protrude from the sulky.

16. There can, however, be no question that the video vision of Race 4 clearly establishes that Mr Harper's body position during the race was well and truly protruding beyond the sulky for a sustained period of the Race.
17. The video evidence clearly established that the driving position adopted by Mr Harper was in breach of the terms of Rule 170(2). Mr Harper's challenge was more directed to trying to gain an understanding of the circumstances or threshold point at which the Stewards would allege there has been an infringement of the Rule. That seems to be a matter in which the Stewards have been exercising a prosecutorial discretion having regard to the evolution of sulky designs and modern race craft.
18. Mr Harper's appeal fairly draws attention to the need for the controlling bodies to review the terms of Rule 170(2) so that it adequately accommodates the evolution of modern sulky designs.

Grounds of Appeal

Ground 1

19. This ground contends that the Stewards failed to accord Mr Harper procedural fairness (natural justice) by failing to give reasons for convicting Mr Harper of the breach of Rule 170(2) and for failing to give him an opportunity to make submissions on penalty.
20. It is necessary in considering this ground to first establish what rules of natural justice are required to be observed by the Stewards.
21. The rules of natural justice are not fixed and immutable, but are influenced by the circumstances in which they are invoked.
22. Procedural fairness is directed to avoiding practical injustice and what is necessary to avoid practical injustice will depend on the circumstances: *Defendi v Sziglieti* [2019] WASCA 115 at [48] (Murphy, Mitchell and Beech JJA).
23. In the racing context, procedural fairness generally requires that proper notice of a proposed decision is given to the person potentially adversely affected by it, that the potentially affected person has a reasonable opportunity to be heard, and that the Stewards remain open to persuasion despite the fact that under the Rules they have often have the roles of witness, prosecutor, judge and jury: *Fletcher v Racing NSW* [2019] NSWSC 358, [80].
24. This Tribunal has previously rejected the proposition that the Stewards have the same obligations to provide reasons for decision as judges or magistrates in criminal cases: *Miller, Appeal 413*. The extent to which the Stewards will need go in order to adequately articulate the basis for their determination, will be informed by the circumstances, nature, degree, and seriousness of the case under consideration.
25. The form of inquiries undertaken by the Stewards is to some extent informed by the need for such inquiries to be conducted in a manner that is in the interests of well-organized racing and allowing for the expeditious resolution of infractions of the Rules, particularly those that are at the lower end of seriousness.

26. Even if there has been an infraction of the rules of natural justice at a Steward's hearing, the right of appeal to this Tribunal allows a person adversely affected to have the matter reviewed on its merits having regard to equity, good conscience and the substantial merits of the case: section 11(1)(b) *Racing Penalties (Appeals) Act 1990*. In my view, the existence of such a right of appeal is a discretionary factor that in an appropriate case, having regard to the overall merits and seriousness of the case, allows relief for any detected failure of the Stewards to accord procedural fairness to be withheld by the Tribunal in the exercise of its supervisory jurisdiction: *Day v Harness Racing New South Wales (2014) 88 NSWLR 594, [125]*; *Day v Saunders [2015] NSWSCA 324 at [112] to [113]*, see also *R v Brewer; Ex parte Renzella [1973] VR 375, at 384*.
27. In this case Mr Harper disputed the infringement notice which specified both the charge and the proposed penalty of \$100.
28. As a consequence, there was a hearing before the Stewards at which Mr Harper addressed them in respect of the outdatedness of the Rule and how it was being applied. In the course of that discussion, the Stewards referred to the fact that Mr Harper had been the subject of four previous reprimands and that the Stewards had accorded Mr Harper some leeway to take into account the way he drives, but that in Race 4 he was positioned in what they described as a 'basically like horizontal' position. Mr Harper concluded his remarks with the following exchange with the Stewards at T7:
- HARPER: look I will leave that to you, so with that evidence to decide*
- BROWN: Mmm Hmm*
- HARPER: whether I deserve 100 or not?*
- BROWN: Alright*
- HARPER: You know I am always happy to abide by the ruling*
- BROWN: Yes*
29. There was the following exchange between Senior Steward Brown and Mr Harper at T7:
- BROWN:we will consider what you put forward, but if you are fined today it's \$100, if you are spoken to again in the near future then the fines only go up.*
- HARPER: For sure and that's why I wanted to have this conversation*
30. In my view, it is apparent from the transcript that Mr Harper knew precisely what the charge was, he was given a reasonable opportunity to be heard about the charge, and that the Stewards remained open to considering his arguments or contentions. It was also clear at the end of the hearing that the Stewards were going to deliberate on whether they found Mr Harper guilty of the charge and if they did, whether he would be receiving a modest \$100 penalty.
31. In considering the fairness of the procedure adopted by the Stewards, the circumstances of the hearing and the nature and severity of the charge must be born in mind.

32. The nature and circumstances of the charge did not warrant the Stewards to undertake the same type of process as one may expect if the charge involved was more serious and had more serious potential consequences for Mr Harper.
33. In my view, having regard to the context and circumstances, there was no denial of procedural fairness to Mr Harper.
34. Further, by his counsel's written submissions, at paragraph [34], Mr Harper now asks that this Tribunal determine the matter rather than refer it back to the Stewards. Accordingly, even if I am wrong in the conclusion that I have reached above in respect of the procedural fairness ground, for the reasons that follow in relation to the remaining grounds of appeal, in the exercise of the Tribunal's supervisory jurisdiction, I would as a matter of discretion withhold relief for any failure by the Stewards to accord procedural fairness.

Ground 2

35. By this ground it is contended that the Stewards applied an incorrect interpretation of Rule 170(2) in convicting Mr Harper.
36. As noted above, all that is required for Rule 170(2) to be infringed is for part of the driver's body to protrude beyond the sulky.
37. There was no issue that part of Mr Harper's body was protruding beyond the sulky during the Race, which he implicitly accepted in his evidence at the hearing before the Stewards. It was plainly observable on the video of the Race.
38. The real issue does not seem to involve any question as to the proper construction of the Rule in question, but rather when the Stewards will exercise their prosecutorial discretion to charge a breach of the Rule given the evolution of sulky designs and modern driving styles. As Mr Harper fairly put to the Stewards at the hearing, the rule is outdated.
39. However, having determined to prosecute him, I cannot see that there is any error on the part of the Stewards in finding that Mr Harper had breached the Rule.
40. In my view, Ground 2 of the Appeal must be dismissed.

Ground 3

41. By this ground, Mr Harper argues that the conviction was not reasonably open or supported by the evidence.
42. I repeat what is said in respect of Ground 2 above. The conviction was clearly supported by the evidence.
43. Ground 3 of the Appeal must be dismissed.


Ground 4

44. By this ground, Mr Harper contends that the penalty imposed was excessive in all the circumstances of the case.

45. Given the Rule is clearly outdated and that drivers, such as Mr Harper, are in a state of uncertainty as to where the Stewards will draw the line in terms of allowing drivers 'leeway' in the enforcement of the Rule, it is reasonable for this to be presented as a relevant factor in considering penalty.
46. Having said that, the penalty imposed, even on Mr Harper's own submission (paragraph 32), was minor and the real complaint was more directed to the issue of the legal procedure that followed.
47. At the hearing before the Stewards, Mr Harper did not seek to argue the issue of the quantum of the proposed penalty as is evident from the extract of the transcript referred to in paragraph 28 above. It was more a question of whether there should be any penalty at all.
48. During the course of oral submissions, Mr Harper's counsel did not specifically address this ground nor articulate the basis on which it was contended that the penalty was excessive.
49. As has been stated in numerous decisions of this Tribunal, the Tribunal will not interfere with a penalty imposed by the Stewards unless the Tribunal finds that there has been an error by the Stewards in the imposition of the penalty.
50. The penalty has clearly been set at a very low monetary level. It is apparent from the transcript of the hearing, that Stewards were concerned that Mr Harper had leaned back excessively during the Race (to the point of being almost horizontal) and that there had been four prior reprimands and two fines for similar conduct.
51. As the Stewards' counsel submitted at the appeal hearing, the excessive backwards protrusion of Mr Harper's body during his drive in Race 4 presented as a risk to safety.
52. In my view, the penalty imposed by the Stewards was not demonstrably or manifestly excessive.
53. Accordingly, I dismiss Ground 4 of the appeal.

Disposition

54. I have determined that the appeal must be dismissed. Having done so, I would add that I consider Mr Harper has through this appeal raised a legitimate concern about the outdatedness of Rule 170(2) and the need for the controlling bodies to review the wording of that rule in light of the evolution of sulky designs and modern driving techniques.



ROBERT NASH
CHAIRPERSON

