APPEAL - 239

DETERMINATIONS AND REASONS FOR DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT : **GREGORY DONALD HARPER**

APPLICATION NO. : **A30/08/239**

PANEL : **MR D MOSSENSON (CHAIRPERSON)**
MR P HOGAN (MEMBER)
MR F ROBINS (MEMBER)

DATE OF HEARING : **23 JANUARY 1995**

IN THE MATTER OF an appeal to the Tribunal by Mr G D Harper under section 13(1)(d) of the Racing Penalties (Appeals) Act against the decision of the Western Australian Turf Club Committee on 14 December 1994 not to issue to Mr Harper a trainer's licence.

Mr P J Vincent, instructed by DCH Legal Group, appeared for the applicant.

Mr R J Davies QC appeared for the WA Turf Club Committee.

BACKGROUND

Mr Harper had formerly held a trainer's licence issued by the Turf Club. He had been convicted of breaches of the Rules of Racing and his licence had not been renewed. He applied again for the issue of a licence. The Committee, acting in reliance on some information adverse to the appellant and not made known to him, refused to issue a licence. The appellant appealed to this Tribunal, which ordered that the Committee hear the application again after providing the appellant with the adverse information and allowing him the opportunity to be heard on it.

The Committee considered the application again on 4 November 1994. The appellant appeared in person and spoke in support of his application. He also tendered a book of personal references.

The Committee again refused to issue the appellant with a trainer's licence for the 1994/1995 season. It communicated that decision to him by letter dated 14 December 1994. By application dated 23 December 1994, the appellant sought leave to appeal. The appeal, and application for leave to appeal, were heard together on 23 January 1995. At the conclusion of the hearing, pursuant to Section 13(1)(d) of the Racing Penalties

(Appeals) Act, leave was granted and the Tribunal reserved its decision on the merits of the appeal. It is the appeal arising out of that application which is now before the Tribunal for determination.

GROUNDS OF APPEAL

There were initially three grounds of appeal:

"1. The determination of the Western Australian Turf Club Committee ("the Committee") dated 14 December 1994 to refuse the appellant a trainer's license ("the decision") was made contrary to the rules of natural justice and procedural fairness in that the Committee, having heard from the appellant, then conferred in camera with the stewards, prior to making its decision, thereby

(a) giving rise to a reasonable apprehension of bias on its part; and

(b) denying the appellant an opportunity to respond to such matters or material as were placed before it by the stewards.

2. The decision is bad in law in that it is manifestly unreasonable and is not such that a reasonable decision-maker would have made in the circumstances.

3. The decision is wrong in principle in that, by refusing to renew the appellant's license, the Committee has, in effect, penalised the appellant disproportionately in respect of any matters of concern to the Committee which had been disclosed to the appellant."

By leave granted on 23 January 1995, a fourth ground was added, namely:

"4. The determination of the Committee was made in contravention of the rules of natural justice (procedural fairness) in that the resolution of the Committee on 13 December 1994 refusing to grant the appellant's application for a trainer's licence was made by the Committee

(a) at a time when it included Mr J Miorada and Mr R Hart members who were not present at the hearing relating to that application before the Committee on 4 November 1994; and further

(b) in the presence of other persons who were not members of the Committee and not required to be present for the purposes of making the resolution".

GROUNDS 1 AND 4 - NATURAL JUSTICE

It was contended that the rules of natural justice applied to the Committee's proceedings, and that there were breaches of these rules. This proposition was not disputed by the respondent. It is beyond doubt that the rules of natural justice did apply to the Committee's proceedings (Heatley v Tasmanian Racing and Gaming Commission (1977) 137 CLR 487; Kioa v Minister for Immigration and Ethnic Affairs (1986) 62 ALR 321.) What falls to be determined in this appeal under grounds 1 and 4 is whether the

Committee's proceedings were in fact tainted by any breach of the rules of natural justice, rather than as a matter of law.

The evidence in support of grounds 1 to 4 is contained in paragraphs 6 to 11 of the appellant's affidavit sworn 17 January 1995, and in the transcript of proceedings before the Committee on 4 November 1994. As to the events before, during and after the hearing, the appellant deposed as follows:

"6. On the afternoon of 4 November 1994 I attended at the Committee's office in Grandstand Road, Belmont. There was a hearing by the Committee prior to my hearing. I waited outside while that occurred. After those involved in that hearing had left, Mr Finn Powrie, Chief Steward, and Mr Ron Goddard, the Racecourse Investigator, went into the hearing room with the Committee for about 10 minutes. They then came out of the hearing room. I do not know why they had entered the hearing room.

7. I was then called in. In addition to Committee members, Mr Rick Mitchell, the Chief Executive Officer of the Western Australian Turf Club was also in attendance.

8. At the hearing I handed to the Committee members a letter prepared in support of my application together with a book of references. Annexed to this affidavit and marked with the letter "A" is a copy of the letter. I adopt, for the purposes of these proceedings, what I stated in the letter. Annexed to this affidavit and marked with the letter "B" is a copy of the book of references.

9. No specific matters of concern about my application for a Trainer's License were raised by the Committee, so I addressed them generally. In reference to the matter mentioned in paragraph (c) on page 3 of my letter, the "Hall" incident, I recall one of the Committee members, Joyce Stowe, passing comment to the effect that "telephone abuse is as bad as physical abuse".

10. Following my address to the Committee I left on the basis that the Committee Chairman, Mr Tuckey, had said that the Committee would make its decision in due course and let me know the result.

11. When I walked out, Mr Powrie and Mr Goddard (referred to above in paragraph 6) walked back into the room where the Committee was sitting. I am aware from the previous proceedings before this Tribunal that both the Chief Steward and Mr Goddard had given adverse reports to the Committee about my application. I was then, and am still of the belief that each of them were opposed to the granting of a trainer's license to me."

It can be seen, then, that these facts relate directly to grounds 1(a) and 1(b). In the light of the circumstances it was reasonable for the appellant to believe that Mr Goddard and Mr Powrie were opposed to his application. Those persons were each involved in the reports adverse to the appellant which had quite properly been considered by the Committee.

GROUND 1(a) - BIAS

The rule against bias can be stated thus: "... a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it". (Livesy v NSW Bar Association (1983) 151 CLR 288 at page 294.) The rule is similar to but not identical with the rule which requires that a person be given an opportunity to meet the case against him.

There was no evidence that the Committee in fact was biased against the appellant. The real question is whether there was the appearance of bias. We are of the opinion that there could be no reasonable apprehension of bias.

Both Mr Powrie and Mr Goddard are officers of the Turf Club. Both had legitimate reason to be in and about the Committee room on that day. This is made clear from a consideration of the extract of the Committee's Minutes of 4 November which was tendered in evidence. It can be seen that there were other racing matters on the agenda that day. The appellant himself deposes that two officers went in to the Committee room at the conclusion of the previous hearing. From those bare facts, it is impossible for this Tribunal to find that their presence related to the appellant's hearing. It may have related to another matter. The presence of Mr Powrie and Mr Goddard in the Committee room before hearing the appellant cannot itself create the appearance of bias.

The presence of Mr Powrie and Mr Goddard immediately after the appellant's hearing was, on the evidence, in relation to his matter. Committeeman Yovich, at page 7 of the transcript, indicated his intention to discuss "some more matters" with the Stewards. The appellant was invited to wait, in case there were any questions later.

We do not accept that the mere presence of the two officers at this stage tainted the process. It is clear that the Committee was aware of its obligation to give the appellant the opportunity to be heard on adverse matters. It is reasonable to infer that nothing additional was discussed which was adverse to the appellant. At different stages in the course of the hearing before the Committee, Committeeman Yovich stated to the Chairman of the Committee in respect of the appellant:

> "Is it possible to ask Mr. Harper to wait in case something happens after we perhaps discuss some more matters with the stewards in case there is any questions after."

The Chairman replied:

> "I have no objection if you believe there might be something point you want to raise."

Mr Yovich then said to the appellant:

> "If you could just wait for 1/4 of an hour just in case there is another matter that rises in our discussions."

Further, there is no evidence before us as to whether the two officers remained during the deliberative process.

In the circumstances we find that the presence of the two officers after the appellant had been heard could not create a reasonable apprehension of bias.

GROUND 1(b) - THE RIGHT TO KNOW THE CASE

The rule is clearly stated in KIOA (supra) at page 345 - "It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it".

In this case, it was not submitted to us that there was adverse material not disclosed to the appellant. Rather, it was submitted that there may have been, because Mr Powrie and Mr Goddard were before the Committee in the absence of the appellant.

We do not find this ground made out.

The appellant submits that the reasonable inference to be drawn is that the two officers did make additional adverse comment before the Committee as stated above. We find that the inference to be drawn is that the persons did not make any additional adverse comment. The transcript shows that the Committee was aware of its obligation in that regard. Had there been any new matters raised, then the Committee was likely to have recalled the appellant. After all, he was asked to wait "... in case there is any questions after".

In the circumstances we find that the appellant was not denied an opportunity to know the case against him and was not denied an opportunity to respond.

GROUND 4 - COMPOSITION OF THE COMMITTEE

The background to this ground of appeal is a little unclear. The Committee's decision was communicated to the appellant by letter dated 14 December 1994. On request from the appellant's solicitor, the Turf Club supplied an extract from the Committee's Minutes of 13 December. This extract showed that on 13 December "It was resolved to refuse G D Harper's application for a trainer's licence".

During the course of the hearing before us, an extract from the Committee's Minutes of 4 November was tendered in evidence. That extract shows, amongst other things - "The Committee resolved not to renew the trainer's licence of G D Harper". We are satisfied that the Committee refused the application to renew on that date, the later resolution simply amounts to restatement, albeit in slightly different terms of that earlier decision.

As the appellant's ground 4 is founded on the fact that the Committee members who resolved on 13 December 1994, were not identical with those who heard the application on 4 November 1994, it fails.

GROUND 2 - MANIFESTLY UNREASONABLE DECISION

The Rules of Racing empower the Committee to grant or to refuse to grant licenses to trainers and there is no obligation to give reasons (Rule 7b). In the light of all of the relevant circumstances, we are satisfied that the Committee's decision was not unreasonable.

GROUND 3 - DISPROPORTIONATE PENALTY

It is said that the refusal to issue the licence in effect amounts to a penalty. We do not accept that proposition. The refusal to issue was a proper exercise of the licensing discretion. The fact that the appellant will suffer is incidental to that and in no way can be seen as the imposition of a penalty.

That being so the past conduct was indeed relevant and was the basis upon which the Committee was entitled to arrive at the decision which it did.

For these reasons the appeal fails.

DAN MOSSENSON, CHAIRPERSON

PATRICK HOGAN, MEMBER

FRED ROBINS, MEMBER

Seal of the Racing Penalties Appeal Tribunal of W.A.