

DETERMINATION AND REASONS FOR DETERMINATION OF
THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT : LINDSAY B HARPER
APPLICATION NO. : A30/08/241
PANEL : MR D MOSSENSON (CHAIRPERSON)
MR T MULLIGEN (MEMBER)
MR L ROBBINS (MEMBER)
DATE OF HEARING : 19 JANUARY 1995

In the matter of an appeal by Mr L B Harper against the decision of the Western Australian Trotting Association on 12 January 1995, to charge him in accordance with Rule 469(a) of the Rules of Trotting.

Mr Harper was charged with a breach of Rule of the Rules of Trotting 469(a) which states:-

"No person shall:

- (a) *either by himself or any other person do or permit or suffer any act or thing to be done during the progress of any race or prior or subsequent thereto in connection therewith, which the Stewards or Controlling Body shall deem to be fraudulent, corrupt, foul or improper, in any way, or by which other persons may suffer or otherwise be penalised."*

The particulars of the charge were that Mr Harper had:-

"... deliberately driven REMEDY in such a way as to severely hinder BURNSIDE LANE Mr Hall's drive, after the start of Race 7. We say from a point as the gate approached the starting point until just past the winning post."

Mr Harper pleaded not guilty. After considering all of the evidence, the Stewards were satisfied that the charge was made out. Mr Harper was convicted and his reinsperson's licence was suspended for a period of three months.

Mr Harper appealed on the grounds that he was "Not guilty of the charge and the penalty is excessive." No reasons or particulars were supplied by Mr Harper in the appeal notice or at the hearing.

At the beginning of the appeal proceedings which took place before the Tribunal Mr Styles gave notice that he planned to call Mr Hall as a witness and further that he desired to submit two Stewards' reports for 6 January 1995 and 13 January 1995, as evidence in the appeal.

It was clear that Mr Harper had not seen those particular reports. They were not brought to his attention at the Stewards' inquiry. Mr Harper not only objected to the reports being produced but also tried to resist the enquires made by the Tribunal with a view to clarifying the background to them and their relevance to the appeal.

When the Tribunal gave Mr Styles the opportunity to comment on the relevance of the new material, Mr Styles stated that:-

"... on that same evening, the Van Rens lodged a complaint alleging there was unfair tactics against their horse.... they believed the tactics were designed to assist the number one horse in the race CAPTAIN KERWAYNE. In light of that Detective Dablestein and myself - he felt that it'd be wise to speak to the people in respect of the betting on CAPTAIN KERWAYNE and also to the fact that Mr Hall had been approached by a person prior to the running, or after the running of Race Four, indicating that perhaps he shouldn't be going forward on his horse, namely BURNSIDE LANE.

... if corruption is found or we get any evidence to indicate there has been corruption in the running of the race, we would then reopen the matter... I believe it has affected perhaps the evidence that Hall has given and coupled with the fact that there was a second incident in the race, which we notified both drivers of, I believe Mr Hall to assist the Stewards' case today ..."

I reacted to these comments by stating:-

"... what seems to be emerging is that there was some information which the Stewards had prior to determining that Mr Harper should be convicted of the offence which he was ultimately convicted of and then that material was at no stage presented or given to Mr Harper, even although it had the potential to influence the Stewards' attitude and the outcome of the charge that was made against Mr Harper."

As the appeal proceeded it became apparent that these documents which did have the potential to influence the outcome of the matter were withheld from Mr Harper. It was revealed that these new documents played some part in convicting Mr Harper at the Stewards' hearing. This material ought to have been disclosed at the hearing and Mr Harper should have been given opportunity to answer the questions raised."

Even although Mr Harper did not argue the matter on this basis, and indeed the technical legal issue was completely lost on him, this situation does constitute a breach of the rules of natural justice. The three aspects of natural justice that Stewards must abide by, as outlined by the Privy Council in *Byrne v Kinematograph Renters' Society [1958] 2 All ER 579*, are:-

- (a) *the right to be heard by an unbiased adjudicator;*
- (b) *the right to have notice of charges of misconduct; and*
- (c) *the right to be heard in answer to those charges.*

The rules require a full disclosure of all relevant material known to the adjudicator, which may have the possibility of affecting or influencing the outcome of the hearing. In the circumstances the withholding of the two documents in question combined with the other information which the Stewards had and which was relevant to the matter but which was not disclosed do amount to a breach of the rules.

Had Mr Harper known of this material during the course of the Stewards' hearing it may have influenced the way in which he conducted his defence and consequently may have effected the outcome of the inquiry.

A denial of natural justice is an error of law which deprived the Stewards' hearing of any jurisdiction which it otherwise possessed and rendered their decision void. As was decided by the Privy Council in *Calvin v Carr 53 ALJR 471* "A decision made contrary to natural justice is void, not voidable; but, until it is so declared by a competent body or court, it may have some effect, or existence, in law".

Section 17 of the Racing Penalties (Appeals) Act states that:-

- "(G) *Upon the determination of an appeal the Tribunal may ... (e) confirm, vary or set aside the determination or finding appealed against or any order or penalty imposed to which it relates*".

This empowers the Tribunal to declare a decision made contrary to natural justice void. The Tribunal tentatively concluded at the hearing on 19 January 1995, that there was a breach of the rules of natural justice. However, in view of the unusual circumstances in the matter and the fact that the Stewards were not represented an adjournment was afforded to the Stewards to enable them to seek legal advice and to consider their position.

At the resumed hearing on the 6 February 1995, Mr Styles conceded there had been a breach of natural justice. The Stewards invited the Tribunal to send the matter back to the Stewards for rehearing. As a decision which is made in breach of the rules of natural justice is void it was not appropriate for this matter to be directed back to the Stewards. The appeal was upheld and the conviction was quashed.

The \$200 lodgement fee was ordered to be refunded to Mr Harper.

The question that was left for my determination was as to the appropriate consequential orders to be made.

The appellant did seek the reimbursement of his expenses associated with the appeal which he claimed to be as follows:-

Transcript costs	\$203.00
Taxi fares	\$ 50.00
Casual labour	<u>\$ 50.00</u>
	<u>\$303.00</u>

According to section 17(9)(e) of the Racing Penalties (Appeals) Act, upon the determination of an appeal, the Tribunal may:-

"... make such other order as the member presiding may think proper including, an order for the total or partial refund of any fee paid or, subject to subsection (10), an order that all or any of the costs and expenses of the Tribunal or any party to the appeal shall be paid by a specified person."

As observed by Mr D K Malcolm QC, as he then was in his then capacity as Chairman of the Town Planning Appeal Tribunal, in *Bonton Pty Ltd v City of South Perth and Metropolitan Region Planning Authority* (unreported, delivered 18 January 1982), "the power of a Tribunal such as this Tribunal to award costs depends upon statute" (*R v Justices of South Brisbane: Ex parte Zagami* (1901) 11 QJL 81; *Victorian Philip - Stephan Photolitho etc Company v Davies* (1890) 11 LR (NSW) 257)".

In that appeal the Town Planning Appeal Tribunal observed that in the exercise of its discretion to award costs it followed two principles. First, that the discretion must be exercised judicially, and second that, in accordance with the settled practice of court, costs should follow the event except in exceptional circumstances or for some reason connected with the particular appeal (citing *Ritter v Godfrey* (1920) 2 KB 47; *Donald Campbell & Co v Pollack* (1927) AC 732).

In applying these principals to this Tribunal it must be observed that section 17(10) of the Act provides that:

"An order for the payment of costs shall not be imposed save where the member presiding is satisfied that the appeal, or the aspect of the appeal to which the order relates, was vexatious or frivolous."

Section 17(10) applies expressly only to an order for costs, rather than expenses. Although the section may be interpreted as indicating the general approach of this Tribunal in ordering either costs or expenses the most that can properly be drawn from the section in relation to an order for expenses or disbursements is that such an order does not necessarily follow the event. In this respect the Act requires that the approach of this Tribunal differ from the "settled practice" referred to and applied by the Town Planning Appeal Tribunal. To give effect to this approach in relation to expenses or disbursements, this Tribunal makes reference to the Rules of the Supreme Court of Western Australia, examining whether the expenses or disbursements claimed are "necessary payments and expenses incurred in the conduct of the litigation" (Supreme Court Rules O.66 r.19). There is no technical or special meaning associated with this phrase, which has been held quite simply

to refer to a payment or expense "needed to run an action" (*Corwest Management v Deputy Commissioner for Taxation* (unreported, SC lib no. 6696)).

I consider that the transcript cost which was incurred by Mr Harper should be paid by the Stewards as an expense which was necessary and proper for the conduct of this litigation, and I order accordingly.

As to the claim for taxi fares this was not supported by any documentary evidence. The Tribunal was not told anything regarding the need to engage in this form of transport and the background circumstances. Further the Appellant has not suggested that it was necessary and appropriate in the circumstances.

I do not consider, that the expenses relating to the hire of casual labour by Mr Harper are either necessary or proper expenses in this sense. Accordingly I refuse the latter orders sought.



DAN MOSSENSON, CHAIRPERSON

819/1995

