

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN
(ACTING CHAIRPERSON)

APPELLANTS:

DAVID ANDREW O'HEARE
RICKY JAMES FARRELL

APPLICATION NOS:

A30/08/442 & A30/08/443

DATE OF HEARING
AND DETERMINATIONS

18 FEBRUARY 1999

IN THE MATTER OF an appeal by Mr D A O'Heare against the determination made by the Western Australian Turf Club Stewards on 18 January 1999 imposing a two month suspension for breach of Rule 175(gg) of the Australian Rules of Racing

AND

IN THE MATTER OF an appeal by Mr R J Farrell against the determination made by the Western Australian Turf Club Stewards on 18 January 1999 imposing a one month suspension for breach of Rule 175(gg) of the Australian Rules of Racing.

Mr T F Percy QC, instructed by D G Price & Co, represented Mr O'Heare.

Mr P Harris, instructed by D G Price & Co, represented Mr Farrell.

Mr R J Davies QC, represented the Western Australian Turf Club Stewards.

Mr David O'Heare is an Apprentice Jockey. At the time of the relevant events, he was 18 years old. Mr Ricky Farrell is a licensed Jockey. He has recently completed his apprenticeship.

On Thursday evening 14 January 1999, Mr O'Heare and Mr Farrell and others went out together. They went to an hotel and later to a nightclub. Mr O'Heare drank alcohol, but did not get drunk. He left the nightclub and went home sometime between 1.30 and 2.00 a.m.

On Friday morning 15 January, Mr O'Heare did not turn up to ride trackwork. He slept through his alarm.

The next day, Saturday 16 January, Mr O'Heare was booked to have five rides. He wanted to keep those rides. One of them was on the horse KING AND ACE.

Through the day on 15 January, there were repercussions arising out of Mr O'Heare's failure to turn up for trackwork earlier in the morning.

Mr O'Heare's Master, Mr Williams, sought permission of the Stewards to replace Mr O'Heare as the rider of KING AND ACE. The Acting Chairman of Stewards interviewed Mr O'Heare that afternoon concerning that request.

Mr O'Heare stated that he did not ride on Thursday 14 January because he was ill. He produced a doctor's certificate to that effect. He stated that he did not attend trackwork on Friday morning 15 January because he was ill. When questioned specifically about his movements on Thursday night 14 January, Mr O'Heare stated that he did not go out for the evening, did not drink alcohol and did not go to the nightclub in question.

Mr O'Heare was taken off his ride on KING AND ACE. That was by way of Mr Williams imposing punishment for not turning up at trackwork. He retained his other rides for Saturday 16 January.

On 16 January, Mr O'Heare spoke to another of the Stewards, Mr Wagener, in the Jockey's Room after Race 1 or Race 2. There had been a lot of talk. Mr Wagener asked:

" be honest with me, did you go out and get on the slops on Thursday night?"

Again Mr O'Heare denied going out.

During the afternoon of 16 January, between races, the Stewards also spoke to Mr Farrell. He also had not attended trackwork on the Friday morning. He had slept in. In answer to specific questions, Mr Farrell told the Acting Chairman of Stewards that he did not see Mr O'Heare on the Thursday night, and he did not go out with Mr O'Heare.

On the Saturday, the Stewards questioned another Apprentice Jockey, Joshua McLeod. He said that he was with both Mr O'Heare and Mr Farrell at the hotel and later at the nightclub.

On Monday 18 January, an inquiry was held concerning the answers given to Stewards by Mr O'Heare on Friday 15 January, and the answers given by Mr Farrell to Stewards on Saturday 16 January. Both appellants admitted the falsity of their earlier statements.

DAVID ANDREW O'HEARE

At the conclusion of his inquiry, Mr O'Heare was charged as follows:

"Now you're charged under that Rule for making a false statement when questioned on Friday the 15th January, 1999 in relation to your movements on the evening of Thursday the 14th January, 1999."

He pleaded not guilty. He called no further evidence.

After considering the matter, the Stewards convicted Mr O'Heare. Penalty was announced in the following terms:

"We consider that a breach of AAR.175(gg) is extremely serious. It is central to the control of racing, that participants, when questioned, state the truth. Failure to do so, eventually affects the Stewards' ability to properly perform their functions. The Stewards are extremely concerned at your lack of remorse and your referral to this matter as a 'big joke'. We have

considered the provisions of ARR.196 in this case. It is our decision that your permit to ride in races be suspended for a period of two months."

Rule 175(gg) of the Australian Rules of Racing states:

"The Committee of any Club or the Stewards may punish:

(gg) Any person who makes any false or misleading statement or declaration in respect of any matter in connection with the administration or control of racing."

Mr O'Heare's grounds of appeal against conviction and penalty are as follows:

A. CONVICTION

1. *The Stewards erred in convicting the Appellant of the offence in that they found that the words spoken by the Appellant constituted a 'statement or declaration' for the purposes of Rule 175(gg) of the Australian Rules of Racing.*

Particulars

- (i) *The Appellant's evidence at an informal interview with the Acting Chairman Mr Zucal and WATC Steward Mr Wagener could not constitute a 'statement or declaration' for the purposes of Rule 175(gg).*
 - (ii) *Whilst in some circumstances oral words might constitute a 'statement', one must look at the word 'statement' as it appears in Rule 175(gg).*
 - (iii) *The word 'statement' as it appears in Rule 175(gg) is to be read and interpreted in light of its neighbouring words. The word 'declaration' means a formal written declaration.*
 - (iv) *In Rule 175(gg) the word 'statement' is closely associated with the word 'declaration' and should be interpreted in this context.*
 - (v) *Even if the word 'statement' as it appears in Rule 175(gg) is to apply to oral statements, such a 'statement' would require some degree of formality and would not apply to answers given at an informal interview.*
2. *The Stewards erred in convicting the Appellant of the offence in that they found that the words spoken by the Appellant were 'in respect of any matter in connection with the administration or control of racing' for the purposes of Rule 175(gg) of the Australian Rules of Racing.*

Particulars

- (i) *Rule 175(gg) confers upon the Stewards powers to direct and regulate matters directly related to the administration of racing, it confers upon them no generalised powers in relation to the private or social life of licensed persons.*
- (ii) *The words 'in connection with' require a substantial connection of some real relevance between what the Appellant said at the interview and the administration or control of racing.*

- (iii) *Rule 175(a) makes punishable any 'dishonest, corrupt, fraudulent, improper or dishonourable action or practise in connection with racing' generally. This rule can be contrasted with Rule 175(gg) in that it makes no reference to the 'administration or control' of racing.*
- (iv) *Furthermore, Rule 175(g) provides that the Stewards may punish any person who gives false or misleading evidence on any matter in particular at any inquiry or appeal – again, no reference is made to the 'administration or control' of racing.*
- (v) *There is no casual connection between the Appellant's words and the administration or control of racing to bring the words within the ambit of Rule 175(gg).*
- (vi) *Unlike Rule 175(a) the test in relation to Rule 175(gg) is an objective one and is not governed by the opinion of the Stewards.*

B. PENALTY

3. *The penalty imposed by the Stewards was excessive in all the circumstances.*

RICKY JAMES FARRELL

At the conclusion of his inquiry, Mr Farrell was charged as follows:

"You're charged under that Rule for making a false statement when questioned at Ascot Racecourse on Saturday the 16th January, 1999 in regards to questions asked of you in relation to Apprentice D. O'Heare."

He pleaded not guilty, and called no further evidence. He too was convicted. Penalty was announced in the following terms:

"The Stewards consider that a breach of ARR.175(gg) is a serious matter. It is essential to the control of racing that participants when questioned tell the truth. Failure to do so adversely affects the Stewards ability to properly perform their functions. We have taken into account that you were assisting a friend, albeit that we do not and cannot condone such behaviour. We have considered the provisions of ARR.196 in this case the Stewards have decided to suspend you for a period of one month."

Mr Farrell's grounds of appeal against conviction and penalty are as follows:

A. CONVICTION

1. *In convicting the Appellant of an offence under Australian Rules of Racing 175(gg) the Stewards erred in finding that the words spoken by the Appellant constituted a 'statement or declaration' within the meaning of the Rule.*

Particulars

- (i) *The Appellant's evidence at the informal interview with the Acting Chairman Mr Zucal and other Stewards cannot constitute a 'statement or declaration' for the purposes of Rule 175(gg).*

- (ii) *The word 'statement' as contained in Rule 175(gg) is to be interpreted in light of the neighbouring words 'or declaration'.*
 - (iii) *Properly construed the word 'declaration' means a formal written declaration..*
 - (iv) *As used in ARR 175(gg) the word 'statement' is closely associated with the word 'declaration' and should be interpreted in this context.*
 - (v) *In short, the word 'statement' as contained in ARR 175(gg) means a formal written statement.*
 - (vi) *Even if the word 'statement' as it appears in ARR 175(gg) is to apply to oral statements, such a 'statement' would require some degree of formality and would not apply to answers given at an informal interview.*
2. *In convicting the Appellant of an offence under Australian Rules of Racing 175(gg) the Stewards erred in finding that the words spoken by the Appellant were 'in respect of any matter in connection with the administration or control of racing'.*
- (i) *Looked at objectively the words spoken by the Appellant did not have a sufficient 'connection with the administration or control of racing' to justify a conviction..*
 - (ii) *The subject matter of the Stewards' inquiry and the words spoken by the Appellant did not relate to the 'administration or control of racing', but rather to recent events in the Appellant's personal recreation time.*
 - (iii) *Rule 175(gg) confers no generalised power upon the Stewards to inquire into the private social life of licensed persons or to penalise licensed persons for making false statements relating to such matters.*

B. PENALTY

1. *The penalty imposed was manifestly excessive in all the circumstances of the case.*

Particulars

- (i) *The Stewards placed the offence into a category of seriousness which was beyond that warranted by the evidence.*
- (ii) *The Stewards erred in failing to give sufficient weight to the nature of the false oral statements made by the Appellant.*
- (iii) *The Stewards erred in failing to give any weight to the fact that the Appellant was unaware that he was giving evidence at an alleged formal inquiry and that he was being taped by the Stewards.*
- (iv) *The Stewards failed to attach adequate weight to the remorse shown by the Appellant.*

- (v) *The Stewards erred in failing to consider the appropriateness of alternative penalties, in particular the appropriateness of a fine rather than a period of suspension.*

APPEALS AGAINST CONVICTION

The appeals are substantially in the same terms in respect of both appellants. It is said that in each case, the 'statement' to be proved for the purposes of Rule 175(gg) must be formal. I do not accept that.

There are different types of false statements which can be made. If the false statement is made at an inquiry, it is made as part of giving evidence. When persons speak at an inquiry, they are giving evidence before the Stewards who are acting in their judicial role. Thus Rule 175(g) penalises the giving of false or misleading evidence.

Outside of an inquiry, the Stewards carry out a policing and investigative role. When they do that, and when questions are asked, answers given cannot be properly characterised as evidence. However, those responsible for the Rules have seen fit to have a rule wider in its operation than Rule 175(g), namely Rule 175 (gg). The essential difference between the two sub-rules is that one penalises false statements made at an inquiry (evidence) and the other penalises false statements made outside of an inquiry (not evidence).

In using the phrase 'statement or declaration' the writer of Rule 175(gg) has simply tried to cast as wide a net as possible, to catch anything which is stated or declared outside of an inquiry. I accept that the word 'declaration' means 'a positive, explicit or formal statement, announcement etc'. MACQUARRIE DICTIONARY (1997, 3rd ED)

But that does not mean that the word 'statement' in Rule 175(gg) must also mean a statement made with some degree of formality. There is no need to resort to a rule of legal construction to decide what the word means. Even less is there reason to add the word 'formal' when the draftsman has not seen fit to include it.

The words 'statement' and 'declaration' in Rule 175(gg) are used simply to refer to what is said outside of an inquiry. The false statement could for example be frivolous, vexatious or malicious, and designed to send the Stewards on a fruitless investigation. No formality would be necessary for such a statement to be caught by Rule 175(gg). Even less would the statement have to be in writing as stated in ground (1)(v) of Mr Farrell's appeal.

For these reasons, I concluded that there is no substance in ground 1 of the appeals against conviction in both cases.

Ground 2 in each case contends that the words spoken by each appellant were not 'in respect of any matter in connection with the administration or control of racing'. The basic proposition on behalf of each appellant was that he lied to the Stewards about a matter concerning his private life. The unstated proposition on behalf of each appellant is that his social or private life did not in these circumstances have any relevant connection with the administration or control of racing. I do not agree with that proposition.

The phrase 'in connection with' has been the subject of discussion in previous cases. In *BURSWOOD MANAGEMENT v ATTORNEY GENERAL* (Cth) (1990) FCR 144, the Full Court of the Federal Court said, at 146:

"The words 'in connection with' are words of wide import; and the meaning to be attributed to them depends on their context and the purpose of the statute in which they appear ...

Reference to particular reported cases is of little assistance in determining the meaning of the words 'in connection with' because they take their meaning from the particular statute in which they appear."

Here, the purpose of the phrase in the Rules of Racing is to limit the operation of Rule 175(gg) to something relevant to the administration or control of racing. Some limiting words are necessary, otherwise the rule would be *ultra vires* as beyond power. By using the phrase '*in connection with*', the draftsman has simply stated the obvious. The words have their ordinary meaning. What is required in each case is to determine whether the facts provide the necessary connection to the administration or control of racing.

It is necessary then to look at each appellant's circumstances separately.

DAVID ANDREW O'HEARE

As stated above, Mr O'Heare's false statement was made to the Stewards on Friday afternoon 15 January 1999. The Chairman was then investigating (if that is the right word) the request from Mr Williams that Mr O'Heare be replaced as the rider of KING AND ACE.

It is necessary to go back in the process to understand why the request was made. Counsel for the Respondents explained the position as follows. On the Thursday before a Saturday race meeting, trainers are required to nominate final riders for the meeting. That information, together with the barrier draw already published, is then available to all interested parties including the betting public. On the Friday, if any change is sought to riding arrangements, then the Stewards must give permission.

The power to order a rider down is specifically given by Rule 8(1). It would seem obvious that, before the Stewards exercise that power, they ought to hear from potentially affected parties. That is precisely what the Chairman of Stewards was doing when he was asking questions of Mr O'Heare on the Friday afternoon 15 January. He needed to know the facts behind the request made by Mr Williams. He needed to know so that he could make a decision under Rule 8(1).

The questions asked were about Mr O'Heare's social life. But his social life had a connection to his work, in that he admittedly had not turned up to ride trackwork on the Friday morning. Not turning up for trackwork could lead to action taken under Rule 8(1), which is obviously part of the administration and control of racing.

Further, it appears to have been understood and accepted by the appellant himself that his social life, in going out to the nightclub and being out late, was a matter within the ambit of Rule 175(gg). The following exchange took place at the inquiry:

“CHAIRMAN All right. So haven't you been, haven't you been telling us the truth?”

O'HEARE No I haven't.

CHAIRMAN Why haven't you?

O'HEARE Oh, there's only one reason Sir, is because I had five rides on the Saturday and there is no way I'd be riding them if I had told you, so, and I did want to ride them.

- CHAIRMAN *But when asked about this, you categorically stated that you hadn't gone out, you told untruths to me. On other words you lied.*
- O'HEARE *Yes.*
- CHAIRMAN *How do see, how that would have affected your Saturday rides?*
- O'HEARE *I would have got stood down.*
- CHAIRMAN *Why?*
- O'HEARE *Well I was stood down last time Sir, for not attending trackwork.*
- CHAIRMAN *So you decided to lie?*
- O'HEARE *Yes."*

For all of the above reasons, ground 2 of Mr O'Heare's appeal against conviction is also without substance.

RICKY JAMES FARRELL

Mr Farrell's false statement was made to the Stewards on Saturday afternoon, 16 January 1999. It was taken between races. Mr Farrell was in the Stewards Room being spoken to about an upcoming ride.

By that time, the Stewards had some information that Mr O'Heare had made a false statement the previous day. They were no longer on an investigation into whether or not to discipline Mr O'Heare for missing trackwork. They were by then investigating other possibilities, one of which was a possible offence under Rule 175(gg) committed by Mr O'Heare for making a false statement.

In short, the Stewards were speaking to Mr Farrell as a possible witness.

Mr Farrell's social life and personal life included the fact that he was out on the Thursday night at the nightclub with Mr O'Heare. The connection with racing was that that fact was relevant to a Stewards' investigation of a possible breach of Rule 175(gg) by Mr O'Heare. The connection with the administration or control of racing was that all the Stewards' investigations, if they relate to the rules, are part of the administration and control of racing.

For these reasons, ground 2 of Mr Farrell's appeal against conviction is also without merit.

APPEALS AGAINST PENALTY

The imposition of a penalty is a matter of discretion by the Stewards. A penalty will not be set aside unless it can be shown that an error of fact or principle was made, or that the penalty was so outside the range as to demonstrate error itself.

DAVID ANDREW O'HEARE

The Stewards did not make any errors of fact in assessing the penalty to be imposed. They made an assessment of the seriousness of the offence. The Chairman said, at T15:

"Apprentice O'Heare and Mr. Williams, we have considered the matter of penalty and what you've said. We consider that a breach of ARR.175(gg) is extremely serious. It is central to the control of racing, that participants, when questioned, state the truth. Failure to do so, eventually affects the Stewards' ability to properly perform their functions. The Stewards are extremely concerned at your lack of remorse and your referral to this matter as a 'big joke'. We have considered the provisions of ARR.196 in this case. It is our decision that your permit to ride in races be suspended for a period of two months."

It is important to note that the false statement that Mr O'Heare made was at a time when the Stewards had to make the important decision of whether or not to permit him to be taken off the ride on KING AND ACE. That was a decision which would have a significant impact on the next day's race meeting. The Stewards, therefore, did not err in their assessment of the seriousness of the offence.

The range of penalties imposed for breaches of Rule 175(gg) is between disqualification and small fines. Suspensions of 3, 2 and 1 months are not uncommon. The penalty imposed on Mr O'Heare was, therefore, within the acceptable range.

For these reasons, Mr O'Heare's appeal against penalty was dismissed.

RICKY JAMES FARRELL

In giving the Stewards' assessment of the seriousness of Mr Farrell's offence, the Chairman said at T10:

"Mr Farrell the Stewards have considered the matter of penalty and all what you've placed before us. The Stewards consider that a breach of ARR.175(gg) is a serious matter. It is essential to the control of racing that participants when questioned tell the truth. Failure to do so adversely affects the Stewards' ability to properly perform their functions. We have taken into account that you were assisting a friend, albeit that we do not condone such behaviour. We have considered the provisions of ARR.196 in this case the Stewards have decided to suspend you for a period of one month."

The Stewards, in my view correctly, differentiated between Mr Farrell and Mr O'Heare. Clearly Mr Farrell was the less culpable, and thus received half the penalty which Mr O'Heare received.

However, in my view the Stewards erred in principle in not taking into account the fact that Mr Farrell's false statement was in a less serious category than Mr O'Heare's. Mr Farrell's false statement could not affect anything which was going to occur on race day. It was only ever going to affect any action the Stewards might take against Mr O'Heare, and whether they could prove an offence or not. It was not a matter which was going to affect the industry generally. For that reason, in my view Mr Farrell's false statement was in an entirely different category of seriousness than Mr O'Heare's. It deserved a different category of penalty.

For these reasons, I allowed Mr Farrell's appeal against penalty, and substituted a fine of \$300.



PATRICK HOGAN, ACTING

