



THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON  
(CHAIRPERSON)

APPELLANT: LINDSAY BRETT HARPER

APPLICATION NO: A30/08/704

PANEL: MR D MOSSENSON (CHAIRPERSON)  
MR P HOGAN (MEMBER)  
MR A MONISSE (MEMBER)

DATE OF HEARING: 4 MAY 2009

DATE OF DETERMINATION: 3 JULY 2009

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IN THE MATTER OF an appeal by MR LINDSAY BRETT HARPER against the determination made by the Racing and Wagering Western Australian Stewards of Harness Racing on 22 January 2009 imposing a five year disqualification for breach of Harness Rule of Racing 259 and Local Rule of Racing 259.

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Mr L B Harper appeared in person.

Mr R J Davies QC represented Racing and Wagering Western Australian Stewards of Harness Racing.

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**BACKGROUND**

Mr L B Harper was formerly licensed with Racing and Wagering Western Australia (RWVA) as a harness racing trainer/driver until a five year disqualification was imposed on him under RWVA Rule of Harness Racing 243 for behaviour detrimental to the harness racing industry. The penalty was due to expire on 5 May 2010.

On 22 January 2009 the RWWA Stewards of Harness Racing convened an inquiry into a report received by the RWWA principal investigator, Mr P O'Reilly, concerning Mr Harper's activities in the harness industry in America. A relatively short inquiry ensued during which a number of documents were tendered including correspondence from the RWWA Stewards to Mr Harper and some documentary evidence from the State of Delaware Harness Racing Commission.

Mr O'Reilly gave evidence to the Stewards' inquiry that he had received some information early in the previous month which caused him to make enquiries in the United States regarding Mr Harper's activities. Those enquiries revealed that Mr Harper had applied to the Delaware Harness Racing Commission in November 2008 to become a groom. A groom is the equivalent in Western Australia of a stable hand of a licensed harness owner/trainer. The groom's licence was issued to Mr Harper based on information which was supplied by him on the application form which he had completed. Some of that information was false. Mr Harper had wrongly denied on the form that any licence he had held had ever been suspended or revoked in any jurisdiction and that he had been refused admission to any racetrack. Mr Harper had signed the declaration on the application for a groom's licence form that stated the contents were true and correct.

A paddock entry gate sheet, which is part of the official records of the Delaware Harness Racing Commission, was also produced in the Stewards' inquiry. The sheet revealed that on at least 10 occasions Mr Harper had formally signed in horses between late November 2008 and January 2009. In addition Mr Harper's signature appeared on an official sheet of the Delaware Racing Commission as the licensed witness for the owner of a horse which had won its race and had been brought to the Delaware State test barn for post race samples to be taken. The barn was a restricted area, being the sample area in which only official and licensed persons were allowed entry.

Rule of Harness Racing 297, which deals with '*Matters related to recognised harness racing authorities*,' states:

*'(5) A person who has been penalised by suspension, disqualification or warning off or placed under a disability by a recognised harness racing authority shall not, during the currency of the penalty, be eligible to apply for any form of licence to any other recognised harness racing authority.'*

This Rule had been added in March 2005, shortly before Mr Harper had been convicted and penalised. This Rule clearly applied to Mr Harper and meant so far as the harness racing scene in Western Australia is concerned Mr Harper was in fact ineligible to apply for a licence as a groom in Delaware until after 5 May 2010. Other Harness Rules also applied to his situation which restricted his ability to be involved in the industry because of the disqualification imposed on him, namely Rule 259. That Rule states:

*'(1) A disqualified person or a person whose name appears in the current list of disqualifications published or adopted by a recognised harness racing authority or a person warned off cannot do any of the following -*

- (a) associate with persons connected with the harness racing industry for purposes relating to that industry;*
- (b) be a member or employee of the Controlling Body;*
- (c) be an office holder, official, member or employee of a club;*
- (d) enter a racecourse or any place under the control of a club or Controlling Body;*
- (e) race, lease, train, drive or nominate a horse;*
- (f) conduct breeding activities;*
- (g) enter any premises used for the purposes of the harness racing industry;*
- (h) participate in any manner in the harness racing industry;*

- (i) permit or authorize any person to conduct any activity associated with the harness racing industry at his/her registered training establishment.*
- (2) A licence or other authority held by a disqualified person to do any of the things mentioned in sub rule (1) automatically lapses upon disqualification.*
- (3) The prohibitions mentioned in sub rule (1) come into effect immediately upon disqualification, subject to any contrary directions which might be given by the stewards.*
- (4) If during a period of disqualification the stewards form the opinion that the circumstances relating to the disqualified person have materially changed, they may remove one or more of the prohibitions set out in sub rule (1) either permanently or for a time.*
- (5) The power conferred by sub rule (4) does not empower the stewards to remove the prohibition on an activity which can only lawfully be carried on under licence.*
- (6) Notwithstanding the foregoing provisions of this rule the Controlling Body may make determinations waiving, varying or qualifying the prohibitions set out in the rule.*
- (7) A disqualified person who fails to comply with this rule is guilty of an offence.*

In the course of the inquiry Mr Harper confirmed what he had previously admitted to Mr J Zucal, the Chairman of the Stewards who was chairing the Stewards' inquiry, that his actions in Delaware did contravene the disqualification restrictions which had been imposed on him in Western Australia. Mr Harper was unable to provide any explanation or excuse for this other than the fact that things had been tough for him since his disqualification.

Despite having acknowledged under the Rules he had been guilty of a breach Mr Harper claimed there were extenuating circumstances and asked the Stewards to exercise their discretion in his favour. Mr Harper sought compassion based on the difficult personal circumstances which he claimed were confronting him since returning to Western Australia. He sought leniency and asked that the Rules not be invoked, the penalty not be reinstated and that he be given no penalty at all.

The Stewards concluded their inquiry in the following terms:

*'Mr Harper, the Stewards have considered this matter, taking into account the evidence in total. You are currently serving a five-year disqualification under 243, Harness Rule of Racing 243, for behaviour that was detrimental to the Harness Racing Industry. That disqualification is due to expire on 5 May 2010. Following an appeal process, you were advised in writing on 30 August 2007 of the effects and restrictions of a disqualification. You clearly understood the restrictions of a disqualification. You clearly understood the restrictions imposed on you under your disqualification. Local Rule of Racing 259 states; "The period of disqualification or warning off of any person, who is disqualified or warned off, who contravenes rule 259(1) shall automatically be deemed to recommence as from the most recent date of such contravention and may also be subject to further penalty." You have contravened Harness Rule of Racing 259:1(a), (d), (g) and (h). Your last recorded presence on a racecourse was the 5th of January 2009 when you were recorded on the paddock sign-in sheet as bringing WESTERN HOT SHOT to the Dover Downs racecourse in Delaware USA. After due consideration the Stewards are invoking the provisions of Local Rule 259 and now deem your disqualification to commence from 5 January 2009 to expire 4 January 2014.'*

## THE APPEAL

Mr Harper appealed against both the '*Stewards jurisdiction on this matter*' as well as the severity of the sentence imposed on him. In the course of arguing his own case Mr Harper submitted Harness Rule of Racing 259 did not extend outside Western Australia and that the authority of the Stewards was confined to the local jurisdiction. Because Rule 259 could not be applied as the Stewards had purported to do, the finding should be set aside, according to Mr Harper.

On the subject of severity Mr Harper claimed the penalty was excessive as he had no employment since having become de-licensed and without enjoying the benefit of any other training he was unemployable. Mr Harper produced some written submissions together with supporting correspondence and verification of his loans, his medical position and the impact of the disqualification on his children. He claimed that there was a discretion in dealing with the matter and that he wanted the Tribunal to substitute its own decision for that of the Stewards.

In response Mr R J Davies QC argued that, whilst he agreed the Stewards had no jurisdiction to deal directly within another country or another state, such a situation had not occurred in this case. There was no denial or disputing by Mr Harper of the facts in context of Rule 259(a), (d), (g) and (h). Rule 297(5) was all encompassing in that it implied mutual recognition by all official harness racing authorities. There was no dispute that Delaware Harness Racing Commission in the United States was the relevant body in that State and therefore it constituted a recognised harness racing authority as specified in the relevant part of the Rules. Schedule 1 to the Rules is a 'dictionary' which defines '*recognised harness racing authority*' as meaning '*...an organisation accepted by the Controlling Body as controlling the harness racing industry in a State or Territory of Australia or in part of or the whole of a country.*' The Schedule also specifies '*Controlling Body*' to mean '*... an organisation which by convention, recognition or law or is deemed to be in control of harness racing in the state or territory of Australia or in part of or the whole of a country.*'

As senior counsel pointed out the provision in Rule 297 would be nugatory if it were limited to Western Australia. It would be inoperable and pointless. Further, one could deal with the matter under Rule 259 in any event. The scope of the Rule was not limited to Western Australia.

In reply Mr Harper cited a number of examples, namely Fallon, Munce and Jackman, where he claimed the relevant rule was not applied. In response to those propositions Mr Davies also included the case of George Way and explained that none of these cases were any guide whatsoever as to mutual recognition. They were all decisions made by the respective executive bodies rather than the Stewards. Further, they were all one off and none of them amounted to a legal precedent.

Mr Davies then referred to Eaton (Appeal 279) which dealt with the then equivalent Australian Rule of Trotting 96. In that case I stated:

*'... Mr Eaton appeals against the automatic recommencement of the term of his disqualification and seeks compassion and leniency from the Tribunal. His explanation for such treatment is that he visited racecourse on business rather than in relation to trotting matters.'*

*The Tribunal is satisfied that the rule automatically applies and in the circumstances of this case where Mr Eaton admits the offence the Tribunal has no scope to interfere with the automatic application of the rule.'*

Senior counsel argued that hardship was not a consideration for the Tribunal. The relevant provision was clear cut, water tight and automatic. The use of subrule 2 of Rule 259 was misconceived and it was meant for a different situation. Subrule 5 empowered a variation on a limited basis and had nothing to do with Rule 259.

## **REASONS**

Having had the opportunity to consider the propositions put by both parties I am completely satisfied firstly, that the Rules of Harness Racing do apply to the facts and circumstances of



this case, and secondly, both the conviction and penalty imposed were appropriate. The Stewards without doubt do have jurisdiction to deal with the matter. The Rules of Harness Racing clearly empower the Stewards to inquire into a case such as this. Indeed it would be surprising and a serious omission if the Rules did not authorise the Stewards to determine whether a person who, having previously transgressed and lost all right to participate in the sport, had re-offended during the period of banishment. The main reference to the power to conduct inquiries is Rule 181 dealing with '*Conduct and scope.*' That Rule states:

*'The Stewards may, and when directed by the Controlling Body shall, conduct inquiries or investigations in such manner as they think fit into any occurrence or matter at or arising out of or connected with a meeting, race or event, or into any aspect of the harness racing industry, or into anything concerning the administration or enforcement of these rules.'*

Clearly Mr Harper's conduct and activities in the harness racing scene in Delaware met or satisfied the description contained in this Rule of being '*...an occurrence or matter connected with a meeting...*' as well as being '*...aspect(s) of harness racing...*' and were also relevant to the '*...enforcement of these rules.*'

Mr Harper's disqualification placed a severe and clear-cut embargo on his ability to participate in harness racing. This cannot be disputed. Mr Harper's licence had automatically lapsed following his disqualification. Consequently during the term of that disqualification he was prohibited from:

- associating with persons connected with the industry for purposes related to the industry;
- entering race courses and premises used for the purposes of the industry;
- in any way participating in the industry; and
- applying to the racing authority in Delaware for a groom's licence.

Those factors having been established, one then resorts to Local Rule 259 to determine the consequences, namely:

- (1) *The period of disqualification or warning off of any person, who is disqualified or warned off, who contravenes rule 259 (1), shall automatically be deemed to recommence as from the most recent date of such contravention and may also be subject to further penalty.*
- (2) *The provisions of sub-rule(1) shall apply to any person to which Rule 259(1) applies, regardless of when such penalty that gives rise to the application of the rule was imposed."*

Local Rule 259 is very clear as to what must happen to an offender in such a case as this. Once a transgression by a disqualified person is established there is no scope under the Rules for an adjudicator to exercise any discretion in the matter as to the recommencement of the penalty. That situation must be dealt with as prescribed by the Rules. There is no discretion for the Stewards to entertain any leniency. There is no room to argue the reinstatement of the original penalty should be reduced for compassionate or any other reasons personal to an appellant. This is hardly surprising due to the seriousness of the situation. The only discretion is as to the possible imposition of a further penalty.

Once Mr Harper had admitted he had breached the Rules, the offence was established. That then meant the operation of the penalty component of the Local Rule automatically applied. By having committed the successive offences of breaching the terms of the disqualification then the Local Rule 259 provides, at the very least, the fresh five year penalty to be served by the offender in addition to any time which had already been served. It matters not whether the situation occurred at or near the end of a period of disqualification compared to at or near the beginning. Irrespective of the timing the same consequent period of disqualification is imposed.

One breach of the embargo on a disqualified person's rights is sufficient to bring into play the automatic application of Local Rule 259. In this case the situation was in fact much

worse as there were multiple breaches. However the Stewards did not impose any further penalty.

The Tribunal, like the Stewards, has no power to consider leniency or any mitigating factors and circumstances. The Rule is designed to ensure a repeat offender who has committed a serious breach of the Rules and consequently is already excluded from harness racing to remain so excluded for the full duration of the period of disqualification without further breach or any interruption. Should an interruption occur to the banishment from the industry by that person wrongfully re-entering into the harness racing sport arena then the automatic minimum punishment according to the Rules is for the original term to start again and run for the full period of disqualification. Clearly the whole length of the term of exclusion must be served unabated. This did not occur due to the numerous unlawful activities which Mr Harper had embarked upon in the racing industry in Delaware. The Rules require that Mr Harper's disqualification now must persist uninterrupted until 4 January 2014.

For these reasons I would dismiss the appeal both as to conviction and also penalty.



**DAN MOSSENSON, CHAIRPERSON**



**THE RACING PENALTIES APPEAL TRIBUNAL**

**REASONS FOR DETERMINATION OF MR P HOGAN**  
**(MEMBER)**

**APPELLANT:** LINDSAY BRETT HARPER

**APPLICATION NO:** A30/08/704

**PANEL:** MR D MOSSENSON (CHAIRPERSON)  
MR P HOGAN  
MR A MONISSE

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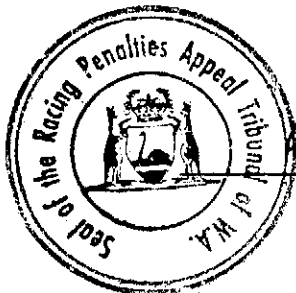
Mr L B Harper appeared in person.

Mr R J Davies QC represented Racing and Wagering Western Australia Stewards of Harness Racing.

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I have read the draft reasons of Mr D Mossenson, Chairperson.

I agree with those reasons and conclusions and have nothing further to add.



*[Handwritten signature]*

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**PATRICK HOGAN, MEMBER**

**THE RACING PENALTIES APPEAL TRIBUNAL**

**REASONS FOR DETERMINATION OF MR A MONISSE  
(MEMBER)**

**APPELLANT:** LINDSAY BRETT HARPER

**APPLICATION NO:** A30/08/704

**PANEL:** MR D MOSSENSON (CHAIRPERSON)  
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I agree with those reasons and conclusions and have nothing further to add.



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**ANDREW MONISSE, MEMBER**