APPEAL NO. 827

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: MATTHEW HENWOOD

APPLICATION NO: A30/08/827

PANEL: MR P HOGAN (PRESIDING MEMBER)
MR A E MONISSE (MEMBER)
MR R NASH (MEMBER)

DATE OF HEARING: 23 MARCH 2020

DATE OF DETERMINATION: 3 AUGUST 2020

IN THE MATTER OF an appeal by Matthew Henwood against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 29 July 2019 imposing a disqualification period of 7 years for breaches of Rules 190(2), 231(1)(e), 238 and 231(2) of the Rules of Harness Racing.

Mr T F Percy QC and Ms J Byrne appeared for the Appellant

Mr R J Davies QC and Mr D Borovica appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

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1. This is a unanimous decision of the Tribunal.

2. The appeal against penalty is allowed.

3. The period of disqualification of 7 years is set aside and in lieu thereof a period of disqualification of 5 years and 6 months is imposed.

PATRICK HOGAN, PRESIDING MEMBER

APPEAL NO. 827

RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR DETERMINATION OF MR P HOGAN
(PRESIDING MEMBER)

APPELLANT:	**MATTHEW HENWOOD**
APPLICATION NO:	**A30/08/827**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)** **MR A E MONISSE (MEMBER)** **MR R NASH (MEMBER)**
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Mr T F Percy QC and Ms J Byrne appeared for the Appellant

Mr R J Davies QC and Mr D Borovica appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

1. This is an appeal against penalty.

2. The Appellant is a registered harness trainer and driver.

3. On 22 January 2019, the Appellant presented BARON JUJON to race in Race 3 at Narrogin where it raced and finished first. The prohibited substances cocaine, benzoylecgonine and ecgonine methyl ester were detected in a post-race sample. On 16 February 2019, the Appellant presented the same horse to race in Race 4 at Northam where it finished the race and finished unplaced. The same prohibited substances, namely cocaine, benzoylecgonine and ecgonine methyl ester were detected in a post-race sample. The Appellant was later charged with a presenting offence arising out of each incident.

4. On 22 March 2019, the Stewards attended the Appellant's premises for the purposes of conducting the ongoing investigation in relation to the prohibited substances detected in the samples. Ultimately the Stewards left without carrying out the investigation which they had intended. The Appellant was charged with three offences arising out of the visit, being the assault of RWWA Veterinarian Dr Medd, failing to comply with the requirement of the Stewards to conduct a search, and misconduct.

5. The Appellant pleaded not guilty to each of the five charges, but was found guilty. The Stewards imposed a penalty of 7 years disqualification. They provided written reasons on penalty under cover of a letter to the Appellant dated 29 July 2019.

The particulars of each charge and penalties imposed

6. The particulars of each charge and the penalty imposed on each, (taken directly from the Stewards' reasons), were as follows:

Charge 1— Rule 190 (2) - Particulars

"The particulars of the charge are that you Mr M Henwood as the trainer presented BARON JUJON to race in Race 3 at Narrogin on 22 January 2019 where it raced and finished first with the prohibited substances cocaine, benzoylecgonine and ecgonine methyl ester present within the horse.

Penalty: 3 years disqualification."

Charge 2 — Rule 190 (2) - Particulars

"The particulars of the charge are that you Mr M Henwood as the trainer presented BARON JUJON to race in Race 4 at Northam on 16 February 2019 where it raced and finished unplaced with the prohibited substances cocaine, benzoylecgonine and ecgonine methyl ester present within the horse.

Penalty: 3 years disqualification."

Charge 3 — Rule 231 (1)(e) - Particulars

"The particulars of the charge are that on 22 March 2019 when Stewards attended your premises for the purposes of conducting an investigation in relation to the report of cocaine, benzoylecgonine and ecgonine methyl ester being detected in samples taken from BARON JUJON, you did assault RWWA Industry Veterinarian Dr J Medd in the paddock in which horses were located as she was attempting to identify them, by deliberately making physical contact to her chest region.

Penalty: 1 year disqualification."

Charge 4 — Rule 238 - Particulars

"The particulars of the charge are that on 22 March 2019 when Stewards attended your premises for the purposes of conducting an investigation in relation to the report of cocaine, benzoylecgonine and ecgonine methyl ester being detected in samples taken from BARON JUJON you did fail to comply with the requirement of the Stewards to conduct a comprehensive search and inspection of your premises, as notified to you by

them verbally and in writing (Exhibit 1) at the time, by repeatedly directing them to leave, with them unable, as a result of your response, to conduct such search and inspection.

Penalty: 3 year(s) disqualification."

Charge 5 — Rule 231 (2) - Particulars

"The particulars of the charge are that on 22 March 2019 when Stewards attended your premises for the purposes of conducting an investigation in relation to the report of cocaine, benzoylecgonine and ecgonine methyl ester being detected in samples taken from BARON JUJON, upon being advised of the Stewards intention to conduct a search and inspection of the premises whilst participating in a video record of interview, you did misconduct yourself by proceeding to behave in a loud and aggressive manner towards RWWA officials present at that time, which was conduct that was not of a manner reasonably expected of licensed persons towards officials.

Penalty: 6 month disqualification."

Cumulative, concurrent and totality

7. The Stewards dealt with these matters in some detail at paragraph 33, and then paragraphs 62 to 65 of their reasons.

8. In relation to the two presenting offences, the Stewards said at paragraph 33:

"We must, however consider whether partial concurrency is appropriate after considering principles of totality. That permeates throughout this matter given the number of charges involved. Whilst we can see no reason why these two charges should not be served cumulatively, matters of totality do arise and we must therefore give consideration to whether partial cumulation of penalty ought to apply, having regard to all other charges also."

9. In relation to totality, the Stewards said at paragraphs 62 to 65:

"62. Matters of concurrency and totality must be considered with respect to all charges. These are separate but related considerations. For the reasons already expressed it is our view that Charges 1 and 2 ought to be served cumulatively. As a matter of principle it is also our view that Charge 4, relating as it does to the separate matter of failing to comply with requirements, should not be totally subsumed by the penalties issued with respect to charges 1 and 2. The consequence of the offence relating to Charge 4 is very significant and can attract a level of penalty in its own right. Otherwise there is no incentive for people to co-operate with stewards and comply with such requirements if the matter becomes subsumed by the very reason that brought Stewards to the premises in the first place, where had a proper inspection been conducted, potentially other or more serious charges may have applied.

63. We are of the view that it is appropriate for the penalty relating to charge 3 to be served cumulatively to any other penalties given the nature and seriousness of this offence. Were it not for the total length of penalty we would have applied the same with respect to Charge 5 for the same reasons. If such penalties were to be subsumed entirely by the

commission of other offences it would create an undesirable precedent. Were it to be served concurrently it would do little to encourage persons to refrain from such behaviours when in the future officials attend premises to investigate serious matters such as these where the prospects of significant disqualification may apply. They would effectively have no reason to resist such behaviours once they draw the conclusion in their minds that a disqualification was likely.

64. *Although each penalty potentially could be served cumulatively, it is our view that a penalty of ten and half years would be disproportionate with the overall level offending [sic] when viewed in totality. Principles of totality in penalty must be considered and applied. In this respect there are matters of mitigation that ought to be applied in consideration of principles of totality to determine a total period of disqualification that is appropriate in all of the circumstances. Having considered and applied those principles we are of the view that a total period of seven years disqualification ought to be served.*

65. *In order to achieve such outcome, we direct that the periods of disqualification with respect to charges 1, 2 and 3 be served cumulatively. The period of disqualification issued with respect to charges 4 and 5 to be served concurrently with those penalties. Effectively this achieves a total period of disqualification of 7 years."*

The grounds of appeal

10. The grounds of appeal are:

"1. The Stewards erred by dealing with the question of penalty on counts 1 and 2 on the basis that offences relating to cocaine in a racing animal are more serious than offences relating to other prohibited substances under the same rule.

2. The penalties imposed in respect each of counts 1 and 2 were manifestly excessive having regard to:

(a) The circumstances of the offences;
(b) The antecedents of the offender;
(c) The fact that the offences related to presentation rather than administration; and
(d) Penalties usually imposed in relation to similar offences.

3. The Stewards erred by imposing fully cumulative periods of disqualification on both Counts 1 and 2.

4. The penalty of one year's disqualification on Count 3 was manifestly excessive having regard to:

(a) The circumstances of the offence;
(b) The antecedents of the offender; and
(c) Penalties usually imposed in relation to similar offences.

5. The Stewards erred by making the penalty on Count 3 fully cumulative on the penalties imposed on Counts 1 and 2.

6. The penalty imposed on Count 4 was manifestly excessive having regard to:

(a) The circumstances of the offence;
(b) The antecedents of the offender; and
(c) Penalties usually imposed in relation to similar offences.

7. *The penalty imposed on Count 5 was manifestly excessive having regard to:*

(a) The circumstances of the offence;
(b) The antecedents of the offender; and
(c) Penalties usually imposed in relation to similar offences.

8. *The total effective sentence imposed was manifestly excessive in all the circumstances of the case and infringed the totality principle."*

Consideration of the grounds of appeal

Ground 1

11. The Stewards said at paragraph 27 of their reasons on penalty:

> *"Cocaine in a racing animal has no legitimate purpose at any time. Accordingly it must attract a premium with respect to seriousness."*

12. Ground 1 is set out in the following terms:

> *"The Stewards erred by dealing with the question of penalty on counts 1 and 2 on the basis that offences relating to cocaine in a racing animal are more serious than offences relating to other prohibited substances under the same rule."*

13. Rule 190(2) creates the offence of presenting a horse for a race while not free of a prohibited substance. Prohibited substances are listed in Rule 188A(1). Some exceptions are provided for in Rule 188A(2).

14. Cocaine falls within Rule 188A(1). It is a central nervous system stimulant. Benzoylecgonine and ecgonine methyl ester are also prohibited substances, because they are metabolites of cocaine. (Medd T26 and T27).

15. Rule 188A(1) does not provide for a graduated level of seriousness as between prohibited substances. Further, the maximum penalty is permanent disqualification (Rule 256(2)). The Appellant's ground 1 asserts that, because of the structure of the Rules, the Stewards should have treated cocaine in exactly the same way as other prohibited substances. To accept the Appellant's proposition, it would have to be accepted that a trainer presenting a horse with (for example) an anti-inflammatory should suffer the same penalty as a trainer presenting a horse with (for example) amphetamine. I do not accept that proposition. It is clearly the case that some prohibited substances are more serious than others.

16. The Appellant calls in aid the recent decision of the Court of Criminal Appeal in this State in *Oliveira v The Queen* [2020] WASCA 32. In that case, the Court was considering the Commonwealth legislative scheme for the offence of importing a border controlled drug. The Court found that the learned sentencing judge had applied a *"...judicially constructed harm-*

based gradation of penalties' which is inconsistent with the structure of div 307 of the Criminal Code…". In my opinion, that case has no application to the Stewards' characterisation of cocaine being more serious for the purposes of penalty under the Rules.

17. Cocaine is one of the substances listed in Schedule 8 in the Australian Poisons Standard and is therefore a prohibited substance for the purposes of Rule 190A. That Rule provides that certain substances are prohibited even in an out of competition circumstance. That is because those substances are deemed to be more serious than others. As the Stewards said:

> "*Cocaine in a racing animal has no legitimate purpose at any time*"

18. Dr Medd said at T26:

> *"Specifically under the Harness Rules of Racing, cocaine and its metabolites are considered both prohibited and banned substances, both in and out of competition as cocaine is considered to have no legitimate place in the racing or training of horses."*

19. In Oliveira, the Court referred to, with approval, *Adams v The Queen* [2008] HCA 15; (2008) 234 CLR 143. The plurality in that case said:

> *"But there is nothing in the Customs Act, or the evidence, or the demonstrated state of available knowledge or opinion, which requires or permits a court to sentence on the basis that possessing a commercial quantity of MDMA is in some way less anti-social than possessing a commercial quantity of heroin."*

20. In the present case, both the Rules themselves and Dr Medd's evidence provided a foundation for the Stewards to say that cocaine must attract a "premium" in a presentation offence. I would dismiss ground 1.

Ground 2

21. Ground 2 is set out in the following terms:

> *"The penalties imposed in respect each of counts 1 and 2 were manifestly excessive having regard to:*
>
> *(a) The circumstances of the offences;*
>
> *(b) The antecedents of the offender;*
>
> *(c) The fact that the offences related to presentation rather than administration; and*
>
> *(d) Penalties usually imposed in relation to similar offences."*

22. In order to succeed on this ground, the Appellant has to demonstrate an error by the Stewards, or that the penalty imposed on each of the counts was so outside the range of penalties commonly imposed as to manifest error. There was nothing presented on the appeal to demonstrate that the Stewards made any material error in relation to the circumstances of the offences or the Appellant's antecedents. Particular (c) is irrelevant.

23. In fixing the 3 year period on each offence, the Stewards referred to a number of cases. At the "top end" of the scale, was the case *Baverstock* dealt with in New South Wales in 2019. The Stewards said at paragraph 25 of their reasons:

> *"A more useful comparison exists in the form of the cases of trainer Richard Baverstock and stablehand Adam Baverstock dealt with in NSW in 2019 which involved a detection of the parent drug cocaine in a urine sample taken from a horse called MY WHISKEY LULLABY following it winning a race in October 2018 at Penrith.*
>
> *Mr R Baverstock was found guilty of the same charge being considered here and was disqualified for two years and six months. He had an unblemished record at the time.*
>
> *Mr A Baverstock was also found guilty of the same rule and was disqualified for 3 years and 6 months. He too had an unblemished record at the time. He was also suspended at the same time for a period of 6 months after a sample taken from him also returned a detection of cocaine and its metabolites."*

24. At the "lower end" the Stewards referred to cases in which cocaine metabolites had been detected in greyhounds. The Stewards said at paragraphs 22 and 23:

> *"22. We are also aware of several decided greyhound matters from Victoria involving the substance cocaine. In this respect we refer to the following:*
>
> *2012 — Trainer Mr C. Meo. Presented with Benzoylecgonine (BZE) only. Pleaded guilty with no explanation as to how this occurred and was disqualified for 18-months.*
>
> *2016 — Trainer Mr B Finn. Presented with "miniscule amount" of BZE only. Found guilty and disqualified for 12 months with 6 months suspended of that penalty.*
>
> *2017 — Trainer Ms C Dundon. Presented with BZE and Ecogninemethylester (EZE). Found guilty and disqualified for 18 months.*
>
> *23. We are also aware of the case involving greyhound trainer Mark Azzopardi dealt with by NSW in 2013. Following inquiry he was disqualified for a period of 2 years for a breach under the commensurate rule of greyhound racing when his greyhound TRANSCEND TIME returned a positive result to benzolecgonine. The evidence put forward was that there had been a possibility of inadvertent contamination of the greyhound in the morning prior to the race."*

25. On 15 May 2020, this Tribunal differently constituted handed down its decision in the matter of *Westworth* which concerned a presentation offence involving amphetamine in a greyhound. A penalty of 2 years had been imposed by the Stewards and was confirmed on the appeal.

26. It can be seen from the references above that the penalties imposed in this case were towards the top of the range of penalties imposed in other cases. In my opinion, there is nothing in the two presentation offences here which would justify a top of the range penalty. That being so, I find that the penalties imposed here were manifestly excessive. I would uphold ground 2 and impose a penalty of 2 years disqualification on each of the 2 presentation offences.

Grounds 4 and 7

27. These grounds challenge the individual penalties imposed in respect of the assault on Dr Medd (charge 3) and misconduct (charge 5). The ground of appeal is the same in each case, namely:

> *"The penalty imposed …….. was manifestly excessive having regard to:*
>
> *(a) The circumstances of the offence;*
>
> *(b) The antecedents of the offender; and*
>
> *(c) Penalties usually imposed in relation to similar offences."*

28. Local Rule 15 ("LR 15") is in the following terms:

> *"LR 15. Power to enter premises*
>
> *(1) Without limiting rule 15, the stewards have the power at any time to enter upon the premises occupied by or under the control of a licensed person and used in any manner in relation to any licence, or any premises where Standardbred horses are kept, trained or raced (hereinafter referred to as the premises) to: (amended GG 28/8/15)*
>
> *(a) Inspect and search the premises*
>
> *(b) Examine anything on the premises and also search any licensed person thereon.*
>
> *(c) Take extracts from or make copies of, or download or print out, any documents found in the course of the inspection;*
>
> *(d) Photograph or film anything on the premises*
>
> *(e) Secure against interference anything that cannot be conveniently removed from the premises*
>
> *(f) Require any person who is on the premises to*
>
> *i. state his or her full name and address*
>
> *ii. answer (orally or in writing) questions put to them that are relevant to the investigation*
>
> *iii. give any information in the person's possession or control that is relevant to the inspection*

iv. operate equipment or facilities on the premises for inspection purposes

v. give any translation, code, password or other information necessary to gain access to or to interpret and understand any document or information located or obtained by the Steward in the course of the inspection relevant to the investigation

vi. give other assistance that the Stewards reasonably requires to carry out the inspection.

(2) A steward who enters and remains upon land or premises under this rule, shall not thereby commit a trespass thereon and no action shall be brought or maintained against the steward or the Controlling Body for any damages or relief in respect of such entry or remainder.

(3) For the purposes of this Rule premises includes land, buildings or any fixed or movable structure, including any vehicle."

29. At paragraph 79 of their reasons for decision on conviction, the Stewards panel summarised what had occurred:

> *"From almost the moment that Mr Martins told you a search was afoot it can be seen that your entire demeanour changed and you became very agitated and proceed to question and challenge the Stewards authority to attend the premises and search the premises as they were indicating was their intention. You seemed to scramble to find any reason to resist them in that regard and settled upon relying on the fact that your recorded training premises were at a different location as reason as to why they had to leave. Yet only moments before you had told the Stewards how this other location was your "main stables" and that you were also using these premises to keep horses at the times you described in your own words to them, in a manner relating to your licence. All the while there were horses and other racing related equipment on the property supporting that the premises were being used in relation to your licence."*

30. The video recording of what was said and done is a piece of evidence which was before the Stewards panel and before this Tribunal. I would disagree with the Stewards' assessment that the Appellant was agitated. At best, it could be described that both the Appellant and the investigating Stewards were insistent about the merits of their respective positions.

31. The video shows that at between 16:17 and 16:27 the exchange between the investigating Stewards and the Appellant was normal. The Stewards told the Appellant that they intended to search and inspect his premises. The Appellant then questioned the Stewards' right to be there. He asked what sort of "permit" they had. Dr Medd replied that they did not need a permit. After a short further exchange, Steward Mr Martins asked the Appellant whether he had an objection to the Stewards being there. The Appellant said "*Off, you're not allowed to be here.*" An argument between the Stewards and the Appellant then occurred which escalated in intensity. The level of animosity between the Stewards and the Appellant is reflected best in the exchange at 16:37. The Appellant said: "*you're not supposed to be here*". Dr Medd said: "*I couldn't care less.*"

32. The investigating Stewards did finally leave at about 16:42, after the assault on Dr Medd had occurred. Steward Martins said to the other Stewards *"let's go"*. It is important to note that it

was the Stewards' own decision to leave, without carrying out the search and inspection. If they had made that decision earlier, once the Appellant had made his position clear, it is fair to assume that his assault and misconduct breaches might not have occurred.

33. In my opinion, the events which occurred between 16:27 and 16:42 are relevant to the penalties imposed on charges 3 (assault) and 5 (misconduct).

34. The Stewards panel did not give any weight to the mitigating fact that the investigating Stewards had contributed to the escalating situation by engaging in argument up to and including the assault on Dr Medd. Similarly, they did not give any weight to the investigating Stewards' contributory actions on the misconduct charge.

35. The omission to take into account the mitigatory effect of the investigating Stewards' part in the events in my opinion amounts to a material sentencing error requiring the penalty on charges 3 (assault on Dr Medd) and 5 (misconduct) to be revisited. The ground of appeal is made out because the sentence on each charge was manifestly excessive having regard to the circumstances of each offence. I would therefore allow the appeal in respect of charge 3. I would set aside the penalty of 1 year disqualification and impose a penalty of 4 months disqualification. I would allow the appeal in respect of charge 5. I would set aside the penalty of 6 months disqualification and impose a penalty of 2 months disqualification.

Ground 6

36. Ground 6 challenges the penalty imposed in respect of charge 4:

> *"The particulars of the charge are that on 22 March 2019 when Stewards attended your premises for the purposes of conducting an investigation in relation to the report of cocaine, benzoylecgonine and ecgonine methyl ester being detected in samples taken from BARON JUJON you did fail to comply with the requirement of the Stewards to conduct a comprehensive search and inspection of your premises, as notified to you by them verbally and in writing (Exhibit 1) at the time, by repeatedly directing them to leave, with them unable, as a result of your response, to conduct such search and inspection."*

37. In relation to penalty, the Stewards said at paragraph 47:

> *"As a result of your successful thwarting of the intended investigation by failing to comply with the requirement of the Stewards in this regard you denied them any prospect of confirming any evidence as to any potential explanations for the detection that may have been present at the time of their visit. In the absence of a properly conducted investigation the inquiry laboured with an incomplete picture of facts where you were able to divert focus to matters external to your own operations as they remained obscured. Had the Stewards been able to conduct a comprehensive search and inspection which may have led to the seizure and testing of items of interest, including those horses like BARON JUJON scheduled to race that evening, a more complete picture may have been available. This may even have been to your benefit had the investigation served to demonstrate that there was no evidence that would give rise to potential source of the cocaine being anything within your sphere of control or operations. Some scenarios may have been able to be eliminated or alternatively confirmed. These are now considerations that will never be known which is completely unacceptable. By your actions you have effectively emasculated the Stewards powers and prevented them from discharging their important duties in the course of protecting the broader interests of the racing industry."*

38. In my opinion, there was no failure on the part of the Stewards panel to properly take into account the circumstances of the offence. There could hardly be a more serious and blatant example of an offence of this kind. The ordering of the Stewards to leave was done at a very early stage of the events at the premises on that day, preventing the Stewards from gathering any evidence at all.

39. The fact that the Appellant refused to comply with the requirement to allow an inspection (charge 4) by deliberately ordering the Stewards to leave must logically mean that this offence carries a penalty which will discourage him and others from doing exactly the same thing in the future.

40. I would dismiss the appeal against penalty in respect of charge 4.

Totality - Appeal grounds 3, 5 and 8

41. To summarise, the position following these reasons so far is as follows:

Charge 1 - presentation 22 January 2019	Appeal allowed - 2 years disqualification
Charge 2 - presentation 16 February 2019	Appeal allowed - 2 years disqualification
Charge 3 - assault	Appeal allowed - 4 months disqualification
Charge 4 - refuse to comply	Appeal dismissed - 3 years disqualification
Charge 5 - misconduct	Appeal allowed - 2 months disqualification

42. The Stewards' decision on totality necessarily must be revisited, because I would impose different individual penalties.

43. The penalties I would impose total 7 years 6 months. There were 3 distinct incidents under consideration, leading to the two presentation offences and the offences arising out of the attempted search. In my view, a total period of 7 years and 6 months would be disproportionate with the overall level of offending.

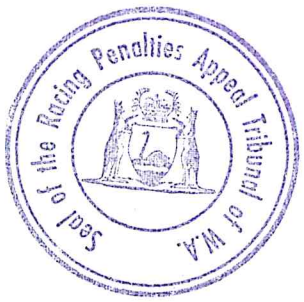
44. In my opinion, a total period of 5 years and 6 months ought to be served. In order to achieve that, I would direct that the periods of disqualification be served as follows:

Charge 1 - presentation 22 January 2019	2 years disqualification
Charge 2 - presentation 16 February 2019	2 years disqualification, concurrent
Charge 3 - assault	4 months disqualification, cumulative
Charge 4 - refuse to comply	3 years disqualification, cumulative
Charge 5 - misconduct	2 months disqualification, cumulative

Conclusion

45. I would allow the appeal against penalty. I would set aside the penalty of 7 years disqualification and impose a period of disqualification of 5 years and 6 months.

PATRICK HOGAN, PRESIDING MEMBER



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REASONS FOR DETERMINATION OF MR A E MONISSE (MEMBER)

APPELLANT: MATTHEW HENWOOD

APPLICATION NO: A30/08/827

PANEL: MR P HOGAN (PRESIDING MEMBER)
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DATE OF HEARING: 23 MARCH 2020

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Mr T F Percy QC and Ms J Byrne appeared for the Appellant

Mr R J Davies QC and Mr D Borovica appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

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1. I have read the draft reasons of Presiding Member, Mr P Hogan and Member, Mr R Nash.

2. I agree with the reasons and conclusions of the Presiding Member except for his reasons for Grounds 4 and 7. While I would impose the same revised penalties as the Presiding Member of 4 months for the Appellant's assault on a RWWA official and 2 months for his misconduct, my reasons for doing so are as follows.

Ground 4

3. The Appellant contends that the 1 year disqualification that the Stewards imposed for his assault on RWWA veterinarian Dr Judith Medd on 22 March 2019 is manifestly excessive. I agree that there was that implied error given the factual circumstances of the non-violent nature and low level physical contact of the assault.

4. The Appellant made slight, momentary physical contact with Dr Medd when he quickly approached her from behind and put his left forearm across her chest region to stop her from proceeding to inspect two horses that were on his property. Those circumstances are in

contrast with the violent nature and greater physical contact of the assaults that were considered on appeal in *Staeck* (RPAT Appeal no. 555) and *Lynch* (RPAT Appeal no. 541 and 542).

5. In *Staeck*, a senior jockey had his 8 weeks suspension reduced to 4 weeks on appeal for punching an apprentice jockey in the head in the Jockey's Room after that apprentice had just had his first race ride. In *Lynch* a stable foreman's appeal was dismissed against a total of 2 months suspension that stewards imposed on him for two separate incidents of assault on an apprentice jockey. The first incident involved assaults with a whip to the leg and face and the second incident involved hits to the head, hard kicks to the backside, a punch to the head and a knee to the leg.

6. These decisions demonstrate that the penalty the Stewards imposed on the Appellant for his assault was so excessive as to manifest an error in the exercise of their discretion. However, his assault was on an official involved in the racing industry. That, in my view, makes it a more serious case than an assault on others who are employed, engaged or participating in the harness racing industry. Given that circumstance, the non-violent nature and minimal physical contact of the assault and the Appellant's prior very good record in the racing industry stated below, I would impose 4 months disqualification for the assault.

Ground 7

7. The Appellant also contends that the 6 months disqualification imposed for his *misconduct* breach of the Rules was manifestly excessive. For the reasons that follow, I agree.

8. In support of this ground Counsel for the Appellant submitted that *Davies* (RPAT Appeal no. 524) was not a dissimilar case. The improper conduct in *Davies* occurred at an Ascot race trial when, following a dangerous incident with a horse, a trainer verbally abused and made physical contact with a pre-apprentice and had a verbal exchange with another trainer. On appeal the trainer's $2,500 fine that stewards imposed was reduced by half due to circumstances that included his exceptional, unblemished record of involvement in the racing industry over 39 years.

9. In my view, the Appellant's misconduct is more serious than that in *Davies* as it was directed at RWWA officials. The parties to this appeal did not refer to any other decisions by this Tribunal that may assist in determining whether the Appellant's penalty for his misconduct was manifestly excessive in all the circumstances.

10. After considering all the factual circumstances of this matter, I am of the view that the penalty of 6 months disqualification for the misconduct was so excessive as to manifest an error. The Stewards found the charge proven that the Appellant had behaved in a loud and aggressive manner towards RWWA officials from when he stood up at the table in his patio area. However, it cannot be said that that behaviour was at the highest level of misconduct as the Appellant did not swear at, abuse or ridicule those officials as they tried to inspect and search his property. Given the absence of those aggravating factors and the Appellant's almost clean record as a licensed trainer for nearly 20 years (in 2006 he received a $200 fine for improper speech), I would impose 2 months disqualification for his misconduct.

The *failure to comply* breach

11. The Stewards preferred a separate charge against the Appellant for failing to comply with their requirement to inspect and search his premises, which they found to be proven. Although the events that gave rise to this charge occurred at the same time as the Appellant's assault and misconduct, the penalty to be imposed for the failure to comply should be considered separately. Consequently, the Appellant's failure to comply should not be reflected in the penalties to be imposed for his assault and misconduct. Consistent with this approach for determining a penalty, the Stewards at paragraph 51 in their reasons on penalty stated:

> *"**Charge 5** It is important to again make clear in determining penalty for this offence that it is distinct from those dealt with above that relate to your conduct on the day in question. The assault of Dr Medd as described and the failure to comply with orders are separate matters, dealt with separately. Those matters and the penalties that emanate from those charges relate to the specific and discrete matters those charges address."*

12. For these reasons I would uphold Grounds 4 and 7 and impose the revised penalties stated above.

A E Monisse

ANDREW MONISSE, MEMBER

APPEAL NO. 827

RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR DETERMINATION OF MR R NASH (MEMBER)

APPELLANT:	**MATTHEW HENWOOD**
APPLICATION NO:	**A30/08/827**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)** **MR A E MONISSE (MEMBER)** **MR R NASH (MEMBER)**
DATE OF HEARING:	**23 MARCH 2020**
DATE OF DETERMINATION:	**3 AUGUST 2020**

IN THE MATTER OF an appeal by Matthew Henwood against the determination made by the Racing and Wagering Western Australia Stewards of Harness Racing on 29 July 2019 imposing a disqualification period of 7 years for breaches of Rules 190(2), 231(1)(e), 238 and 231(2) of the Rules of Harness Racing.

Mr T F Percy QC and Ms J Byrne appeared for the Appellant

Mr R J Davies QC and Mr D Borovica appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

1. I have had the benefit of reading a draft of the decision of the Presiding Member, Mr Hogan.

Grounds 1, 2 and 6

2. I agree with his reasons given in respect of grounds 1, 2, and 6 of the appeal.

Grounds 4 and 7

3. I would dismiss grounds 4 and 7 of the appeal.

4. In my view the Stewards had every right to be assertive and persistent in seeking to exercise their powers under the Act. With the greatest of respect, contrary to the view taken by the learned Presiding Member, in my view the attitude and conduct of Mr Henwood towards the Stewards was completely unacceptable. Such conduct cannot be tolerated from a licensed trainer.

5. As a licensed trainer, Mr Henwood is statutorily bound to comply with the *RWWA Rules of Harness Racing (Rules)*. The *Rules* are made pursuant to section 45(1) of the *Racing and Wagering Western Australia Act 2003 (RWWA Act)*. Being delegated legislation made pursuant to the *RWWA Act*, the *Rules* have binding force on those persons to whom they are addressed: *JOHN ZUCAL, RWWA CHAIRMAN OF STEWARDS & ORS -v- HARPER [2005] WASCA 76, per Steytler P at [30].*

6. In my view the Stewards were quite entitled to firmly resist the demands of Mr Henwood to leave and, in refusing to do so, they ought not be criticised. If the Stewards are expected to leave premises as soon as a licensed person purports to order them to leave, it opens up the potential for abuse. The fact that it may still be open to charge a person with a breach of Rule 238 for failing to comply, does not entirely overcome the risk that the Stewards may have been effectively prevented from uncovering evidence of some systemic or nefarious activity.

Totality (Grounds 3, 5 and 8)

7. Grounds 3, 5, and 8 of the appeal deal with the issue of totality.

8. Given that I have agreed that ground 2 of the appeal should be upheld for the reasons given by the learned Presiding Member and that the terms of disqualification for each of charges 1 and 2 should each be reduced to 2 years, I need to revisit the Stewards' reasons from the point of view of totality.

9. In my view:

   (a) The penalties for charges 1 and 2 should be partly cumulative and partly concurrent. That reflects the fact that although they were quite close in time, they were separate and distinct offences of a serious nature. This is consistent with the appellant's written submission in which it was conceded that some degree of cumulation was warranted.

   (b) The penalty for charge 3 should be cumulative on the penalty for charges 1 and 2 for the reasons given by the Stewards.

   (c) The penalty for charge 4 should be partly cumulative and partly concurrent with the penalties imposed for charges 1 and 2. That reflects the distinct and separate nature of that offence from the presentation offences, but acknowledges that making it fully cumulative would be excessive given that the reasons for the search and inspection in the first place arose out of, and was integrally connected to, the Stewards' investigation into the positive test results that were the subject of charges 1 and 2.

   (d) The penalty for charge 6 should be served concurrently with the penalty for charge 3 since they both arose out of the same incident.

10. Therefore, in summary, I would direct that the penalties be served as follows:

- Charge 1: 2 years disqualification;
- Charge 2: 2 years disqualification, with one year to be served concurrently with charge 1:
- Charge 3: 1 year disqualification, cumulative;
- Charge 4: 3 years disqualification, with 18 months to be served concurrently with charges 1 and 2; and
- Charge 5: 6 months disqualification, to be served concurrently with charge 3.

11. The result is a total effective penalty of 5 years and 6 months. Accordingly, I have reached the same result in relation to penalty as the other members of the Tribunal.

ROBERT NASH, MEMBER