

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: PETER LESLIE ANDERSON

APPLICATION NO: A30/08/837

PANEL: MR P HOGAN (PRESIDING MEMBER)
MR R NASH (MEMBER)
MS B ROBBINS (MEMBER)

DATE OF HEARING: 6 JULY 2020

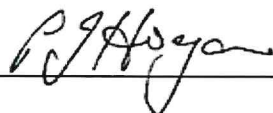
DATE OF DETERMINATION: 21 AUGUST 2020

IN THE MATTER OF an appeal by Peter Leslie Anderson against determinations made by the Racing and Wagering Western Australia Stewards of Harness Racing on 9 June 2020 imposing a fine of \$500 for a breach of Rule 231(2) and a disqualification of 12 months for a breach of Rule 231(1)(e) of the Rules of Harness Racing.

Mr T F Percy QC and Mr C Woodhouse 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. The appeal against conviction is dismissed.
2. The appeal against penalty is allowed.
3. The penalty of disqualification is set aside and a fine of \$5000 is imposed.



PATRICK HOGAN, PRESIDING MEMBER



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

APPELLANT: PETER LESLIE ANDERSON

APPLICATION NO: A30/08/837

PANEL: MR P HOGAN (PRESIDING MEMBER)
MR R NASH (MEMBER)
MS B ROBBINS (MEMBER)

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Mr T F Percy QC and Mr C Woodhouse 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.

INTRODUCTION

1. On Tuesday 11 February 2020, the Appellant and his employee Ms Roberts were fast working 2 horses at the Byford training track. The fast work finished and Ms Roberts was jogging her horse. An incident then occurred between the Appellant and Ms Roberts. Shortly afterwards, a related incident occurred at the Appellant's registered stables. Later that day, Ms Roberts reported both incidents to the Stewards, and an inquiry commenced. There were a number of hearings as part of the inquiry. On 21 May, at the third hearing, the Appellant was charged with misconduct and assault.

2. The relevant rules are:

231(2) A person shall not misconduct himself in any way.

and:

231(1)(e) A person shall not assault anyone employed, engaged or participating in the harness racing industry or otherwise having a connection with it.

3. The Stewards particularised the charges in the following terms:

Misconduct:

"The particulars of the charge are that you, licenced trainer/driver Peter Anderson did misconduct yourself on 11 February 2020 at the Byford training track when you deliberately and intentionally allowed STAR OF THE CLASS to run up the track making contact with the sulky shaft of SHE SAID DIAMNDS, driven by Miss Roberts."

Assault:

"The particulars of the charge are that you, licenced trainer/driver Peter Anderson did assault Miss Deni Roberts on 11 February 2020 at your registered stables at Byford when you placed your hand on the chest area of Miss Roberts and applied force to move her away."

4. The Appellant pleaded not guilty to both charges, but was convicted. The Stewards provided their decision and reasons to the Appellant by letter dated 28 May 2020. The Stewards then dealt with the matter of penalty at a hearing on 2 June 2020. By Letter dated 9 June 2020, the Stewards imposed a penalty of \$500 for the misconduct offence, and a period of 12 months disqualification for the assault offence.
5. The Appellant now appeals against the convictions and the penalties.

FACTS NOT IN ISSUE

6. Mr Anderson has been in the industry for approximately 45 years. He owns properties and has 6 staff, 4 of whom are full time. He has between 30 and 45 horses in training at any one time. He is an A grade trainer and a B Grade driver. He is aged 61 years. At the time of the incident giving rise to the offences, Mr Anderson was the employer of Ms Roberts. She is a C grade trainer and an A grade driver. She is aged 24 years. She had been employed by Mr Anderson for about 12 months.

THE DIFFERENT VERSIONS

7. Ms Roberts was interviewed on video on Thursday 13 February 2020, 2 days after the incidents. The video became an exhibit at the first hearing of the inquiry on 12 March 2020. At the hearing, Ms Roberts gave evidence to the same effect as in her video interview. The following summary of the interview is itself taken from the Stewards' summary prepared by Senior RWWA investigator Mr Johnson. It is sufficient for present purposes.

8. Ms Roberts said that she and the Appellant were fast working the 2 horses. Near the 400 metre mark, the Appellant kept ripping his horse up the track and she subsequently followed the horse's line. She then drove down on the inside of the Appellant's horse and made the following comment "Could have pulled out." She then finished the fast work approximately 10-15 metres in front of the Appellant and was jogging her horse near the outside of the track. The Appellant's horse come alongside her horse. The Appellant's right hand was outside the confines of the cart and he appeared to be driving his horse in to hers.
9. Ms Roberts said that it was quite close and unsafe, so she quickly grabbed hold of her horse moving it in to the outside fence. She said that the Appellant started yelling at her and saying, "Don't give me that attitude, you can talk to your partner like that but not me", later stating "that was nothing". She stated that there was little contact with the two horses and her main contact was with the outside fence. There were no injuries to either of the horses.
10. The assault offence occurred a short time later. Ms Roberts said that she and the Appellant both left the complex and went back to the stables. The Appellant had arrived first and was standing next to his cart with his horse tied up. She moved her horse to the tie up rail and got off the cart. The Appellant was yelling at her over the back of her horse. The comments were about her mother and her Italian heritage. Ms Roberts said that she started yelling back at him and there was swear words used by both parties. The Appellant then moved around to the near side of her horse where she was standing, was in her face and was continuing to yell at her. She said to the Appellant, "Get away from my space". She stated that his face went bright red and she thought that the Appellant was going to hit her. The Appellant then put his clenched right fist in to her chest area and pushed her backwards. Her momentum backwards was stopped by the tie-up rail.
11. The Appellant was interviewed on video on Tuesday 19 February. Again, the following summary is taken from the summary prepared by senior investigator Mr Johnson. The Appellant gave substantially the same evidence at the hearings.
12. The Appellant said that he asked Ms Roberts to do something (on the track) and she didn't do it. She eventually took an inside run and said to him, "I can go around the outside". He said to her "Deni do as your told, don't speak to me like that". He said that that he ran his horse up the track and he let the carts hit. He said to Ms Roberts, "You can't speak to me like that:". The Appellant did not consider these actions dangerous whatsoever, he was making a point that she worked for him and should not talk to him like that.
13. As to the Assault offence, at the stables, the Appellant said that both horses were in the in tie up area outside the barn. He walked from the near side of his horse to where Ms Roberts was standing at the near side of her horse. Ms Roberts said to him, "Fuck off, get out of my face, fuck off". The Appellant said that Ms Roberts was screaming at the top of her lungs telling him to "Fuck off". The Appellant said that he placed his open right hand on her vest/chest area because she was screaming at him and telling him to "Fuck off". He repeated at the hearing that Ms Roberts' screaming was extreme provocation for placing his hand on her chest. He said that the hand in the chest was involuntary as Ms Roberts was in his space. When he placed his hand on her chest she took a step backwards, but he didn't push her backwards. The Appellant said that he was sorry he put his hand on Ms Roberts' chest but there were no injuries.

THE STEWARDS' REASONS

14. The Stewards' findings on conviction were delivered to the Appellant under cover of a letter dated 28 May 2020. As to the misconduct offence, the Stewards said at paragraphs 9 and 10:

"9. It is clear you have been unhappy with Miss Roberts since 4 February 2020 regarding what you believe to be her unacceptable attitude. Your ongoing displeasure at Miss Roberts has come to a head on the training track on 11 February 2020 and has resulted in you allowing your horse and sulky to make contact with Miss Roberts' sulky while on the Byford track. This is because you believed Miss Roberts deliberately ignored your driving instructions. Stewards are not satisfied Miss Roberts was given any specific driving instructions on that day and in any event even if she was, your response to her failure to take an inside run is a complete overreaction. Miss Roberts' words to you when eventually taking the inside run did not contain foul or abusive language.

10. We do not find that the words of Miss Roberts in the context in which they were given amounted to provocation and certainly not to the point where your subsequent behaviours could be excused. Using your horse and sulky as a vehicle to make a point to Miss Roberts is not appropriate. It is a dangerous practice that creates a risk to the safety of Miss Roberts, yourself and your horses. It was an over-reaction and entirely unnecessary."

15. As to the assault offence, the Stewards said at paragraphs 14 to 18:

"14. After this exchange and further swearing by both parties, you approached Miss Roberts. You walked from your horse around the sulky and approached Miss Roberts to 'have it out.' Miss Roberts clearly did not want you in her vicinity and told you to 'fuck off'. You wanted to 'have it out once and for all' and your action of deliberately approaching Miss Roberts was done to resolve the matter completely. Stewards are satisfied your focus was to finalise the matter. The words said to Miss Roberts "we're going to sort this out once and for all" and your actions of physically moving toward Miss Roberts clearly indicate you were the aggressor.

15. Stewards do not accept that Miss Roberts approached you. Miss Roberts had the reins in her hands and was about to loop them through the turret which is located on the saddle, just behind the whither. There was no reason for Miss Roberts to be toward the rear of her horse or sulky as there is no gear there that needs to be detached or removed. The statement of Miss Roberts, given to Senior RWWA Investigator Geoff Johnson on 13 February 2020, some two days after the incident and video recorded was that she "moved her horse to the tie up rail and got off the cart. She was now standing on the near side of the horse near the head."

16. You claim that Miss Roberts walked toward you and that is why you were both standing close together near the horse's back leg. As stated above there was no reason for Miss Roberts to be near the back leg of her horse in relation to gear and Stewards accept Miss Roberts' version of events that she would not go toward you when she wanted to get away from you. You approached Miss Roberts and stood close to her,

which is an aggressive move, and Miss Roberts' response confirms she felt uneasy with your approach. (page 29)

CHAIRMAN: *When he, Mr Anderson approached you, what were you doing?*

ROBERTS: *When he approached me I was at the shoulder of my horse, cause when he got to the wheel of my cart, that's when I started telling him to "Fuck off" cause I knew that he was going to come and get up in my face."*

And later:

"ROBERTS: *Just that, you know, I didn't, I don't know why I would go towards him, you know, when I'm trying to get him away from me.*

17. It is evident on the evidence before us that you were the aggressor. You approached Miss Roberts directly and deliberately clearly wanting to 'have it out'. You stood close to Miss Roberts and were 'in her face'. Miss Roberts was unable to remove herself from that situation and she was fearful of being hit, as stated to Mr Johnson, RWWA Investigator on 13 February 2020.

18. There was no reason for you to place your hand on the chest area of Miss Roberts, Miss Roberts wanted you to move away so she would not be walking toward you ("fuck off, get out of my face"). The placement of your hand on Miss Roberts' chest area was done not to stop Miss Roberts moving forward toward you but to exert your authority over Miss Roberts. There can be no other reason for you doing this. You felt her attitude toward you as her employer was not acceptable and you did this in a determined manner in order to exert your authority over Miss Roberts, You described this action as a fend off, however to fend someone off means you are defending yourself against them and Miss Roberts was not the aggressor in this incident.

It is not necessary for this panel to determine if you used an open hand or a closed fist on Miss Roberts. The action of touching Miss Roberts, without her consent, and applying force is assault."

THE ISSUES BETWEEN THE PARTIES

16. The above summaries do not purport to be an exhaustive analysis of the evidence. What is clear however is that the Appellant admitted the conduct giving rise to the misconduct offence, but disputed that it amounted to an offence. It is also clear that he admitted placing his hand on Ms Robert's chest area but claimed the defence of provocation.

THE GROUNDS OF APPEAL - MISCONDUCT

17. The grounds of appeal are as follows:

Conviction:

"1. The Stewards erred in convicting the appellant of the offence contrary to Rule 231(2), the evidence in support of the charge being insufficient to constitute the offence."

Penalty:

"2. The penalty imposed by the Stewards was manifestly excessive in all the circumstances of the offence."

CONSIDERATION OF THE GROUNDS OF APPEAL - MISCONDUCT

18. Misconduct is not defined in the Rules. In *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197, the New South Wales Court of Appeal considered the meaning of that term, and referred with approval to the approach taken in courts in England and the United States.

"....."misconduct" generally means wrongful, improper or unlawful conduct, motivated by premeditated or intentional purpose or by obstinate indifference to the consequences of one's acts. Similar approaches to the meaning of the word "misconduct" have been taken in Australia, outside the context of professional discipline: see, e.g., O'Connor v Palmer (No 1) (1959) 1 FLR 397. The primary dictionary meanings confirm that this is also the way "misconduct" is used in everyday speech."

19. In written submissions, counsel for the Appellant summarised the Appellant's actions as being "...generally undesirable and probably inappropriate...". Reference was made to the experience of both drivers, the fact that the action was not unsafe. It was said that the Appellant was merely bringing to Ms Roberts' attention the fact of his displeasure at her actions. The Stewards, however, had found that the action was a dangerous practice, an overreaction and unnecessary.
20. In my opinion, the Stewards' findings of fact were open on the evidence. Their finding that the action amounted to misconduct was in accordance with authority. I would dismiss the appeal against conviction in relation to the misconduct offence.
21. As to penalty, the Appellant submits that the offence was at the lowest end of the scale and merited being disposed of by way of caution or reprimand. In my opinion, the fine imposed of \$500 in the present case was modest and was within a sound discretionary judgment and cannot be said to be unreasonable or unjust. One only has to look at the Appellant's own previous history in order to see that misconduct is most often dealt with by way of a fine. In 2012 he was fined \$1500 for swearing at the Starter and the Deputy Chief Steward. In 2006 he used abusive language to the Chief Steward and was fined \$2000. The \$500 fine imposed was not manifestly excessive.

THE GROUNDS OF APPEAL - ASSAULT

22. The grounds of appeal are as follows:

Conviction:

"1. The Stewards erred in convicting the appellant of the offence contrary to Rule 231(1)(e), the evidence in support of the charge being insufficient to constitute the offence.

2. The Stewards erred in reversing the onus of proof in relation to the question of provocation.

3. *The Stewards erred by using a number of irrelevant issues in support of their decision to convict the appellant.*"

Penalty:

"1. The Stewards erred by imposing a penalty which was broadly consistent with penalties imposed for assaults on Stewards.

2. The Stewards erred by referring to and relying upon decisions from other jurisdictions, the particulars of which were not known to them.

3. The Stewards failed to adequately factor into their assessment of penalty the fact that:

a. There was no injury to the complainant; and

b. The offence was not observed by any member of the public.

4. The Stewards erred by finding as an aggravating factor that the appellant was in a position of trust or authority in relation to the complainant, and that this had enabled the commission of the offence.

5. The Stewards failed to adequately factor into their assessment of penalty the consequences of a penalty of disqualification and the financial hardship that would accrue to the appellant as a result.

6. The Stewards took into account as an aggravating factor the fact that the appellant had exercised his right to defend the charge.

7. The Stewards failed to take into account the appellant's previous good record over the past 8 years.

8. The Stewards failed to consider the appropriateness of a fine as a penalty.

9. The penalty imposed by the Stewards was manifestly excessive in all the circumstances of the offence."

CONSIDERATION OF THE GROUNDS OF APPEAL – ASSAULT CONVICTION

23. The Rules are part of the statute law of Western Australia. They are delegated legislation. (*Zucal v Harper* (2005) 29 WAR 563). The provisions of the Criminal Code ("Code") therefore apply: s. 3 (4) *The Criminal Code*. There is nothing in the Rules which excludes the Code provisions, either expressly or by necessary intendment. Assault is defined as a striking, touching or moving without consent (Code section 222). A person is not criminally responsible for an assault if the provisions of sections 245 and 246 of the Code are satisfied.

Ground 1

24. There is no merit in ground 1 of the Appeal against conviction. The Appellant admitted in his interview with the Stewards and in his oral evidence at the inquiry that he had placed his open hand on Ms Roberts' vest. It matters not that the allegation and finding was that the Appellant

applied force to move Ms Roberts away. The act of touching without consent itself amounts to assault. I would dismiss ground 1.

Ground 3

25. This ground needs to be dealt with before count 2. It requires consideration of the facts concerning the issue of provocation.
26. In relation to both the misconduct and the assault, the Appellant justified his actions by reference to a previous incident which had occurred between Ms Roberts and him on 4 February, one week before the incidents the subject of the charges.
27. In his video recorded interview of 19 February, at 00:53, the Appellant said:

“...if there's going to be an inquiry, it's going to go right back, because it's been building up...”

28. At the hearing on 3 March, the following exchange took place (T14):

***ANDERSON** Two weeks before at Gloucester Park, I'd already warned her about her attitude because I asked her about a drive and she wasn't, she's never happy about you asking about drives.*

***CHAIRMAN** Mmm hmm.*

***ANDERSON** And I was, indicated at that, that day because the Stewards also asked her about that drive..*

***CHAIRMAN** Mmm hmm.*

***ANDERSON** and on the grass, again, she swore in front of one of my long term owners and just said “Well it's fucking finished now anyway” and I sent her a text on the way home about her attitude. So that was the sort of start of that.....*

and later at T19:

***CHAIRMAN** Didn't you, didn't you instigate the discussion with Ms Roberts? First of all on the track by telling her “You've got to do as you're told” and then back at the stables? When she said “Just leave it” and you said “No we're going to have this out”?*

***ANDERSON** Yeah because it keeps happening. Because..*

***CHAIRMAN** What keeps happening?*

***ANDERSON** if Deni doesn't, her attitude that, if Deni doesn't want to do something she doesn't want to do it.”*

And later at T32:

“ANDERSON Nothing. I was just saying I wasn't hot, I just said to her “You can't speak to me like that” and she said “Leave it”, “No we're gonna have it out now, we're going to sort this out once and for all”.

29. The Appellant's references to the incident on 4 February were put forward by him as a justification for his actions in relation to both the misconduct and the assault offences on 11 February (provocation is, of course, not a defence to misconduct). However, the Stewards in their reasons for conviction used the incident of 4 February against him, rather than for him. It was used by the Stewards as evidence that when he placed his hand on Ms Roberts' chest he was not deprived of the power of self-control, but was rather acting in anger. The Stewards also used the evidence as demonstrating that he did not act “...on the sudden...”. The Stewards said in their reasons at paragraphs 21 to 23:

“21. Your deliberate approach to Miss Roberts, saying “No, we're going to have this out now” and standing in close proximity to Miss Roberts so as to be in her face confirms to the Stewards that you were the aggressor and made the choice to confront Miss Roberts. Your actions were deliberate and intentional. You have not acted suddenly in response to any provocation. Stewards find there was no provocative conduct by Miss Roberts at any time and it was only when faced with your approach that Miss Roberts objected and verbally expressed her desire for you to leave her alone.

22. It is clear to the Stewards that you had been unhappy with Miss Roberts' attitude since 4 February 2020 and this came out in your behaviour and actions. The words of Miss Roberts or the manner in which she spoke to you on the training track were 5 minutes prior to you approaching Miss Roberts at your stables and wanting to have it out. It therefore cannot be said that you have acted suddenly or without the benefit of time. You had time for contemplation.

23. You say you were provoked due to Miss Roberts' attitude since you questioned her driving tactics at Gloucester Park on 4 February 2020. Stewards consider your passion (or anger) did not arise due to the incident on the training track but was anger you held inside from 7 days earlier. This means your passion did not arise at the time of the incident on 11 February 2020 but was the result of former provocation. It is clear to the Stewards that your actions were the result of resentment which had been thought upon since 4 February 2020 and brooded over. Therefore it cannot be said your passion was sudden.”

30. In my opinion, it was open to the Stewards to use the evidence concerning the previous incident of 4 February in the way which they did on the assault offence. It was relevant evidence because it tended to disprove that the Appellant acted suddenly, and without time for his passion to cool.
31. The Appellant complains that the Stewards took further irrelevant matters into account in finding him guilty of the assault. At paragraph 26 of their reasons, the Stewards said:

“26. It is not acceptable for a person in authority over another in a workplace to assault another as a means of enforcing their authority or relieving their frustration. You, as an employer, have an obligation to provide a safe workplace and you failed to do this. You

have no policies or procedures for dealing with staff issues. As an employer, you are required to take all necessary precautions to ensure the physical and mental wellbeing of your staff. You have therefore failed in your duty of care to Miss Roberts.”

32. I agree with the submission that these matters were irrelevant to conviction. They are matters which could properly be taken into account (if proved) on penalty. However, it appears to me that those matters were not taken into account in finding the Appellant guilty. The comments did not form any part of the reasoning which the Stewards used in finding the Appellant guilty. They come at the very end of the reasons and only after the Stewards had dealt with the substantive issues in the case, namely the factual dispute and the matter of provocation. These irrelevant matters did not affect the merits of the case. I would dismiss ground 3 of the appeal against conviction for the assault offence.

Ground 2

33. The Stewards said at paragraph 25 of their reasons:

“25. We therefore have not accepted that matters of provocation have been made out on the evidence.”

34. It is trite law that in a criminal case the onus is on the prosecution to disprove beyond reasonable doubt any defence raised on the evidence. Paragraph 25 could have been better expressed. However, I am not satisfied that the Stewards did in fact reverse the onus of proof. Paragraph 25 is expressed somewhat ambiguously. The Stewards certainly did not say that the Appellant had not made out his defence. The conduct of the inquiry up to delivering the reasons, and the fact that paragraph 25 comes at the end, indicates to me that it simply a summary of the outcome on the principal issue, rather than a statement of law.
35. I would dismiss ground 2.

CONSIDERATION OF THE GROUNDS OF APPEAL – ASSAULT PENALTY

36. The Stewards imposed a period of 12 months disqualification. Their decision can only be set aside if it is found that they acted on a wrong principle, or that the penalty itself was manifestly excessive. The Appellant alleges both of those things in this case.

Grounds 1 and 2

“1. The Stewards erred by imposing a penalty which was broadly consistent with penalties imposed for assaults on Stewards.

2. The Stewards erred by referring to and relying upon decisions from other jurisdictions, the particulars of which were not known to them.”

37. The Stewards referred to a number of decisions, both in Western Australia and other States. The purpose of that reference was not to try to equate the penalty in this case with one of those. The purpose was to indicate what the range of penalties commonly imposed is for assault. That approach should be commended, rather than criticised. The Stewards recognized that when they said:

“Without knowing the full particulars of all of the above cases, it would appear that a mixture of fines, suspension of licence and disqualifications are the usual penalties. An explanation for the different penalties can be explained by each case being determined on its merits, taking into account the individual circumstances of the offending. Stewards are conscious of the need to be consistent however are equally aware that every case must be dealt with on its own set of circumstances.”

38. The Stewards also said that an assault on an official in the performance of duties warrants a more severe penalty. I agree with that proposition. Applying that principle to this case, the Appellant should be dealt with less severely than persons who assault officials. That principle also means that a less severe type of penalty may be imposed where the complainant is not an official.
39. I am of the opinion that the Stewards recognised that principle, and therefore did not fall into error.
40. I would dismiss grounds 1 and 2.

Ground 3

“The Stewards failed to adequately factor into their assessment of penalty the fact that:

- a. There was no injury to the complainant; and*
- b. The offence was not observed by any member of the public.”*

41. In my opinion, the fact that there was no physical injury to the complainant was irrelevant. Certainly on the evidence she suffered psychological injury. Her unchallenged evidence at the inquiry (by way of her video interview) was that she was frantic and emotional after the assault. As to the incident being observed by members of the public, it was common ground between the Appellant and Ms Roberts that farrier Tommy Sheehy was working at the stables at the time. Indeed, the Appellant (at T35) asked the Stewards to speak to Mr Sheehy. Mr Sheehy was interviewed by the Stewards and said that he saw the Appellant and Ms Roberts yelling at each other, although he did not see the assault itself.
42. I would dismiss ground 3.

Ground 4

“The Stewards erred by finding as an aggravating factor that the appellant was in a position of trust or authority in relation to the complainant, and that this had enabled the commission of the offence.”

43. The Stewards said at page 3 of their reasons:

"The assault of Miss Roberts is aggravated by the fact that Miss Roberts was vulnerable, being a young female and you were in a position of authority over Miss Roberts. You abused your position of authority or of trust in committing the offence."

44. I agree that the Stewards were in error in taking these factors into account. On all of the evidence, Ms Roberts was not young. She was 24 years old. Her gender was irrelevant. She cannot be said to have been vulnerable. The relationship was one of employer and employee, not one of trust or authority over and above being an employer. I would uphold ground 4.

Ground 6

45. The Stewards took into account as an aggravating factor the fact that the appellant had exercised his right to defend the charge.

46. At page 4 of their reasons, the Stewards said:

"Stewards have taken into account your not guilty plea, and that you have not shown any remorse or accepted responsibility for your actions..."

47. It was an error on the part of the Stewards to take into account the fact that the Appellant had pleaded not guilty. It is well accepted that a plea of not guilty cannot be used to increase an otherwise appropriate penalty: See *Siganto v The Queen* (1998) 194 CLR 656 at [21]-[22].

48. I would uphold ground 6.

Grounds 5, 7, 8 and 9

49. These grounds can conveniently be considered together.

50. The Stewards found that the penalty of disqualification would result in the Appellant's bankruptcy, loss of properties, and his son having to be taken out of private school (page 3). The Stewards also said that they had considered all the modes of penalty available and their likely impact on him, given his personal circumstances (page 3). The Stewards went on to say at page 4:

"You have raised the issue of hardship however your personal circumstances do not make you any different to anyone for whom a suspension or disqualification is found appropriate to their individual circumstances. Those penalties are an inevitable consequence of breaching the rules and if an appropriate penalty is found to be a suspension or disqualification, matters of financial hardship are a regrettable consequence of that conduct rather than a reason to reduce the appropriate penalty."

51. In my opinion, the Stewards were in error in not taking into account the Appellant's personal circumstances in fixing the type of penalty. A particular type of penalty is never an inevitable consequence of being found guilty of offence. The penalty will depend on all the circumstances of the case, including the seriousness of the offence and the offender's personal circumstances.

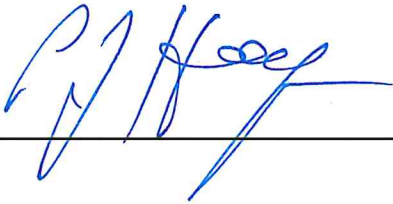
52. In my opinion, grounds 5, 7, 8 and 9 are made out. Taken together with the fact that grounds 4 and 6 are made out, the sentencing discretion miscarried to the extent that the penalty must be revisited. The appeal against penalty in respect of the assault offence should be allowed.

RESENTENCING - ASSAULT PENALTY

53. The seriousness of the offence can be adequately reflected in a fine. A fine should be imposed in this case. That is principally because of the catastrophic effect which a disqualification would have on the Appellant. Disqualification is out of all proportion to the seriousness of the offence

54. Fines have been imposed in respect of assault offences in other cases. In that respect, it can be said that a fine is within the range of penalties commonly imposed. General and specific deterrence can be given effect by a not insignificant fine. The Appellant still suffers the ignominy of the fact of his convictions.

55. I would set aside the penalty of disqualification and impose a fine of \$5000.



PATRICK HOGAN, PRESIDING MEMBER



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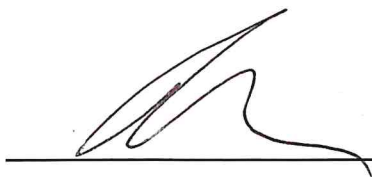
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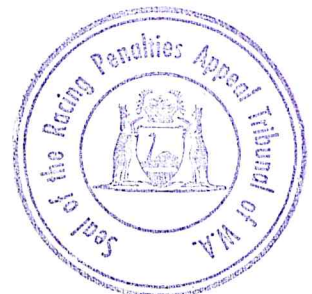
Mr T F Percy QC and Mr C Woodhouse appeared for the Appellant

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

1. I have read the draft reasons of Mr P Hogan, Presiding Member.
2. I agree with those reasons and conclusions and have nothing further to add.



ROBERT NASH, MEMBER



RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR DETERMINATION OF
MS B ROBBINS (MEMBER)

APPELLANT: PETER LESLIE ANDERSON

APPLICATION NO: A30/08/837

PANEL: MR P HOGAN (PRESIDING MEMBER)
MR R NASH (MEMBER)
MS B ROBBINS (MEMBER)

DATE OF HEARING: 6 JULY 2020

DATE OF DETERMINATION: 21 AUGUST 2020

IN THE MATTER OF an appeal by Peter Leslie Anderson against determinations made by the Racing and Wagering Western Australia Stewards of Harness Racing on 9 June 2020 imposing a fine of \$500 for a breach of Rule 231(2) and a disqualification of 12 months for a breach of Rule 231(1)(e) of the Rules of Harness Racing.

Mr T F Percy QC and Mr C Woodhouse 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 read the draft reasons of Mr P Hogan, Presiding Member.
2. I agree with those reasons and conclusions and have nothing further to add.



BRENDA ROBBINS, MEMBER

