

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: MR PAUL JAMES HARVEY

APPLICATION NO: 21/743

PANEL: MS K FARLEY
(CHAIRPERSON)

DATE OF HEARING: 29 MARCH 2021

DATE OF DETERMINATION: 28 APRIL 2021

IN THE MATTER OF an appeal by PAUL JAMES HARVEY against a determination made by Racing and Wagering Western Australia Stewards of Thoroughbred Racing imposing a 20 day suspension for a breach of Thoroughbred Rule of Racing 131(b).

The P Harvey appeared in person and was represented by Mr Des O’Keeffe.

Mr J Zucal represented the Racing and Wagering Western Australia (“RWWA”) Stewards of Thoroughbred Racing.

Introduction

1. Paul James Harvey (“Mr Harvey” or “the Appellant”) is a RWWA Licensed Jockey in the WA Thoroughbred Racing Industry.
2. Mr Harvey was found to have breached Thoroughbred Rule of Racing 131(b) by failing to ride his mount, FREQUENT FRIAR out to the end (being the final stride) of Race 6 at Ascot on 17 March 2021.
3. RWWA imposed a 20 day suspension commencing midnight 20 March 2021 and expiring midnight 9 April 2021.
4. On 29 March 2021 I heard and determined the appeal. The order of the Tribunal was that the appeal be dismissed.

5. Mr Harvey's mount Frequent Friar finished second in the race. The winner beat him by a nose. Mr Harvey had ridden the horse vigorously in the race and particularly when approaching the finish line. However, Stewards found that Mr Harvey compromised Frequent Friar's opportunity to win the race by failing to ride the horse out in the final stride.
6. Whilst the Stewards could not "categorically" say that Mr Harvey would have won the race had he ridden the horse out, they could not "categorically" say that he would not have won the race either.
7. The importance of the rule is of course to protect the integrity of the racing industry by ensuring that every horse is given the best chance of achieving a placing. Persons betting on the outcome of a race need to be assured that their chosen mount is given every opportunity to win.
8. It is for this reason that Stewards will look keenly at the way a horse is ridden when the placings are close.
9. Mr Harvey had initially appealed against the finding that he had breached AR131(b), however he discontinued that appeal prior to the hearing.
10. At the hearing of the appeal against penalty, I gave leave to Mr O'Keeffe to represent Mr Harvey. Mr O'Keeffe submitted that the penalty imposed was manifestly excessive, although he conceded on Mr Harvey's behalf that a period of suspension was not an inappropriate penalty. That concession was appropriately made. Whilst there are examples, (not least of which are the majority of Mr Harvey's prior breaches of the rule) of fines and reprimands being imposed when the breach occurs in relation to close place getters it would be more likely than not that suspension would be appropriately imposed.

The Appellant's Argument

11. On Mr Harvey's behalf, Mr O'Keeffe suggested that the length of suspension was inappropriate when regard was had to effectively, four considerations:
 - the level and impact of the breach;
 - the mitigating factors;
 - the impact of the penalty (financially) on Mr Harvey; and

- comparable penalties previously imposed.
12. In relation to the first of these Mr O’Keeffe submitted that one stride put this failure to ride out the race on the lower end of the scale of seriousness. He said that the position of the rail placement meant that Mr Harvey’s view of the finishing post may have been obscured (although Mr Harvey did not raise this at the inquiry and in any event accepted that it was his responsibility to make a judgement as to when he had crossed the finishing line).
 13. Mr O’Keeffe’s submissions in relation to the mitigating factors in this matter effectively (and appropriately) repeated matters raised in relation to the level and impact of the breach. In addition, Mr O’Keeffe submitted that Mr Harvey’s history of breaching this rule whilst “not exemplary” should be viewed in light of his lengthy and highly successful career as a jockey.
 14. In relation to the impact (financially) upon Mr Harvey Mr O’Keeffe submitted that a 19 day suspension equated to a \$13,000 loss of income. He suggested that amount was a “massive” (and therefore excessive) financial burden.
 15. With regard to comparable penalties Mr O’Keeffe accepted that the matter of 2019 B Parnham (Thoroughbred) (17 days suspension) and 2016 D Whyte (Thoroughbred) (30 days suspension) were relevant but submitted that Mr Parnham had breached the rule earlier in the race than Mr Harvey (2 strides) and had a prior period of suspension for a similar breach (8 days in 2015). Mr O’Keeffe submitted that Whyte could be distinguished from Mr Harvey in that the breach also occurred earlier (2 strides) and it occurred in a Group1 race, making the breach more serious.
 16. Mr O’Keeffe also provided me (at Tab 5 in Exhibit 1 – Folder of Materials) with other examples of suspensions imposed on other jockeys. None of these are directly comparable to Mr Harvey’s situation and some of which involved pleas of guilty.
 17. At the Steward’s inquiry Mr Harvey did not enter a plea of guilty to the breach. When asked by the Stewards, he withheld his plea. What he meant by that was unclear. In any event, he did cooperate fully with the inquiry and was forthcoming in his response to the Steward’s questions. He put forward no defence when charged, and made comments against his interest without being pressed (e.g. transcript of Steward’s Inquiry, last line of page 3: “I may have stopped one stride”).
 18. Mr Harvey’s lack of guilty plea is not, of course, an aggravating factor with regard to penalty, however he misses the benefit of such a plea as a mitigating factor.

19. Likewise, Mr Harvey's prior offences under the same rule whilst not aggravating, provide no mitigation. In their reasons for penalty (transcript of Steward's Inquiry, paragraph 2, page 11) Stewards comment "we can't say that you have a good record overall under the Rule Mr Harvey."
20. At the hearing before me, Mr Zucal for the Stewards described Mr Harvey's prior record for breaches of this rule as "abysmal". This was not how the Stewards described the record at the hearing and I would prefer Mr O'Keeffe's description as "not exemplary". Stewards were not however in error in finding as they did with regard to his prior history.

The Stewards' Response

21. In reply to Mr Harvey's submissions, Mr Zucal for the Stewards submitted that Stewards had made no error in finding as they did. Mr Zucal submitted:
 - this breach was serious. Whilst it was not concluded that Mr Harvey's mount would have won the race his chances of doing so were compromised;
 - punters on the outcome and owners were entitled to see their horses ridden out and given every chance;
 - a suitable penalty must enforce the rules of racing;
 - Mr Harvey had previously breached this rule 34 times, 7 of which were in the past two years (although it had been a 10 month period since his last offence);
 - Stewards had taken all relevant matters into consideration (and had not taken incorrect consideration of irrelevant matters) in assessing penalty; and
 - the penalty imposed was within an appropriate range of penalties and was not manifestly excessive.
22. It is perhaps useful to reproduce the portion of the transcript of proceedings dealing with penalty as follows:

"Obviously the Rule is a serious one in the Rule book. It ensures that riders ride their horses out to the end of the race so that the outcome of the race is not affected Mr Harvey. But in this particular instance we can't categorically say that you would have won the race but equally we can't categorically say that you wouldn't have won the race. So, you haven't fulfilled your obligations under the Rule. You've compromised FREQUENT FRIAR's opportunity to win the Race. So, there has to be a deterrent, both

specific and general in a penalty and we apply that in this particular case. Your record, whilst showing no recent offences since the 3rd May 2020 does show a number of prior offences under the same Rule so we can't say that you have a good record overall under the Rule Mr Harvey, this particular Rule even though it's been clear for, what did we say, 10 months. There has been a number, I think you would agree with that, there has been numerous offences under the Rule as we have said with those fines being recorded against you. It does involve second and first placing, it is a metropolitan mid-week event, so they're things that we also have to consider. We also look at the degree of the lack of riding. It's one stride. So, we say that's towards the lower end of the scale, it's not, as you said, like three or four strides, so it's one stride so that does lessen it somewhat. The precedent in terms of penalty, we can see that Brad Parnham rode a horse called WINNIFER in October '19. He was suspended for 19 days and probably most famously recently Douglas Whyte got suspended for a month and that was in a Group 1 event, the Railway or the Kinston Town Group 1 event in 2016. So we look at all the modes of penalty that are available to us, fines, suspensions, take into account your personal circumstances, your seniority, your experience, weighing it all up Mr Harvey we felt a suspension to be appropriate, one of twenty days and we do take into account that there are Group and Listed races in that period of time but we do feel it should result in a suspension of your licence to ride in races midnight the 20th March to midnight the 9th of April. So, in that time there's five provincial meetings, there's two midweeks, there's four country meetings and there's two Saturday meetings in that time. We do bear in mind the significance of those feature meetings. It does bring you back for the Derby."

23. It is clear that Stewards are not in error in the matters that they have taken into account. They have also had regard, in their settling of the suspension period, to the types of races and race meetings that Mr Harvey would miss. They have had appropriate regard to precedents. They have had regard to all relevant matters and not taken into account any irrelevant matters.
24. Whilst it may be argued that the penalty imposed upon Mr Harvey was not lenient, or that it was severe, I cannot find that it was manifestly excessive.

25. Whilst I (had I been sitting at first instance) or more relevantly a differently constituted panel of Stewards, may have imposed a shorter (or potentially longer) period of suspension, this does not allow the Tribunal to substitute its own discretion for that exercised by the Stewards. The Tribunal has been very clear in that regard (Prentice v RWWA Stewards of Harness Racing (Appeal Number 816 (2018) para. 59).

For these reasons I dismiss the appeal against penalty.



KAREN FARLEY, CHAIRPERSON