APPEAL NO. 856

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT:	**MR DARREN ROBERT LEE TAYLOR**
APPLICATION NO:	**22/4637**
PANEL:	**MR ROBERT NASH (CHAIRPERSON)** **MR ANDREW E MONISSE (MEMBER)** **MS NATALIE SINTON (MEMBER)**
DATE OF HEARING:	**11 NOVEMBER 2022**
DATE OF DETERMINATION:	**3 FEBRURY 2023**

IN THE MATTER OF an appeal by DARREN ROBERT LEE TAYLOR against a determination made by Racing and Wagering Western Australia Stewards of Thoroughbred Racing to impose a disqualification period of two years for two breaches of Rule AR 233(c) of the Rules of Thoroughbred Racing

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Messrs Tom Percy KC and Jack Young represented Mr Taylor.

Messrs Ron Davies KC and Denis Borovica represented the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

Background

1. The Appellant is a licensed Racing and Wagering Western Australia (RWWA) trainer. On 15 August 2022, following an inquiry by RWWA Stewards held on 22 July 2022 and 15 August 2022, the Appellant pleaded guilty to two charges of sexual harassment of a person employed, engaged in, or participating in the racing industry contrary to the Rules of Thoroughbred Racing (the Rules) AR 233(c).

2. On 25 August 2022, the Stewards imposed a total effective disqualification of 2 years for those charges, consisting of 18 months for charge 1, and 12 months for charge 2, to be served cumulatively but reduced by 6 months to give effect to the totality principle.

3. The Appellant appeals the total disqualification imposed on three grounds, the first alleging express error in the Stewards' characterisation of the seriousness of his offending, the second and third alleging implied error in the imposition of a penalty that was manifestly excessive.

4. In order to succeed, the Appellant must establish that the Stewards expressly or impliedly made a material error of fact or law: *House v The King* (1936) 55 CLR 499 at [505].

5. The appeal cannot be allowed simply because, had this Tribunal been in the place of the Stewards on 25 August 2022, it would have imposed a different penalty.

6. For the reasons that follow, I am satisfied that the penalty imposed was manifestly excessive, and I would allow the appeal and reduce the disqualification imposed on charge 1 to 8 months, and the disqualification imposed on charge 2 to 6 months, with both disqualifications to be served concurrently. The total disqualification period is therefore 8 months, commencing 25 August 2022.

The facts

7. The facts of the Appellant's offending conduct are not in dispute.

8. The Appellant is 37 years of age. He has been involved in the racing industry for many years, and for the past five years has held a trainer's licence.

9. In that capacity, the Appellant employed the two victims, namely CBM and CLD, on a trial basis, at separate times, the intention being that if their trials went well, they would be apprenticed as jockeys with the Appellant as their trainer.

10. In relation to charge 1, CBM was employed by the Appellant from March to May 2022. She was 17 years of age. The Stewards found, at the conclusion of their inquiry, that the Appellant engaged in sexual harassment of CBM by sending a series of text messages and videos that were of a sexual nature, specifically:

    a. 'Come spoon'.

    b. Photo of a ham roll imaging a vagina.

    c. 'Can we cuddle, it's cold'.

    d. 'Send me a lack of boob pic'.

    e. 'Send nudes'.

    f. Picture of a male and female with the caption 'Hi I'm the electrician...I'm here to remove your shorts and check your box.'

    g. 'Cuddles?'

    h. 'BJ?'

    i. Article titled 'For the love of Anambra'.

    j. Message with a love heart and 'Ascot!'

       Him: fancy going for a coffee today?

       Me: 'shave vagina just in case'

    k. Four videos of sexual content.

11. In relation to charge 2, CLD was employed by the Appellant from May to July 2021. She was 21 years of age. The Stewards found, at the conclusion of their inquiry, that the Appellant engaged in sexual harassment of CLD by sending a series of text messages and videos which were of a sexual nature, specifically:

    a. 'Hope it's the same when you are sucking my dick'.

    b. 'A boner for you'.

    c. 'I'll rub some cream on you'.

    d. 'G not coming home.'

       'You have to take one for the team'.

    e. 'I love you'.

    f. 'Kiss me'.

    g. 'Can I feel you then'.

    h. 'Can we kiss'.

    i. 'I could do anything internal to you'.

The Appellant's personal circumstances

12. The Appellant was at the time the Stewards imposed their penalty 37 years of age. He was in good health and had recently become a father.

13. He has been involved in the racing industry for a number or years, with about the last five of them as a licensed trainer. He was reliant on training and associated equine industries for his income, with the Stewards in their reasons noting that he can earn a living from educating and training equestrian and pleasure horses outside thoroughbred racing. His partner was on maternity leave, with a limited income as a result.

The Stewards' reasons for penalty

14. The Stewards provided the Appellant with comprehensive written reasons for penalty.

15. In those reasons, the Stewards note that the racing industry has been historically male dominated, and that the increasing number of women entering the industry should be able to do so confident that they will not be subjected to sexual harassment. Nothing in these reasons should be interpreted as suggesting that the Stewards were wrong on this point.

16. The Stewards noted that the Appellant's conduct was ongoing, and not a singular case of sending an inappropriate text message. They further noted that CBM, at 17 years of age, was a minor at common law and the Appellant, as her employer, was in a position of trust.

17. The Stewards confirmed receipt of four references vouching for the Appellant's character and describing his conduct as out of character – a description the Stewards found difficult to reconcile with the persistence of the Appellant's conduct.

18. In the Appellant's favour, the Stewards noted that he pleaded guilty, acknowledged fault and had cooperated with RWWA investigators. He had expressed remorse and had no prior breaches of the Rules in relation to matters of this kind.

19. It was also noted that the Appellant had provided the Stewards with confirmation that he had been attending counselling with a psychologist.

Ground 1 – mischaracterisation of the seriousness of the Appellant's conduct

20. The Appellant's first ground of appeal alleges express error in that the Stewards categorised the offending as being 'in the most serious category under the rule'.

21. The ground contains six particulars, which it is not necessary to repeat.

22. AR 233 provides that a person must not:

    a. breach a policy, regulation or code of practice published by Racing Australia or a PRA;

    b. engage in workplace harassment or bullying of a person while the person is acting in the course of his or her duties while employed, engaged in, or participating in the racing industry;

    c. engage in sexual harassment of a person employed, engaged in, or participating in the racing industry.

23. 'Sexual harassment' is defined in AR 2 as:

    a. subjecting a person to an unsolicited act of physical intimacy; or

    b. making an unsolicited demand or request (whether directly or by implication) for sexual favours from a person; or

    c. making a remark with sexual connotations relating to a person; or

    d. engaging in any other unwelcome conduct of a sexual nature in relation to a person, where the person engaging in the conduct described in paragraphs (a), (b), (c) or (d) does so:

        i. with the intention of offending, humiliating or intimidating the other person; or

        ii. in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.

24. AR 2 also provides that the conduct described in paragraphs (b), (c) and (d) includes, without limitation, conduct involving the internet, social media, a mobile phone, or any other mode of electronic communication.

25. It is apparent from this definition that sexual harassment can cover a wide range of conduct, from making unwanted physical contact intending to offend, humiliate or intimidate, to making a remark with sexual connotations where there is no such intention, but where a reasonable person would have anticipated that the remark might cause offence.

26. The Appellant's conduct was clearly serious. It involved repeated and persistent offending against two young and vulnerable victims in circumstances where there was a significant age and power disparity between the victims and the 37 year old Appellant. One of victims was 17 and therefore not an adult and the other only 21. In relation to both victims, the Appellant, as their employer, was in a position of authority.

27. The Appellant's conduct, while serious, cannot be properly described as 'in the most serious category under the rule'. Had the Stewards so categorised the Appellant's offending, this would have been an error.

28. The Stewards did not, however, do so.

29. In their reasons for penalty, the Stewards made the following relevant statements.

    a. *'An offence under AR 233 of sexual harassment is undoubtedly a very serious breach of the Rules of Racing'*: at [8].

    b. *'A clear message needs to be sent to the racing industry that there is no place for such conduct and will [sic] be treated as a most serious breach of the rules. There needs to be in cases such as these a clear message to both the offender and the wider industry, that harassment of this nature and type will not be tolerated and that there is no place for it within the industry'*: at [25].

30. Both statements, in their proper context, refer to offences of sexual harassment generally and not to the Appellant's specific offending.

31. Further, while it may seem to be a fine distinction, the Stewards in their reasons refer to such conduct as 'a' most serious breach, not 'the' most serious breach.

32. 'The most serious breach' means exactly that – there is no breach more serious. 'A most serious breach' is merely another way of saying 'very serious'.

33. I would therefore dismiss the Appellant's first ground of appeal.

Grounds 2 and 3 – manifestly excessive penalty

34. Grounds 2 and 3 each allege the imposition of a manifestly excessive penalty.

35. Ground 2 makes reference to the circumstances of the case and matters personal to the Appellant, whereas ground 3 makes reference to penalties imposed in similar cases both within Western Australia and in other jurisdictions.

36. While the grounds are particularised differently, they allege the same error and may conveniently be dealt with together.

37. A ground of appeal that alleges a penalty is manifestly excessive alleges the existence of an implied error. A penalty will only be manifestly excessive if it is shown to be plainly unreasonable or unjust. The range of penalties customarily imposed is of significance although each case turns on its own facts and circumstances. Sentencing ranges provide a general guide only and is merely one of the factors to be taken into account. The discretion conferred on the primary decision maker is of fundamental importance and this Tribunal will not substitute its own opinion merely because it would have exercised the discretion differently: *Houghton v The State of Western Australia* [No 2] [2022] WASCA 7 at [224] to [228].