

APPEAL PANEL OF RACING NEW SOUTH WALES

APPEAL OF LICENSED TRAINER MICHAEL DWYER

Appeal Panel: **Mr R. Beasley SC, Principal Member; Mr C. Tuck; Mr J. Nicholson**

Appearances: **On the Papers:**
Mr P Sweney, General Counsel for Racing NSW
Mr P. O’Sullivan, Solicitor, for the Appellant

Date of submissions: 14 August 2023

Date of Reasons: 18 August 2023

Rules involved: AR233(b): workplace harassment; AR233(c): sexual harassment

REASONS FOR DECISION ON PENALTY

The Panel

Introduction

1. On 7 August 2023, the Panel dismissed the appeal of Michael Dwyer (**Appellant**) against the Stewards findings that he had breached AR 233(b) and AR 233(c) of the Australian Rules of Racing (**Rules**). The full particulars to each charge are set out in the Panel’s Reasons for Decisions of 7 August 2023, and do not need to be repeated here. In summary form the charges brought against the Appellant were as follows:

Charge 1: Alleged breach of AR233(b) relating to workplace harassment. It was alleged that between January 2022 to 20 October 2022 the Appellant said the words “You’re on a see-food diet” to licensed stable hand Ms Rhiannon Smith at a race meeting.

Charge 2: Alleged breach of AR233(b) concerning workplace harassment. It was alleged that during the Taree race meeting on 26 August 2022 the Appellant said the words “Are you on a see-food diet?” to licensed stable hand Ms Bree Peet while she was eating.

Charge 3: Alleged breach of AR233(c) concerning sexual harassment. It was alleged that between 30 August 2022 and 10 September 2022 the Appellant put his arm around the waist of licensed stable hand Ms Krystal Taylor at the Newcastle racecourse without her consent.

Charge 4: Alleged breach of AR233(c) relating to sexual harassment. It was alleged that between 30 August 2022 to 20 October 2022 at the Newcastle racecourse the Appellant said to Ms Taylor “Oh, those tights make your hips look really big today and it looks good”.

Charge 5: Alleged breach of AR233(c) relating to sexual harassment. It was alleged that between 30 August 2022 and 20 October 2022 at the Newcastle racecourse the Appellant patted Ms Taylor on the backside without her consent.

Charge 6: Alleged breach of AR233(b) relating to workplace harassment. It was alleged that during the period 13 September 2022 to 20 October 2022 at the Newcastle racecourse the Appellant said to Ms Taylor the following remarks:

(a) “If you lost a bit of weight, you would find all this a bit easier.”

(b) “If you lost a bit of weight, you wouldn’t have to struggle so much to pull the jumper over so much and you would be fine.”

(c) “Oh good girl, good girl. Keep doing your job, you little bitch.”

2. At a Stewards’ Inquiry held on 22 March 2023, the Appellant was found not guilty of Charge 4. He pleaded guilty on that day to Charge 2. The Appellant pleaded not guilty to the remainder of the charges, but was found by the Stewards to have breached the relevant rules. As indicated, following a hearing on 23 June 2023, on 7 August 2023 the Appellant’s appeal to the Panel was dismissed in relation to each finding of breach.

3. The Appellant has also appealed against the severity of penalties imposed on him by the Stewards, which were as follows:

Charge 1: 2 months' suspension of licence, reduced to a 6-week suspension taking into account various aspects of mitigation.

Charge 2: 2 months' suspension of licence, reduced to 4 weeks taking into account various aspects of mitigation including the guilty plea.

Charge 3: 4 months' disqualification, reduced to 3 months.

Charge 5: 5 months' disqualification, reduced to 4 months.

Charge 6: 4 months' disqualification, reduced to 3 months.

4. The Stewards determined that all penalties imposed on Mr Dwyer should be served concurrently, meaning the total penalty was a 4-month disqualification. That disqualification commenced on 14 April 2023. Upon the lodgement of his appeal to the Panel, a stay on penalty was granted, which remains in force.

5. Following the Panel's determination of the breach appeal, the parties agreed that the penalty appeal could be determined on the papers. On 14 August 2023, written submissions were provided to the Panel by Mr P Sweney (**RNSWS**), the General Counsel for Racing NSW, and from Mr P O'Sullivan, the legal representative of the Appellant (**AS**). The Panel has carefully considered the submissions made. In summary, Mr Sweney contends that the penalties imposed by the Stewards are appropriate, and the appeal should be dismissed. Arguably at the other end of the spectrum, Mr O'Sullivan calls for the imposition of a fine.

Grading on each charge

Charge 1: AR 233(b), Workplace Harassment

6. Ms Smith was understandably offended by the Appellant's comments. At the Stewards' Inquiry of 6 December 2022, she said that she took them to mean that the Appellant was asserting that she was fat: see T68 L3094-3100 (6.12.22). She said that while she "brushed off" the comment, it had a negative impact on her, and she felt "down about it": T69 L3127.
7. If Ms Smith was more upset by the comment made to her than she let on, that would be understandable. The comment is unpleasant, and hurtful. Nevertheless, we accept that the Appellant was probably attempting to make a joke (albeit one in bad taste), and did not intend to humiliate Ms Smith. While all workplace harassment is objectively serious, we agree with Mr O'Sullivan that the offending here is at the lower end of the scale, which should be reflected in the penalty.

Charge 2: AR 233(b), Workplace harassment

8. Charge 2 involves nearly identical offending to Charge 1. Ms Peet was made to feel uncomfortable by what the Panel accepts was a poor attempt at humour, and is a breach of AR 233(b) that is at the lower end of the scale.

Charge 3: AR 233(c) Sexual Harassment

9. Sexual Harassment is obviously always objectively serious. It involved the Appellant touching Ms Taylor around the waist, albeit for a relatively short period of time. Mr O'Sullivan has submitted that the offending falls within the low range because (inter alia) "the offending:
 - a.did not involve touching of the breasts or genitals.
 - b.did not involve the use of threats, force or violence.
 - c. The lack of any actual sexual connotation.
 - d.the offending was not done for the sexual gratification of the Appellant": AS [28].
10. While the Panel accepts a and b, we do not entirely accept c. What is said at d was not explored in the evidence. Mr O'Sullivan also contends that the offending was less

serious than that penalised in *Bellman and Harness Racing Victoria* [2022] VCAT 249 (where a licensed person flicked a whip between a female driver's thighs) or that the subject of *The Appeal of Troy O'Neile* (RAT, 21/4/23) (*O'Neile*). The Panel is of the view that the offending here is in the low-mid range for breach of AR233(c).

Charge 5: AR 233(c), Sexual Harassment

11. Mr O'Sullivan also submitted the offending here was at the low end of the scale, for similar reasons to those submitted for Charge 3: AS [31]. We are in general agreement with Mr O'Sullivan, although we consider the offending to again be in the low to mid-range.

Charge 6

12. Charge 6 concerns breach of AR 233(b). Mr O'Sullivan considers the offending to again be at the low end of the scale. We do not agree.
13. In her interview of 24 October 2022, Ms Taylor gave evidence to Ms Burke that the Appellant had started talking to her "like a dog", and that he said: "Oh good girl, good girl. Keep doing your job, you little bitch." This incident had occurred on the morning of 20 October 2022 at Newcastle racecourse, following which Ms Taylor made a complaint to Ms Scorse and Mr Tearle referred to in our reasons on the breach appeal: Ex 3, T3 L152-T4 L154. These comments were akin to "the straw that broke the camel's back". The three comments particularised form a pattern of comments made to Ms Taylor, that ultimately had a cumulative and negative impact on her. The offending we consider is in the mid-range of seriousness because of that.

Other considerations

14. The Panel in general accepts the principles that apply to imposing penalties under the Rules set out at AS [11] and RNSWS at [2]. Ultimately, the purpose of imposing penalties is to protect the image and integrity of the sport and industry of Racing, not to punish the offender. We have taken into account that the Appellant has been involved in racing since 1997, and has a relevantly unblemished record. He is seventy-one years of age. We note that the Appellant has contributed to his country as a member of the Defence Force for nearly twenty-five years. He is entitled to a discount in relation to

Charge 2 to which he pleaded guilty. However, we have to approach penalty for the other breaches of the rules from the perspective of his denials in circumstances where we have found the charges proven.

Resolution

Charges 3 and 5

15. The Stewards imposed a three-month disqualification for Charge 3 (reduced from four), and a four-month disqualification for Charge 5 (reduced from four). It may be that the Stewards considered the sexual harassment conduct the subject of Charge 5 as more serious than the conduct the subject of Charge 3, or perhaps they considered it to be a second offence and hence warranting a longer disqualification (they could also have held both views).
16. A breach of AR 233(c) is a serious breach of the rules. We agree with Mr Sweney (AS [10]) that a fine is not an appropriate penalty. However, we are of the view that the offending in relation to Charges 3 and 5 does not warrant a disqualification. One reason we hold this view is that we consider that the imposition of a disqualification in the circumstances here would risk being inconsistent with the decision of the Racing Appeal Tribunal in *O'Neile*.
17. Mr O'Neile was charged under AR 233(c) for conduct which involved him saying to an apprentice jockey, after she had been legged on to O'Neile's horse prior to a race, "if you don't win on this horse, I'll jam your face up to my cock". A gesture was also involved. In the Appeal to this Panel (myself, Mrs Foley, Mr Innes), Mr O'Neile was disqualified for four months. This was a majority decision, as I considered a four-month suspension to be appropriate. Mr O'Neile's appeal to the Tribunal was successful, and his disqualification was set aside, and a suspension imposed instead.
18. We accept that reasonable minds might differ as to whether the Appellant's conduct the subject of Charges 3 and 5 is more serious than that of Mr O'Neile. The Appellant's conduct involves physical contact (albeit transitory). Mr O'Neile's comments however were beyond bad taste, and could have created a safety issue. While we note Mr O'Neile pleaded guilty and was contrite, we are not convinced that the conduct for which Mr O'Neile was charged differs significantly in terms of seriousness than that involved

here. Mr Armati's decision on penalty in *O'Neile* is a carefully considered one, and we do not believe we should depart from his reasoning in similar circumstances. Ultimately, we take that view that a suspension and not a disqualification is appropriate for each of Charges 3 and 5, and that a disqualification also risks inconsistency with *O'Neile*. We would not however alter the length of the penalty, and so we impose a three-month suspension for Charge 3, and a four-month suspension for Charge 5.

Charge 6

19. The Stewards imposed a three-month disqualification for Charge 6 (reduced from four). This offending involves a breach of AR 233(b), at the mid-range of seriousness for such offending. We again do not consider a fine is appropriate, but equally consider that a disqualification is not warranted. In lieu of a three-month disqualification, we consider a three-month suspension to be appropriate.

Charges 1 and 2

20. The Appellant pleaded guilty to Charge 2, and was penalised with a 4-week suspension, reduced from two months. A six-week suspension was imposed for Charge 1 (reduced from two months).
21. The comments made by the Appellant the subject of Charges 1 and 2 are offensive and humiliating. There is no place for them. However, we accept they were a poor (and seriously misguided) attempt at humour, rather than being malicious. There was no nasty intent, but rather (perhaps at best) foolishness. If the only offending the subject of this appeal was Charges 1 and 2, we would agree with Mr O'Sullivan that a fine and not a suspension was appropriate (despite the repetition of the offending). Given we are imposing suspensions for the other offending however, imposing a fine for Charges 1 and 2 would in fact amount to an additional penalty, which we do not consider to be appropriate. We consider that Charge 1 warrants a three-week suspension, and Charge 2 a two-week suspension.

Conclusion

22. The Stewards considered that all penalties imposed by them should be served concurrently. There was perhaps an element of generosity in that, given the different complainants (and see AS [4]). While the case could be made that some part of the

penalties imposed should be cumulative and not concurrent, we have chosen not to take a different approach to the Stewards. The penalties we impose then are:

- Charge 1: Three weeks suspension (in lieu of a six-week suspension).
- Charge 2: Two-week suspension (in lieu of a four-week suspension).
- Charge 3: Three-month suspension (in lieu of a three-month disqualification).
- Charge 5: Four-month suspension (in lieu of a four-month disqualification).
- Charge 6: Three-month suspension (in lieu of a three-month disqualification).

23. The penalties are to be served concurrently, and hence the total penalty imposed is a four-month suspension. The orders of the Panel are:

1. Appeal against severity of penalty upheld.
2. In lieu of a four-month disqualification, the Appellant's license is suspended for four months. That suspension may be deferred under AR 283(7) for 7 days from the date of these reasons by arrangement between the Appellant and the Stewards.
3. Appeal deposit forfeited (based on dismissal of breach appeals)