RACING APPEAL PANEL NEW SOUTH WALES

IN THE MATTER OF THE APPEAL OF LICENSED TRAINER S HENLEY

Heard at Racing NSW Offices on Friday 10 January 2020

APPEAL PANEL: Mr T Hale (Convenor)
Mr J Murphy
Mr T King

APPEARANCES: Mr Marc Van Gestel for the Stewards

Mr Paul O'Sullivan for Appellant S Henley

Date of Reasons: 2 March 2020

REASONS FOR DECISION

1. **Convenor:** Scott Henley (the Appellant) is a licensed trainer based in Grafton. On 17 September 2019 the Appellant was charged and found guilty by the Stewards of a breach of AR240. This followed an inquiry held that day at the Stewards Room at Grafton Racecourse. The Panel of Stewards was comprised of Mr M A Holloway (Chairman) and Mr R W Loughlin.

2. The charge and the particulars were as follows:

   Licensed trainer Mr Scott Henley, you are hereby charged with a breach of AR240(2)

   > ***AR 240 Prohibited substance in sample taken from horse at race meeting***
   >
   > *(2) Subject to subrule (3), if a horse is brought to a racecourse for the purpose of participating in a race and a prohibited substance on Prohibited List A and/or Prohibited List B is detected in a sample taken from the horse prior to or following its running in any race, the trainer and any other person who was in charge of the horse at any relevant time breaches these Australian Rules.*
   >
   > The particulars of the charge:
   >
   > *Licensed trainer Mr Scott Henley, being the trainer of the racehorse Tesarc, brought Tesarc to Grafton Racecourse on Monday, 29 April 2019 for the purpose of participating in race 9, the Benchmark 66 Handicap over 1420 metres and the prohibited substance cobalt was detected above the level of 100 micrograms per litre, excepted in paragraph 11 of the Division 3 of the Prohibited List B, in a post-race urine sample taken from the gelding following it winning race 9 the Benchmark 66 Handicap over 1420 metres on that day.*

3. Having found the Appellant guilty of the breach of AR240(2), the Stewards imposed a penalty of disqualification of the Appellant's trainer's licence for a period of 14 months. The disqualification was to commence immediately and expire on 17 November 2020.

4. On that day, 17 September 2019, the Appellant appealed to this Panel pursuant to s.42 of the *Thoroughbred Racing Act, 1996*. He appealed only against penalty. He did not appeal against conviction. At the inquiry before the Stewards, the Appellant was not legally represented and entered a plea of not guilty. However, by the time of filing the Notice of Appeal he had obtained legal advice from Mr Paul O'Sullivan, solicitor. As a result of this advice he did not appeal against conviction. He accepted the conviction.

5. The Appellant applied for a stay of the penalty. On 18 September 2019, the Principal Member, Mr Beasley SC, refused the stay.

6. At the hearing before this Panel, Mr Marc Van Gestel, Chairman of Stewards, appeared for the Stewards. Mr O'Sullivan, solicitor, appeared, with leave, for the Appellant.

7. We received the Appeal Book into evidence as Exhibit "A" which, amongst other things, contained the exhibits and transcript of the hearing before the Stewards. The Appellant gave evidence before us. We received as Exhibit "B" a schedule setting out the penalties imposed for similar breaches of the Rules of Racing concerning the presence of elevated levels of cobalt in samples taken from horses. Each of the cases on the schedule concerned a trainer.

8. The Appellant is a licensed trainer based in Grafton. He has been a trainer for 5 years. He has worked in the racing industry for his whole adult life; for more than 34 years. He first began working in the racing industry when he was still at school. He has worked for such prominent trainers as Bart Cummings and John Hawkes. During his 34 years in the racing industry, he has not been convicted of any offence against the Rules of Racing.

9. The Appellant was the trainer of the racehorse *Tesarc*. On 29 April 2019, he brought the horse to Grafton Racecourse for the purpose of it participating in race 9, the Benchmark 66 handicap over 1420 metres, which it won. After the race, a urine sample was taken from the horse. The report of the analysis, dated 30 May 2019, by the National Measurement Institute (NMI), recorded that the sample contained a concentration of 216 micrograms per litre of cobalt. Cobalt is a prohibited substance under Prohibited List B pursuant to Schedule 1 of the Rules of Racing, unless in a concentration of 100 micrograms per litre or less. The concentration detected was well in excess of that threshold. The Stewards had first been informed by NMI of the results of the analysis by email on 17 May 2019, although somewhat informally: Transcript line 1880 and Exhibit 23. The certificate of analysis by Racing Analytical Services Ltd, dated 23 July 2019, confirmed a concentration of 195 micrograms per litre of cobalt in the sample. Dr Toby Koenig BVSC, Chief Veterinary Officer of Racing NSW explained in his letter to the Stewards, dated 1 August 2019 (Exhibit 19 before the Stewards), that excessive levels of cobalt are not only performance enhancing, they can also cause muscle damage to the horse.

10. On 28 May 2019, Mark Holloway, Chief Steward NRRA, conducted an inspection of the Appellant's stables at Grafton. His report was Exhibit 7 before the Stewards. Prior to that date he had been provided with the informal email of 17 May 2019 from NMI about the test results of the sample, a copy of which he provided to the Appellant. He interviewed the Appellant and his wife, Fleur Henley, who works as a stable hand. They informed him that they had stopped using legitimate products that contained cobalt "for fear of an irregularity". The inspection of the stables, the Appellant's motor vehicle and horse float revealed no substances that could explain the elevated cobalt reading. Nor did the search of the Appellant's residence. The stable treatment records did not reveal any treatments administered to *Tesarc* in the week leading up to the race on 29 April 2019. The Appellant fully cooperated with Mr Holloway during the inspection.

11. Mr Holloway also reported that the stable consists of two stable complexes with padlocked entry points. *Tesarc* is kept in the secondary complex, which is secure. However, the stable complex does not have a yard. The Appellant uses four public yards on Grafton racecourse during the day, which are readily accessible. From time to time, food is left for the horses in those yards. Horses are not left in the yard on the day they are to race. In his evidence before the Stewards, the Appellant said that it was possible that the horse might have been treated in the yards without his permission on the Sunday before it raced on the Monday: Transcript lines 1200-1212.

12. On the afternoon of the inspection, another sample was taken from *Tesarc*, which when analysed showed a concentration of cobalt of 12 micrograms per litre; well below the threshold.

13. In summary, neither the Appellant nor the investigations by the Stewards are able to identify any facts which might cast light on the elevated levels of cobalt found in the samples taken from *Tesarc* on 29 April 2019.

14. Between 14 June 2014 and 19 June 2019, 58 swabs had been taken from horses trained by the Appellant, none of which were found to contain prohibited substances.

15. A breach of AR240(2) is a strict liability offence (or perhaps an offence of absolute liability; for present purposes it does not matter). *In the Matter of the Appeal of John Sprague*[1], a decision of this Panel of 22 February 2018 comprised of myself, Mr J Nicholson and Mr K Langby, I explained that in the case of a strict liability offence, liability is imposed irrespective of whether the person has acted without fault. Statutory offences of strict liability are commonplace in the regulation of activities involving public welfare. Putting a person under strict liability is intended to assist in the enforcement of the statute or regulation by encouraging greater vigilance to prevent the commission of the prohibited act: see for example *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 530, 566-8, *Lim Chin Aik v The Queen* [1963] A.C. 160 at 174. The policy behind the imposition of strict liability in AR 240(2) is to similar effect. It is intended to encourage greater vigilance in ensuring that no horse is brought to a racecourse for the purpose of engaging in a race with a prohibited

[1] The Racing Appeals Tribunal comprised of Mr DB Armati allowed an appeal from this decision on 27 June 2018 but it does not appear that there was any disagreement with this statement of principle.

substance in its system.

16. As this Panel, comprised of Mr Beasley SC (Principal Member), Ms Skeggs and Mr Fletcher, observed in *The Appeal of Ms Collette Cooper* of 15 February 2018:

> "One of the key objects of the Rules, including of its penalty provisions, is to uphold the image, interests and integrity of racing. A breach of AR178 [the predecessor of AR240(2) – involving, as it does, the presentation of a horse to race with a prohibited substance in its system – always bring racing into disrepute. Penalties imposed for such breaches must redress that".

17. The penalty that is appropriate to be imposed for such a breach of AR240(2) will depend on the particular circumstances. In *Kavanagh v Racing Victoria Limited (No.2)* (Review and Regulation) [2018] VCAT 291, the President of VCAT, Justice Greg Garde, accepted that from the point of view of penalty in such cases, the onus is on the trainer to demonstrate that he or she lacks culpability because he or she did not administer the substance himself or herself or was not otherwise responsible in any way. If the trainer establishes this, it will be a significant mitigating factor on the issue of penalty. It is for the trainer to establish that in the circumstances his or her culpability is reduced or even absent. I respectfully agree with his Honour.

18. The weight to be given to such evidence should be viewed in the context of the purpose and policy of the strict liability offence, which as I have said, is to encourage greater vigilance in ensuring that no horse is brought to a racecourse for the purpose of engaging in a race with a prohibited substance in its system. Depending on the circumstances, evidence of strict procedures in place to prevent such an occurrence may be of be of significant weight. So also, would evidence establishing that the prohibited substance was administered by someone unconnected with the trainer or stables and without the trainer's knowledge. However, on its own, evidence from the trainer that he or she is unable to say how, when and why the substance was administered, is unlikely to be of weight.

19. In *Kavanagh v Racing Victoria Limited (No.2)*, Garde J agreed[2] that prohibited substance cases *generally* fall into one of three categories. The **first category** is where through investigation, admission or other direct evidence, positive culpability is established on the part of the trainer or person responsible. For example, it is established that the trainer administered the drug to the horse either himself or at his direction or had otherwise acted in some way as to be instrumental in the commission of the offence. Within that category, the culpability may be in the class of deliberate wrongdoing or it may be through ignorance or carelessness or something similar. This is the worst case from the point of view of the trainer or other person concerned. In such a case, a severe penalty is likely to be appropriate.

20. The **second category** is where at the conclusion of any evidence and plea the Panel is left in the position of having no real idea as to how the prohibited substance came to get into the horse. This may be with the trainer giving some explanation which the Panel is not prepared to accept or the trainer may simply concede that he or she has

[2] He accepted the approach of Judge Williams of the Racing Appeals Tribunal in *McDonough v Harness Racing Victoria*.

no explanation. The second category is perhaps the most common.

21. *In the Matter of Graeme Rogerson,* his Honour Judge Barry Thorley said of this category of case:

> "The common experience is of course that the Stewards have no idea as to how it is in the case of any racehorse that the prohibited substance came to be in it. They immediately, as is required, opened an inquiry. It is very seldom indeed that that inquiry demonstrates the actual culprit. Why is that? For the obvious reason that the sole knowledge of what transpires is within the stable and its staff and its professional advisors. No doubt one can speculate that there are many ways in which a horse may present with a prohibited substance. One can contemplate the act of some intruder by stealth of night entering the stable and administering some drug. One can contemplate the consumption by the animal accidentally of some substance left lying around negligently or the ingestion of some grasses which produce adverse results. One can contemplate that there was an actual, albeit mistaken administration within the stable of some product which was really intended for the horse in the adjoining stall, but mistakenly administered to the horse in question. One can even imagine that the horse might lick a rail or someplace which had previously been contaminated. The number of examples one can contemplate is manifold."

22. The **third category** is where the trainer (or other person charged) provides an explanation which is accepted, and which demonstrates that the trainer has no culpability at all or limited culpability. In this category of case, one would expect any penalty to reflect the absence of culpability or of a low level of culpability. In such a case, it may be appropriate to impose no penalty at all. General deterrence may have no part to play in such a case.

23. The present case comes within the second category. The evidence does not establish how the prohibited substance came to be present in the horse. However, there may be circumstances which sit somewhere between the second and third categories. For example, the evidence does not reveal how the administration of the prohibited substance occurred but the evidence establishes that strict procedures were in place, designed to prevent such an occurrence. Relevantly, in the present case, the following facts were established:

    a. The inspection by the Stewards of the stables, the Appellant's residence, motor vehicle and horse float revealed no substances that could explain the elevated cobalt reading;
    b. The stable treatment records did not reveal any treatments administered to *Tesarc* in the week leading up to the race on 29 April 2019. It was not suggested that these records were inaccurate;
    c. *Tesarc* was kept in the secondary stable complex, which is secure. However, the stable complex does not have a yard. The Appellant uses four public yards on Grafton racecourse during the day, which are readily accessible. His evidence was that from time to time, food was left for the horses in those yards, although horses are not left in the yard on the day they are to race. The Appellant said that it was possible the horse might have been treated in the yards without his permission on the Sunday before it raced on the Monday. However, the evidence goes no higher than this.
    d. On 28 May 2019, on the afternoon of the inspection, another sample was taken from *Tesarc*. The sample showed a concentration of cobalt of only 12 micrograms per litre, giving some support for the submission that the elevated

levels of cobalt found in the horse's sample of 29 April 2019 was not due to a practice of administering substances containing cobalt;

e. Between 14 June 2014 and 19 June 2019, 58 swabs had been taken from horses trained by the Appellant, none of which were found to contain prohibited substances. This gives support to a submission that during this period the Appellant was vigilant in ensuring that prohibited substances were not administered to his horses.

The Plea of Not Guilty

24. As I have previously observed, the Stewards Inquiry commenced on 17 September 2019. The transcript of that day is 92 pages. The inquiry is recorded at pages 1 to 85. Page 85 records the Appellant being charged. He pleaded not guilty. He said that he did not believe the horse came to the races with cobalt in him. Page 87 records that the Stewards adjourned. Pages 87 to 89 record the Stewards delivering their finding of guilt and considered submissions on penalty. At page 89 they again adjourned. At pages 89 to 91 the Stewards announced their decision and reasons on penalty. The transcript reveals that the Appellant cooperated during the inquiry.

25. The Appellant was not legally represented at the hearing on 17 September 2019. Due to the injuries he sustained from a serious fall from a horse, he was taking pain killer drugs, which he said affected his judgment. I accept his evidence. Later that day, after the decision of the Stewards, he obtained legal advice from Mr O'Sullivan. He filed a Notice of Appeal to the Appeal Panel that day, in which he appealed only against the severity of the penalty. He did not appeal against the conviction. He accepted that finding. Before this Panel he pleaded guilty to the offence with which he was charged. An issue arose as to weight in mitigation that should be given to the plea of guilty before us and to the fact that there was no appeal from the conviction.

26. In the criminal law, the appropriate degree of discount for a guilty plea has been the subject of considerable judicial consideration. Section 22 of the *Crimes (Sentencing Procedure) Act 1999* makes specific provision for the taking into account of a plea of guilty in sentencing. In *R v Thomson: R v Houlton* (2000) 49 NSWLR 383, the NSW Court of Criminal Appeal considered the proper sentencing approach to a plea of guilty. Of course, the principles of sentencing in the criminal law have no direct application to the approach to the imposition of penalties in a disciplinary hearing before this Panel. However, making due allowance for those differences, the principles adopted in the criminal law are of assistance. What underpins a discount for a guilty plea in the criminal law is its "utilitarian value".

27. *R v Thomson* emphasised that the utilitarian value of a plea of guilty is to encourage guilty persons to admit their guilt and that there needed to be practical encouragement for guilty persons to do so.[3] "If a plea of guilty, as distinct from remorse evidenced by such a plea, cannot be regarded as a factor in mitigation of penalty, there is no incentive, other than the demands of honesty, for an offender to admit his guilt"[4].

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[3] *R v Thomson* [128] per Spigelman CJ citing with approval the judgment of King CJ in *R V Shannon* (1979) 21 SASR 442.

[4] *R v Thomson* at [128].

28. From the utilitarian perspective alone, an early plea offers distinctive and substantially greater benefits over a plea at the commencement of the trial[5]. In his conclusions Spigelman CJ said:

> The utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10-25 per cent discount on sentence. The primary consideration determining where in the range a particular case should fall, is the timing of the plea. What is to be regarded as an early plea will vary according to the circumstances of the case and is a matter for determination by the sentencing judge.

29. The dangers of a too mathematical or precise calculation of the discount has also been emphasised in the authorities. Amongst other things, there can be an overlap in the considerations to be taken into account in assessing the discount for a plea of guilty and in relation to considerations of other matters going to penalty. The "instinctive synthesis" approach to sentencing is the accepted approach[6]. That is, taking into account all relevant considerations, including the discount for a guilty plea, and forming an instinctive view of what the appropriate penalty or sentence should be. This is also the accepted approach in determining penalty in disciplinary proceedings. Precise mathematical discounts do not always sit comfortably with this approach.

30. In the context of the present appeal, a plea of guilty at page 85 of the transcript before the Stewards, on 17 September 2019, may not have saved a great deal of time, effort and expense compared with the plea of not guilty on that day and the acceptance of guilt later that day when the Notice of Appeal was filed. A plea of guilty at the first opportunity may not have had a great deal of utilitarian value. At the same time, regard must be had to the fact that the Appellant did plead not guilty before the Stewards. This must count against him. To do otherwise may discourage an appropriate plea of guilty before the Stewards.

31. The circumstances of the present case are in stark contrast to those in *The Matter of the Appeal of John Sprague,* where the changed plea of guilty was on the day of the hearing before the Panel. In that case, the Stewards had prepared the appeal on the basis that it was an appeal against conviction.

32. In all the circumstances of the present case I consider that the Appellant should be given a substantial discount for his plea of guilty having regard to:

    a. The effect of painkillers on his judgment and the absence of legal advice at the time of his plea of not guilty.
    b. The short period of time between his plea of not guilty and the filing of a Notice of Appeal, in which he appealed only against the severity of the penalty; he having accepted his guilt, once he had had the benefit of legal advice. In taking this into account, I am of course conscious of the fact that in a strict liability offence under AR240(2), establishing the commission of the offence is generally quite straight forward. It usually depends on the analysis of the sample.

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[5] *R v Thomson* at [133].

[6] *R v Thomson* at [122]; *Wong v The Queen* (2001)207 CLR 584 at [75] per Gaudron, Gummow and Hayne JJ.

c. The Appellant's co-operation during the inquiry and during Mr Holloway's investigation and inspection at the Appellant's stables and his home on 28 May 2019.

33. I should add that I see the present charges as being very different from a charge of careless riding against a jockey. In such cases, the careless riding template is a valuable tool to achieve consistency in the imposition of penalties for careless riding. It provides for a discount for a plea of guilty. The reduction of penalty in the template clearly reflects the utilitarian value of a guilty plea in circumstances in which the conduct under consideration is recorded on film from many angles, which the jockey will have seen at the time that he or she pleads.

34. The Rules of Racing do not impose a minimum penalty for breach of AR240. Pursuant to AR283(1) the penalty that may be imposed is disqualification, suspension, reprimand or a fine not exceeding $100,000.

35. In the case of a breach of a strict liability provision such as AR240, the penalty must be sufficient to encourage vigilance in ensuring no breach of that rule occurs. In that sense, the penalty is to be a deterrent: see [15] above. The penalty should be sufficient to publicly mark the seriousness of the offence.

36. Consistency in the imposition of penalties is something to be sought to be achieved, but, of course, at the same time, every matter has to be dealt with on its own facts. To assist in attaining consistency, the Stewards tendered Exhibit B. It is a table of penalties imposed on trainers for cobalt related offences from March 2015 to June 2019. On each occasion disqualification was imposed. The penalties range from 10 months disqualification to 13 years disqualification. On 12 occasions the disqualification was 12 months. On two occasions the penalty imposed was less than 12 months. On both occasions it was 10 months disqualification.

37. One of those two occasions on which a disqualification of 10 months was imposed was *In The Matter of Tommy Wong*. It was a decision of the Stewards of 24 December 2018. A post-race sample was taken from the gelding *Story of Tom Slade*, which the NMI certified had a level of cobalt of 300 micrograms per litre. Mr Wong pleaded guilty and cooperated with the Stewards. He had a clean record in respect of prohibited substances and in general. He had been a licensed trainer for 17 years and had been a licensed person for 27 years. A disqualification of 10 months was imposed.

38. The only other case of a disqualification of less than 12 months was the 10 month disqualification in *The Matter of John Sprague*. This Panel had imposed a disqualification of 12 months. The Racing Appeals Tribunal reduced that period of disqualification to 10 months. A pre-race sample taken from a horse trained by Mr Sprague had revealed a cobalt concentration of 190 micrograms per litre. Mr Sprague was 55 years of age and had been associated with the industry since he was 13, both as an apprentice jockey, as a jockey and then as a trainer. He had been convicted of no previous offences against the Rules of Racing.

39. As I have mentioned, in Exhibit B there are listed 12 occasions in which a disqualification of 12 months has been imposed. With the exception of the two disqualifications of 10 months, the lowest level of penalty is 12 months

disqualification.

40. *In the Matter of the Appeal of Wayne Lawson*, a decision of this Panel of 28 July 2018, the sample taken from the horse was 330 micrograms per litre. Mr Lawson had been in the industry for 13 years. He had no prior convictions for breaches of the Rules of Racing. He did not admit his breach at any stage.

41. *In the Matter of the Appeal of Stephen Farley*, a decision of this Panel of 17 June 2016, a 12 month disqualification was imposed for a reading of 377 micrograms per litre. Mr Farley admitted his breach of the rules from the outset. He had a 14 year history in the racing industry without any prior convictions. He had 24 horses in training.

42. In *Sprague*, the Racing Appeal Tribunal considered that the starting point for the assessment of the penalty in that case was 16 months disqualification, to which a discount should be applied. I take the reference to 16 months disqualification as being based upon circumstances in which there were no aggravating factors of the kind referred to in category 1, referred to above, and that there were none of the mitigating factors referred to in category 3 above. I should add, that I do not see that the Tribunal intended that a 16 month disqualification should be the starting point in all category 2 cases. In *Sprague*, the Tribunal applied a one third discount for the particular circumstances of that case. This led to the imposition of a disqualification of 10 months.

43. Having considered previous relevant decisions on penalty and the various mitigating factors in the present case, I consider a penalty of less than 12 months disqualification ought to be imposed, but more than 10 months. In my view, a period of 11 months disqualification is warranted. In doing so, I take into account the Appellant's personal circumstances, his 34 years in the racing industry, including 5 years as a trainer, without ever being convicted of any offence against the Rules of Racing. I take into account the concentration of cobalt that was detected in the sample, together with each of those matters referred to at [23] and [32] above. I give weight to the fact that the Appellant cooperated with the Stewards and that at an early stage he admitted his liability, although for a brief period he pleaded not guilty at a time when he did not have legal representation. Importantly, he gave evidence of the manner in which his stables operated, so as to establish that he was concerned to ensure that horses in his care were not administered with prohibited substances. The evidence that in the 5 years from June 2014 to June 2019, 58 swabs were taken from horses trained by the Appellant, none of which were found to contain prohibited substances, gives some support for the submission that he showed some vigilance to ensure there were no breaches of AR240.

44. While the "instinctive synthesis" approach to determining penalty is the more appropriate approach in determining penalty, the approach of applying a numerical discount in a case such as the present is of assistance. I would adopt a discount on penalty of one third, having regard to the various mitigating factors to which I have referred. I would attribute a discount for cooperation, the early acceptance of guilt and the plea of guilty of between 15%-20% and the balance of the one third discount to the other mitigating factors. If one adopts the starting point of the ordinary category 2 case as a disqualification of 16 months, as the Tribunal did in Sprague, the period of disqualification would be a little under 11 months. This confirms me in my view that

in the present circumstances, a period of disqualification of 11 months should be imposed.

45. The Appellant has been serving his period of disqualification since 17 September 2020. The period of disqualification of 11 months should expire on 17 August 2020, on which day he may apply for a licence.

46. The orders that I propose are as follows:

    1) Appeal allowed.

    2) The period of 14 months disqualification imposed by the Stewards is set aside.

    3) In lieu thereof, the Appellant is disqualified for a period of 11 months commencing on 17 September 2019 and expiring on 17 August 2020.

    4) The Appeal deposit is to be refunded.

47. Mr J Murphy: I agree.

48. Mr T King: I agree.