RACING APPEALS TRIBUNAL

NSW

Mr D B Armati

17 May 2019

FURTHER PENALTY DECISION

Appeal by licensed trainer Mr Sam Kavanagh
v Racing NSW

DECISION

1. Redetermination in relation to the cumulative penalty for breach 5

2. For breach 5 a cumulative penalty imposed.

3. Redetermination in relation to discount for special circumstances for breaches 13-15.

4. For breaches 1 -15 a special circumstances discount of 95%

5. For breaches 13-15 concurrent penalties each of disqualification of 1 month.

6.Redetermination of all penalties to provide disqualification from 19 May 2015 to expire 26 October 2019

7. Appeal deposit refunded

1. As a result of an order of the Supreme Court of 15 February 2019, the penalty determination with respect to the appellant Kavanagh has been returned to this Tribunal on the basis of the following order in that decision of *Kavanagh v Racing NSW* [2019] NSWSC 40 at [88] as follows:

> *To give effect to these reasons it will be necessary to make orders quashing the Tribunal's determination that the plaintiff is liable for breach 1 and remitting the proceedings for redetermination of (a) penalty in relation to breaches 13, 14 and 15; and (b) concurrence or accumulation of the penalty for breach 5 relative to the penalties for breaches 2 and 3.*

2. The Tribunal had dealt with charges with numbers 1, 2, 3, 5, 13, 14, 15, 24; 6, 7, 8, 9, 10, 11, 16, 18, 19 and 21, together with 17, 22 and 23. The effect of the remittal is that is that of all of those, penalty is to be redetermined in relation to 5 and 13 to 15.

3. The Tribunal, in a 207 paragraph decision of 13 August 2018, determined penalty in all of the matters before it. This decision does not require a revisiting of the majority of its reasons for decision. The effect, of course, is that one of the charges, number 1, has been removed. Other than the redetermination in 5 and 13 to 15, the remaining determinations of the Tribunal are undisturbed. The particular breaches which are relevant today were set out in the earlier determination, and the actual breaches annexed to that determination, and are not repeated.

BREACH 5

4. The first issue, breach 5, is whether an allegation of the presentation at race day with a prohibited substance, caffeine, should be accumulated or made concurrent with other matters.

5. To summarise a lengthy history, the Stewards had grouped a number of matters and the Appeal Panel adopted that grouping. That grouping was for in competition administration and presentation with cobalt (now 2 and 3) and presentation with caffeine (5).

6. The Tribunal in its decision determined that there would be an accumulation of the penalty for breach 5. That determination was made notwithstanding that Racing NSW had maintained, in its submissions on appeal, that the penalty should be part of a group which was dealt with concurrently. Kavanagh's case was similarly put. The Tribunal determined, as it was required to determine penalty itself de novo, without reopening the hearing, that it would be cumulative and that became a conceded procedural fairness issue by Racing NSW requiring the matter to be redetermined.

7. The penalty of 10 months disqualification which the Tribunal found appropriate for breach 5 is not in issue. It is a question whether it is to be made cumulative to what remains of the first group of matters which is charges 2 and 3.

8. The determination of the Tribunal was 13 August 2018. Challenge was taken on that procedural fairness issue. A hearing occurred on 7 February 2019 and there were written submissions and oral submissions to the Supreme Court. His Honour delivered his decision on 25 February 2019. Today is 17 May 2019.

9. The issue of what facts and evidence might go to the question of accumulation or not has been acutely in the minds of the appellant since at least 13 August 2018. There has been every opportunity, armed with a confidence that they would succeed in the Supreme Court in having that issue remitted, to have prepared a case to put to the Tribunal which would deal with breach 5, the caffeine presentation. No evidence has been adduced.

10. The Kavanagh arguments are that by reason of the past history, the way in which the parties, in a very practical sense, approached the Tribunal's penalty determination after they had done the same before the Appeal Panel and having regard to the vast volume of evidence in this matter over three hearings, that really it was too late to try and bring that issue of accumulation.

11. To the Tribunal's knowledge, it was flagged by Racing NSW, that is the respondent, that it be cumulative, to the appellant as late as yesterday and on opening remarks made clear today. Such late notification may, in the circumstances, have led to a determination that the procedural unfairness continued. The Tribunal forms an opinion, however, for the reasons outlined, the appellant has had every opportunity to come to this Tribunal, on a remittal of the matter, fully armed to deal with arguments on that point.

12. It is submitted that it would be difficult now to meet that test, that there has been a range of times and events and any new submission, that is now in support of accumulation, is a new argument. No factual evidence has been adduced to support any conclusion that any prejudice in fact exists in now being able to address it, nor, for example, that there has been, because of the passage of time, a loss of witnesses, documents or other evidence which might be relevant or an inability to investigate matters to deal with the issue of facts on that issue. Accordingly, the Tribunal does not find that the submission for Racing NSW today should be rejected.

13. In any event, the Tribunal quite clearly flagged its reasoning, in essence other than the unfairness agitation, that there is nothing that has been put to the Tribunal which would cause it to form a different conclusion than that which is expressed in paragraphs 23 and 189 of its penalty determination of 20 August 2018.

14. The Tribunal notes the whole of his Honour's decision on aspects of fairness, error, the nature of the conduct in which the appellant engaged, findings of fact in his favour made by the Tribunal and which were reiterated by his Honour, but there is nothing in relation to this issue which causes the Tribunal to come to a different conclusion.

15. The Tribunal remains of the opinion that whilst the grouping, as it were, might have covered cobalt presentations, this was a caffeine presentation. The Tribunal remains of the opinion for the totality of the evidence earlier available that that necessitated, as it determined it in paragraph 189, that different facts and circumstances were associated with that presentation for caffeine to the cobalt despite the fact it was the same horse and the other cobalt administration and presentation occurred on the same date.

16. In those circumstances, the determination is that the finding of 13 August 2018, expressed in paragraph 189, that the breach 5, where a determination of 10 months is appropriate, should be served cumulative to the grouped matters 2 and 3, which now comprise a 13 month disqualification.

BREACHES 13 TO 15

17. The second issue upon remittal is the calculation of the discount for special circumstances in relation of LR108. It is not necessary to set that out again, nor the reasoning that went with it in the decision of 13 August 2018. The question is whether the amount of the calculation for LR108(2)(d) was adequate on the issue of knowledge.

18. It is apparent from what his Honour said on a judicial review, based upon the findings of fact made by the Tribunal, that there was not clarity in the way in which the Tribunal had determined a further discount of 11 per cent for 108(2)(d) in addition to the 25 per cent discount it had allowed for 108(2)(a), that is a total of 36 per cent.

19. The actual aspect of knowledge was dealt with at length by the Tribunal and repeated by his Honour. It is necessary to repeat part of those findings.

"*The plaintiff did not know that the bottle contained cobalt. He had been specifically told by Dr Brennan that it did not contain cobalt. The bottle gave no indication of who manufactured it, what its precise ingredients were or where it came from. It is accepted that the plaintiff obtained the bottle from Dr Brennan. The plaintiff trusted Dr Brennan. The plaintiff believed that it was vitamin complex and that it was a legal substance to administer. "*

"The plaintiff" and "he" there referred to being Mr Kavanagh.

20. His Honour also noted other findings by the Tribunal, at its decision [49]:

"*In the hearing on penalty Racing NSW conceded that the plaintiff did not know a prohibited substance was present. "*

21. The Tribunal in its decision in paragraphs 32 and 33 made its findings in respect of those related matters. In essence they covered that the vitamin complex was recommended by a highly credentialed and highly regarded and trusted vet, that he had assured the appellant it did not contain a prohibited substance and that that vet was questioned by the appellant about it.

22. Racing NSW, as found at [33], relied on the physical appearance of the bottle with minimal labelling and who the manufacturer was, where it came from or its ingredients, therefore he was on notice about certain matters. Those issues went to his knowledge.

23. His Honour determined at [61], based on those findings, the following:

"*Assuming that the plaintiff committed breaches 1, 13, 14 and 15 his doing so was entirely inadvertent and blameless. He not only did not know of the prohibited substance that attracted the operation of these two Rules but, in the words of the Tribunal, "there were no other enquiries that [the plaintiff] could reasonably have been expected to undertake having regard to his then level of knowledge and reliance upon a well known and well respected and very professional vet" and there was no evidence "to indicate what other type of knowledge he might have gained if he had made other enquiries". "*

24. Aspects of knowledge, therefore, that were determined by the Tribunal with that brief summary led to a determination by his Honour that the conduct was entirely inadvertent and blameless; a finding highly relevant to the issue of knowledge, which is relevant to the issue of special circumstances and relevant to the issue of a discount.

25. Today the respondent raised six points which it was said demonstrated an aspect of blame and that his conduct was not inadvertent.

26. The first of those was that the vitamin complex bottle was not labelled with its actual ingredients or made reference to any registration. The first of those ingredients was dealt with by the Tribunal, referred to by his Honour and the risk associated with it was dealt with by the Tribunal. Accordingly that part of it does not raise any new and accelerated aspect of blame to which any consideration should be given. The fact that it was not registered was not directly referred to earlier. The Tribunal is satisfied that is a mere consequence of the lack of labelling and the lack of labelling had appropriately been dealt with.

27. The second point raised was that he did not record the administration of the vitamin complex in his treatment book. That is a fresh submission. It is a correct one established on the evidence and as the submissions indicate, it could have raised issues had others chosen to look in his treatment book in various ways. That of course might have been the subject of a separate charge, but was not, and in any event, it does carry with it an aspect of blame.

28. The third matter was that the appellant did not charge the vitamin complex to the owners as he appeared to do on the evidence with numerous other substances as the evidence established, in particular, for Bute and electrolytes. The mischief there is that there is nothing the owners might have picked up that a vitamin complex was being used. Again a level of scrutiny was avoided and it was not good practice. The Tribunal accepts there is an aspect of blame.

29. The fourth point raised was that it had been obtained from Flemington Equine Services and the evidence was that he had paid Dr Brennan $1000 for each of the two bottles and it was noted that in none of the invoices to which the Tribunal was taken from that equine service, where there was detailed charging for individual items, that there was any reference to the vitamin complex. A means of avoiding oversight, it was submitted, and the Tribunal agrees.

30. The fifth point raised was that the vitamin complex bottle was kept in the kitchen and separate to the standard medications and other substances which were administered to horses. That was a poor practice and created a risk in respect of placing treatment products in such a place and also that had an avoidance of oversight. Two matters with which the Tribunal agrees on an aspect of blame.

31. The sixth matter raised was that the appellant could not be sure the product was suitable for use on a racehorse. That was placed on various conversations he had had with an earlier co-charged veterinarian Dr Mathews and others, that he had spoken to people about it and was worried about it. Therefore, he had embarked upon the administration of a substance to a racehorse to be presented when he was not 100 per cent confident about the contents of it. The Tribunal is satisfied that that particular sixth point was adequately covered in respect of the other issues to which the Tribunal has referred and does not find it as a new matter on the issue of blame.

32. The Tribunal, therefore, having received an indication from his Honour that earlier matters would lead to blamelessness, then has to assess whether the four matters now found carry with them a loss of reduction for special circumstances because there was blameworthy conduct.

33. The actual mischief to which the Tribunal was taken has not eventuated, nor was there a submission that it had or should be. The Tribunal is satisfied that the matters themselves, when considered in the totality of the acts which have already been analysed and in which the appellant engaged, do not lead to a conclusion that those four points of blame are particularly grave nor that there would be any substantial loss of discount for special circumstances.

34. On the issue of special circumstances, as the Tribunal has said, under LR108(2)(a), 25 per cent has been given. If under LR108(2)(d), there was then to be a finding of complete blamelessness, such that 100 per cent should be given there, does not mean that some credit is given back to the appellant on other matters because he reaches 125 per cent, it simply means that the discount under special circumstances under the local rule would lead to no penalty being imposed.

35. The Tribunal does not find that he was entirely blameless, for the reasons outlined, but that blame can be assessed at a level of a minimum nature.

36. The Tribunal determines, in respect of LR108(2)(d), that consistent with what his Honour has said, and interestingly as quoted in the earlier decision as Justice Garde in *Kavanagh v Racing Victoria Ltd* [2018] VCAT 291 that if a third category of breach is found, that is in certain circumstances a trainer is blameless, no penalty might be

appropriate. Indeed decisions of the Stewards have found a number of trainers in fact blameless and have imposed no, or exceptionally nominal, penalties. They were referred to in the earlier determination.

37. To the Tribunal's knowledge this is the first time that special circumstances of this type have had to be considered at the level at which they are being considered, it is not inappropriate, it is not disproportionate, it is not contrary to the appropriate message being sent, to the extent that this either specifically or generally, that if a person has engaged in a breach and is entirely blameless, that they should not been penalised.

38. The Tribunal has determined 70 per cent for LR108(d) The Tribunal is reluctant to embark upon percentages again but feels that to finalise this matter, it is not an inappropriate vehicle to continue to do so. When coupled with the 25 percent under LR108(2)(a), there is to be a discount of 95 per cent.

39. The effect of that is that from a minimum mandatory penalty of 2 years, there would be a discount leaving some four weeks and a little bit more. The Tribunal proposes to round that figure down to 4 weeks, the equivalent of a month. It means, therefore, in respect of that matter, the penalty is a one month disqualification.

40. The next matter is that breaches 13 to 15 were each concurrent and concurrent with breach 24. There is no submission that that 'grouping" should change. In matter 24, the Tribunal determined a 6 month and 2 weeks period of disqualification. In paragraph 192, it indicated for those grouped matters there would be a 50 per cent discount. In its determination of 13 August 2018, that 50 per cent was applied to the former penalty in respect of 13 to 15 with the continued concurrency of 13, 14, 15 and 24, it is that there is in fact, in that group of matters a starting point of 6 months and 2 weeks. That arises because for 13 to 15 there is now a lesser penalty of 1 month and the higher penalty of 6 months 2 weeks becomes the starting point.. There is, therefore, on the application of a 50 per cent discount, an accumulation of 3 months and 1 week.

41. The effect of those matters is this, using the former calculation in paragraph 194 with appropriate corrections, the disqualifications are:

    a. breaches 2 and 3 of 13 months to which there is cumulated breach 5 of 10 months to give 23 months,

    b. breaches13, 14, 15 and 24, there is a cumulation of 3 months and one week to give 26 months and one week,

c. breaches 6, 7, 8, 9, 10, 11 and 16, together with 18 and 19, together with 21, as previously determined in paragraph 194, lead to an addition of 27 months to that 26 months and one week, to give 53 months and one week,

d. That is 4 years, 5 months and 1 week, which when calculated from 19 May 2015 leads to a disqualification to 26 October 2019.

42. The severity appeal is upheld.

43. The Tribunal orders the appeal deposit refunded.