RACING APPEALS TRIBUNAL OF NSW

Mr D B Armati

17 July 2017

Ex Tempore Penalty Decision

Appeal by licensed trainer Mr Cliff Bashford in respect of ARR 175(n) and 175(l)

DECISION:

1. DISQUALIFICATION OF 1 YEAR IN EACH MATTER TO BE SERVED CONCURRENTLY

2. 50% OF APPEAL DEPOSIT REFUNDED

1. The function of the Tribunal today is to impose penalty on licensed trainer Mr Bashford consequent upon the findings of this Tribunal in its decision of 16 May 2017.
2. The fresh evidence has comprised references, past determinations in respect of breaches of 175(n) and 175(o), the appellant's disciplinary record and some agreed facts. The closing submissions invite, so far as Racing NSW is concerned, concurrent penalties of two years disqualification; in respect of the appellant it is submitted that a fine is an appropriate outcome.
3. The brief history of the matter is that on 22 June 2016 the stewards found breaches of the rules and imposed penalties of three years and two years. On 10 February 2017 the Appeal Panel rejected the appeal on guilt and imposed respective penalties of 18 months and 15 months. On 16 May 2017 the Tribunal submitted a 41 page, 257 paragraph decision making findings that each of the rules had been breached by the appellant. The penalty decision was stood over for hearing. The submissions have taken the Tribunal to numerous of its factual findings. The Tribunal in this decision does not propose to touch upon those findings in detail again nor to repeat them in detail.
4. In determining penalty, the adverse findings having been made, AR196(1) is enlivened, with the powers of the Tribunal to disqualify, suspend, reprimand or impose a fine not exceeding $100,000 and also that the disqualification or suspension may be supplemented by a fine. 196(3) deals with cumulative or concurrent. It is accepted by both parties here that penalties in these matters should be concurrent, as they were before both the stewards and the Appeal Panel.
5. In the decision of McDonald of this Tribunal, thoroughbred racing, 10 April 2017, the Tribunal set out in paragraphs 11,15 and 119 certain principles as follows:

> "11. It is agreed that as this is a de novo hearing it is the function and duty of the Tribunal to determine for itself an appropriate penalty.
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> 15. As the Tribunal said in the appeal of Smith v Racing NSW, 15 August 2014:
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> > "5.In determining penalty this Tribunal emphasises that it is not imposing sentence. It in particular is not imposing sentence in a criminal law sense, therefore the adoption by the stewards and the Appeal Panel of what might be called a general sentencing approach, in this Tribunal's opinion, is incorrect. These are civil disciplinary proceedings in which it is necessary to have regard to the conduct which has been disclosed, to have regard to all the relevant facts and circumstances relating to the facts themselves and those of the individual person concerned, and then looking to the future to determine what order is required within the scope and purpose of the rules.
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> > 6. To the extent that criminal law principles such as deterrence are considered, they are not relevant. To the extent that proportionality of sentencing is said to be considered, it is not relevant. In respect of the first of those, the Tribunal in determining what order is appropriate has regard to what message is to be given to this individual trainer to ensure that in the future this type of conduct is not repeated, but to ensure that there is an appropriate penalty imposed to indicate the response of the community to integrity and welfare issues. In addition, it is a question of what general message is required to be sent to the community at large to indicate to those who might be likeminded to engage in such conduct, what the likely consequences are, and, secondly, to indicate to the broader community who are not likely to engage in the type of conduct that, should it be detected, they, whether they be wagerers or people just generally interested in the individual code, will know that it is operating at the highest possible standards."
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> > 119. The Tribunal has to determine penalty having regard to objective seriousness and the subjective circumstances of the appellant. Each of the facts to support findings on those issues have been set out above."

6. In addition, there are other principles to be considered, not the least of which is that which is often expressed in civil disciplinary matters that in certain circumstances the objective seriousness of the conduct might be such that the appropriate penalty for that objective seriousness is not further reduced by reason of subjective factors.
7. The important thing to recognise in this decision, so that a comparison can be made by those who choose to do so, between the decisions of the stewards and the

Appeal Panel in respect of penalty, is that this Tribunal in its findings of 16 May 2017 rejected a number of the particulars of the breaches of the rules that the stewards had put before the appellant. Each of the stewards and the Appeal Panel in making their adverse findings found each of the particulars established and then determined penalty based upon those findings. It is important to recognise that the findings made by this Tribunal require a consideration of penalty on less serious facts.

8. To summarise those differences, and there are a number of which in essence are contained in paragraphs 208, 216 and 239 to 248, that the actual application of the old horse remedy to the leg of the subject horse was not an act of cruelty. In addition, the particularised failures said to have been committed by the appellant between the date of application on the 28th May and his visiting of the horse on the 10th June and acts of cruelty in other places were not established.
9. To summarise the findings, and it is a brief summary for penalty purposes only, the essential failure which was found against the appellant, against which penalty must be assessed, relates to his failure on the 10th June onwards for himself to deal with veterinary treatment, and the fact that he was therefore a party, for the reasons found, to the failures of Mr Delaney to call veterinary treatment. There must be some context to the extent and gravity of that failure.
10. A very brief paraphrase, it has been noted in the detail in paragraph 69 of the findings from the autopsy on the subject horse has enabled the Tribunal finding in paragraph 70, in part, where it is said, “in lay terms the skin has been eaten away to the bone and the tendon exposed”. To provide some other minor context, as was set out in paragraph 183, referring to the 10th June the Tribunal said this:

> “183.Upon arrival and inspection it was apparent, and Mr Bashford accepts, that the leg was infected, that the skin had been degloved, the wound was weepy and on an assessment of pain “It was pretty ordinary”. From that point on it must have been apparent to Mr Bashford that his application of the solution had caused the

problem. So much greater did the obligations upon him become to ensure the welfare of the horse."

11. It must be accepted as well that the findings of the Tribunal were that both Mr Delaney and Mr Bashford had knowledge of the treatment given by Mr Delaney to the horse between about 30th May and the 10th June. That treatment in the decision has been analysed against that which Dr Suann said should have been given. In respect of all of Dr Suann's expressed treatment regimes, virtually all had in some fashion been applied and in some applied in greater, and therefore more beneficial quantities, than he would have considered necessary.
12. The adverse finding was the failure to do more, not to do nothing. This was not a case of cruelty where a licensed person has done nothing to look after an animal properly and allow it to become unwell and possibly need to be euthanased . His application of the substance was not cruelty.
13. The brief factual findings that have been summarised need to be assessed as to the objective seriousness of his conduct. That objective seriousness cannot lose sight of the fact that the injuries to this horse would, by any independent member of the community's assessment, be seen as serious, and would almost be described as horrific. That aspect of horrific must be lessened by the fact that the horse itself, whilst displaying some indicia of pain, as was found and described in the decision, was not overtly in pain. The need for expert help in this Tribunal's opinion, and in accordance with the findings, and as would be assessed by any reasonable objective observer, would have been obvious. The Tribunal found that it was the initial application of the remedy that led to those matters, but there was the independent failure of Mr Delaney to follow instructions, which in assessing issues of welfare considerations, must be taken in to account.
14. What then of modern welfare concerns? It is relevant because this Tribunal has to assess this appellant's objective seriousness in failure, but also in doing so have

regard to a message which must be given clearly to the community at large as to how this Tribunal will react to welfare concerns.

15. In the submissions the respondent has touched upon recent concerns in related industries, such as greyhounds, which, whilst essentially dealing with live baiting, dealt with other welfare related issues. The codes themselves are under acute public scrutiny. Indeed, in respect of greyhounds the very continuation of the industry teetered on the balance and parliament in fact at one stage had provided for the abolition of the industry, essentially because of welfare concerns. The stewards reflected upon, the Appeal Panel has reflected upon and now this Tribunal considers the public expressions of concern for welfare in relation to the racing industries. This industry is not isolated from it. There are other matters which are constantly in the forefront, such as the use of whips in both the thoroughbred and the harness racing industries.
16. In determining objective seriousness, each matter must be assessed in respect to the breach that occurred and the seriousness of it.
17. In this matter there is a strong overlapping in the acts of failure which this Tribunal has found, essentially vet related issues or, more strictly, a failure to have a vet involved more promptly. It is apparent, therefore, that any penalty must respect the fact that the submissions as to concurrency are quite appropriate and the Tribunal is of the opinion that the penalties must reflect that.
18. What then of the subjective factors which might go to consideration of the message to this individual appellant and which might have some impact upon a penalty appropriate to his general conduct?
19. He has been licensed for 50 years. He has no related conduct matters in that history. The few matters that are shown on his disciplinary report between 2000 and 2016 are ignored. Importantly there are no matters for animal cruelty on his history.

20. So a person who has been licensed since 1967 should be able to say, “I have not done anything remotely like this,” is a really strong subjective matter. It does not stand alone. The Tribunal found in its decision that he is a person of good character and now has the benefit of three character referees that confirm that and other attributes which he is entitled to have taken into account.
21. The first is by Mr Alan Brown, a retired barrister, 4 May 2017, which refers to his long association and friendship with the appellant and his own association with the industry. “He strikes me as an excellent dedicated trainer, totally trustworthy and honest with a clear love and wellbeing for his horses. He is a person who would not knowingly do any harm to nor assist any others in acts of cruelty.”
22. The second is by Mr David Gardner, also of a lengthy association and himself a licensed trainer of long-standing. He has worked alongside him and found him to be a competent horseman, always concerned by the general condition of his horses and showing care and kindness and not being a person that would intentionally commit any act of cruelty.
23. The third is by Mr John Curtis of May 6, 2017. A person who has never doubted the integrity of the appellant who he says is a person of the highest calibre. Mr Curtis is a former racing journalist and Chief Executive of long-standing of the Newcastle Jockey club. He says the appellant has always conducted his training business in a most professional manner and set out to ensure the promotion of racing. He treated his owners with due respect and with great care, and the appellant is a person held in high esteem in Newcastle. Mr Curtis never had a problem with him.
24. In assessing his circumstances, and these are relevant to an assessment of the objective seriousness of his conduct, it is that he was not the owner, he was not the trainer, it was a neighbour’s horse in an adjoining stable complex. The treatment was given on a voluntary, non-commercial basis for the purpose of assisting a

fellow trainer who had a horse with a problem and within his own knowledge using a remedy that he had used in the past and which he reasonably expected, if his instructions were followed, would cure a horse from a disability. His conduct in the sense of that which has been found against him, that is a failure to call a vet, was isolated conduct. He accepts now, it is said, that he should have done more. The objective assessment which the Tribunal has made is that that should have been patently obvious to him.

25. It is submitted on his behalf that the isolated conduct, armed with the message now received, will not be repeated. In determining therefore a message to be given to this individual trainer as to what is an appropriate disciplinary response for a person with the privilege of a licence, that the Tribunal can be more than comfortably satisfied that the message will not be required to be given again to this trainer to ensure he does not repeat that conduct. Those matters are balanced by the fact he did not admit his failures and has expressed no contrition or remorse. He receives no discount for those matters.

26. In determining a penalty the parties have asked the Tribunal to have regard to other decisions given for breaches of the subject rule and if possible find penalties which both parties can say is not disproportionate to facts which have been found in the past. Whilst the Tribunal has the benefit in the exhibits of past breaches for 175(n) and 175(o) the parties fairly acknowledge, and the Tribunal itself finds, that they are not of great assistance. Only two have been touched on. The Tribunal has the benefit of some printouts of what occurred in respect of those matters.

27. In respect of 175(n), in the decision of Woodward of the then Appeal Panel, reasons for decision of 18 December 2008, a breach of 175(o)(i) failure to exercise reasonable care to prevent cruelty, that a licensed trainer was aware of the deteriorating condition of the thoroughbred and failed to give it adequate nutrition.

He was a trainer of 20 years with no prior matters, with appropriate references, and he was find $5,500.

28. In respect of the175(o) matter put to the Tribunal, it was a decision of the then Appeal Panel of then New South Wales Thoroughbred Racing Board, 22 October 2004, in the matter of Nicoletti . It is interesting that the opening remarks are that Nicoletti was not a licensed person. The facts do not indicate whether that was at the time the conduct was committed or whether he was not at any time because it is apparent that he was considered for disciplinary penalty for comparative purposes to a penalty on a licensed person, who is someone for whom the requirement to comply with the rules, and who has the privilege of a licence, would appear to need to contain a more substantial message than for an unlicensed person. Be that as it may, the facts are uncertain. What happened was that Mr Nicoletti was given a horse to agist and the horse ended up a walking skeleton because he did not feed it, and accordingly he faced a 175(o)(iii), a failure to provide veterinary treatment matter. He admitted that breach early and other breaches and he received a 12 months disqualification.

29. They are not of great assistance because they do not equate to the type of conduct in the subject circumstances here. In addition they are aged matters. The submission for the appellant is that they should not be disregarded because they are aged matters, simply because of the passage of time. That in certain circumstances can be correct but here the Tribunal is satisfied from its own knowledge that the focus upon welfare issues today is much greater than it was in 2004 and 2008, for reasons that were briefly touched upon earlier in this decision. It is accepted that otherwise for matters which happen to be aged, there are a number of principles that there should be in force before a comparative decision is considered. One that has been suggested here is that there has been an increase

in that type of conduct; there has been a change in penalties available, or there has been some move by the industry itself to educate and inform its participants about strategies that should be avoided. It is also submitted that the penalty should not be greater now simply because with the passage of time there might have some equivalence with CPI or inflationary increases. The Tribunal agrees with each of those matters but they are not the only matters to be taken into account in determining whether aged matters are still current.

30. For the reasons expressed, the Tribunal is not assisted in determining penalty by those matters.

31. Having dealt with the subjective message, the Tribunal returns to the objective message in its final reasons for determination. This is an animal welfare issue for the reasons previously set out. This is of a failure, which is not a total failure but one which was of considerable seriousness for a licensed person. The gravity of that objective seriousness is in these circumstances reduced by the very strong subjective factors and the limited nature of the failures in which this appellant engaged.

32. The Tribunal considers the penalty should be less than that of the Appeal Panel for those reasons.

33. In its determination of penalty the Tribunal is not of the opinion, as the stewards were, and as was submitted is appropriate here, that a starting point should be three years and two years respectively. The Tribunal has formed an opinion to the extent that it is necessary to express such matters, that it considers that the appropriate message to be given to the community at large, such that licensed persons will not engage in this type of conduct and that the public will understand that should they do, or others associated with it do, that the consequences of that conduct will be the loss of the privilege of licence.

34. Having regard to those matters the Tribunal has given consideration to a lesser starting point for each matter of two years .

35. As expressed, for the subjective circumstances in respect of each matter there is to be a discount for those factors of one year.

36. In the circumstances the penalties are to be concurrent.

37. Should they be reduced to a fine because of the consequence for a 76 year old trainer where any loss of licence would be an effective end to participation in the industry, or do they necessarily reflect a fair penalty for this licensed person's conduct? The Tribunal is of the opinion that the message to be given is not to be found in the imposition of a monetary penalty.

38. In those circumstance a disqualification is considered to be appropriate in each matter and the periods of disqualification are one year to be served concurrently.

39. The Tribunal notes the submissions on the appeal deposit.This is an appeal against an adverse finding in respect of two matters. The Tribunal has determined that in respect of each matter the appeal is dismissed. The second leg of the appeal was in respect of severity. The appeal did lead to substantial changes in the adverse factors finding and in that regard, whilst a penalty has been imposed, it is a lesser penalty.

40. The Tribunal orders 50 percent of the appeal deposit be refunded.
