RACING APPEALS TRIBUNAL OF NSW

TRIBUNAL: Mr D B Armati

RESERVED DECISION

2 MAY 2022

APPELLANT WANDA INGS

RESPONDENT RACING NSW

ARR255

SEVERITY APPEAL

DECISION:

1. **APPEAL DISMISSED**
2. **DISQUALIFICATION OF 9 MONTHS**
3. **ORDER MADE ON THE APPEAL DEPOSIT**

INTRODUCTION

1. The Appellant, licensed trainer Wanda Ings, appeals against a decision of the Appeal Panel of 24 March 2022 to disqualify her for a period of three months to expire on 24 June 2022.

2. The charge was, relevantly, as follows:

> "AR 255 - stomach-tubing prohibited at certain times
> (1) A person must not, without the permission of the Stewards:
> (b). cause the stomach-tubing of:
> a horse engaged to run in a race...:
> (ii) at any time during the one clear day prior to 12am on the day of the scheduled race...."

The Stewards particularised that breach as follows:

> "Being that Ms Ings did cause the racehorse Chur Bro (NZ) to be stomach-tubed on 24 September 2021 inside one clear day, when such horse was engaged to race at Wellington on 25 September 2021."

3. This is a severity appeal only.

4. The Appellant pleaded guilty at the Stewards' inquiry on 16 November 2021 and maintained that plea of guilty before the Appeal Panel at its hearing on 24 March 2022 and with her Notice of Appeal to the Tribunal maintained the admission of the breach of the rule.

5. The Respondent calls in aid the principles established in Vasili v Racing NSW [2018] NSWSC 451. The Appellant has made no submission that the principles in Vasili should not apply to this appeal.

6. To summarise the decision in Vasili, it is that once an appeal is lodged with the Tribunal then the Tribunal is seized with jurisdiction with respect to the decision appealed against and that means the whole of the decision, including all parts of it.

7. Based upon that decision, the Respondent has notified the Appellant in writing well prior to the hearing that she will not establish additional special circumstances and the only discount will be that for the admission of the breach of 25% and, therefore, the penalty that the Stewards considered appropriate should be applied (disqualification 9 months).

8. The Tribunal agrees that the principles in Vasili apply and that it is a function of the Tribunal to determine penalty itself and the Tribunal is not constrained by the decision of the Appeal Panel (disqualification 3 months) and the appellant is on notice that a higher penalty is sought. It is, therefore, open to the Tribunal to impose the penalty that the Stewards thought fit or some other penalty which the facts and circumstances warrant.

9. The brief history of the proceedings has been has been the Stewards' inquiry on 16 November 2021, with a disqualification of nine months. A stay granted by the Appeal Panel. The Appeal Panel determination of 24 March 2022, with a disqualification of three months. The Tribunal, by consent, granted a stay of that decision. The Tribunal heard the appeal on 26 April 2022.A summary of the main pieces of evidence is set out as a postscript at the end of the decision.

RULES

10. A considerable number of rules have been referred to in the submissions and they are:

"AR 2:

Clear day means a 24 hour period from 12am to 11.59pm.
Penalty includes the suspension or partial suspension of any licence, disqualification, reprimand and the imposition of a fine. (**Penalise** has a corresponding meaning.)

AR 24:

Without limiting any other Stewards' powers, the Stewards have the following powers in relation to disciplining and/or penalising:

(a) to penalise any person who breaches the Rules; and…

AR 227:

Without limiting any other powers...the Stewards may penalise any person who:

(a) commits any breach of the Rules...

AR 255:

Relevant parts of (1) set out above
(2) Provided that the stomach-tubing or attempted stomach-tubing occurred on race day or during the 1 clear day prior to 12.00am on race day for a horse engaged to run in race on that race day, if a person breaches sub-rule (1) a disqualification of not less than12 months must be imposed (other than where the person is not, in the opinion of a PRA (or a person employed or engaged by a PRA)

or the Stewards, the principal offender), unless there is a finding that a special circumstance exists, in which case that penalty may be reduced.

AR 283 Penalties:

(1) Subject to sub-rule (3), a person or body authorised by the Rules to penalise any person may, unless the contrary is provided, impose:

(a) a disqualification;

(b) a suspension;

(c) a reprimand; or

(d) a fine not exceeding $100,000.

(2) Further to sub-rule (1), a disqualification or suspension may be supplemented by a fine.

(6) Where a person breaches any of the rules listed below, a disqualification for a period of not less than the period specified for that rule must be imposed unless there is a finding that a special circumstance exists, in which case that penalty may be reduced:

...

(j) AR 255(1) (subject to the conditions in AR 255(2)): 12 months.

LR 5A:

On and from 1 March 2019, where the Local Rules make reference to an Australian Rule of Racing that was in place prior to 1 March 2019, such reference is to be interpreted as referring to the Australian Rule of Racing that replaced that rule as from 1 March 2019...

LR 108(2):

(2) For the purposes of AR196(5), special circumstances means where:

(a) the person has pleaded guilty at an early stage and assisted the Stewards or the Board in the investigation or prosecution of a breach of the Rule(s) relating to the subject conduct; or

(b) the person proves on the balance of probabilities that, at the time of the commission of the offence, he:

(i) had impaired mental functioning; or

(ii) was under duress, that is causally linked to the breach of the Rule(s) and substantially reduces his culpability.

(c) in the case of offences under AR178E, the medication in the opinion of the Stewards does not contain a prohibited substance, is of an insignificant nature and is for the welfare of the horse; or

[paragraph added 18.11.13]

(d) the person proves, on the balance of probabilities that, he did not know, ought not to have known and would not have known had he made all reasonable inquiries, that his conduct was in breach of the Rules of Racing."

11. The parties have referred to the decision of McDonald entitled James McDonald v Racing NSW [2017] NSWSC 1511 and the decision of the Tribunal in respect of the same parties of 10 April 2017. Those decisions dealt with now substituted rules and it is necessary to set out some of those substituted rules and they were:

"AR 1- Definition of penalty sufficiently similar;
AR 64G - Stomach-tubing - the breach of provisions are substantially the same as AR 255(1), but there is no equivalent of AR 255(2);
AR 196(1) - Equivalent to the present AR 283(1) and (2);
AR 196(5) - Where a person is found guilty of a breach of any of the rules listed below, a penalty of disqualification for a period of not less than the period specified for that rule must be imposed unless there is a finding that a special circumstances exists, whereupon the penalty may be reduced;
AR 64G(2) - stomach-tubing rule;
AR 83(d) - the McDonald breach for a jockey betting."

ISSUES

ORDERS SOUGHT

12. As set out above under the Vasili warning, the Respondent seeks that the decision of the Stewards that there be a mandatory minimum disqualification of 12 months, reduced for special circumstances by 25% for the plea, leading to a disqualification of nine months be imposed.

13. The Appellant seeks a nominal penalty being, if it is to be a disqualification, a nominal disqualification, but more so that it be a fine or suspension.

14. The Appellant submits that if she is not successful in respect of her appeal that there is no appeal against the three months disqualification found to be appropriate by the Appeal Panel by determining for the plea of guilty and assistance a discount of 75% on the mandatory minimum penalty of 12 months.

GROUNDS OF APPEAL

15. The grounds of appeal identify a number of errors said to have been identified in the Appeal Panel decision. As this is a de novo hearing, it is not

necessary to examine those errors, if any, and the issues identified in those suggested errors are adequately covered by the subsequent submissions.

16. Essentially, however, the grounds of appeal say that the Appeal Panel decision was not the correct and preferable decision and was too severe. As identified, it is submitted in the grounds that parity was not adequately addressed, nor an appropriate penalty for like comparability and that, as recognised in McDonald, a nominal disqualification only would be appropriate.

MATTERS TO BE DETERMINED

17. The parties agree that the mandatory minimum penalty of 12 months under 255(2) applies.

18. The parties agree that Local Rule 108(2)(a) on special circumstances is established and applies.

19. The parties agree that there is a need to determine the effect of the rewriting of the rules and the applicability of the determinations in McDonald.

20. The parties agree that there is a need to determine some factual disputes.

21. As stated, the Appellant maintains that at least there should be a finding under 108(2)(a) such that there be a nominal penalty only or the 75% discount to the mandatory minimum penalty, which the Appeal Panel found, be applied.

22. The Appellant, in addition, submits that special circumstances under LR108(2)(b)(i) and (ii) are established and that there is the appropriate causal connection and substantial reduction in culpability such that there be a nominal penalty only.

23. The Appellant also submits that the provisions of Rule 255(2) enable the Tribunal to exercise a full discretion such that the range of penalties provided in 283(1) can be considered.

24. The Respondent maintains that the McDonald principles are still applicable on the determination of the penalty.

25.The Respondent submits that the Tribunal should not find LR 108(2)(b)(i) or (b)(ii) established and should not find that there is the appropriate causal connection and that there is no reason to find that the culpability should be found substantially reduced.

26. The Respondent submits that there must be a limit on the discretionary factors for the plea and co-operation under LR 108(2)(a) and that would be consistent with a number of precedent cases, to which the Respondent refers.

KEY FACTS

27. As this is a severity appeal only, the need to focus on the facts in greater detail falls away and it is only necessary to examine the facts and circumstances sufficient to deal with the appropriate penalty determination and resolve the disputed issues between the parties.

28. On 1 September 2013 the old 196(5) rule came into operation, as did Local Rule 108.

29. On that date the one clear day rule was rewritten to remove old references to 24 hours and the new definition, as set out above, of a 24 hour period from 12.01am midnight to 12 midnight was added.

30. From September 2013 the Respondent published in its monthly magazine notice of that changed rule and an explanation of what the one clear day rule now meant. That material has been repeated in every monthly edition since.

31. From 2015 the Racing NSW website contains an explanation of the rule and various charts to assist trainers to understand it.

32. On 1 March 2019 the rules were rewritten and the difference between the relevant new rules and old rules is set out above.

33. On 20 February 2019 Racing Australia published a letter advising of the new rules. It made clear that the new rules were a modernisation and reordering, but not set out as a change to the substance or effect of existing rules. The aim of the rewrite was to make it easier for participants.

34. The Tribunal notes that the new LR 5A makes LR 108 applicable to the new written rule 255.

35. The cases of McDonald contain various findings and principles of relevance, but it is said by the appellant that the change in the rules is such that many of those principles no longer apply. McDonald involved an offence by a jockey of a bet placed on 5 December 2015, contrary to the then rule 83(d). A Stewards' inquiry was held on 22 December 2016 and an Appeal Panel determination led to a determination by the Tribunal on 10 April 2017, with the outcome set out

above and the subsequent confirmation of that Tribunal determination by Justice Rein in the Supreme Court. A further analysis will be undertaken later.

THE APPELLANT

36. The Appellant was licensed in New Zealand and has now been licensed in Australia for nearly 40 years.

37. She has no relevant adverse history, except a prohibited substance presentation in 2002, being for a therapeutic administered on veterinary advice, but under a wrong belief that a sufficient withholding period had been given.

38. The Appellant has continued to train under stays and trains from a developed facility, which she rents in Bathurst. Her current evidence is that she usually has 20 horses in training, but it could be as high as 22 and that is for some 44 owners on her books. She presently has three employees.

39. The Appellant, in her various documents and evidence, has referred to her medical history, her training practices, her use of veterinarians and her knowledge about the rules. These will be expanded upon in greater detail later. In particular, the Appellant gave substantial evidence about the facts surrounding the commission of the breach of the rules.

40. The Appellant has called in aid 26 referees. That is too many references for the Tribunal to adopt its usual practice of summarising each of those references. It is not a necessary exercise in this case because the Appellant's good character and other matters established by the referees are not in issue.

41. The other reason for not summarising the references, or at this stage other subjective facts in greater detail, is that under the rules to which she is subjected those matters become virtually irrelevant. That will be explained in more detail below.

42. The Tribunal notes that the majority of the references are people associated with the industry or licensed in it and, as often expressed by the Tribunal, a reference by a licensed person is to be given greater weight because of the support it engenders in confidence in the industry than a reference by an outsider.

43. The Tribunal has gleaned the following from those references: Excellent character, honest, highly responsible, highly respected in the industry, an awareness of the Appellant's misconduct, the Appellant's presentation of horses in excellent condition, the excellent way in which the Appellant conducts her

stables, the impact of any adverse order against her, the fact that she helps others in the industry and many with disabilities, charities and children, she is a hard worker and a dedicated professional, she is courteous and obliging, she is down to earth, she promotes the industry, she would not knowingly participate in a breach of the rules, she puts horses and others ahead of her own interests and she has kept operating her stables for the benefit of her owners during the COVID pandemic.

44. The Tribunal will examine objective seriousness and the application of her favourable subjective circumstances on the issue of penalty below.

THE FACTS ON THE BREACH ITSELF

45. The Appellant, as a licensed trainer, arranged for her usual vet, Dr Corones, to stomach-tube the subject horse with a drench for its welfare and for the purposes of aiding hydration.

46. Dr Corones, with the Appellant present and assisting, drenched by stomach-tube with vitamins and salts on 24 September 2021 in the morning.

47. The Appellant had recorded that treatment by Dr Corones in her log book.

48. The subject horse arrived at the course to race at Wellington in the afternoon on 25 September 2021.

49. The horse was scratched by the stewards at the appellant’s request because it was unwell, treated on course ,then euthanased on 26 September 2021.

50. As a result of the horse being euthanased, Inspector Bucknell, on behalf of the Respondent, attended the Appellant's stables on 30 September 2021.

51. On the inspector looking at the Appellant's treatment book, the following conversation took place:

> "BUCKNELL: Your records refer to a saline drench that was administered to the horse on 24 September. Is that correct?
> INGS: That's correct, yeah, in the morning.
> BUCKNELL: Are you aware that a horse cannot be nasogastric-tubed within one clear day of racing?
> INGS: I thought it was within 24 hours like (inaudible). Sorry, I was of the opinion if it was in the morning it was all right because he was racing in the late afternoon.
> ...

INGS: ...Well, if I was aware of that I probably wouldn't have put that down...
BUCKNELL: Dr George Corones, was he aware that Chur Bro was in to race on the Saturday?
INGS: He may not have been. ...
BUCKNELL: Was it ever advised to Dr Corones that the horse was in to race on the Saturday?
INGS: I believe not, no."

52.The inspector interviewed Dr Corones on 7 October 2021 and the relevant parts of that interview are:

"BUCKNELL: Were you aware that any of those horses were accepted to race on Saturday, 25 September?
CORONES: No, I was not. Quite to the contrary, when Ms Ings spoke to me early in the week and asked me if I would saline drench some horses, my understanding was very clear that those horses were all to race on Sunday, the 26th, at Bathurst. Indeed, we had a discussion as to when would be the most appropriate time to drench the horses, as they were racing at Bathurst and I said that we would have to do them a minimum of 48 hours before the race, which meant Friday."

53. The Appellant was again interviewed by Inspector Bucknell on 7 October 2021 and she confirmed in that interview that the drench was at 8 o'clock in the morning and she had assisted Dr Corones to do it. The interview then continued:

"BUCKNELL: ...You would have been aware that the horse was in to race the next day?
INGS: Yeah, as I say, I was always of the opinion it was 24 hours, and hence I got the horse early on that Friday morning because it was. It was--
BUCKNELL: Outside the 24 hours?
INGS: Yeah.
...
INGS: It was 30 hours that he was done previous to his race.
...
INGS: ...He wouldn't have known that the other horse was in on the Saturday. It wasn't mentioned to him. It was just that they weren't drinking. I honestly thought I was within my rights of doing it 30 hours before instead of 24 because I thought, you know, okay, I was wrong. I think 24 hours was the day previous, um, it was 30 hours which was longer than a full day..."

54. The Appellant wrote an undated letter to the Stewards' inquiry, which became exhibit 11 there and which relevantly stated:

> "I was not intentionally doing anything wrong as I did misunderstand the rules. One full day (24 hours). It was a genuine mistake."

And later:

> "My misunderstanding with the stomach-tubing rule being one full day was totally innocent as 30 pre-race in my eyes was clearly over the 24 hours that I thought consisted of one day."

55. The Tribunal will return to the evidence given by the Appellant at the Stewards' inquiry and before the Appeal Panel on this issue.

56. At the Stewards' inquiry on 16 November 2021 the Appellant pleaded guilty and made ready admissions and the Tribunal will return to those. Before the Appeal Panel and before the Tribunal the Appellant has maintained the admission of the breach of the rule and has frankly answered all questions of her and participated appropriately at all times.

DETERMINATION OF BREACH AND PENALTY

57. The Appellant has admitted a breach of AR 255(1)(b)(ii) at all times.

58. Accordingly, the need to analyse the evidence on guilt falls away.

59. The wording of AR 255(2) means that because there has been a breach of sub-rule (1) a disqualification of not less than 12 months must be imposed. That is because the stomach-tubing occurred during the one clear day prior to 12am on raceday for a horse engaged to run in a race on that raceday.

60. There has been no submission to the contrary.

61. There has been no submission that the exception in AR 255(2), namely "(other than where the person is not, in the opinion PRA (or a person employed and engaged by PRA) or the Stewards, the principal offender)" applies.

62. It is noted that AR 283(1) provides a range of penalties available because of the breach of the rule.

63. It is also noted that AR 283(6) also applies and, when read in conjunction with sub-rule (j), a disqualification of not less than 12 months must be imposed for the breach of the rule. AR283(6)(j) provides "subject to the conditions in AR 255(2)" but those conditions, as stated above, do not arise.

64. The Tribunal determines that AR 255(2) and AR 283(6) are essentially in the same terms. No material difference is apparent to the Tribunal. The words "subject to conditions", et cetera, do not enliven any different penalty regime in 255(2).

65. In those circumstances the Tribunal is satisfied that when a specific type of breach is specified in a particular rule (here 255) and a particular penalty is provided that rule was intended to and in fact does take precedence or priority over a general rule such as 283.

66. As they are essentially in the same terms, subject to the McDonald arguments below, nothing turns on that however.

67. To be clear, the Tribunal determines that the mandatory minimum penalty it is considering is under 255(2) and that that penalty must be imposed.

68. However, if the Tribunal is wrong and that 283 applies, then it is necessary to consider what the Tribunal had to say in McDonald at paragraph 87:

> "(i) determine an appropriate penalty under 196(1) having regard to the objective seriousness of the breach and the subjective circumstances of the Appellant,
> (ii) determine if rule 196(5) is enlivened because the breach may involve one of the rules specified that sub-rule, here being 83(d),
> (iii) if the penalty determined under (i) is not a disqualification then a disqualification must be imposed,
> (iv) if the penalty determined under (i) is less than the mandatory minimum disqualification of two years then disqualification of two years is imposed,
> (v) if the penalty determined under (i) is a disqualification of more than two years then that longer disqualification is imposed,
> (vi) determine special circumstances in LR 108(2) are established,
> (vii) determine the reduction in penalty, if any, that will flow from the particular special circumstances established."

69. This approach requires a standard consideration of civil disciplinary penalties designed to provide an appropriate message to this Appellant and the industry at

large and have a projection to the future. The Tribunal has set out these principles in numerous cases and they are not detailed here.

70. The objective seriousness here is patent from the particular rule breached. However, there was no nefarious activity and the explanation is a simple one. The Appellant misunderstood the rule. However, the privilege of a licence carries with it a duty to ensure knowledge of the rules and their application. A licensed trainer cannot expect that the message to be given to that trainer can be other than a salutary one for failing to know and apply the rules. Integrity will be quickly lost if the rules are not followed. Welfare considerations could also arise. That is a basic requirement of the privilege of a licence under a regulatory regime. Therefore, consistent with precedent, the breach is considered as serious and warrants, consistent with prior decisions by the Tribunal which need not be listed, that a disqualification is appropriate.

71. The Tribunal accepts the unchallenged, very strong subjective factors in favour of the Appellant, but they are not sufficient to reduce the penalty below a disqualification.

72. On consideration of the application of the mandatory minimum penalty of 12 months there has been no submission to the contrary by the Appellant that that is not an appropriate starting point.

73. Accordingly, the Tribunal determines if it was applying 283(1) that a disqualification is appropriate, but that that would be on all of the objective facts and subjective facts less than a period of 12 months.

74. The Tribunal, again considering if it was applying 283(1), would not consider a period of disqualification greater than 12 months is justified.

75. Accordingly, again the Tribunal again returns if it was to apply 283(1) to the mandatory minimum disqualification required by 283(6) of 12 months.

76. The Tribunal emphasises that on the facts and circumstances of this case and for these reasons a further detailed analysis of objective seriousness and subjective facts is not required.

DETERMINATION ON LR 108(2)(a)

77. It is again apt to set out the relevant provision here and its key words are:

> "...Special circumstances mean where:

(a) the person has pleaded guilty at an early stage and assisted the Stewards...in the investigation or prosecution of a breach of the rules relating to the subject conduct."

78. In other words, there must be a plea a guilty, it must be at an early stage and there must be assistance to the Stewards and that assistance must relate to an investigation or prosecution in respect of the subject breach.

79. It is not necessary to examine this provision in greater detail, nor the facts that go to it, because both parties are in agreement that it is enlivened.

80. The Appellant from the outset has assisted the inspector and later the Stewards, then the Appeal Panel and the Tribunal in determining the investigation and prosecution of her breach and also has pleaded guilty at every appropriate stage.

81. The Tribunal determines that the LR 108(2)(a) special circumstances is established under subparagraph (a).

THE APPROPRIATE REDUCTION FOR SPECIAL CIRCUMSTANCE UNDER LR 108(2)(a)

82. Contrary to the submissions of the Appellant and the findings of the Appeal Panel, the Tribunal finds the discount available for the early plea and assistance is limited to the precise terms of the sub-rule, that is, for the early plea and assistance.

83. The Tribunal is reinforced in that conclusion because it is a specified special circumstance reduction, not a general civil disciplinary penalty reduction.

84. The Tribunal is further reinforced in that conclusion by precedent.

85. The Tribunal is satisfied that this approach is not an unreasonable fetter of the discretion to consider discounts.

86. The Tribunal is also satisfied that the rule-makers have chosen not to leave the discretion at large.

87. The Tribunal accepts that the facts and circumstances of each case must be the determinant of a discretionary discount, but that that discretion is limited by this finding.

88. The matters advanced by the Appellant in this case are those found by the Appeal Panel and, after the appropriate finding of a guilty plea at the first opportunity and the appropriate assistance, the Appeal Panel then took into account: A prohibited substance was not used; tubing for animal welfare reasons; no unfair advantage, nor any sinister or nefarious intent behind the stomach-tubing; behaviour by the Appellant with transparency and integrity.

89. In written submissions for the Appellant the following additional factors were advanced generally: The Appellant has a correct understanding of the rule; expressed contrition and remorse; assistance went beyond the ordinary admissions after confrontation and the matter would not have come to light without her assistance and honest record-keeping. A range of subjective factors were set out as well.

90. The references, as summarised above, are noted.

91. The Tribunal rejects the submission that a greater discount is appropriate for this Appellant for assistance to the Stewards in their investigation because she properly completed her log book and showed it to the inspectors and then admitted the undeniable facts that the log book disclosed. The Appellant was required to complete the log book. The Appellant was required to show the log book to the inspector. The Appellant was required to answer truthfully and honestly the inspectors' questions. Likewise, the questions before the Appeal Panel and the Tribunal were likewise required to be honest.

92. There is nothing over and above a basic requirement to comply with the rules that accompanied her assistance to the authorities. For example, the Appellant did not disclose breaches by other people. For example, the Appellant did not self-volunteer to the inspector or Stewards that she had breached the rules. Of course disclosing offences by others does not fall within the precise wording of the sub-rule in any event, but is given as an example of circumstances in other cases where additional discounts above the 25% have been given to those being penalised.

93. It is necessary to consider parity.

94. The Appellant is unable to point to any case where a discount for plea and assistance of greater than 25% has been given. The Tribunal notes that it is not aware of any such cases in any event.

95. The Tribunal does note the harness racing case of Honson, where in sealed transcript on 11 September 2019 the Tribunal granted, for reasons which are not disclosed here, a discount for assistance to the authorities, which was a

separate and distinct discount above the 25% for the plea of guilty and assistance to the authorities.

96. The Tribunal also notes the harness racing appeal of Atkinson, where on 4 October 2019, in addition to a 25% discount, the Appellant received a substantial additional discount for assistance to the authorities in identifying wrongdoers.

97. The Respondent took the Tribunal to seven prior cases where 25% discount was given.

98. They were Racing NSW cases of Walter of 10 September 2021, Sprague of 27 June 2018, Sam Kavanagh of 13 August 2018, James McDonald of 10 April 2017.

99. The Respondent reminds the Tribunal that in paragraph 36 of its McDonald decision it made reference to the fact that it applied a 25% discount there because the parties asked it to and it is apparent that the Tribunal would not otherwise have done so.

100. The Respondent also took the Tribunal to three harness racing cases of Mabbott of 4 August 2021, Sanderson of 19 May 2021 and Brown of 25 January 2021. Each of those received a 25% discount.

101. In all the Respondent's precedent cases a 25% discount was given for the plea of guilty at and early stage and co-operation with the Stewards.

102. Again it is important to recognise that the discretion is not to be unreasonably fettered, but is governed by the precise words of sub-rule (2)(a) as to the matters to which the discount can be attached.

103. That 25% discount can, as the Tribunal has often said, be increased or decreased, depending on the facts and circumstances of each case and the appropriate discretionary considerations.

104. Here, however, the Tribunal finds no reason on the facts and circumstances that are found that a discount of less than or greater than 25% is justified.

105. The Tribunal does not accept the reasoning of the Appeal Panel and does not adopt its findings, as invited to do by the Appellant.

106. The Tribunal does not otherwise, consider that the facts and submissions for the Appellant justify greater than the 25% discount for the sub-rule special circumstance.

SPECIAL CIRCUMSTANCES UNDER LR 108(2)(b)

107. Five ingredients need consideration and they are:

> "At the time of the commission of the offence
> impaired mental functioning or
> under duress
> causally linked to the breach of the rules, and
> substantially reduces culpability."

108. As set out above, the Respondent says none of these have been established and the Appellant says each has.

RELEVANT FACTS

109. The Appellant says that at the time of the breach of the rule she was suffering from an accumulation of severe physical and mental stress, especially:

> "(i) severe post-viral fatigue and exhaustion
> (ii) chronic shoulder pain
> (iii) chronic lymphoedema, pain and disability
> (iv) inability to visit her mother in New Zealand, who is suffering from dementia and inability to travel to aunts' funerals, all of which were distressing
> (v) sleep disturbance and feelings of exhaustion, anxiety and depression
> (vi) accordingly, she was not her usual self and not operating to her usual capacities."

110. The Appellant expanded upon some of these issues in her oral evidence to the Tribunal.

111. She confirmed that her breast cancer resulted in lymphoedema and that if she suffered any cut and a prospect of infection she must immediately go to hospital and had had to do so two or three times. She said the result of this was debilitation and pain, causing sleep affectation.

112.In relation to her shoulder injury she described a fall and confirmed evidence given before that she was operated on by Dr Duckworth, who was not able to ameliorate the conditions and recommended further surgery. The effect of this was she has to sleep on her side and hasn't slept well for some two years.

113. She described the viral illness had caused her to be rundown at a time when she was having to drive all over the place for country meetings for her own commitments and those of her daughter and that things were "full on". She said, accordingly, she was "getting to the end of it". She said she was tired and not picking up by working 16 hour days.

114. She described all of these symptoms prevented her from being her usual self, who is a battler who would get things done.

115. These matters were such that on one occasion she was required to obtain approval of the Stewards to have a substitute trainer attend to her horses at a Warren race meeting.

116. The Appellant repeated her evidence about her mother and her aunts.

117. The Appellant set out that the COVID pandemic had caused substantial stress because of problems with owners, who were running out of money and all of this led to a decline in turnover.

118. Accordingly, she said a combination of all these factors meant she was not her normal self. She said her daughter confirmed these factors by saying she was very difficult to live with because of the stress she was creating.

119. In cross-examination she conceded her viral illness was just a cold, with no fever or cough and consistent with her not going to a doctor. As a result of an adverse reaction to an injection some years ago, she did not see a doctor on this occasion. Her daughter spoke to the doctor on her behalf.

120. A report of Dr Duckworth was put in evidence. With the exception of the report of Dr Bertucen, consultant psychiatrist, there is no medical evidence supporting the Appellant's beliefs.

121. The Appellant gave none of this evidence to the Stewards' inquiry.

122. However, after the Stewards' inquiry on 19 November 2021 and 6 December 2021, the Appellant started to document these conditions. Her evidence to the Appeal Panel was in the factual range just set out.

123. To the Appeal Panel she gave evidence of being "stressed to the eyeballs", particularly by reason of the burden of travel for a country trainer, which was constant and tiring. As stated, she confirmed to the Tribunal in her statement of 30 March 2022 that she was now stressed, anxious and depressed.

124. That statement caused her to indicate the combined effects of these was: Severe exhaustion, weakness, debilitation, chronic pain, depression, sadness, pressured, stressed, worried.

125. The Appellant was corroborated by evidence to the Appeal Panel by her friend, Sue McMaster, who made two statements before the Appeal Panel. She described the Appellant at relevant times as being extremely ill, extremely unwell, in poor health and Ms McMaster had a concern for her welfare.

126. The Appellant was not cross-examined before the Appeal Panel to the effect that these facts did not exist or were wrong.

127. The Appellant was referred by her solicitor to consultant psychiatrist, Dr Bertucen.

128. Dr Bertucen is MBBS FRANZCP Cert. Adult Psychiatry. He is a consultant psychiatrist.

129. Dr Bertucen received very detailed instructions from the solicitor, including advice in respect of the rules, facts and various definitions on key matters in issue. Dr Bertucen did not examine her in person, but interviewed her by video conference - the Respondent takes no issue with the facts and conclusions drawn by Dr Bertucen from that fact.

130. Dr Bertucen's report is dated 15 February 2022 and was before the Appeal Panel and he was there subject to cross-examination.

131. That report commences by setting out factual matters relating to the Appellant and the history of the incident given to him by the instructing solicitor.

132. Under the heading "Psychological Sequelae" he stated the following:

> "At time of incident not using any psychotropic medications or attending any mental health professionals; significant anxiety and distress from a number of confluent stressors; financial trauma; August 2021 severe flu-like illness, issues about her mother; treatment by Dr Duckworth on the shoulder; contending with severe pain; sleeping poorly; constant pain; impaired concentration and memory."

133. And then a documentation of matters since the incident, which are only relevant to provide corroboration of the existence of the conditions at the time of the incident.

134. Under the heading "Past Psychiatric History" he then noted a denial of any mood/anxiety disorders or psychiatric conditions, the existence of her breast cancer problems, a lack of medications and the family history about her mother and aunts.

135. Next, under the heading "Mental State Examination" he referred to the video conferencing and found the Appellant to have appropriately participated in the examination, being candid, articulate and credible and being appropriately reactive. He found no formal thought disorder, evidence of psychosis, self-harming ideation or features of elevated mood/hypomania and that she was oriented.

136. He concluded the report by answering a series of questions posed by the solicitor to him in the letter of instructions.

137. That letter of instructions is in evidence and is very detailed on the facts and the rules and legal principles, instructions and particular definitions.

138. The letter of instructions contained a report from the Centre for Social Impact on behalf of Racing Victoria entitled "'And They're Off' Industry Health Promotion Investigation in Victorian Participants" dated September 2017.

139. Little has been said to the Tribunal about the report and really it is only relevant to establish, by reference to the executive summary, that those in the racing industry can have mental health issues, deprived sleeping habits and a loss of wellbeing.

140. Relevant to LR 108(2)(b) Dr Bertucen opined as follows:

> "1(a) At the time of the breach of 25 September 2021 I am not persuaded that Ms Ings was suffering from a diagnosable psychiatric illness, as defined by DSM-V criteria.
> (b)...It would certainly appear from the history and examination that Ms Ings was suffering (in the months prior to the subject incident) from a combination of stressors which, in my view, would be likely to cause in any person of 'normal fortitude' symptoms of low mood an anxiety and associated features, such as sleep disturbance, appetite disturbance, alteration of mood state and cognitive impairments, including reduced concentration, forgetfulness and distractibility.
> (c) It is possible that Ms Ings may have also been suffering from post-viral effects of fatigue, general malaise and exhaustion.
> (d) Relevant stressors were identified in the main body of the report."

141. In cross-examination before the Appeal Panel Dr Bertucen conceded that the symptoms of post-viral effects, general malaise and exhaustion was a determination by him that was speculative, but reasonably probable as the Appellant described the symptoms to him.

142. Dr Bertucen conceded that the Appellant did not suffer these conditions between 2013 and early 2021, but only in the months prior to the incident (September 2021).

CONCLUSION ON THESE FACTS

143. There being no evidence to the contrary, and only limited cross-examination as referred to above, the Tribunal finds that at the time of the incident the Appellant suffered the condition she has described with the effects that she felt.

144. The Tribunal finds that she only suffered these conditions and effects in the months prior to the incident.

THE LR 108(2)(b)(i) TEST AND WHAT IS IMPAIRED MENTAL FUNCTIONING

145. The test requires proof that at the time of the incident the Appellant had impaired mental functioning.

146. Impaired mental functioning is not otherwise described or defined in the rules.

147. The usual tests as to the meaning of the words used in the sub-rule generally and, of course, in the (b)(i) provision in particular require a purposive construction looking to the text and its context.

148. The Tribunal was not taken to any statute provision or case law that uses the expression "impaired mental functioning", only taken to each word.

RESPONDENT'S SUBMISSIONS

149. The Respondent submits that the term covers a situation where a person has a clinically or medically diagnosable condition and examples of that would include brain or head injury or a developmental issue which would impair mental functioning.

150. The Respondent continued that Dr Bertucen's report is based upon a psychiatric definition of impairment as follows:

> "A deficit or an inability to function or to perform a function in various domains on the basis of an underlying psychiatric injury or illness."

151. It is submitted that the letter of instructions aligned the term to provide for something less than a diagnosable psychiatric position.

152. The submission continues, therefore, that the Appellant was not suffering from a diagnosable psychiatric illness and she was not suffering from depression or anxiety that was a diagnosable condition that met the threshold of DSM-V, but that Dr Bertucen concluded she was suffering from a sub-clinical psychiatric condition.

153. The submission concluded on the basis that sub-clinical diagnosis does not reach the threshold of diagnosis for DSM-V condition. Therefore, there was no impaired mental functioning in the context of the sub-rule.

154. Earlier before the Appeal Panel the Respondent submitted the following:

> "We say that impaired mental functioning is a situation where a person is suffering from a brain injury or a developmental issue where they are not able to properly comprehend what is happening due to those injuries. It's not a situation where we would say the Panel could find that Ms Ings is suffering from a mental impairment or impaired mental functioning just because, and I use that term respectfully, because of some stressors in her life."

APPELLANT'S SUBMISSIONS

155. The Appellant's submissions commence by stating that mental impairment is recognised to be broader than a formal psychiatric disorder.

156. The Appellant then took the Tribunal to various dictionary definitions and numerous case law citations, which are before the Tribunal, but the Tribunal limits its assessment to a summary of those matters. The Tribunal emphasises it has taken into account in detail the definitions in full and the cases cited.

157. The Tribunal summarises the Appellant's submission as:

> (a) Impairment is defined as injurious, lessening or weakening and to make worse or to alter for the worse.

(b) It need not be permanent and may be only temporary.
(c) Mental condition is a condition pertaining to the mind which is the seat of consciousness, thoughts, volition and feelings, et cetera, that have both serious and less serious consequences.
(d) Impairment of mental condition includes feelings of upset, distress and anxiety.
(e) It is necessary to assess how a reasonable person without any impairment would conduct themselves in assessing the condition.
(f) Impairment of mental functioning means a worsening, whether temporary or permanent.
(g) This can include something less than a diagnosable psychiatric or medical condition.
(h) Without reaching a diagnosis of major depression people can seek support and treatment for lesser symptoms, such as anxiety, depression and the like.

THE OPINIONS EXPRESSED ON IMPAIRED MENTAL FUNCTIONING HERE

158. Dr Bertucen stated in his report:

"1(b) Nonetheless I am of the view that Ms Ings was most likely, on the balance of probabilities, suffering from a sub-clinical psychiatric condition (an adjustment disorder or anxiety disorder) caused by the effects of several concurrent significant stressors.
2. On the balance of probabilities, I consider that the confluence of stressors cited by Ms Ings would have been likely on the balance of probability to have impaired her mental/cognitive functioning and certainly to have caused her to be under a 'state of duress'."

159. The Tribunal notes those stressors were set out above.

160. The Tribunal has set out his conclusions in 1(c) above of post-viral effects of fatigue, general malaise and exhaustion and 1(d) above of the relevant stressors being identified.

161. It is to be remembered that Dr Bertucen said she was not suffering from a diagnosable psychiatric illness at DSM-V criteria.

162. The Tribunal notes that before the Appeal Panel in cross-examination, as set out above, Dr Bertucen used a psychiatric definition.

163. In cross-examination before the Appeal Panel Dr Bertucen stated, after giving his definition of "psychiatric impairment", that the Appellant had that psychiatric impairment.

164. In cross-examination Dr Bertucen continued:

> "...An anxiety disorder is, as I'm sure you must appreciate, a clinical condition and different from merely a period of anxiety."

And later:

> "...She was suffering from that sub-clinical, and I emphasise sub-clinical, psychiatric condition within the few months prior to the breach."

And later:

> "Now my diagnosis in (a) is not contradicted by my statement in 1(b). A person can suffer from a sub-clinical psychiatric condition, such as an adjustment disorder or an anxiety disorder, but not reach a threshold or diagnosis as per DSM-V."

And later:

> "An adjustment disorder or an anxiety disorder can be sub-clinical in the sense that it can be very strong anxiety or stress or low mood, but not necessarily meet the threshold criteria for anxiety or depression. Also, she had not, as far as I am aware, complained of her symptoms to any qualified person. So it was not diagnosable."

And later:

> "That was a presumptive diagnosis made in retrospect based on the facts."

And later:

> "Q. What do you mean by sub-clinical, doctor?
> A. Basically not reaching, as I've said, not reaching the threshold of diagnosis for DSM-V condition. In other words, not reaching the threshold criteria for either a DSM-V major depressive disorder or an anxiety disorder. In other words, severe or moderately severe symptoms of anxiety or low mood, which we might all suffer from time to time or might all experience, but not necessarily reaching the criteria for a diagnosable condition as per the DSM-V."

And later, being asked to describe to the Appellant's mental impairment, said:

> "...The symptoms of confusion, forgetfulness, poor executive functioning, impaired prioritisation of information and so forth."
>
> CONCLUSION ON IMPAIRED MENTAL FUNCTIONING HERE

165. Upon the purposive interpretation and looking to text and context, the Tribunal finds that what is required is a diagnosable condition.

166. The Tribunal is not satisfied that the test requires brain or head injury or a developmental issue of the type advanced by the Respondent.

167. There is no reason to limit the facts and circumstances of each case to such a limitation.

168. Incidentally, the Tribunal does not find that the words "or duress" in the sub-rule provide any guidance or limitation in respect of the subject test here or vice versa when considering duress.

169. The Tribunal is satisfied that the sub-rule requires some lessening of function that need not be permanent.

170. The Tribunal finds that the rule-makers have not limited the expression, and they could have, by adding words such as "diagnosable psychiatric condition" or "medical condition". Therefore, it can be something less.

171. The Tribunal agrees that impairment means there is some lessening of function that need not be permanent.

172. The Tribunal is satisfied that mental merely means related to the mind.

173. The Tribunal finds function, guided by the word impaired, means operation of processes.

174. Therefore impaired mental functioning means some lessening of the mind’s processes.

175. In any event the satisfaction of the test must be determined on the facts and circumstances of each case.

176. On the other hand, the Tribunal is satisfied that more than simple stressors, as submitted by the Respondent and accepted by the Appellant, are required.

177. The Tribunal is satisfied that the sub-rule was not intended to capture such a low level of affectation in view of the seriousness of matters relating to mandatory minimum disqualification and the limited reductions provided from that.

178. Dr Bertucen's evidence was not addressed by contrary expert reports.

179. Accordingly, there is no reason to reject Dr Bertucen's opinions based upon the established facts.

180. Dr Bertucen concluded that the Appellant was not suffering a diagnosable psychiatric condition because she did not reach DSM-V, but she did have a sub-clinical psychiatric condition, that is, adjustment disorder or anxiety, that is a diagnosable condition.

181. It is acknowledged that Dr Bertucen did qualify his findings by stating that they were "a confluence of stressors".

182. It is also noted factually that Dr Bertucen concluded further as follows, answer to question 2 set out above:

> "on the balance of probability to have impaired her mental/cognitive functioning

183. However, as the Tribunal has set out, there were more than just mere stress matters. There was severity for individual symptoms and the seriousness of the combination of them.

184. The Tribunal accepts Dr Bertucen's assessment of her impaired mental/cognitive functioning.

185. The Tribunal is satisfied the appellant had lessening of the mind’s processes or otherwise impaired mental functioning however defined.

186. The burden is on the Appellant to prove on the balance of probabilities that at the time of the commission of the offence she had impaired mental functioning and she does so.

187. The Tribunal finds that the Respondent fails to eliminate a finding that (b)(i) is satisfied.

THE LR 108(b)(ii) TEST AND WHAT IS DURESS

188. The test requires the Appellant to prove on the balance of probabilities at the time of the commission of the offence she was under duress.

189. Duress is not otherwise described or defined in the rules.

190. As set out above under the (b)(i) consideration, the appropriate tests on purposive, text and context must be applied.

RESPONDENT'S SUBMISSIONS

191. The Respondent has sourced a number of dictionary definitions, including Macquarie Dictionary Online, Cambridge Dictionary Online, Collins English Dictionary Online and Oxford Reference Dictionary Online and says that a combination of those leads to the following meanings of the word "duress":

> "(a) threats used to force a person to do something;
> (b) compulsion by the use of force or threats; constraint, coercion;
> (c) pressure, especially actual or threatened force, put on a person to act in a particular way;
> (d) constraint, compulsion."

192. The Respondent challenges the definition given by the solicitor to Dr Bertucen and, as he based his conclusions on that definition, they should be rejected. That is on the basis that the equivalent of "under stress" could found a finding a duress.

193. The opinion of Dr Bertucen is also challenged on the basis he is not normally asked to give an opinion as to whether a person was under duress and, accordingly, he is of the opinion that it is more subjective and less scientific a matter to determine.

194. The Respondent particularly relies upon the fact that duress cannot be simply under stress because otherwise every person in a competitive sport being under stress would be entitled to say they are under duress. It is said, therefore, this could not be the meaning intended by the rule-maker.

APPELLANT'S SUBMISSIONS

195. The Appellant says that "duress" means that the will or judgment of the person is relevantly overborne and this can be achieved by some overt

illegitimate act, but can also arise in circumstances that have an effect on the volitional quality of the act or mental state in issue. It is said that the origin of the word "duress" gives meaning to the word as being hardness or severity.

196. In a submission to the Appeal Panel the Appellant accepts that it is not the case for the Appellant that here a threat was used to force her to do something.

197. That submission relied on a constraint of her in her ability to form an intention and to act on that intention being destroyed by the circumstances. It is said that need not be an immediate effect.

OPINION ON DURESS HERE

198. As set out above, Dr Bertucen in his report concluded in paragraph 2 that, on balance of probability, it caused her to be under a state of duress.

199. The Appellant relies on other factual findings by Dr Bertucen set out above under "Consideration of Impaired and Mental Functioning".

200. Dr Bertucen was cross-examined before the Appeal Panel. He maintained that the definition of "duress" given to him by the solicitor was appropriate for the circumstances of this case. The Respondent put to the doctor that the solicitor's instructions on duress were:

> "Question. It says 'duress' in ordinary English usage may encompass a range of direct and circumstantial pressures acting as a constraint or compulsion. It is not limited to direct threat or inducement, but may include illegitimate, undue or unfair pressure or extremity of circumstances that affects the volitional quality and understanding of an act of omission. Is that the definition you used specifically when you gave your opinion?
> BERTUCEN: I believed that that definition fits the circumstances most aptly."

201. As set out above, Dr Bertucen agreed that in respect of his duress assessment it was more subjective and less scientific.

202. Therefore, as set out above, the Respondent submits his opinion should be rejected. The submission continues that mere stressors are insufficient, as set out above.

CONCLUSION ON DURESS

203. The Tribunal in its conclusions on duress agrees with the case for the Respondent.

204. Duress in the text and context requires more than some effect on volition.

205. The Tribunal is satisfied that duress requires an overbearing of will by threat or force.

206. The Appellant accepts that that is not the case here.

207. Therefore, the Tribunal does not accept that stressors of the type found by Dr Bertucen arose by an overbearing of the will by force.

208. Therefore, the Tribunal rejects Dr Bertucen's conclusion in paragraph 2, as set out above, that duress is established.

209. The Appellant fails to satisfy the Tribunal that, on the balance of probabilities, at the time of the commission of the offence she was under duress.

210. The Respondent, therefore, satisfies the Tribunal that duress under LR 108(b)(ii) is not established.

THE LR 108 TEST OF CAUSALLY LINKED AND SUBSTANTIALLY REDUCES CULPABILITY

211. In view of the above findings the issue now to be considered becomes:

> Has the Appellant proved, on balance of probabilities, that at the time of the commission of the offence she had an impaired mental functioning that is causally linked to the breach of the rules and substantially reduces her culpability?

212. It is convenient to assess "causally linked" and "substantially reduces culpability" together.

213. Neither party has sought to examine the two tests by analysis, case law and so on.

214. The Tribunal is satisfied that both expressions of "causally linked" and "substantially reduces culpability" have, in the text and context, an ordinary meaning and do not require further analysis of definition.

215. The Appellant must establish both.

FACTS ON THE TEST

216. The Appellant had a belief that prior to the new rule in 2013 that the expression "one clear day" meant 24 hours.

217. The Tribunal has set out her evidence to the inspector in the interviews on 30 September 2021 and 7 October 2021 and in exhibit 11, provided to the Stewards at their inquiry.

218. In her submission to the Stewards' inquiry, exhibit 11, as set out above, the Appellant repeated her misunderstanding of the rule.

219. In her evidence to the Stewards' inquiry on 16 November 2021 the Appellant said:

> "So my - it's my fault. It's my problem, but I wasn't aware of the 48 hours. I was always thinking a clear day was 24 hours. We did them early in the morning on the Friday, which at 7 gave us - you know, it worked out him starting at 2. It was 30 hours. I thought I was well and truly clear. I would not - never done anything bad, so that was my understanding."

And later:

> "Well, I understand it was a clear day, so in my mind 24 hours is a clear day. Therefore, it was done early. I thought 30 hours is way out of that 24 hours bracket. That is my - that's the truth, deadset the truth."

And later:

> "...but I was definitely unaware that it needed to be the 12 o'clock the night before the race meeting...."

220. In her statement of 19 November 2021 to the Appeal Panel the Appellant said:

> "e. I knew that I must not cause a horse to receive treatment by stomach-tubing on raceday or within a clear day of a race, but misunderstood the rule as to the reckoning of time as to what a clear day meant. The previous rule prohibited such treatment within 24 hours of the appointed starting time for such race and I had not appreciated the difference in the operation of the present the rule and that a clear day did not mean a clear 24 hours. I now understand my error, for which I have apologised, and

acknowledge that it is my responsibility to understand the Rules of Racing."

221. Before the Appeal Panel and in her statement of 6 December 2021, the Appellant set out the circumstances of her breach and the reasons for it. The Tribunal will return to that evidence.

222. Before the Appeal Panel on 7 March 2022 the Appellant said:

> "...I was definitely unaware of the clear day being from 12 o'clock the day, to Thursday for Saturday. That was entirely my fault, but I was definitely unaware of the rule as such..."

223. It is apparent from the totality of the evidence that the Appellant now understands the rule and will abide by it.

224. Before the Appeal Panel the Appellant was cross-examined and stated:

> "Yes. I remember when Dean said to me that was, you know, outside the required time, I said, "Well, look, the horse was drenched before the 24 hours. It was actually 31 or 32 hours before the race and my recollection of the rule was that 24 hours was one clear day and that's where I've made the mistake.
>
> Q. So that was clearly in your mind at the time when Mr Bucknell interviewed you. In your view at that time, one clear day was 24 hours?
> A. Yes, that's correct."

And later:

> "Q. And the reason for that was you thought you were in the right giving the horse the salt drench 30 hours before?
> A. That's correct."

225. The Appellant did not keep herself up to date by using the systems she should have. The evidence is not in dispute, so it is summarised as follows.

226. She did not do anything between 2013 and 2021 to inform herself on the stomach-tubing rule from that date. She was not aware it had changed. She stated she found it tedious to read the rules and racing calendar. She did not look at the Respondent's website or magazine and she received the latter monthly.

227. Because she used a salt drench only occasionally she did not feel concerned about the one clear day rule.

228. Her evidence was that she would not have acted as she did if she had read the magazine.

229. When the Appellant transferred her stables to Bathurst in 2019 she started to use local vet, Dr Corones.

230. In her interview of 30 September 2021 the Appellant said Dr Corones may not have been aware that the horse was to race on the Saturday and that she did not then advise him of that fact.

231. Inspector Bucknell interviewed Dr Corones on 7 October 2021 and he said:

> "Q. Were you aware that any of those horses were accepted to race on Saturday, 25 September?
> A. No, I was not. Quite the contrary, when Ms Ings spoke to me earlier in the week and asked me if I would saline drench some horses, my understanding was very clear that those horses were all to race on Sunday, the 26th, at Bathurst. Indeed, we had a discussion to when would be the most appropriate time to drench the horses, as they were racing at Bathurst and I said we would have to do them a minimum of 48 hours before the race, which meant Friday."

232. In her interview with the inspector on 7 October 2021 the Appellant confirmed that Dr Corones was not told the horse was to race on the Saturday and it was because the Appellant thought she was within her rights to have the horse drenched on the Friday morning, 30 hours before the race.

233. The Appellant confirmed that fact in her statement to the Stewards, which was exhibit 11, undated, to them.

234. In her statement of 19 November 2021 to the Appeal Panel the Appellant confirmed that the veterinary treatment was for hydration and that Dr Corones was unaware the horse was to race the next day and again set out the above stated misunderstanding of the rules.

235. In her statement of 6 December 2021 the Appellant set out for the first time to establish the causal connection.

236. In paragraphs 4 to 10 she set out her history, as detailed above under "Impaired Mental Functioning".

237. In paragraphs 11 to 13 she described the effects on her of her then circumstances:

> "11. It is my normal practice to confide in my vet, George Corones, and to make sure to give him the relevant details of when my horses are racing whenever I book treatment for them and again when he attends at my stables to look after my horses and to be very clear with him and be careful to be correct in my information. I always follow his advice.
> 12. This time I made a mistake of not being clear to tell him...
> 13. Such a mistake and omission is very unlike me and is contrary to my normal practice. I can only think that I was so tired and overborne by my post-viral exhaustion, chronic pain and lymphoedema, grief, stress and worry that it slipped my mind to mention that detail to him and confirm his advice...I had made a mistake about what the clear rule day meant...Normally I give myself that safety net of following veterinary advice, but on this occasion did I not think to double-check my arrangements by seeking that advice based on all relevant information. Had I followed my usual practice I would have received advice from Dr Corones and avoided a breach of the rule..."

238. Dr Corones made a statement for the Appeal Panel dated 14 February 2022 and stated:

> "11. I spoke to Wanda on Monday, 20 September, or possibly Tuesday, 21 September 21, to book an appointment to attend her stables. Wanda had called me to tell me that she had some horses running at Bathurst on 26 September 2021 and asked me to the effect of how long before racing can we give a saline drench to horses that are not drinking enough...My understanding of the rules is that drenches have to be completed 48 hours before a race, which is when I have always done them..."

239. In that statement Dr Corones confirmed the evidence he had been attending the Appellant's stables, since about 2019, for veterinary work two or three times a week and that she normally is present and there are frequent discussions on the telephone about veterinary care generally.

240. His statement continued that had he been aware the horse was to race on the Saturday, he would have advised a drench was needed on the Thursday. However, the issue of when the horses were racing did not come up again.

241. He continued that the Appellant always accepted his advice and it was not like her to make an error about the day the horse was going to race.

242. The Appellant gave evidence to the Appeal Panel on her arrangements with Dr Corones.

243. She commenced by confirming that she would normally tell Dr Corones the date a horse is engaged to race and that it was her normal practice in discussions with him for her to have arranged for him to attend the horse on the Thursday.

244. Having confirmed that stomach-tubing of horses is done rarely and probably only two in the previous eight months, she went on to say:

> "Q. ...You've said that you actually having consulted Dr Corones about what the requirement is in respect to a stomach-tube? You've never actually asked him that question, have you?
> A. No, I haven't.
>
> Q. So it wasn't your usual practice to ask Dr Corones what the rules required in respect to stomach-tubing because you actually thought it was 24 hours?
> A. That's correct.
>
> Q. So it wasn't your standard practice to ask Dr Corones about stomach-tubing?
> A. No."

And later:

> "Q. Was there any reason at that point in time or at any other time leading up to it as to why you didn't say to Dr Corones that the horse was racing on the Saturday?
> A. Because I thought I was in my rights to do the horses 24 hours before..."

And later:

> "Q. ...that it wasn't the fact that you in fact were under stress and some of the unfortunate circumstances that have occurred in the lead up to this incident that resulted in you then being under stress, but the actual reason why you didn't actually speak to Dr Corones and tell him the horse was racing on the Saturday was because you, in your own mind, thought it was a 24 period. That's the only reason you didn't ask Dr Corones, isn't it?

A. Well, probably the reason why I didn't ask Dr Corones because I was flat out, I was tired and I, yeah, probably I did not. You know, my understanding of the rule was that I thought it was 24 hours, but at the same time I didn't have a chance to talk, like, to confide and talk to him because I had horses coming in and...Probably it was a lot of stress going on at that time..."

And later:

"Q. If you had any concerns about whether it was in breach of the rules, that would have been the time that you would have asked Dr Corones about them?
A. But I wasn't concerned about breaching the rules..."

245. In cross-examination before the Appeal Panel the evidence of Dr Corones was:

"...Ms Ings contacted me, as I've stated, early in the week leading up to the Saturday race meeting at Bathurst, asking me when we could stomach-tube the horses prior to racing and I indicated at that point it was 48 hours and Ms Ings indicated she would get back to me once the fields were out and then she knew which horses had accepted for the race on Sunday."

And later:

"Q. ...Did Ms Ings say anything to you at that point in time or ask you any questions about the horse, when it was racing or what the actual requirements are for the rules?
A. No. Look, to be honest, I don't recall that. I think the conversation we had was a very general conversation..."

And later:

"Q. How did Ms Ings seem to you at that point of time? Was she calm? Was she in a state that you were concerned for her? Anything like that?
A. Not that I can recall. My recollection would be that she was as is usual, calm, chatting, interested in what was going on in the procedure being undertaken.
Q. Did she seem to be under stress when you were there?
A. Not that I noticed."

246. The Appellant gave evidence to the Tribunal and was cross-examined on the incident.

247. The Appellant confirmed that Dr Corones rarely drenched her horses, but when he did so it was with vitamins and salts and that the Appellant knew that that drench contained no prohibited substances and was not swabable.

248. The Appellant confirmed that she only asked Dr Corones about medicines and swabable medications. She did say she would still question him, but it was still worth it for her to tell him when the horses were to race. However, she could not remember what she said to him.

249. The Appellant conceded her only concern at the time was the drenching for hydration purposes and that at the time she knew there were no prohibited substances in the drench.

250. It was put to her that she did not tell Dr Corones the horse was to race the next day and her answer was only that she was concerned that the horses would have a drink.

251. Based upon all of these factual matters Dr Bertucen reported as follows:

> "3(a) On the balance of probabilities, I consider that the effects of the relevant stressors could most likely have caused Ms Ings uncharacteristic lapse of memory and judgment that the veterinary treatment did not fall within the 'clear day' rule at the time of booking the veterinary treatment and at the time of the veterinary treatment.
> (b) Ms Ings' general levels of stress and duress would have been likely on the balance of probability to have caused her to fail to appreciate the true meaning of the 'clear day' rule."

252. Dr Bertucen was cross-examined before the Appeal Panel on this opinion. He stated:

> "Q. ...Ms Ings didn't have a proper understanding of the 'clear day' rule because of those stressors. Is that the response you're giving?
> A. Well, yes. I think that's fairly clear from the response, that as a result of her combination or confluence of stressors, that she most likely experienced a sense of confusion or lapse of judgment, which led her to misinterpret the rule. That was my impression."

And later:

"The combination of poor sleep, exhaustion, possible post-viral syndrome and chronic pain may well have combined to produce that sense of lethargy and confusion, which may have caused her to make a very uncharacteristic mistake."

253. In re-examination before the Appeal Panel he stated:

"Q. ...Would you expect they could also or did also affect her ability to give instructions properly to the vet?
A. Well, I do and there seems to be no other explanation as to why the vet was not informed...A combination of pain, sleeplessness, lethargy, other physical symptomatology may well have contributed to her failure to inform the vet.
Q. ...Would those operating factors on her mental condition that you've described have impaired her ability to understand or appreciate the vet's advice?
A. If the vet had attempted to explain the situation clearly, then, yes, I consider if Ms Ings was suffering from the symptoms described, that may have interfered with her ability to interpret the advice once given. Yes. I think that's plausible."

RESPONDENT'S SUBMISSION

254. The Respondent emphasises the Appellant's failures to keep up to date were contrary to the obligations of a licensed trainer. The Respondent submits that the Appellant has never spoken to Dr Corones about the one clear day rule. The Respondent submits that the Appellant believed she was within her rights to do what she did, therefore, she had no reason to discuss the timings with Dr Corones.

255. The Respondent, therefore, submits that the Appellant's failures had nothing to do with her impaired mental functioning.

256. The Respondent submits that there is no evidence to establish that the Appellant suffered her sub-clinical condition from 2013 to months prior to the breach. The Respondent also noted that the Appellant now understands the rule and will abide by it.

257. The Respondent notes that before the Appeal Panel it was established that her misunderstanding of the rule was unaffected by the impaired mental functioning.

258. The Respondent further submitted that Dr Corones did tell the Appellant it was a 48 hour requirement, but the Appellant does not recall that. The Appellant again emphasises that the Appellant did not ask Dr Corones questions about the timings because she thought she was acting correctly.

APPELLANT'S SUBMISSION

259. It is submitted that the Appellant knew the one clear day rule, but misunderstood it and had done so for a long time.

260. The Appellant submits, but the Respondent does not agree, that it was the Appellant's practice to correctly inform Dr Corones of racing engagements, that she followed Dr Corones' advice each time and, accordingly, she had a safety net. The Appellant submits that the Appellant merely made an error.

261. The Appellant accepts Dr Corones attempting to explain a need for a 48 hour gap before drenching to her, or on the Friday, or both, but notes that the Appellant could not recall this.

262. Therefore, it is submitted that the Appellant, having received the explanation, did not appreciate it or understand it and, therefore, there was no realisation of her misconception.

263. The Appellant submits that even experienced lawyers struggle with the precise meaning of the once clear day rule and that is why there is a need for continuing explanation of it by the Respondent.

264. Therefore, the Appellant submits that the safety net broke down. Therefore, Dr Bertucen's opinion should be accepted.

265. The Appellant submitted to the Appeal Panel that the impaired mental functioning is such that the Appellant made a mistake about the rule and did not follow her usual practices.

266. Therefore, it is submitted that there is a causal link and that is Dr Corones' attempt to explain the rule and her not appreciating the explanation and then failing to give Dr Corones correct instructions, which was contrary to her normal practice.

CONCLUSION ON CAUSALLY LINKED

267. The Tribunal is satisfied that the evidence is quite clear.

268. The Tribunal accepts Dr Corones' evidence that he was not told the horse was to race on the Saturday.

269. The Tribunal accepts Dr Corones' evidence that he told the Appellant when he understood it was to race on the Sunday that it needed to be drenched 48 hours before or on the Friday. It matters not which was correct.

270. The Tribunal accepts that the Appellant and Dr Corones regularly discussed horses and treatment, but that Dr Corones had only drenched the Appellant's horses on two or three occasions in that year.

271. The Tribunal finds that the Appellant had no concerns about what was to be in the drench, that is, vitamins and salt, and that there were to be no prohibited substances or substances of concern.

272. Therefore, the Tribunal finds the Appellant had no need from her perspective to discuss general concerns, as was her usual practice, with Dr Corones on the subject drenching.

273. The Appellant unequivocally believed that the administration of the drench on a Friday, some 30 hours before the race, was legal.

274. Therefore, the Appellant had no reason to discuss with Dr Corones the fact it was racing on the Saturday.

275. The Tribunal is satisfied that on the 48 hour, or Friday, explanation not being recalled by the Appellant made no difference to her belief at the time of the incident.

276. To the Appellant it was a mere welfare drench for hydration.

277. Her misunderstanding was such that her usual practices or concerns were not enlivened in her mind. No alarm bells were ringing. There was no reason to be concerned about Dr Corones’s comments on the 48 hour rule or drenching on the Friday.

278. The impaired mental functioning material had nothing to do with her actions, or inactions at the time of the incident.

279. The Tribunal accepts those impaired mental functions existed, but did not affect a change or oversight, et cetera, in her understanding, that is misunderstanding, of the legality of a drench at that time or what Dr Corones

was saying. There was no failure to appreciate what Dr Corones told her. There was no breakdown in her safety net.

280. Dr Corones did not recall her as stressed at the time of the drenching, but that she was her normal self. This provides reinforcement that she was not concerned.

281. Therefore, the Tribunal cannot accept the opinion of Dr Bertucen that the stressors caused an uncharacteristic lapse of memory and judgment because the factual foundation to support that opinion is not accepted.

282. The Tribunal is satisfied that nothing lapsed - she was completely sure she was acting correctly. She did not have a lapse of judgment. That sureness was not displaced because of impaired mental functioning.

283. The Tribunal does not accept the opinion of Dr Bertucen that the impaired mental functioning caused her to fail to appreciate the true meaning of the clear day rule because the factual foundation to support that opinion is not accepted.

284. There was nothing she had to appreciate. She had a longstanding belief of the rule. That did not change in the months leading up to the incident. That belief was not affected by impaired mental functioning.

285. The Tribunal is satisfied that there is no link between her impaired mental functioning and her not following her usual practice in dealing with Dr Corones. There was no need to deal with the issue with Dr Corones because of her fixed misunderstanding of the rule, therefore nothing to discuss, therefore nothing that impaired mental functioning caused her to do differently.

286. The Appellant's impaired mental functioning is not linked to her conduct and the breach.

287. The Appellant does not prove, on the balance of probabilities, that at the time of the commission of the offence her impaired mental functioning is causally linked to the breach.

288. The Respondent satisfies the Tribunal that the Appellant has not established the appropriate link.

CONCLUSION ON SUBSTANTIALLY REDUCES CULPABILITY

289. It is not now necessary to deal with this test, but for completeness it is.

290. This second limb was not directly addressed in submissions because the Tribunal accepts that the parties saw it as linked with the causally linked test.

291. Because the Tribunal is satisfied that there is no link between the impaired mental functioning and her conduct, there likewise is no factual or legal reason to find that the Appellant's culpability is reduced by it.

292. The consideration of this test does not bring in a reconsideration of the general subjective factors, which are not in dispute.

293. The impaired mental functioning factors had nothing to do with the offending.

294. The objective seriousness of her conduct, which has been reflected upon before and when diminished by favourable subjective factors, does not lead the Tribunal to conclude that the impaired mental functioning, when otherwise considered, would cause any reduction in culpability, let alone a substantial reduction.

295. The seriousness of her failures were not reduced by her impairment.

296. The Appellant fails to satisfy the Tribunal, on balance of probabilities, that at the time of the commission of the offence her impaired mental functioning substantially reduced her culpability.

297. The Respondent satisfies the Tribunal that this ground is not made good.

CAN THE PENALTY OF DISQUALIFICATION BE REDUCED TO SOMETHING LESS

298. For the reasons set out above the Tribunal has determined that the only reduction from the mandatory minimum disqualification is for the LR 108(2)(a) plea and assistance and that was determined at 25%.

299. The imperative to consider other reductions under LR 108 has fallen away.

300. The Tribunal finds it is not the case on the facts and circumstances here in a discretionary instinctive synthesis consideration of a civil disciplinary penalty that the mandatory minimum disqualification should be substituted by any other penalty type.

301. The strong subjective factors set out above do not displace the regulator's consideration that, harsh as it may be, that a disqualification can be other than a minimum type of penalty.

302. The Tribunal reflected at length in its decision in McDonald on circumstances in which lesser periods of disqualification may be appropriate (see paragraphs 92, 93 and 95).

303. Accordingly, as the Tribunal is of the opinion that a disqualification is appropriate on its findings, it is not necessary to deal with the detailed arguments that another type of penalty could be applied.

304. However, in case it is necessary to do so in the future, some brief remarks are made.

305. The starting point on this consideration is the change in the wording of the rule. That is rules 255 and 283, as compared to 196(5).

306. The first change is that the word "whereupon" has been replaced by the expression "in which case".

307. The second change is that the words "the penalty" have been replaced by the words "that penalty".

308. The Tribunal notes that the words "may be reduced" have not changed.

309. The Tribunal notes the intention of the amendments was to modernise and replace the word "whereupon" and that the amendment has certainly done that.

310. However, regardless of intention, it is the rule that is written that must be considered.
'

311. The Tribunal notes the detailed submissions of the Appellant on a proper reading of the new rule as against that which applied in McDonald.

312. The Tribunal finds that the rule, as read, does not change by the removal of the word "whereupon" and its replacement with "in which case”. They are words and expressions that mean the same thing.

313. Therefore, it is not necessary to further examine each of the word and expression in more detail.

314. Contrary to the Appellant's submissions, the Tribunal finds that the new expression using "that penalty" introduces a much stronger concept than that which applied under the old rule where the words "the penalty" were expressed.

315. The Tribunal is satisfied to find that "that penalty" provides certainty.

316. It means that penalty of disqualification not a penalty type generally.

317. It is the penalty of disqualification that may be reduced.

318. The use of the expression "may be reduced" means to make less and it is not compulsory. It does not equate to "substitute" and other like words. That is it does not introduce other penalties.

319. The Tribunal is satisfied that the principles dealt with in the Supreme Court and by the Tribunal in McDonald remain apt on this point.

320. The Tribunal declines, therefore, to consider a fine or suspension is appropriate.

321. The Tribunal does not examine the detailed submissions of the parties further on this issue because, on the findings here, it is not necessary to do so.

DETERMINATION

322. The Tribunal is satisfied that the Respondent has established that a disqualification of nine months is appropriately calculated by applying the mandatory minimum disqualification of 12 months, reduced by three months for special circumstances.

323. The Tribunal again notes that this was an appeal against a three month disqualification and that has failed and the penalty increased , but not more than the stewards determined. The appellant was clearly on notice that this outcome was sought by the respondent and was a possibility.

324. The expiry date of the disqualification can be determined by the parties.

ORDER

325. The Tribunal imposes a period of disqualification of nine months.

326. The severity appeal is dismissed.

APPEAL DEPOSIT

327. By reason of the matter having been determined by reserved decision, the parties have not been invited to make applications or submissions in respect of the appeal deposit.

328. The Tribunal allows the Appellant seven days from the receipt of these written reasons for decision to make an application for a refund of the appeal deposit in whole or in part. That application should be accompanied by submissions and, if made, will be referred to the Respondent for reply and, if necessary, referred back to the Appellant for any other comments to be made on her behalf.

POSTSCRIPT

RELEVANT EVIDENCE

APPEAL PANEL BUNDLE
Notice of Appeal, decision of stewards, stewards hearing transcript, records for the appellant and the horse, interview appellant 30.9.21 and 7.10.21, interview Dr Corones 7.10.21, undated statement of appellant
Appellant's evidence bundle including, statements of appellant of 19.11.21 and 14.2.22, statement of Dr Corones 6.12.21, medical reports Dr Bertucen of 15.2.22 and Dr Duckworth 2.12.21, 26 references, Farmer report September 21, letter of instructions to Dr Bertucen.

APPEAL PANEL TRANSCRIPT AND DECISION.

APPELLANT'S STATEMENT 30.3.22

MEDIA RELEASE RACING AUSTRALIA 20.2.19

AIDE MEMOIRE
Appellant's case list comprising 23 cases
Appellant's additional cases Allianz [2005] HCA 26 and March [1990] HCA at 508
Respondent's definitions bundle

SUBMISSIONS
Respondent 25.4.22
Appellant 26.4.22