

RACING NEW SOUTH WALES APPEAL PANEL

THE APPEAL OF COLUM McCULLAGH

Appeal Panel:	Mr R. Beasley SC, Principal Member; Mrs J. Foley; Mrs S. Skeggs
Appearances:	Mr M. Van Gestel, Chairman of Stewards, for the Stewards Mr W. Pasterfield, Solicitor, for the Appellant
Date of Hearing and Orders:	2 March 2022
Date of Reasons:	4 March 2022
Rules involved:	AR228(a) – Conduct prejudicial to the interests of Racing AR233(a) – Breach of Racing NSW Policy COVID-19

REASONS FOR DECISION ON PENALTY

Mr R Beasley SC, for the Panel

Introduction

1. On 30 December 2021, Licensed Stablehand Mr Colum McCullagh (the Appellant) pleaded guilty to engaging in conduct prejudicial to the image of Racing in breach of AR228(a). The appellant is the Racing Manager for Snowden Racing. The charge brought against him was particularised this way:

“...after displaying COVID-19 like symptoms on Sunday 19 December 2021, he obtained a COVID-19 test in agreement with Mr Snowden and then attended Randwick, Wyong and Canterbury Racecourses and the licensed stable premises of training partnership Mr Peter and Paul Snowden on 20 and 21 December 2021, prior to receiving his COVID-19 test result, which returned positive on the morning of 21 December 2021.”

2. On the same day, the Appellant pleaded guilty to a breach of AR233(a) for his non-compliance with the Racing NSW Policy concerning Covid 19. Particulars for this breach were similar to the breach of AR228(a) in that his conduct in attending

racecourses and stables prior to receiving his COVID-19 test result was in breach of this policy.

3. Having heard submissions from the Appellant on 30 December 2021, the Stewards suspended his licence for 3 months for both breaches of the Rules (following a reduction for the Appellant's guilty pleas). The Stewards determined that the penalties should be served concurrently. The Appellant has appealed to the Panel in relation to the severity of the penalty imposed on him, and has been on a stay pending the outcome of the appeal hearing.
4. The Appellant was represented by Mr W. Pasterfield, solicitor, at the appeal hearing, and the Stewards were represented by Mr M. Van Gestel, the Chairman of Stewards.
5. There was no oral evidence called at the appeal hearing. Instead, an Appeal Book, containing the transcript of the Stewards' Inquiry, and the exhibits tendered at it, were tendered. In addition, Mr Pasterfield tendered the following documents for the Appellant:
 - (i) a letter from Snowden Racing dated 28 February 2022 indicating that 90% of the duties of the Appellant in his employment as Racing Manager involved work in the stables and the racetrack, with only 10% of his duties being office work: Ex 1;
 - (ii) a certificate from the Appellant's general practitioner concerning his history of recurrent tonsillitis: Ex 2;
 - (iii) copy of a script for antibiotics in relation to the Appellant's tonsillitis condition: Ex 3; and
 - (iv) a series of text messages to the Appellant containing numerous negative results from COVID-19 testing throughout 2021: Ex 4.

Evidence

6. There are no matters of controversy in the evidence. The essential facts are particularised in the charges brought against the Appellant. The Appellant's evidence was that prior to taking his COVID-19 test on 19 December 2021 his symptoms were a runny nose and a tickle in his throat, which he felt were related to his tonsillitis condition. After taking his COVID-19 test, the Appellant did not receive his test results in the timely fashion that he had on prior occasions. He therefore worked on 20 and 21 December 2021 until he obtained his COVID test result. This saw him working in the stables and at the racetracks as particularised in the charge. He came into close contact with a number of people. This included coming into contact with other people and trainers at the trainer's tower at Randwick Racecourse. He admitted he was supposed to be self-isolating until he obtained his test result, but did not do so, seemingly because his symptoms were his usual tonsillitis-type symptoms which is what he thought he had: Stewards' Inquiry T4.199-.200.

Submissions

7. Mr Van Gestel placed reliance on two prior decisions of the Panel involving breach of the same rules relating to COVID-19. These were *The Appeal of John Sharah* (2 September 2021) and *The Appeal of Apprentice Jockey Tommy Sherry* (14 October 2021). Both of these Panel decisions involved similar factual circumstances to the appeal here. They both involved symptomatic licensed persons undertaking a COVID test and yet failing to self-isolate until such time as they received a positive test result.
8. In *Sharah*, the appellant came into close contact with six people in the racing industry who had to immediately get tested and self-isolate for 14 days. A further twenty-five people had to immediately get tested and isolate until they obtained a negative result. Special measures had to be adopted for two race meetings as a result of the appellant's conduct. Mr Sharah was penalised with a 9-month suspension by the Stewards. His appeal against the severity of penalty was dismissed by the Panel.
9. In the case of *Sherry*, it can be noted that Mr Sherry, unlike the Appellant here, was unaware of the Racing NSW Policy that he breached. He of course should have been aware of that Policy. The stables of his master were inconvenienced as a result of Mr

Sherry's actions, although no person contracted COVID as a result. There were also some subjective circumstances in relation to Mr Sherry which resulted in him receiving a 4-month suspension from the Stewards. That penalty was confirmed by the Panel on appeal, save for the Panel suspending 2 months of that suspension under AR283(5) for 2 years.

10. In his submissions, Mr Pasterfield emphasised that the Appellant had made a silly mistake in self-diagnosing himself, but asked the Panel to consider that he had undergone multiple tests in the period leading up to this offending, and on each occasion had tested negative for COVID. We were asked to take into consideration the Appellant's good character, the evidence of his hardworking approach to his duties, and the fact that a suspension will have a severe financial impact on him as very little of his duties are now related to office work. There was no suggestion, however, that a suspension would jeopardise his employment.

Resolution

11. The Panel accepts the submission of Mr Van Gestel that this matter involves serious offending. It involves a risk to the health and livelihood of others. That risk should never be thought of as trivial or fanciful. It is a real risk. The COVID-19 pandemic has had enormous negative consequences for many industries and businesses and the relevant policy here was established by Racing NSW in an attempt to keep the industry going during the pandemic and protect it and its participants from potential catastrophe. It is a serious matter when such a health policy is breached.
12. The Panel does, however, accept that the Appellant genuinely thought, mistakenly, that his symptoms were associated with his tonsillitis condition. That is not an excuse, but it does explain his conduct. There is no evidence that any of the persons that the Appellant came into contact with contracted COVID-19 from him.
13. The Panel is unanimous in the view that the conduct relating to the Appellant's breaches of the Rules warrants a suspension. It should be noted that there has already been some leniency from the Stewards in their imposition of penalty. Whilst they suspended the Appellant's licence for 3 months, they exercised their discretion under

AR270 to structure the suspension such that the Appellant would (only) be able to undertake office duties.

14. All members of the Panel consider that the penalty of a 3-month suspension imposed by the Stewards, and reflecting the Stewards' use of AR270, is appropriate. There is otherwise a slight disagreement amongst the Panel.
15. Mrs Foley and I consider that the last month of the 3-month suspension should itself be suspended under AR283(5) for a period of 12 months on the basis the Appellant not breach any conduct rules of the Australian Rules of Racing. Mrs Skeggs would have suspended the last 6 weeks of the 3-month suspension.
16. The orders of the Panel are as follows:
 - (1) Appeal against severity of penalty allowed.
 - (2) Suspension of the Appellant's licence for 3 months is confirmed. Pursuant to AR270, the Appellant is not permitted to attend:
 - (i) Mr Snowden's stable area during the period of suspension;
 - (ii) any racecourse for the purpose of supervising trackwork (trainer's stand or any other position);
 - (iii) any area on race day that is restricted to licensed personnel (including but not limited to the weighing room and tie-up stalls).
 - (3) By majority, the last month of the Appellant's 3-month suspension is itself suspended under AR283(5) for a period of 12 months on the basis the Appellant not breach any of the conduct rules of the Australian Rules of Racing. The Appellant's suspension is therefore to commence on 2 March 2022 and expires on 2 June 2022, noting, however, that the suspension is suspended from 2 May 2022 on which day the Appellant may resume normal duties.
 - (4) Appeal deposit to be refunded.