**APPEAL PANEL OF RACING NEW SOUTH WALES**

**APPEAL OF LICENSED TRAINER MR TROY O'NEILE**

| | |
|---|---|
| Appeal Panel: | **Mr R. Beasley SC, Presiding Member; Mrs J. Foley; Mr P. Innes** |
| Appearances: | **Ms K. Campbell, Legal Counsel for Racing NSW** |
| | **Mr M. Callinan for the Appellant** |
| Date of Hearing: | 27 February 2023 |
| Date of Reasons: | 7 March 2023 |
| Rules involved: | AR 233(c) Sexual harassment; AR 228(b) Improper conduct |

**REASONS FOR DECISION ON PENALTY**

**Mr R Beasley SC, Presiding Member**

**Introduction**

1. On 24 January 2023, licensed trainer Mr Troy O'Neile (the Appellant) pleaded guilty to a breach of AR233(c) of the Australian Rules of Racing (the Rules). That rule provides as follows:

> **AR233 Other misconduct offences**
>
> *A person must not:*
> *...*
> *(c) engage in sexual harassment of a person employed, engaged in, or participating in the racing industry.*
>
> **AR2 Dictionary**
>
> *Sexual harassment means:*
>
> *(a) subjecting a person to an unsolicited act of physical intimacy; or*
>
> *(b) making an unsolicited demand or request (whether directly or by implication) for sexual favours from a person; or*

*(c) making a remark with sexual connotations relating to a person; or*

*(d) engaging in any other unwelcome conduct of a sexual nature in relation to a person, where the person engaging in the conduct described in paragraphs (a), (b), (c) or (d) does so*

*(i) with the intention of offending, humiliating or intimidating the other person; or*

*(ii) in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.*

*The conduct described in paragraphs (b), (c) and (d) includes, without limitation, conduct involving the internet, social media, a mobile phone, or any other mode of electronic communication.*

2. The particulars of the breach of AR233(c) were as follows:

*1. You are a licensed trainer with Racing NSW.*

*2. While* [apprentice jockey] *Ms Owen was acting in the course of her duties while employed in the racing industry on 24 December 2022 at Tamworth Racecourse you made the following remark and action:*

*(i) As you gave instructions to Ms Owen near the mounting enclosure prior to her riding "Eighth Immortal" for you in race 8, you said words to the following effect "If you don't win on this horse, I'll jam your face up to my cock".*

*(ii) At the same time as saying those words you gestured by thrusting your pelvis.*

*3. Such remark, exacerbated by the thrusting action of your pelvis, is sexual harassment as it has a sexual connotation relating to Ms Owen made in circumstances where a reasonable person would have anticipated that Ms Owen would have been offended and/or humiliated and/or intimidated by the remark and action.*

3. The Appellant also pleaded guilty to a breach of AR 228(b) of the Rules, which makes it an offence for a person to engage in "misconduct, improper conduct, or

unseemly behaviour". The particulars of the breach of this rule are sufficiently similar to the particulars for the breach of AR233(c) that they need not be repeated.

4. After hearing submissions made for the Appellant by his legal counsel at the Stewards' Inquiry, including the consideration of written submissions, the RNSW Stewards determined that the base penalty for both offences was a disqualification of 12 months. Each penalty was reduced to a 7 month disqualification as a result of the Appellant's guilty plea, and various subjective circumstances. The Stewards determined that the penalties should be served concurrently.

5. The Appellant has appealed to the Panel against the severity of the penalty imposed upon him. He was represented by Mr M. Callinan, his solicitor. The Racing NSW Stewards were represented by Ms K. Campbell, legal counsel for Racing NSW.

6. The Appeal Book containing the transcript of the Stewards' Inquiry and various exhibits from it was tendered in evidence and marked as Exhibit A (with the exhibits from the Inquiry retaining the number given to them there).

7. In addition to the material in the Appeal Book, a submission made on the Appellant's behalf dated 12 February 2023 by Mr R. Callender, the CEO of the NSW Trainers' Association, was accepted into evidence and marked as Exhibit B. A further statement of the Appellant dated 19 February 2023 was accepted into evidence, as was a medical report from Dr H. Carr dated 10 February 2023, and a certificate confirming the Appellant had completed a course in "harassment and discrimination" conducted by Sport Integrity Australia.

**Matters relevant to penalty**

8. The Panel has had the benefit of detailed and helpful submissions from Ms Campbell and Mr Callinan. There are no disputed facts, and there is either no dispute or no significant dispute concerning matters relevant to the Panel's determination of penalty.

9. Ms Campbell's submissions in support of the penalty imposed by the Stewards can be summarised as follows:

(a) The penalty to be imposed must serve the principal purpose for the imposition of penalties for breach of the Rules. That is, the penalty is not to punish the appellant, but to protect the image and interests of Racing. To the extent general deterrence is related to that, it is to deter similar conduct from persons that would damage the image and interests of Racing: see, for example, *The appeal of Noel Callow*, Racing Appeal Panel, 3 April 2017, at [37]-[42].

(b) The admitted conduct is that described in the particulars of the charge. That conduct is disgraceful, and has no place in Racing. It is objectively very serious offending under the Rules.

(c) The conduct is aggravated by the fact that it occurred immediately before the apprentice jockey was due to ride in a race. At a minimum, the conduct had the potential to "rattle" or upset the apprentice rider in circumstances where she was about to engage in an inherently dangerous sport where riders' "wits" should never be potentially compromised by the inappropriate or offending conduct of others. There is evidence in the Appeal Book gathered by the Stewards and Racing NSW investigators that the apprentice rider was understandably both "upset" and "frazzled" by the conduct. That does raise a safety issue.

(d) The conduct occurred in a working place or work environment. That environment is increasingly occupied by women who should not be subjected to this kind of offending conduct, and who need to know that their work environment is safe from it.

(e) There is an obvious power dynamic difference between the Appellant as a licensed trainer and an apprentice jockey. There was a considerable size and age difference. This brings to the conduct an additional element of intimidation.

10. I accept all of the above submissions made on behalf of the Racing NSW Stewards by Ms Campbell.

11. Having made the above submissions, Ms Campbell accepted some of the matters put in mitigation by Mr Callinan that are referred to below. This includes the concession made by the Stewards at the Stewards' Inquiry that the conduct was "out of character", and that specific deterrence did not loom large as a consideration given that the Appellant is "not likely to repeat that type of conduct": Stewards' Inquiry T-7.313.

**Appellant's Submissions**

12. No attempt was made by Mr Callinan to minimise the seriousness of the Appellant's conduct. Rather, he asked the Panel to bear in mind these matters when determining penalty:

    (a) While appalling, the Appellant's conduct was an isolated instance of conduct constituting sexual harassment. It was not part of a pattern with other women, or with the apprentice jockey herself.

    (b) The evidence and character references tendered at the Stewards' Inquiry establish that the Appellant has been a person of otherwise good character, with a good professional record as a licensed trainer. He has made a positive contribution to both Racing and his local community.

    (c) The Appellant has proper insight into his offending. He is contrite and ashamed. He has offered genuine apologies to the apprentice rider, her mother, and to the Stewards for his conduct.

    (d) The Appellant has completed an appropriate course on sexual harassment. He is more than remorseful. He has sought to understand the full impacts, potential and otherwise, of his offending conduct.

    (e) Such conduct has not occurred in the past, and is extremely unlikely to occur again. Although not offered as an excuse, the Appellant's judgment at the time of the conduct was clearly impaired by excessive consumption of alcohol. The evidence from the Appellant's staff is that the conduct was out of character to the employer/trainer they have observed in the past.

(f) The publicity concerning the conduct has had an adverse impact on both the Appellant and his family.

(g) A seven-month disqualification will have a devastating impact on the Appellant, his family, and his staff. He has 34 horses in his stable that will need to leave. He has three full-time staff and other casual staff who will lose their immediate employment. The Appellant has numerous financial obligations the Panel has been made aware of.

(h) A disqualification is more suited to a person whose conduct tends to demonstrate that they are not presently a fit and proper person to hold a licence. When all relevant circumstances are considered, the Appellant's appalling but isolated conduct should not lead to a finding that he is not a fit and proper person to hold a trainer's licence.

**Resolution**

13. I have given consideration to all submissions made by Mr Callinan, as well as accepting the submissions made by Ms Campbell as to the matters relevant to our determination. There is limited precedent for guidance. In addition to what I have said above about the purpose of imposing penalties for breaches of the Rules, I also consider that we should exercise our discretion to ensure that the penalty that we arrive at:

(a) is proportionate to the gravity of the offence;

(b) deters the offender (where specific deterrence is relevant) and other persons from committing similar breaches of the Rules;

(c) takes into consideration all conduct that could be considered aggravating of the breach of the Rules; and

(d) takes into account matters such as early plea, cooperation, evidence of good character, and evidence of insight into the offending, as well as remorse and contrition: see generally, *Norman Loy and Racing NSW*, Racing Appeals Tribunal, 29 March 2022 at [66].

14. I have found the determination of appropriate penalty in this matter difficult. The conduct the subject of the charge is obviously objectively very serious. Without wishing to put on the hat of an employment lawyer, it is conduct that for an employed person would be highly likely, in most workplaces, to result in summary dismissal. However, after considering all relevant matters, I am of the view that the appeal against severity should be allowed. Accepting the vulgar and utterly inappropriate nature of the Appellant's conduct, in circumstances where it is isolated conduct of a person of otherwise good character who has a long record of a positive contribution to Racing, I consider that a base penalty of a 12 month disqualification for each breach to be too severe. Disqualifications of many months are potentially financially ruinous, and while a penalty must protect the sport, and send a message that such conduct will not be tolerated, that message can be given short of imposing a disqualification of 12 months as a base penalty.

15. It can be stated now though that there might be instances where breach of AR233(c) involving sexual harassment would appropriately result in a disqualification, and of an even longer period than 12 months. In all the circumstances here, however, this is not such a matter.

16. I am of the view that the conduct is too serious for the imposition of a modest fine, but I consider that the nature of the penalty should be changed from disqualification to suspension. I am also of the view that a 12 month period is too long as a base. I consider that the appropriate base penalty for the offending here, when all the circumstances are considered, is a 6 month suspension of the Appellant's licence to train. I consider it is also appropriate to reduce that penalty to a 4 month suspension in light of the Appellant's early plea, cooperation and frank admissions. This applies to the breach of both rules. The penalties should also be served concurrently.

17. Ms Foley and Mr Innes agree with me as to the period of the penalty, but they would maintain that penalty as a disqualification, not a suspension. For what it is worth, while I disagree, I consider the penalty they have arrived at to be well within the range of reasonable penalties for the offending under the rules here. Their majority view on that is reflected in the Panel's orders below.

**Mrs J Foley and Mr P Innes**

18. We have read a draft of the Reasons for Decision of the Presiding Member. We agree with the matters that he says are relevant to the Panel's determination of penalty as set out in [9], [12] and [13] above. We are also of the opinion that a base penalty of a 12-month disqualification for each breach of the Rules is longer than is appropriate. We also agree with the Presiding Member that a base penalty of 6-months is appropriate, reduced to 4-months because of the Appellant's plea, cooperation, and contrition. However, we respectfully disagree that the penalty should be a suspension rather than a disqualification.

19. While we have taken into account all of the matters in mitigation referred to by the Presiding Member above, we are particularly concerned that this incident took place in a workplace, and so close to the apprentice jockey competing in a race. Our decision must protect Racing from such behaviour, and seek to send a message that such conduct will be deterred so that Racing is seen and felt to be a safe place for women riders. For those reasons in particular, we would reduce the penalty from 7-months in total to 4-months for both breaches, but in our view the nature of the penalty should remain a disqualification rather than a suspension.

**Orders**

20. The Panel is unanimous that the appeal against severity of penalty should be allowed. By majority, the penalty should reflect a base disqualification of 6 months for each breach, reduced to four months to take account of the appellant's plea and cooperation. The Panel makes the following orders:

    (1) Appeal against severity of penalty allowed.

    (2) The penalties of a 7 month disqualification for the breaches of AR233(c) and 228(b) are set aside.

    (3) In lieu of a 7 month disqualification for the breaches of AR233(c) and 228(b), a penalty of a 4 month disqualification is imposed for each breach. Those penalties are to be served concurrently, meaning that the total penalty imposed is a 4 month disqualification. That disqualification is deferred for 7 days from the date of these Reasons under AR283(7) (noting however that AR 283(8)

still applies) save that the Appellant may elect, with the agreement of the Stewards, to commence his disqualification earlier. On the day following the end of the disqualification, the Appellant may reapply for his license.

(4) Appeal deposit to be refunded.