

RACING APPEAL PANEL OF NEW SOUTH WALES

APPEAL OF JOHN SHARAH

Panel: Mr R Beasley SC, Principal Member; Mr J Murphy; Ms J Foley

Appearances: For the Stewards: Mr M Van Gestel.

For the Appellant: Mr P O’Sullivan, Solicitor

Date of Hearing: 2 September 2021

Date of Reasons: 2 September 2021

REASONS FOR DECISION

Mr R Beasley SC, for the Panel

Introduction and outline of agreed facts

1. Licensed trainer Mr John Sharah (the appellant) has appealed to the Panel against the severity of the penalty imposed upon him by Stewards following his plea of guilty relating to breaches by him of Covid-19 measures imposed by Racing NSW.
2. On 17 August 2021, Racing NSW Stewards conducted an inquiry into whether the appellant had on both 29 and 30 July 2021 breached certain Covid-19 “protocols and policies” developed and implemented by Racing NSW.
3. Following the gathering of evidence, including taking oral evidence from the appellant, the following facts were made out, none of which was disputed on this appeal:
 - i. On Thursday 29 July 2021, at about 4pm, the appellant obtained a COVID-19 test as:

- (a) he had displayed COVID-19 like symptoms the day prior (a cough while wearing a mask); and
 - (b) his horses were located in the Campbelltown LGA that had been placed into restricted lockdown the day prior.
- ii. Prior to taking the Covid test at Hurstville on 29 July, the appellant had attended trackwork at the Warwick Farm racecourse that morning. This was despite having developed a cough from 28 July, while otherwise feeling well.
 - iii. On the morning of Friday 30 July 2021, the appellant attended Warwick Farm racecourse for trackwork, before he had been advised of the outcome of his Covid test.
 - iv. On or around midday on Friday 30 July 2021, the appellant was advised by NSW Health that his COVID-19 test had returned “positive” to the virus. Six people immediately became “close contacts” of the appellant, and another 25 were impacted as “casual contacts”.
 - v. The appellant immediately contacted Racing NSW to advise of the test result, and identified racing industry participants with whom he had been in close contact.
4. There is no dispute that in attending Warwick Farm racecourse at a time when he had a cough on 29 and 30 July 2021, the appellant breached protocols developed by Racing NSW (Exhibit 4). As a result of the conduct outlined in iii in the paragraph above, the appellant additionally breached “self-isolation rules” of NSW Health, which are enforceable under a Public Health Order (Exhibit 3).
5. As a result of his conduct, the appellant was charged with a breach of AR228(a) of the Australian Rules of Racing, which provides as follows:

AR 228 Conduct detrimental to the interests of racing

A person must not engage in:

- (a) conduct prejudicial to the image, interests, integrity, or welfare of racing, whether or not that conduct takes place within a racecourse or elsewhere.*

6. The particulars of this charge were that the appellant:

- *breached Racing NSW COVID-19 protocols and policies by attending Warwick Farm racecourse on Thursday 29 July 2021 having displayed COVID-19 like symptoms the day prior, and by attending Warwick Farm racecourse on Friday 30 July 2021 after being tested for COVID-19 when he was required to self-isolate and wait for his test result.*
 - *breached the requirement of the NSW Government that persons that have COVID-19 like symptoms are to immediately undertake a COVID-19 test and to self-isolate until they receive a negative test result,*
- such conduct detailed above having the potential to compromise the continuance of the NSW thoroughbred racing industry during the pandemic and increasing the risk of endangering the health and safety of all NSW Thoroughbred Racing Industry participants that he came into contact on those days.*

7. The appellant was further charged with a breach of AR233(a) of the Rules, which provides that:

AR 233 Other misconduct offences

A person must not:

(a) breach a policy, regulation or code of practice published by Racing Australia or a PRA;

8. The particulars of this charge were substantially the same as those for the charge brought under AR228(a).
9. The appellant pleaded guilty to both charges. The Stewards considered a base penalty of a 12-month suspension was appropriate for both breaches of the rules, to be served concurrently. Taking into account the appellant's plea, and what were said to be certain mitigating factors, that total penalty was reduced to a 9-month suspension.
10. In this appeal against penalty, the appellant was represented by Mr P O'Sullivan, solicitor. The Stewards were represented by Mr M Van Gestel, the Chairman of Stewards. An appeal book containing transcript of the Stewards' Inquiry, and the

exhibits from that inquiry was tendered in evidence. The appellant also gave oral evidence.

Further factual matters and submissions in mitigation

11. A number of matters were put to the Panel in mitigation by Mr O’Sullivan, some of which fell from the appellant’s sworn evidence. The key matters are the following:
- (a) The appellant had visited his GP on 27 July for a matter unrelated to any Covid symptoms, and was then feeling well. On that date he arranged for a Covid vaccination for the coming Sunday.
 - (b) On 28 July, the appellant developed a cough, but only while wearing a mask. He at no stage felt unwell.
 - (c) The appellant attended trackwork on 29 July almost as a “reflex”. He at no time thought he might have Covid.
 - (d) On the afternoon of 29 July, the appellant had a Covid test, partly because of his cough, and partly because he was working in an LGA of concern (Campbelltown).
 - (e) On 30 July, the appellant attended Warwick Farm again, not giving any thought to his test the day before.
 - (f) Once notified of his positive result at about Midday on 30 July, the appellant contacted Racing NSW Stewards, and provided full details of what had occurred to them. He also cooperated with NSW Health contact tracers.
 - (g) The appellant has been training horses for just over 20 years, and has a seemingly unblemished record. It is accepted by the Panel that he is a person of good character and integrity.
 - (h) The appellant is 71 years of age. He clearly loves horses, and is highly attentive to their wellbeing. The evidence demonstrates he (like almost all trainers) works long hours. He has no assistance from paid staff, and is an owner-trainer.
 - (i) He feels that suspension from training will have some negative effect on his health.
 - (j) No aspect of the offending here has a financial motive. No dishonesty is involved.
 - (k) The appellant accepts that his conduct in attending Warwick Farm, particularly on 30 July when his Covid test result was pending, was the wrong thing to do. He is remorseful, and has good insight into the consequences – real and potential – of his conduct.

12. All of the above matters were referred to by Mr O’Sullivan in support of a reduced penalty, including raising the possibility of a fine (as a whole or part penalty). Further, Mr O’Sullivan submitted that prior decisions of the Panel relating to Covid (*The Appeal of Dean Boal* (RAP, 16/10/20); *The Appeal of Laura McCullum* (RAP, 20/8/20)) were distinguishable on their facts from the present case. Those matters involved dishonesty of some kind, and the conduct involved “border hopping”. The disqualifications imposed in those appeals, Mr O’Sullivan submitted, were not a proper form of guidance for the Panel in the circumstances of this case. The Panel largely agrees, given the very different factual circumstances involved in this appeal to the facts of *Boal* and *McCullum*.

Resolution

13. The conduct involved here is objectively very serious offending under the Rules. It involves breaches of Racing NSW’s Covid protocols. These have been developed to protect not only the health of participants in the industry, but the ongoing operation of the industry itself. It involves a serious breach of NSW Health self-isolation rules designed also to protect the health of individuals, but also businesses, and the wider NSW economy. These matters were at the heart of Mr Van Gestel’s submission that the penalty imposed on the appellant was appropriate. He made that submission emphasising that the character of the penalty imposed was a suspension, rather than a disqualification that might otherwise have been imposed but for welfare concerns relating to the appellant’s horses.

14. Mr Van Gestel also drew the Panel’s attention to the actual consequences of the appellant’s conduct. Six racing participants had to get tested immediately and self-isolate for 14 days. That is not a trivial inconvenience to those concerned. A further 25 people had to immediately get tested, and self-isolate until they obtained a negative result. That too is not a trivial consequence. It creates not mere inconvenience, but no doubt understandable worry as well. Special measures also had to be adopted for the race meetings at Randwick on 31 July, and Kembla Grange on 1 August (see generally Exhibit 1).

15. No person was infected with Covid-19 as a result of the appellant's conduct. With a highly transmissible virus like the one that causes Covid, that might simply be the result of very good fortune. The actual consequences of what occurred here were bad enough. The potential consequences were catastrophic. It is no exaggeration that racing in NSW remains in a precarious position for now as a result of the ongoing Pandemic. Racing's management, administrators and Stewards have put in place measures such as the Covid Protocols referred to above to protect the industry and its participants as far as they can be. So far, those measures would seem to have been hugely successful in keeping the industry going. It is essential that participants comply with those protocols, and of course those of NSW Health. Conduct in breach of these measures is highly likely to result in penalties that range to long disqualifications.

16. It has been said in a raft of appeal decisions by this Panel that the purpose of imposing penalties for breach of the Rules of Racing is protective in nature. Having regard to this, the Panel is of the view that the penalties imposed by the Stewards in this matter are measured, and appropriate. We also consider that some leniency has been extended to the appellant in suspending his licence, rather than disqualifying him. The appeal must be dismissed.

17. The Panel's orders are:

1. Appeal dismissed.
2. Penalty of a 9-month suspension for the breach of AR228(a) confirmed.
3. Penalty of a 9-month suspension for the breach of AR233(a) confirmed.
4. Penalties to be served concurrently. The suspension commenced on 16 August 2021, and expires on 16 May 2022, on which day the appellant may resume training.
5. Appeal deposit forfeited.