

APPEAL PANEL OF RACING NEW SOUTH WALES
IN THE MATTER OF LICENSED TRAINER WANDA INGS

Appeal Panel: **Mr L. Vellis - Convenor; Mrs S. Skeggs; Mr C. Tuck**

Representatives: **Appellant - Ms V. Heath, instructed by Mr F.J. Simpson, Solicitor**
Racing NSW - Mr M. Van Gestel, Chairman of Stewards

Date of Hearing: **7 March 2022**

Date of Reasons and Orders: **24 March 2022**

REASONS FOR DECISION

Introduction

1. At a Stewards' hearing conducted on 16 November 2021, the Stewards heard a charge under AR 255(1)(b)(ii) (Stomach-tubing prohibited at certain times) (**Charge**) of The Australian Rules of Racing (**Rules**) issued against licensed trainer Ms Wanda Ings in respect of stomach-tubing a horse (Chur Bro (NZ)) engaged to run in a race (at the Wellington race meeting on 25 September 2021) within one clear day of racing.
2. AR 255(1)(b)(ii) is in the following terms:

"A person must not, without the permission of the Stewards:

(b) cause the stomach-tubing of;

a horse engaged to run in a race, official trial or jump-out:

(ii) at any time during the 1 clear day prior to 12.00am on the day of the scheduled race, official trial or jump-out".
3. AR 2 includes a definition of "clear day", which is as follows:

"clear day means a 24 hour period from 12.00am to 11.59pm".
4. Ms Ings pleaded guilty to the Charge.
5. AR 255(2) is in the following terms:

"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 a race on that race day, if a person breaches subrule (1) a disqualification of not less than 12 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".

6. LR 108(2)(a) and LR 108(2)(b) of The Local Rules of Racing (**Local Rules**) is in the following terms:

"For the purposes of AR 196(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".

7. Applying LR 108(2)(a) and providing a 25% discount, the penalty imposed by the Stewards for the breach of the Charge was a disqualification of Ms Ings' licence for a period of nine months.

8. In addition, acting under the provisions of AR 283(8) Ms Ings was advised that the period of disqualification would be deferred under subrule 7 to allow Ms Ings to care for and make arrangements for horses under her care.

9. Prior to the date of hearing of this Appeal Ms Ings made an application for a successful stay of proceedings and pursuant to separate reasons for decision a Stay of Proceedings was granted to Ms Ings until such time as her appeal against severity of sentence was concluded. Additional orders were made by the Panel with respect to the production of additional evidence by Ms Ings, although such orders do not warrant mention in these reasons.

Appeal

10. Ms Ings appealed to the Panel against the severity of the penalty imposed upon her.

11. Ms Ings was represented on appeal, with leave, by Ms Valerie Heath, instructed by Mr Francis John Simpson.

12. The Stewards were represented in the Appeal by Mr Marc Van Gestel, the Chairman of Stewards for Racing New South Wales.

13. The Appeal Book was tendered in the Appeal as Exhibit A.

14. The Appellant's Evidence was tendered in the Appeal as Exhibit B.

15. Evidence in Reply was tendered by the Stewards as Exhibit C.

16. An Appellant's case list was also provided and the Stewards also provided cases in response.

Submissions by Ms Heath

17. Ms Heath made detailed submissions on various matters including a detailed description of Ms Ings experience as a trainer and generally exemplary record.
18. Ms Heath accepted that on face value that the breach of AR 255(1)(b)(ii) by Ms Ings was caused by an oversight and an erroneous understanding of AR 255(1)(b)(ii) and the related clear day definition.
19. Ms Heath then submitted that in addition to the special circumstances triggered by Ms Ings pleading guilty and rendering assistance to the Stewards at the first possible opportunity, there were additional "special circumstances" applicable, in that on the balance of probabilities, at the time of the commission of the offence, Ms Ings had impaired mental functioning and / or was under duress, and that such impaired mental functioning or duress was causally linked to the breach of the Rule(s) and substantially reduces Ms Ings' culpability.
20. Oral evidence was also received from Ms Ings, Dr Bertucen (Psychiatrist) and Dr Corones (Veterinarian), in addition to written statements or reports (as applicable) included in the Appellant's Evidence tendered as Exhibit B.
21. Dr Bertucen was of the opinion (among others) that at the time of the breach of AR 255(1)(b)(ii) (25 September 2021):
- (a) Ms Ings was most likely on the balance of probabilities was suffering from a sub-clinical psychiatric condition (an Adjustment Disorder or Anxiety Disorder);
 - (b) the confluence of stressors cited would have been likely on the balance of probabilities to have impaired Ms Ings' mental / cognitive functioning and certainly to have caused her to be under a state of duress;
 - (c) 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; and
 - (d) Ms Ings' general level of stress and duress would have likely on the balance of probability to have caused her to fail to appreciate the true meaning of the clear day rule.
22. Ms Heath submitted that it was normal practice for Ms Ings to inform her vet, Dr Corones when horses were being treated to ensure Dr Corones could advise Ms Ings of the appropriate treatment and timing to ensure compliance with the Rules. Ms Heath further submitted that it was as a result of the mental impairment and / or duress suffered by Ms Ings at such time that Ms Ings' normal practice of communicating with Dr Corones regarding the race day of each horse being treated broke down, which ultimately led to the stomach-tubing of Chur Bro in breach AR 255(1)(b)(ii).

23. Ms Heath, along with Ms Ings in her direct evidence, made submissions with respect to Ms Ings challenging recent circumstances, including health conditions and injuries, as well as family related stresses caused by Ms Ings' inability to visit her mother in New Zealand due to COVID-19 restrictions. Ms Heath submitted that Ms Ings' challenging personal circumstances should be taken into consideration as additional special circumstances that could be considered by the Panel when assessing the appropriate penalty for Ms Ings.
24. Ms Heath referred to *McDonald v Racing NSW [2017] NSWSC 1511* and the position elucidated by Rein J in confirming that when having regard to the special circumstances to be applied when reducing a mandatory penalty, it is the established special circumstances that are to be considered, not other circumstances not mentioned or specified. Ms Heath submitted that the position taken by Rein J in *McDonald v Racing NSW [2017] NSWSC 1511* had since evolved in a manner that would permit the Panel to have regard to special circumstances beyond those described in LR 108(2).
25. Ms Heath also submitted that the case law supported the view that it was open to the Panel to impose a penalty other than a period of disqualification, such as a reprimand or fine, or if the Panel determined that a disqualification was required as a result of the application of the Rules, then a nominal disqualification could be imposed by the Panel.

Submissions by Mr Van Gestel

26. Mr Van Gestel submitted that Ms Ings' breach of the AR 255(1)(b)(ii) was caused by her admitted failure to ensure she was aware of the relevant rule and the meaning of a clear day when causing the stomach-tubing of Chur Bro.
27. Mr Van Gestel further submitted that the stressors encountered by Ms Ings at the time of her breach could not be characterised as mental impairment or duress, and even if they could, they were not causally linked to Ms Ings' breach AR 255(1)(b)(ii).
28. Mr Van Gestel accepted that Ms Ings had a good disciplinary record and that Ms Ings did not have nefarious intent in causing Chur-Bro to be stomach tubed.
29. Mr Van Gestel submitted that it is Ms Ings' responsibility as a licensed trainer to understand and comply with the Rules, and the subsequent breach of AR 255(1)(b)(ii) could have been avoided if Ms Ings had taken the opportunity to familiarise herself with the relevant Rules, which had been in effect in its current format since 2013, at which point there was no suggestion that Ms Ings had any mental impairment or had been under any duress.
30. Mr Van Gestel further submitted that the applicable special circumstances (pleading guilty and assisting Stewards) had already been considered in providing Ms Ings with a 25% discount and that the penalty of a nine month disqualification was appropriate.
31. Mr Van Gestel submitted that the Rules and Local Rules were clear with respect to whether a mandatory period of disqualification applied when breaching AR 255(1)(b)(ii) and in which special circumstances the mandatory period of disqualification of 12 months provided by AR 255(2) could be reduced.

32. Mr Van Gestel submitted that a discount of 25% was appropriate and consistent with precedent and that consistent with *McDonald v Racing NSW* [2017] NSWSC 1511, no additional special circumstances could be considered when assessing whether a penalty could be reduced other than those in LR 108(2).

Determination and Penalty

33. The Panel is unanimously of the view that:
- (a) absent special circumstances the mandatory minimum penalty must be imposed upon Ms Ings for her breach of AR 255(1)(b)(ii);
 - (b) the mandatory minimum penalty under AR 255(b)(2) and AR 283(6)(j) is disqualification for 12 months;
 - (c) the position described by Rein J in *McDonald v Racing NSW* [2017] NSWSC 1511 with respect to not having regard to special circumstances that are not mentioned or specified by the Rules or the Local Rules remains applicable;
 - (d) no additional circumstances beyond those in LR 108(2) are to be considered when determining whether there is a finding of special circumstances; and
 - (e) if a finding of special circumstances is made, then the mandatory minimum penalty of disqualification for 12 months may be reduced at the discretion of the Panel, but the Panel may not impose a different type of penalty, as this would not be a reduction in penalty but rather a change in penalty.
34. It is not in dispute that the special circumstances set out in LR 108(2)(a) are applicable as a result of Ms Ings pleading guilty to the Charge and rendering assistance to the Stewards.
35. Where the Panel is not in unanimity is with respect to whether the special circumstances set out in LR 108(2)(b) are made out.
36. Ms Skeggs is of the view that on the balance of probabilities, at the time of the commission of the offence, Ms Ings had impaired mental functioning and / or was under duress, and that such impaired mental functioning or duress was causally linked to the breach of AR 255(1)(b)(ii) and substantially reduces Ms Ings' culpability.
37. Mr Vellis and Mr Tuck do not agree that the special circumstances set out in LR 108(2)(b) are made out, and that even if on the balance of probabilities, at the time of the commission of the offence, Ms Ings had impaired mental functioning and / or was under duress, such impaired mental functioning or duress was not causally linked to the breach of AR 255(1)(b)(ii).
38. Mr Vellis and Mr Tuck are of the view that:
- (a) Ms Ings' breach of AR 255(1)(b)(ii) was caused by Ms Ings not properly understanding the operation of the "clear day" definition and its application. Ms Ings in her own evidence

agreed that she did nothing to ensure she properly understood the definition of "clear day" or to understand the operation of AR 255.

- (b) the breach of AR 255((b)(ii) could have been avoided if Ms Ings had taken the opportunity to familiarise herself with the relevant Rules during the intervening eight years.
- (c) there was no evidence produced to suggest that Ms Ings had any mental impairment or had been under any duress during the period from 2013 through to mid-2021, during which Ms Ings in her own evidence confirmed she had been operating under a misunderstanding as to when a horse could be stomach-tubed and the operation of the clear day rule.
- (d) Dr Bertucen's opinion that the effects of the relevant stressors encountered by Ms Ings 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, and that Ms Ings' general level of stress and duress would have likely on the balance of probability to have caused her to fail to appreciate the true meaning of the clear day rule, are not borne out by Ms Ings' own evidence, which was that Ms Ings had always misunderstood the definition of "clear day" under the Rules and the operation of AR 255.
- (e) it is not the situation that Ms Ings previously understood the definition of "clear day" under the Rules and the operation of AR 255 and then as a result of the unfortunate stressors impacting Ms Ings at the time of the breach of AR 255((1)(b)(ii), that Ms Ings then forgot or misunderstood the correct position under the Rules.

39. By a finding of two to one the Panel does not find that the special circumstances set out in LR 108(2)(b) are made out.

40. Where the Panel is again in unanimity is with respect to the discount to be applied as a result of the special circumstances set out in LR 108(2)(a).

41. The Panel finds that a discount of 25% is not appropriate in the circumstances of this case. Such discount has been used in certain other matters where there is a plea of guilty and such matters involve deceit, dishonesty or circumstances which strike at the very heart of the integrity of thoroughbred racing and its participants. This is not the situation in Ms Ings' matter.

42. In Ms Ings' matter:

- (a) a guilty plea was made at the first opportunity to do so;
- (b) it is not disputed that Ms Ings rendered assistance to the Stewards in their investigation into the treatment records of horses in her care;
- (c) a prohibited substance was not used;
- (d) Chur Bro was stomach tubed for animal welfare reasons;

- (e) there were no submissions made that Ms Ings was seeking to gain an unfair advantage in stomach-tubing Chur Bro, nor was there some other sinister or nefarious intent behind causing Chur Bro to be stomach tubed; and
 - (f) it was accepted during the hearing that Ms Ings had behaved with transparency and integrity in pleading guilty and assisting the Stewards.
43. The Panel accepts that the racing industry cannot afford participants such as licensed trainers ignoring, flouting or being otherwise unfamiliar with the Rules. It is the responsibility of licenced participants to ensure their understanding and compliance with the Rules and a period of disqualification for a breach of Rule 255(1)(b)(ii) reflects the seriousness of the Charge.
44. The Panel is satisfied that that the special circumstances set out in LR 108(2)(a) are applicable.
45. The Panel can apply different discounts to reflect the facts applying to such special circumstances. In this matter the Panel has determined that a discount of 75% should be applied to reduce the penalty prescribed by AR 255(2), which will result in a disqualification period of three months.

Orders

In the Appeal of Ms Wanda Ings, the following Orders are made by the Panel:

1. Appeal against severity of penalty allowed.
2. Ms Ings is disqualified for a period of three months, to commence immediately and to expire on 24 June 2022, on which day Ms Ings may reapply for her licence.
3. Acting under the provisions of AR 283(7) and AR 283(8), the period of disqualification is deferred for seven clear days following the date the disqualification is imposed to allow Ms Ings to care for and to make arrangements for horses under her care, however Ms Ings must not nominate or start a horse in a race or barrier trial during this period.
4. Appeal deposit to be refunded