RACING APPEALS TRIBUNAL NSW

Mr D B Armati

EX TEMPORE DECISION

9 June 2021

Appeal by licensed trainer Mr David Atkins v Racing NSW

AR240

SEVERITY APPEAL

DECISION:

1. **Appeal upheld**
2. **Fine $10000**
3. **Appeal deposit refunded**

1. The appellant, licensed trainer Mr David Atkins, appeals against a decision of the Appeal Panel of 30 March 2021 to impose upon him a period of disqualification of two months.

2. There were three charges before the Stewards, one of which was subject to an appeal to the Appeal Panel and that matter was subject of appeal on a severity basis to this Tribunal. That charge was as follows:

> "*You are charged with a breach of AR 240(2)."*

Relevantly, it reads:

> *"If a horse is brought to a racecourse for the purpose of participating in a race and a prohibited substance on Prohibited List A and is detected in a sample taken from the horse prior to or following its running in any race, the trainer breaches these Australian Rules."*

3. The particulars were follows:

> *"That you, licensed trainer Mr David Atkins, the trainer of the racehorse Xiaoli's Ying at all relevant times leading up to and including 24 November 2019, did bring Xiaoli's Ying to the Quirindi racecourse on 24 November 2019 for the purpose of participating in Race 1 – 2 & 3YO Maiden Plate 1000 metres and prohibited substances were detected in a sample taken from Xiaoli's Ying following running in Race 1 –2 & 3YO Maiden Plate 1000 metres at Quirindi on 24 November 2019 as;*
>
> *1. Trendione and epitrenbolone were detected in a sample taken from Xiaoli's Ying following running in Race 1 –2 & 3YO Maiden Plate 1000 metres at Quirindi on 24 November 2019.*
>
> *2. Trendione and epitrenbolone are anabolic androgenic steroids.*
>
> *3. Anabolic androgenic steroids are listed on Prohibited Substance List A."*

4. For completeness, the Tribunal notes that the second charge is a breach of AR252, which was possession of the subject medication inappropriately

labelled and charge 3 was failure to keep treatment records. They will not be analysed further. Fines were imposed.

5. The appellant in respect of the subject charge pleaded guilty before the Stewards and the Appeal Panel and has maintained a breach of the rule on this appeal. It is a severity appeal only.

6. The evidence has comprised a bundle of material before the Appeal Panel, the Appeal Panel reasons for decision and in addition the Tribunal has been provided helpfully with written submissions and a number of parity cases.

7. The Tribunal acknowledges the unusual nature of this case for a number of reasons. The bare facts are that anabolic androgenic steroids are not permitted in a horse at any time. They are permanently banned. The subject drug administered was altrenogest. The substances detected and which are prohibited substances are as set out in the particulars, trendione and epitrenbolone, which are metabolites of trenbolone. The levels detected in the subject sample were at 11 nanograms per millilitre for the trendione and 1.6 nanograms per millilitre for the epitrenbolone.

8. It is to be noted at this stage that, in addition to the subject rule, there is a Local Rule 44A, which was introduced to permit matters where there is a reading of less than 1 nanogram per millilitre to be exempted from the prohibition and those matters are not activated here because there was more than that detected, as just read out. There it is referred to as a microgram per litre, but I think the readings might be the same. It does not matter. It was not necessary for the Stewards to turn their minds to the actual application of that discretion because its conditions were not met. It

is, however, the submission for the appellant that it is to be noted that the altrenogest is not itself prohibited, but that the detected substances are.

9. The subject drug altrenogest is prescribed for fillies and mares and is designed to control season in the horse for the purposes of controlling behaviour and that controlling is for the benefit of the horse and those who handle it or where there may be in competition against it. It is banned in Victoria and Queensland and possibly elsewhere in Australia. For work, health and safety reasons Racing NSW has permitted its use in this State, provided the rules are complied with and warnings it has issued are met.

10. The presence of an anabolic steroid in a horse that races is serious. They are prohibited for the obvious reason of the benefit they provide to a horse in a race. Indeed, beyond that the subject ones, as stated, are prohibited at all times. Because of the seriousness of the presence of the drug and detected concerns of impurities in certain of the drugs in which the altrenogest is contained, warnings were issued by this regulator and they were published to trainers and vets and widely discussed, because of the controversy in racing, in the media. The actual warning issued on 22 June 2018, prior to the breach of the rule by this appellant, is relevantly contained in the following words:

> *"…regarding the use of veterinary prescription animal remedies containing the progestagen altrenogest used to control the cyclic activity in fillies and mares.*
>
> *It has been recently discovered that certain batches of altrenogest products may contain low level traces of trenbolone and/or trendione. Racing NSW is conducting its own investigations into this matter.*
>
> *Until the situation is clarified, NSW trainers and veterinarians should avoid using injectable products containing altrenogest and, as a precaution, should not administer oral altrenogest products within one clear day prior to racing."*

11. Subsequently, Local Rule 44A was promulgated which, as stated, provided an exemption from the prohibition list in the circumstances previously outlined.

12. There are also other rules that cover trainers. They are contained in the Agvet Code, the Poisons and Therapeutic Goods Act and its regulation and the Veterinary Practitioners Act and its regulation and those publications, when generally taken together, make provision that a prescription for a horse should only be that which has been registered for use in a horse. If such a product exists it must be used.

13. The industry has operated on the basis that trainers are given the privilege of a licence and that privilege carries with it a number of obligations, not the least of which acknowledge when a licence is issued to comply with the rules, but also it is quite apparent that it is expected that trainers will keep themselves informed of changes to those rules and, importantly, of matters which the regulator has brought to their attention, such as the warnings issued in relation to the drug altrenogest.

14. The respondent here very much relies upon the fact that this appellant gave evidence at the Stewards' inquiry that he did not know of the warnings. Therefore, he was highly negligent in failing to understand those warnings, but also, more importantly, keep himself informed of such notices, particularly in circumstances where was there was much media discussion about these matters. There is no evidence of this appellant informing himself by media articles of such matters.

15. The facts here are that this appellant, as a trainer of many years standing, was more than aware of the need for treatment of mares who in some

cases react very badly to the onset of their season and are prone to kicking, biting and other conduct. So that welfare of the horse is paramount and control essential for people in their proximity or other horses and jockeys racing against them who are put at great personal risk by reason of the danger occasioned by a horse so misbehaving. Indeed, it is the evidence of this appellant that he was armed with the knowledge that in 2012 his brother was, to quote his statutory declaration in evidence, “killed by a mare who kicked him on the chest”. It is, therefore, that he has administering altrenogest type products to his horses for the purposes of so controlling them.

16. The subject horse Xiaoli's Ying was one which this appellant found to be uncontrollable on the standard altrenogest products. He had otherwise used pig Regumate in other horses and found it to be satisfactory. He wished to use it on the subject horse. He knew he could not administer such a product to a horse within one clear day of racing by oral means. As stated, he was otherwise ignorant of the warning given. To note two distinctions, total prohibition on injection, but a warning not to orally administer within one clear day of racing, not a total prohibition on oral administration.

17. The vet, Dr Baltussen, was at his premises and he asked her to prescribe pig Regumate. She informed the appellant it was not registered for horses. That should have rung alarm bells, but the appellant admitted and Dr Baltussen in her own evidence went on to say that the appellant was deeply concerned about the safety issues, as described, in relation to the subject horse Xiaoli's Ying. Accordingly, upon him pressing her, she prescribed the subject pig Regumate for the horse Xiaoli's Ying. It is to be

noted in passing that she was dealt with for a breach of the rules in respect to that conduct and dealt with by the Stewards.

18. Dr Baltussen prescribed an administration of 5mls. The appellant, because he knew 5mls would not work with this horse, administered 7mls. It seems to the Tribunal that whether it was 5 or 7mls is something of a red herring. It is merely reflective of the fact that he took himself outside the veterinary prescription, rather than a causation of subsequent presence of the drugs in the horse.

19. It is the evidence before the Stewards by Dr Cawley from the ARFL that, on his analysis of the pig Regumate, it contained between 10 to 100 times more trendione than Regumate or Ovumate, registered for use, and between 3 and 20 times higher for the trenbolone than other altrenogest products. It is not necessary to more closely examine that because it was well outside Local Rule 44A. The two prohibited substance were detected. Their levels were high and whether it was occasioned by a dose of 7 or 5, in combination with the very high content of the trendione and trenbolone, does not have to be determined. It is relevant to what the appellant should have done to inform himself.

20. On the face of it the presence of the two prohibited substances in the subject horse presented to race carries with it serious consequences. They arise because the substances simply are strictly prohibited and there was clear and positive advice to trainers, which should have been heeded by this appellant, as to the dangers of altrenogest. Of course, he did not breach the actual warning. He did not inject and his administration was orally one clear day before, which otherwise would be quite permissible, but this was not a product registered for a horse.

21. The other facts are those which the appellant draws most strongly from in respect of his conduct that the two particular drugs are impurities of a substance legitimately able to be prescribed, namely altrenogest, although noting again that pig Regumate is not registered for use in horses; that he did not deliberately administer the two prohibited substances trendione and trenbolone. He administered pig Regumate; there was no warning on the product itself and the Tribunal notes at this point it is hard to imagine why there would be a warning in respect of the use of this product on a racehorse if it was designed for use in pigs.

22. It is, therefore, submitted on his behalf that his act was innocent and unintentional and, in further support of that submission, other facts are drawn in aid. To repeat again, he administered orally and not within one clear day of racing, so he would otherwise have complied with the warning. Again, it was orally administered and not injected. It was prescribed by the appellant's vet and particularly prescribed for the subject horse and that was done because it was the opinion of the appellant there was no other suitable product to control that particular horse. There was also the evidence before the Stewards that a 5 millilitre dose, if he had put that in fact in, of this subject pig product was safer than 12mls of the actual horse product, which was available in the marketplace. Importantly, it is emphasised that the reason the appellant engaged in the administration of the product was for safety reasons, armed with the knowledge of the consequences that could flow if this horse was not controlled.

23. It was also submitted in his favour, it is said, that he was not aware of the warnings, but in any event, to the extent they existed, he did not breach the actual warnings themselves.

24. Critically, it has been an agreed fact in these proceedings that the anabolic steroids were not administered deliberately or for any ulterior motive by the appellant.

25. It is submitted that the warning itself was defective because it referred only to certain batches of altrenogest and that they may contain low trace levels. It is said that that was not a sufficient warning about all altrenogest products, including the subject pig Regumate. The Tribunal does not accept that submission. It is quite clear, when it is read as a whole and having regard to trainers' obligations, that that was a sufficient warning to be on notice. It is then submitted that the appellant had no way of knowing this horse would present with banned substances, particularly as altrenogest is not itself a banned product.

26. It is the case for the respondent that it is his failure to inquire in all of the circumstances that he knew, which contains within it the mischief and that mischief the Tribunal distils to be that he knew he was using a product not prescribed for a horse. He was told that by his vet. He was not directly asked by the Stewards, but it is fair to say that it can be implied that the appellant was able to read and understand the label because he said it contained no warning and, therefore, he was in knowledge that he was reading a label in respect of a product to be used on pigs. This trainer, with all of his experience, must be taken to have known that in those circumstances alarm bells should have been ringing. This was not a product for a horse. The absence of the warning, as the Tribunal has said, cannot exculpate from that fact. To administer to a horse that is to race imminently a product not to be prescribed for that horse properly should have been an alarm bell.

27. What should he have done? In the Tribunal's opinion, he should have made inquiries. Acknowledging all of the facts that stood to why he did not, the simple fact is that the consequences that are before the Tribunal and have confronted the appellant since he was advised of the positive test all tell him why he should have. He administered more of the product than he should have. He had failed to make inquiries. So he did not know it was so heavily dosed with the two prohibited substances by way of impurities and the consequences flow accordingly.

28. It is, therefore, that the Tribunal assesses his objective failure as being that. A number of the other suggested objective failures fall away for the reasons expressed. Those that were pressed related to his failure to heed the warnings for the reasons expressed. He otherwise would have met them, but in his failure on the warnings that was in that aspect of knowledge just outlined. There is the fact that it was a pig product that he administered.

29. The Tribunal does not accept the appeal ground that it is based upon the fact that those matters were not particularised. There is a key reason for that. The function of the Stewards in particularising a breach of the rules does not require them to engage in a formal pleading process such as that might be found in a criminal trial or a civil proceeding. Whilst these are civil disciplinary proceedings, they relate to the thoroughbred code and, as has been expressed by this Tribunal and others and, indeed, by Leeming J in *Day v Harness Racing NSW,* when he expressed that the rules are not written by experts. The Tribunal has distilled from that, likewise, the particularisation of the rules is only sufficient for the appellant to understand the breach he has committed, not to have to have every

particular relating to it set out against him. There is no procedural fairness issue, nor was it the basis of the submission.

30. The second reason why that falls away is that the appellant's submissions themselves rely on all of the exculpatory conduct in which he has engaged. Whilst it is for the Stewards to particularise the breach, the assessment of the severity of the breach requires the consideration of all of the facts and circumstances. Many of those facts and circumstances are said to be favourable. If everything about the pig Regumate was to be disregarded, then all of those factors in favour of the appellant himself would have to be disregarded. It becomes, therefore, in essence in relation to the grounds of appeal, the nature of the standard severity appeal, there is no technical failure as such as appeal ground 1 wished to identify.

31. The whole of the facts have to be assessed. In looking at what was the objective seriousness, the Tribunal has focused upon the actual failure.

32. The Tribunal then turns to put those factors about the appellant in the context of what might be described as his subjective facts.

33. Dealing with those in a formal sense, firstly, there has been a plea of guilty and, as expressed by the Tribunal now for over a decade, that will lead to a 25% discount, a principle now applied by the Stewards in any event.

34. Next, it is necessary to look at his other personal circumstances. His statutory declaration sets them out. He is 56 years of age. He has been licensed for 38 years, having previously been an apprentice jockey before a trainer. He has no prior matters whatsoever, nothing in 38 years. That of itself is a substantial subjective factor, but it also goes to the issues of objective seriousness that, if he has gone 38 years without breaching a rule such as this, it is an indication of how the failure he engaged in is to be

assessed in looking at the message to be given to him and to the industry at large, as well as the betting public.

35. He strongly emphasises his correct statement that the altrenogest is in fact a permissible product in racehorses and, as has been stated several times, under LR44A and the fact when it is enlivened it is an exempt product. He describes why he gave it and the Tribunal has touched on that.

36. He also then turns to some of his personal circumstances, namely that any period of disqualification would be a life ban. He was as of March 21 recently divorced, working hard, not taking holidays, no other qualifications except horse training. He has six staff and four track-work riders. He would have to retrench that workforce. He also describes investment in his training premises, where he has built stable and yards and walkers and the like and he would fear that he would lose those if he was to be unlicensed. He describes recent other investments in a horse float and how he was training 24 to 26 horses at the time of his original appearance before the Appeal Panel. He is concerned that he would be financially devastated, become homeless and bankrupt and unable to rebuild his business. He then sets out the fact that he also loses prize money of $9,600.

37. Otherwise based on subjective facts, the Tribunal considers that in respect of those the aspects of hardship, as grave as they would be for this appellant, do not essentially distinguish him from many others who lose the privilege of a licence for a prohibited substance presentation. It is an inevitable consequence of wrong conduct. The Tribunal does not see, as grave as the facts would be for this appellant, that he is, as expressed, greatly different to any other trainer of his size of business. The key factors

that would enable a substantial reduction are those of his years in the industry and nothing prior.

38. Returning then to the analysis of objective seriousness, it is necessary to assess what legal principles need to be applied. They have been set out by the Tribunal almost ad nauseam and are not going to be read into this decision. They are referred to in considerable detail in the *Appeal of Smith*, 15 August 2014, and they require a civil disciplinary penalty having regard to the facts and circumstances of this case.

39. The penalty requires consideration of a message. Is a message required? That requires an assessment of whether the Tribunal, in accordance with recent case law of *Kavanagh v Racing NSW* as to an assessment of whether, as Fagan J said, it would be an an egregious mischaracterisation of objective seriousness if a blameless person was to be subject to a message. On that score the Tribunal does not assess this appellant to be blameless. The reasons for that have been set out. His failure to properly inform himself in the use of a product not for use in a horse is the gravamen of the matter. He knew that product was not registered for a horse. He knew he had an obligation to keep himself informed. That does not make him blameless.

40. If the *McDonough* principles were to be considered, and they do not need to be set out in this decision, strictly speaking, he does not fall within category 1 because what he administered was not the drug that was the prohibited substance found. He administered altrenogest, admittedly in the form of pig Regumate and not in other registered products, but it was not the drugs detected, which are trendione and epitrenbolone. Category 1 is activated if there is that administration and it is also done in a culpable way

or by ignorance or carelessness or something similar. The Tribunal has found it has been done by a failure to properly inform and it considers that to be something similar. He does not fall into category 2 because it is quite clearly established how the prohibited substances came to be present in the subject horse. He is not as expressed in category 3 because he is not blameless.

41. It is, therefore, that the Tribunal does not find itself bound to strictly follow *McDonough.* It is merely a guidance when the facts to be determined in the subject case do not fall within precisely the three categories in question, but if it was to be so analysed it would probably be a category between 1 and 2 because there was an administration and it was done in circumstances of a lack of knowledge, which he should have had. In those circumstances in category 1 the full force of penalty provisions must be enlivened and in category 2, unusual circumstances, the same exists.

42. Returning then to whether a message should be given to him, the Tribunal is of the opinion that it is required and he is not excluded by the principles in *Kavanagh*. That message on this occasion to this trainer is that, when confronted with these similar facts, proper inquiries should be made.

43. Having regard to the impact of his failure, the Tribunal is quite satisfied he will not reoffend in similar conduct, but critically, and it is not excluded by the *Kavanagh* principles, it is necessary to give considerable weight to the integrity of the industry and the necessity for the message to the industry at large and to the betting public that observe it and to the public generally that a longstanding registered trainer, who for otherwise proper motives, seeks to administer a product which is not registered for a horse that greater caution is required than that which he engaged in on these facts.

44. It is to be noted that there is no horse welfare issue enlivened, which is a second aspect of objective seriousness because on this occasion the product was administered for the benefit of the horse and would have been generally considered to be for the benefit of the horse, despite the contents of the anabolic steroids found in it. They do not become, on the evidence available, a welfare concern issue.

45. All of those matters then bring the Tribunal to the decision on what is an appropriate penalty. The Tribunal, as expressed in the submission stage, does believe it is appropriate to consider what is an appropriate penalty on objective seriousness before there are discounts for subjective factors and that requires what might be described as a starting point. This is not a starting point mandated by a mandatory minimum penalty, nor is any starting point provided in the rules. It is simply what does the objective seriousness indicate should be in the mind of the Tribunal, with a message to be given by way of a protective order. It is that it is considered that there must be a thought that a disqualification is the only probable outcome.

46. As the Tribunal has said, such an order will not fall away because of hardship. The Tribunal has given consideration to the subjective facts here and what is an appropriate message for the narrow facts and it is important to discount, as the Tribunal has attempted to point out, that there are many factors here which do not contain egregious misconduct. It is misconduct that is narrowed down to two aspects of failure or not inquiring and permitting the use of a product not registered for a racehorse. Of themselves that would require disqualification.

47. There are other matters. It was given for the benefit of the horse in the genuine belief and it was otherwise given in accordance with warnings,

even though he was ignorant of them. 38 years in the industry, it was found in the case *Sprague*, Tribunal 27 June 2018, to lead to something of a discount of around 10% on top of the standard plea 25%, but the factors here are a bit broader than that, in the Tribunal's opinion, than those simply available in *Sprague* and the Tribunal has reflected on all of the matters that the statutory declarations contain.

48. The Tribunal finds the numerous parity cases referred to in the submissions as unhelpful because their facts do not equate to these.

49. That moves the Tribunal away from a disqualification. The actual period of time that would otherwise be considered to be appropriate does not now have to be analysed. If there was to be a disqualification and the Tribunal thinks that the two months the Appeal Panel found to be appropriate, rather than the four the Stewards found to be appropriate, would have been an appropriate order.

50. However, in the circumstances the Tribunal has considered that a disqualification not being necessary or required, for like reasons a suspension is not.

51. A fine will be imposed. Nothing is put forward on material facts in respect of that. The Tribunal has noted there has been a loss of prize money. That is a consideration.

52. The Tribunal imposes a fine in the sum of $10,000.

53. Severity appeal successful. On application, not opposed, the Tribunal orders the appeal deposit be refunded.