RACING APPEALS TRIBUNAL NSW

Mr DB Armati

Ex Tempore Decision

27 June 2018

Severity Appeal by John Sprague ARR 178

Decision:

1. Appeal upheld
2. Disqualification of 10 months from 23 February 2018
3. 50% of Appeal Deposit refunded

1. Licensed trainer Mr John Sprague appeals against the decision of the Racing Appeal Panel of Racing NSW of 22 February 2018 to impose upon him a period of disqualification of 12 months to commence on 23 February 2018.

2. The allegation proffered against him by the Stewards is in the following terms:

> AR178. Subject to AR178G, when any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be penalised.

3. The Stewards particularised the training as follows:

> That you licensed trainer John Sprague did bring *Saint Denis* to the Tuncurry racecourse for the purpose of engaging in Race 3 Maiden Handicap on 29 October 2017 and a prohibited substance was detected in a urine sample taken from *Saint Denis* prior to running in that race as
> (a) cobalt was detected in a urine sample taken from *Saint Denis* prior to that gelding running in Race 3 Maiden Handicap at Tuncurry on 29 October 2017;
> (b) Cobalt is a prohibited substance pursuant to AR178B(1) as it is an agent that is capable of causing either directly or indirectly an action or effect, or both an action and effect within the blood system and was detected at a level that is not, under AR178C(1)(l), excepted from the provisions of AR178B;
> (c) further, or alternatively, cobalt is a prohibited substance pursuant to AR178B(2) as it is an haematopoietic agent and was detected at a level that is not, under AR178C(1)(l), excepted from the provision of AR178B.

4. Before the Stewards' inquiry the Appellant did not admit a breach of the rule and an adverse finding was made. At the commencement of the hearing before the Appeal Panel he admitted a breach of the rule. Before this Tribunal he has admitted the breach of the rule and this is a severity appeal only. Accordingly, the need to analyse the facts in great detail falls away.

5. This is an appeal de novo and under the legislation it is the Tribunal's function to determine for itself an appropriate penalty having regard to the facts and circumstances of this case.

6. The evidence has comprised the transcripts and exhibits before the Stewards, the transcript and exhibits before the Appeal Panel and in addition the Appellant has given evidence, and Dr Selig, former official veterinarian with the Respondent, has put in evidence a statement and has given oral evidence. The transcript of the hearing before the Appeal Panel was defective and only partially recorded.

7. The relevant facts on this matter, against which penalty must be assessed, are that the Appellant is a trainer of many years standing, and the Tribunal will detail his subjective factors in greater detail later, but over many years of training has had no prior prohibited substance matters. He is well spoken of and well regarded and the Tribunal will return to that. He took on a horse to train, the subject horse, which was not in good condition. It was large horse. He put it in its own yard. Into that yard he placed crusher dust. On the 17th October 2017 he treated the horse with the standard treatment of Coforta, B complex and B12. On the 20th October the horse raced at Taree and a race day sample produced a relevant reading for cobalt at 13. On the 22nd October the horse was treated. On the 27 October the horse was treated and on the 29th October it raced at Tuncurry and a positive sample was produced from that race day. In the treatment regime Langs solution was either used or not used - the transcript before the Stewards does make it clear on what occasions it was or was not used. The reading produced from the Tuncurry sample was, on first testing, 190, and in the B sample 185. It is trite that the threshold for cobalt is 100.

8. The aspect of crusher dust can be dealt with in a straightforward way. It was relevant on the facts because the Appellant has maintained at all times, and

maintained on oath today, that he did not do it – "it" being administer the prohibited substance to the horse – and he has no idea how it happened.

9. At or about the relevant time the Appellant had suffered a track accident and was immobilised as a result of a leg injury. He was unable to attend to the day to day operation of his stable, which at the time had 9 to 10 horses. He was assisted by his wife and also by three other people, two of whom were employees, and one was a casual unpaid person. The Appellant has great faith in those people, knowing their families, and believes them to be trustworthy and honest and would not have engaged in any improper practices. So far as the Appellant is concerned, he therefore is not able to provide an explanation other than the possibility of crusher dust, as to how the prohibited substance came to be detected.

10. It appears that at or about Port Macquarie and his stable area there used to be a cobalt mine. As to precisely where and when and how it operated is not known. Suffice to say that he was told by people, unidentified, that cobalt was to be found in crusher dust. As has been expressed, he put crusher dust in the yard area in which this horse was stabled. He has produced video evidence taken on 21 January 2018 of the subject horse eating what appears to be crusher dust off the ground. He gave evidence that he observed this to take place over a period of time and it concerned him. He was concerned because he knew that ingestion of other things like sand was harmful to the internal workings of a horse.

11. The question whether crusher dust contains cobalt was answered by an analysis which he undertook at his own cost. That analysis showed 8.2 milligrams per kilogram of cobalt in crusher dust. The question whether there may be some accumulation of cobalt in the racehorse by reason of the treatment regime and

the ingestion of crusher dust has to be addressed. Dr Selig gave evidence, confirmed in her cross-examination today, that the horse would have had to have ingested some 20 kilograms of crusher dust daily to reach the level of 190 which was detected. That of course is not a possibility and is not a fact able to be established on any observations by the Appellant, nor of the video recording, to indicate that the horse could possibly have consumed that volume of crusher dust at any time. In addition, Dr Selig gave evidence that crusher dust is not palatable to a horse. In fact, she said it was highly unpalatable and would have an effect on the gastrointestinal tract and make the horse obviously very unwell if it consumed large amounts of crusher dust. She was therefore of the opinion, absent anything else, that crusher dust could not be a source of the high reading. In addition, she was of the opinion that there could not have been an accumulation of cobalt as the result of long term ingestion in lesser quantities over a period of time. She was also of the opinion that crusher dust taken in conjunction with the treatment regime that the Appellant used could not have provided the high reading. And in addition, the evidence establishes that the treatment regime itself could not have produced the cobalt reading on race day.

12. There is a further reason why crusher dust can be eliminated. As stated, the facts indicate that when a race day sample was taken on 20 0ctober a reading of 13 was found. The subject race was the 29th October and produced the reading of 190. It is apparent that the treatment regime could not have caused an increase from 13 to 190 between 20 0ctober and 29 October as that was the treatment regime provided prior to the 20th October sample and the treatment regime between that and the race day sample. In addition, it is quite apparent on the evidence of Dr Selig, and by the application of principles of common sense,

that the horse could not have eaten a sufficient amount of crusher dust between the 20th October and the 29th October to increase its reading from 13 to 190.

14. The principles to be applied in assessing this case have been set out on numerous occasions by this Tribunal. On 2 December 2015 in the severity appeal by Racing NSW against licensed trainer Kevin Moses, the Tribunal summarised a number of matters which it had set out in its decision on an appeal by licensed trainer Darren Smith on 15 August 2015.

15. In the Moses decision the Tribunal ,at paragraphs 21, 22, 23 and 24, set out a number of principles which are applicable to this case. Those paragraphs will not be read into this decision. To give them a very cursory summary, as the principles are not substantially in issue, this is a civil disciplinary proceeding in which the Tribunal must determine what message is to be given to this individual trainer and to the industry and community at large. It requires a consideration of the facts and circumstances of each individual case and the application of principles relating to level playing fields and running on merits. It does not require the application of any criminal principles. It requires the fact that if a person has a prior matter they are not to receive the same leniency as a person with no prior matters, and it also dealt with the fact that in certain circumstances hardship is an inevitable consequence of the conduct in which a licensed person has engaged. The order is to be protective.

16. There is a recent decision of Kavanagh and O'Obrien v Racing Victoria Ltd, a decision of Justice Garde in VCAT [2018] VCAT 291 where at 15 His Honour summarised the decision of McDonagh vHarness Racing Victoria. McDonagh remains an undated decision at the moment. To paraphrase Justice Garde's findings, he adopted the principles set out in McDonagh and they, paraphrased,

are that in assessing a presentation matter at the end of the day the conduct can fall into three categories. The first category is where the responsible trainer admits the conduct. The second is where at the end of the day the decision maker is unable to decide what was the cause of the elevated level or, alternatively, rejects the theories advanced in the matter. The third category is where the person can point to conduct by a third party which clearly exculpates the licensed person from any wrongdoing.

17. As was said in McDonagh and adopted in Kavanagh and O'Brien, the penalties are at their lowest, if not nominal, in the third category. In categories one and two no such leniency is available.

18. The Tribunal's function is to assess the objective seriousness of the conduct and then apply any appropriate reductions because of the subjective circumstances of an appellant. There is not a starting point under the rules of thoroughbred racing in respect of this particular matter. In certain cases there is a starting point and that is provided by mandatory minimum penalties for other types of breaches. In other codes, for example harness racing, there are penalty guidelines which themselves provide, whilst they are for guidance only and not tramlines so far as the Tribunal is concerned, starting points. Greyhound racing itself has adopted a similar form of penalty guidelines. In this code, thoroughbred racing, there are none. There is therefore no mandatory minimum penalty, no starting point and the Tribunal's approach to the consideration of the appropriate civil disciplinary penalty sending the appropriate message to this appellant and the industry at large and looking to the future, is based upon the test just outlined, assessing the seriousness of the conduct first. It is important to

recognise that the facts and circumstances of this individual case are those to which the objective seriousness test must be directed.

19. In the matter of Rogerson, Judge Thorley sitting as the Racing Appeals Tribunal, 24th May 1998, expressed the view that in a matter such as this a disqualification is appropriate but might not be if special circumstances can be found. That has been followed by this Tribunal in various ways, but the Tribunal has reached the determination that in mid 2018 the issue of whether or not special circumstances are considered is not a test. It has not been said that the decision of Judge Thorley imposed a test in any event but that it provided a clear indication of the gravity of prohibited substance matters. It might also be remembered that Judge Thorley had expressed on a number of occasions that it is not unusual for a decision maker to be confronted with circumstances where it simply does not know why a prohibited substance came to be present but that cannot exculpate a licensed trainer from liability because, as paraphrased, no one would ever be liable to any punishment if there could be no explanation found. That has led to the oft expressed wording these days that it is not incumbent upon the regulator to prove how, where, why, when or by what route a particular prohibited substance came to be present, and this rule is a manifestation of that principle. Therefore, special circumstances are not a test which is enlivened.

20. The case here is not about performance enhancing or performance harming. It is not an ingredient of the breach brought forward. That has been the subject of much debate in relation to the drug cobalt but as long ago as Smith (supra) that was starting to be questioned and, indeed, the current science with which this Tribunal has been dealing in other cases in recent times, indicates that that

requires careful consideration. But it does not matter; it is not the test. It is not, as has been said, part of the Respondent's case.

21. It is apparent from the facts that the McDonagh principle would have placed this conduct within the second category. This Appellant has not established factually that he can say that a named person engaged in the conduct. It is not the case that it is established in category one that he did it, and it is not an administration case. It is therefore that it is a category two matter. That does not help this Appellant on issues of penalty.

22. As to the necessity to give an individual message to this Appellant the Tribunal is satisfied from his past history, from his circumstances here and the explanations he has given, the character which is supported by his referees, that he is unlikely to offend. However, the Tribunal remains of the opinion in viewing objective seriousness, despite the fact this is not a performance enhancing or harming case, that a message must be given to other trainers, to the industry at large, and importantly to the public, whether wagering or not, that a level playing field requires the presentation of a horse without a prohibited substance in it. Here the level playing field has not been met because the presentation was with a prohibited substance for unexplained reasons. It is, therefore, that a message must be given, and in determining how that message is to be arrived at, issues of parity are important. This case has enlivened a consideration of principles on parity, but simply put, this Appellant is entitled to have his own facts and circumstances looked at, compared to others who have been dealt with, and is entitled to say that he has had a fair outcome compared to them. Of course, there is the converse to that: likewise, those that have been dealt with are

entitled to say that this Appellant should be dealt with on the same type of principles to which they were subjected.

23. This matter has involved an admission of the breach before evidence was taken before the Appeal Panel. The Appellant did not adopt that approach before the Stewards. He is therefore not in the same position as others who have been dealt with who have made a ready admission from the outset.

24. The second limb of a discount for a ready admission requires cooperation. This Appellant is entitled to have that principle found entirely in his favour. From the outset he cooperated with the Stewards. It appears from his evidence that he continues to discuss the matter with them. He has gone out of his way to try and find and explanation, as has been said, at his cost by testing and of the making of inquiries. Those matters are very much in his favour. He has a long and satisfactory association with this industry with nothing relevant prior. That is, importantly, no prior prohibited substance matters. He is also entitled for the same reasons to draw upon his long record itself. He can say in respect of some of the other cases, to which the Tribunal will now turn, that he is entitled to be better dealt with because of his admission of the breach, late as it was, and his cooperation. He has a longer record than any of them, and unlike some of them he has nothing prior.

25. What then of those other matters? The decision of Moses earlier referred to involved an Appellant who had a presentation and received a 12 month disqualification. Mr Moses as a jockey and as a licensed trainer had a very long and equivalent history. He admitted his breach right from the outset and cooperated fully. He however had a prior matter. It was in 1995 but as the Tribunal expressed, adopting the principles in Carroll, which was one of the

paragraphs earlier summarised from the Moses decision, that could not be disregarded, and it was not, and Mr Moses therefore lost other discounts to which he might have otherwise have been entitled. The appellant can be distinguished therefore on the basis he has no prior matters.

26. The matter of Lawson, an Appeal Panel decision, which was a 12 month disqualification, involved an Appellant who did not admit the breach at any stage. He had a higher reading of 330 – and just to go back on the facts, the Moses reading was 270. Mr Lawson had less years in the industry, only 13, but also had no prior matters. This Appellant is entitled to say that he admitted the breach and has a longer history and a lesser reading and should therefore be assessed at perhaps less than Lawson.

27. The next matter is the matter of Cooper, an Appeal Panel decision. At the outset the Tribunal indicates it does not find that as a parity decision. With great respect to the Appeal Panel, this Tribunal simply disagrees with that decision. That involved an appellant with two prior matters, a substantial differentiation. That was an admission made by the Appellant as to failures of supervision of a stablehand and it appears that it was possible to attribute the conduct to that of a stablehand. The application of the McDonagh principle, which would put that in the third category, is somewhat reduced therefore by the failures of husbandry and stable supervision. This Tribunal considers that decision in Cooper was far too lenient.

28. The next matter was Farley, a reading of 377 and an admission of breach before the Stewards and the Appeal Panel from the outset. A 14 year history with nothing prior and twenty-four horses in training. A 12 month period of

disqualification. Here, of course, it was a later admission of the breach and a much longer history in the industry.

29. The parity cases therefore, and there are others in evidence, about which details and precedents were not given, but the table before the Tribunal indicates a matter of Kavanagh, which has been referred to here, that is where up to three years were given. But that case can be distinguished as there were mandatory minimums and, in any event, it is on appeal before this Tribunal. The matter of Newman where there was a 12 month disqualification. The matter of Smith, 12 months disqualification. McCarney two periods of 12 months disqualification. Fleming, 3years disqualification – high level not given. Want, 15 months disqualification – reasons for that not apparent. And York, 18 months disqualification. The reasons for those variances are not given.

30. Viewed then on objective seriousness, and considering aspects of parity – and it is not the Appellant's case that he should not be subject to disqualification- this is a clear and unambiguous case warranting a period of disqualification. It is necessary in considering that not to apply a strict and rigid formulae, although it is acknowledged the Tribunal itself has introduced a 25 percent discount type of formula.

31. The references themselves are numerous. They are these. The first is by Mr R L Charlie AO, a well-known racing identity who has known the Appellant as a jockey and a trainer, one who keeps his stables in an immaculate condition and has enjoyed success for a range of clients, held in very regard, a person who has expressed to Mr Charlie repentance and remorse for his conduct. The next is by Paul Hassam of Oxley Rural Supplies and Produce, who has supplied to the Appellant and describes him as a most competent horseman and first class

citizen who has trained many horses for him, always produces his horses appropriately and his stables are a credit to him. The next is the CEO of the Port Macquarie Race Club, Mr Bowman, who has known him for over 30 years. He cannot recall any instance when he has done anything which would cause any concerns about his conduct and he has recommended him to many people. Next is by Glen Hodge, a racing stables person who has known him for over 40 years and he has actually lived with him. He found him to be a very honest, hardworking and very capable rider and handler of racehorses. He proves himself to be a highly regarded trainer and produces his horses in the best order they can be. He is a very honest person. Next is by Mr Godbolt of Jack High Lodge. He has known him also for 40 years. He describes him as a person who would always lend a hand if needed and you could trust him. He never found him to be deliberately dishonest or set out to hurt anyone. Next is by Frank Arnell, vet, who describes his knowledge of him over many times and he has been a client of Mr Arnell. Never any misuse of drugs was observed by Mr Arnell and he has maintained the confidence of all syndicates with which he has been associated. They are strong character references by people associated with the industry.

31. To be clear on the Appellant's personal subjective factors, he is 55 years of age, he has been associated with the industry since he was 13, both as an apprentice jockey, as a jockey and then as a trainer. As said, he has no prior matters. As also as said earlier, he had 9 to 10 horses in training at the time and he described the injuries which prevented him attending directly to his duties at or about the time of this presentation. Those injuries continue to plague him. He describes the hardship that this disqualification imposed by the Stewards has

given him. He says he has lost everything. He continues to have substantial financial commitments on a range of assets. He has been unable to work for two reasons- he only knows racing and he is not in the best of health. In addition, he does not have any other apparent skills. He relied on his cooperation with the Stewards and his good past record. He says as to his future, it remains, if he gets his licence back, entirely uncertain for him. As expressed, he maintains he has no idea how this reading came to be there and he does not know who did it.

32. Considering then those matters, it is apparent that over time a range of penalties from 9 months up to 15 years – and that one in the matter of Smith can be disregarded because that involved some 32 matters – it comes down to periods around about the individual presentations, absent mandatory minimums, of anything up to 3 years, although in recent times both Stewards' and Appeal Panel decisions have fallen in the range of 9 to 18 months. The precise facts and circumstances of each of those cases are such that they provide an element of guidance only. As expressed, the Tribunal, and unopposed, considers a disqualification to be appropriate. It considers that in respect of these matters objective seriousness would warrant that there be a penalty of disqualification of or approximately 16 months. The precise expression by formulation is not needed. Against that, and adopting a method of formulation because it is necessary, this appellant would not be entitled to the full 25 percent discount for his early admission and cooperation on the basis that his admission was only at the start of the Appeal Panel decision. If a mathematical formula was to be applied, that would attract something in the order of 15 percent, perhaps 20 percent, but it is not necessary to be precise. There would then be a discount for his personal subjective factors. In particular, his very long association with this

industry, and, secondly, throughout that course of that very long association with this industry he has had no prior presentation matters or matters of any seriousness. It might be expressed at this point that there might have been some suspensions as a jockey but that is disregard. A discount for hardship is not added as he is essentially in no different position from all trainers who breach this rule. It is, therefore, that he would be entitled to a discount from that objective seriousness assessment.

33. The Tribunal has determined that something in the order of one third in total should be allowed to him for those various factors. That would reduce a 16 month appropriately assessed objective serious matter to at or about – and precise formulation is not necessary – a period of 10 months. When the Tribunal measures that against the other cases on parity, is it fair to him or it is fair to them, the Tribunal forms the opinion, having rejected Cooper, that it appropriately recognises that his factors are more favourable to him than Moses and Lawson, and indeed are better than Farley, which were the main matters addressed.

34. In the circumstances the Tribunal has determined that there should be a period of disqualification of 10 months. Consistent with the order of the Appeal Panel that period of disqualification should commence on the 23 February 2018.

35. The final order therefore is that the appeal is upheld.

SUBMISSIONS ON APPEAL DEPOSIT

36. That then leaves one further matter for consideration and that is the appeal deposit. The powers in the Tribunal are to order its return, order it forfeited or something in between.

37 Having regard to the submissions, the Tribunal orders 50 percent of the appeal deposit be refunded.
