

RACING APPEALS TRIBUNAL

QUEENSLAND

NOTICE OF DECISION

APPEAL NO: RH001-09

DATE: 6 February 2009

APPELLANT: Mr Matthew Brett Cross

RESPONDENT: Queensland Harness Racing Board

APPEAL FROM: Appeal from the decision of the Stewards to impose a penalty of 12 months disqualification (conditional) and a fine of \$5,000.00 for a breach of Rule 190(1). Appeal against penalty only.

BREACH OF RULE: Rule 190(1)

DECISION: Appeal upheld with respect to the fine which has been altered to \$1,000.00 with the full penalty being 12 months disqualification (conditional) and a fine of \$1,000.00.

APPEARANCES: Mr Scott Neaves, Solicitor appeared on behalf of the Appellant.

Mr Martin Knibbs, Chairman of Stewards, appeared on behalf of the Respondent.

REASONS FOR DECISION

Mr Leo Williams AO - Chairman
Mr Brock Miller - Deputy Chairman
Mr Dennis Standfield - Member

This is an appeal by Mr Matthew Brett Cross, a harness racing trainer licensed in New South Wales against a penalty of 12 months disqualification and a fine of \$5,000.00 imposed by Queensland Harness Racing Stewards on 29 December 2008. The disqualification imposed was conditional in that it permitted the Appellant to enter training or racing premises for the purpose of carrying out farrier duties during the period of disqualification. It was specifically stated by the Stewards that the prohibition relating to disqualified persons being on a racecourse would apply to Mr Cross.

The penalties imposed by the Stewards followed an Inquiry held on 29 December 2008 in which Mr Cross was charged and pleaded guilty to a breach of Harness Racing Rule 190(1) which states:-

“Rule 190(1) A horse shall be presented for a race free of prohibited substances.”

The particulars provided by the Stewards when laying the charge were stated as (Stewards Inquiry Transcript (“SIT”) at page 12 from line 16):

“The particulars of that charge, Mr Cross, are that you, as the trainer of the gelding QUEENSLAND KARAMEA, which was presented and raced at the Redcliffe meeting on 5th December was subsequently pre-race sampled upon arrival...it was reported that the sample upon analysis showed TCO2 levels in excess of the allowable threshold of 36 millimoles per litre...”

The level on the Certificate of Analysis of the total plasma carbon dioxide concentration from the Racing Science Centre was 37.3 mmol/L while the level of the Confirmatory Certificate from Racing Analytical Services Ltd was 38.1 mmol/L.

While Mr Cross was unable to give any reason for the elevated TCO2 level he did state that when he first became aware of it, he thought that someone was “having a go” at him and referred to difficulty that he was having with his “ex missus” and that he has an order against her not to go near the track or his house. Mr Cross did state (SIT page 6 from line 1):-

“...I am guilty of taking the horse to the races with a substance in it, but I am not guilty of giving the horse anything at all.”

After Mr Cross pleaded guilty the Stewards went on to consider the matter of penalty and raised with him his three previous breaches of the presentation rule since 1999. From review of the Transcript of the Stewards Inquiry (SIT at page 14 from line 16) the Appellant’s offence report provided to the Stewards and the submissions of Mr Neaves the previous breaches are:-

1999 – First conviction – drug was Phenylbutozone – six months disqualification imposed;

2000 – Second conviction – drug was Methyl Salicylate – two years disqualification but allowed to continue as a farrier.

2003 - Third conviction – drug was Ketorolac– twelve months disqualification but allowed to continue as a farrier.

At the Inquiry it was also accepted by the Stewards that Mr Cross's full time occupation for approximately 14 years was a farrier and he referred to himself as a "hobby trainer". He stated that he usually trains about "four or five at a time" and at the time of the Stewards Inquiry he had two horses in work.

After consideration of the matter of penalty the Stewards stated to the Appellant (SIT page 18 from line 5):-

"When assessing penalty the Stewards have had to give consideration to a number of matters. First and foremost are the consequential effects that matters such as this have on the industry as a whole, and included in that the substance involved. I think it has been well documented that previous positive swabs to TCO2 that have been over the threshold have attracted more significant penalties..."

...if I might put it that way, than substances relating to, say, commonly used or everyday treatments. We have taken that into account. We have also taken into account the fact that this isn't the first occasion on which you have come before the stewards on matters such as this, the presentation of a horse not free of prohibited substances under Rule 190(1).

In all the circumstances, the Stewards do believe that the appropriate penalty be that you be disqualified from racing for a period of 12 months, with conditions;..."

The Stewards then referred to the conditional disqualification to enable the Appellant to continue as a farrier.

The Stewards went on further to state (SIT page 18 from line 41):-

"...Bearing in mind that we ordered that the disqualification be for 12 months, with restrictions, we did consider a longer period of disqualification with restrictions, however in addition to that period of disqualification, we also think a monetary penalty should be imposed. We will order that you also be fined the sum of \$5,000.00 in addition."

At the hearing, Mr Neaves presented written submissions setting out additional matters for the Tribunal to consider with respect to penalty then was referred to the

Stewards Inquiry. Those additional matters of the Appellant's record are set out in paragraph 17 to 19 of Mr Neaves's written submissions and are:-

- “17. *The Appellant's record:*
- A. *Two positive swabs within just over one month of each other (20 December 1999 and 24 January 2000)*
 - (a) *These are some 9+years old*
 - B. *A positive swab in May 2002.*
 - (a) *Now nearly 7 years ago*
 - C. *217 starters since the last positive swab, with 23 winners, and 70 prize money earners.*
18. *The Appellant's financial situation:*
- A. *Income of \$24,000.00 before tax.*
 - B. *Average prize money earned from horses trained by the appellant in the last 4 years is \$14 043.50 per year (noting that some horses are trained by the Appellant for clients, some owned by him).*
 - C. *The Appellants current financial hardship due to the divorce proceedings and associated costs.*
 - D. *The Appellant makes payments of \$280 monthly towards the care of his daughter*
 - E. *The Appellant pays \$210 weekly in rent.*
19. *The Appellants family and social situation:-*
- A. *The Appellant is currently involved in a 'messy' divorce, with AVO against his former wife.*
 - B. *The Appellant's father and mother are trainers of harness racing horses.*
 - C. *The Appellant's friends and support base are those involved in the harness racing industry.”*

After the hearing Mr Knibbs contacted the Tribunal Registry and forwarded written submissions stating that he apologised for failing to present them at the hearing. The Tribunal grants leave for the Respondent to present those written submissions. While those submissions refer to similar decisions of the Tribunal, they had nothing that is relevant to the circumstances of the breach of the Rule or the personal circumstances of the Appellant.

At the conclusion of the Tribunal hearing there was a reference when considering the previous breaches by the Appellant to the Penalties and Sentences Act 1992. This was in the context of whether there was anything in that Act which need be considered in view of the length of time of the previous breaches. In view of an email received by Mr Knibbs after the hearing, the Tribunal sets out in full to the reference to the Penalties and Sentences Act taken from the hearing transcript being (Racing Appeals Tribunal Hearing Transcript from page 12, line 29):-

“MR WILLIAMS: Thanks, Mr Neaves. Gentlemen, we will have a think about it.

MR NEAVES: Do you want me to - - -

MR WILLIAMS: Pardon?

MR NEAVES: Do you want me to look at the penalties and procedures?

MR WILLIAMS: Look, would you check that, because I will check it myself. Send a copy of your letter to Mr Knibbs as well, will you? The point being, Mr Knibbs, I don't know that a lot turns on it in this case, but if the Penalties and Sentences Act says that we can't take into account the two earlier ones, it does make much difference because it's still a second offence within the prescribed period.

MR KNIBBS: I think it does refer to spent convictions, Chairman, I understand, but the time period, I am not sure.”

While what was required from Mr Neaves concerning the Penalties and Sentences Act seemed quite clear to the Tribunal, Mr Knibbs's email to the Tribunal stated:-

*“This morning the Chairman observed that Stewards had had regard to breaches of the Rules which occurred more than 7 years ago and indicated that he believed that was contrary to the provision of the Penalties and Sentences Act 1992 (Qld) (**the Act**). Section 3 of the Act sets out the purposes of the Act, which is to address the “general powers of courts” and all of the purposes relate to “sentencing”. The Act defines the term “sentence” as meaning:*

...any penalty or imprisonment ordered to be paid or served, or any other order made, by a court after an offender is convicted, whether or not a conviction is recorded.

It is important to note that it therefore only applies to penalties or imprisonment ordered by "a court" and the Act does not define that expression so as to include a Tribunal or any other person or body.

Accordingly the Act does not apply to:

- *Stewards exercising their powers under the Rules; or*
- *the Tribunal exercising its powers under the Racing Act 2002 (Qld)."*

It is clear that Mr Knibbs did not understand what was requested and this may well be because of the practice of the Respondent to have unqualified people appear on its behalf before the Tribunal. Mr Neaves did understand what was requested and forwarded a facsimile to the Tribunal stating:-

"... I have not been able to locate a section in the Penalties and Sentences Act 1992 that sets out an expiry type timetable for offences I think to what I was referring at today's appeal is the Criminal Law (Rehabilitation of Offenders) Act 1986..."

Mr Neaves's facsimile then went on to refer to section 3 of the *Criminal Law (Rehabilitation of Offenders) Act 1986* which refers to the Rehabilitation Period in that act.

Furthermore, Mr Neaves went on in his letter to state:-

"Please accept my apology for my submission that such a section existed in the Penalties and Sentences Act 1992, I certainly did not intend to mislead the Tribunal."

The Tribunal does not consider that it was misled by Mr Neaves and it is clear that he was simply going to make enquiries concerning the applicability or otherwise of the Act in relation to the Appellant's past breaches of the Rule.

An Appeal before the Tribunal is required pursuant to Section 172(3) of the Racing Act 2002 to be:

“...by way of rehearing, unaffected by the decision appealed against, on the material before the entity that made the decision and any further evidence allowed by the Tribunal.”

The Tribunal must as stated by His Honour Judge McGill SC in the decision of *Wallace v Queensland Racing [2007] QDC16A*:

“...proceed directly... to exercise the decision afresh.”

An issue which the Tribunal has considered deals with the past breaches of the Rule by the Appellant. In his paper presented to the Australian Racing Appeals Tribunal Conference 2007 entitled “Penalty Options for Racing Animal Drug Infringements,” J.E. Murdoch SC, when referring to Repeat offenders in paragraphs 73 to 81 of his paper stated:-

“73. A discussion of recent TCO2 cases enables one to make pertinent observations in respect of repeat offenders. In the recent TCO2 case involving trainer Geoffrey Caught, thoroughbred racing stewards in Queensland imposed a twelve months’ disqualification in circumstances where the trainer’s record in positive swab cases was as follows:-

Date	Drug	Penalty	Appeal
01/09/90	Lignocaine	Fine \$5,000	Varied – fine \$3,000
22/02/02	Testosterone	Fine \$6,000	No appeal
28/05/03	Promozine and Hydroxypromazine	Fine \$12,000	RAT – varied to \$8,000 fine

74. The QRAT determined that the period of twelve months’ disqualification was out of line with what was previously imposed on licensees who have had multiple breaches of AR178. The Tribunal considered a period of nine months’ disqualification to be a more appropriate penalty.⁵¹

75. At the time the benchmark in TCO2 cases in Queensland was six months’ disqualification. This suggests that there was approximately a 50% premium to reflect the poor past record.

⁵¹ QRAT No: RT021-06 Decision 20 December, 2006, Mr Brockwell Miller – Deputy Chairman, Mr Dennis Standfield – Member

76. *In dealing with past records, care needs always to be taken to ensure that old infringements do not come back to haunt a licensee who has learnt from his or her previous mistakes. Using the criminal law as a basis, it can be strongly argued that breaches more than five years old should either be disregarded or give little weight.*⁵²
77. *That said, a particularly bad past record – even in the distant past – tends to come against a licensee. In *Neimann v the Queensland Harness Racing Board*, Neimann was charged with the presentation offence in relation to the substance diclofenac. His prior history was old but involved four similar prior breaches.*⁵³
78. *Niemann was suspended for a period of twelve months and failed in an appeal to reduce the period.*
79. *At the time, the tribunal regarded the mean for this type of offence in harness racing as six months' disqualification for breaches of Rule 190(1).*
80. *In attempting to dissect the penalty in Niemann's case, it might be theorized that the 12 months had the following components:*
- | | | |
|---|---|-------------------------------------|
| <i>Benchmark</i> | - | <i>six months' disqualification</i> |
| <i>Loading for repeat offence</i> | - | <i>three months</i> |
| <i>Loading for suspension in lieu of disqualification</i> ⁵⁴ | - | <i>3 months</i> |
81. *This case also suggests that 50% loading for repeat offenders is a rough guide. It can, though, be no more than that.*"

While Mr Murdoch's analysis of the *Caught* and the *Neimann* decisions are interesting, the position of the Tribunal with respect to past breaches of the presentation rule is that while they are relevant, there needs to be a full consideration of each past offence to formulate what penalty is appropriate. The Tribunal does not consider it is a matter of "loading" a first offence penalty. Furthermore, the matter of

⁵² By analogy under the Criminal Law (Rehabilitation of Offenders) Act 1980, the rehabilitation period, as defined in Section 3(1) is a period of five years commencing on the day the conviction is recorded, for a conviction that was not on indictment.

⁵³ 10 November, 1976; 22 April, 1983; 20 January 1987 and 8 December, 1987.

⁵⁴ He was employed as a farrier by various stables.

past breaches is of secondary consideration to the circumstances of the breach under Appeal and the personal circumstance of any Appellant.

In this Appeal, while there were three previous breaches of the Rule and one did involve Phenylbutozone, the others were a liniment rub and a painkiller prescribed by a vet.

In the Neimann decision referred to by Mr Murdoch, Mr Neimann was also a farrier and a matter that arose then was the consideration of whether there should be a "loading" to take into account that there was a suspension and not a disqualification which would enable Mr Neimann to continue his employment and attend licensed stables. With respect to that matter the Tribunal stated:

"Mr Murdoch submits that it can be inferred that there was a "loading" of the penalty to take into account that it was a suspension and not a disqualification. He argues that there is no justification for any enlargement of the time merely because Mr Neimann's employment is that of a farrier and therefore a need to attend licensed stables. With respect of the matter the Tribunal is in agreement with Mr Murdoch and accepts that where a particular licensee is (apart from being a licensee) employed in some other aspect of the industry this should not be a basis for enlargement of the time imposed if the stewards decide to impose a suspension instead of a disqualification. Whether it is a suspension or a disqualification a licensee is still deprived from privileges granted by his licence. If the stewards [are] of the opinion that there are circumstances where this can be abused they are also free to impose conditions when they decide to impose a suspension."

The Tribunal reaffirms its view that the licensee should not be penalised because of his occupation.

While in the Neimann decision there was a suspension imposed the Tribunal is of the opinion that a disqualification with conditions imposed by the stewards would be the appropriate penalty for the Appellant. The prior breaches of the Rule were not as distant as Mr Neimann's past breaches and the detriment to the industry of a TCO2 elevated reading cannot be underestimated.

With respect to a monetary penalty in addition to the fine, the Tribunal finds that a penalty of \$1,000.00 would be the appropriate penalty. The conditions imposed on the Appellant to enable him to continue his farrier duties does not enable him to attend racemeetings and there will be a loss to his income because of his inability to

carry out his employment in that regard. In addition from the evidence presented to the Tribunal it is clear that the Appellant is under financial stress and the loss of prizemoney he could earn from his hobby training will only add to the Appellant's financial predicament.

The Appellant's Appeal on penalty is upheld and the penalty is varied to twelve months' disqualification on the same conditions as imposed by the Stewards together with a monetary penalty of \$1,000.00.

The Appeal deposit fee is refunded to the Appellant.

Mr Leo Williams AO
Deputy Chairman

Mr Brock Miller
Deputy Chairman

Mr Dennis Standfield
Member