

RACING APPEALS TRIBUNAL

QUEENSLAND

NOTICE OF DECISION

APPEAL NO: RT015-09

DATE: 30 July 2009

APPELLANT: Mr Dale Missen

RESPONDENT: Queensland Racing Limited

APPEAL FROM: Appeal from the decision that the Appellant breached AR81A(1)(a) and the imposition of a penalty of 3 months suspension.

BREACH OF RULE: AR81A(1)(a)

DECISION: Appeal Upheld.

APPEARANCES: The Appellant appeared on his own behalf.

Mr A J Orchard, Director of Integrity Operations of Queensland Racing Limited appeared on behalf of the Respondent.

REASONS FOR DECISION

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

On the second and final day of the Stewards Inquiry held at the Rockhampton Jockey Club on 2 June 2009 the Appellant was found by the Stewards to have breached AR81A(1)(a) and the Stewards imposed by way of penalty suspension of the Appellant's licence to ride in races commencing midnight 6 June 2009 up to and including midnight 23 August 2009. The suspension was said to be for a period of 3 months with an allowance for the two week period the Appellant was stood down from riding.

AR81A(1)(a) reads:-

“AR.81A. (1) Any rider commits an offence and may be punished if –

(a) a sample taken from him is found upon analysis to contain a substance banned by AR81B”

AR81B states that diuretics are banned for the purposes of AR81A.

The particulars of the breach of the rule given at the Inquiry (Stewards Inquiry Transcript (“SIT”) of 2/06/09 at page 16 from line 42) were stated as:-

“...The particulars of the charge are that you, Jockey Dale Missen, did provide a sample at the Sunshine Coast on 21st of the 3rd 2009, when engaged to ride at that meeting, and upon analysis the sample you provided on that day has returned a positive reading to a diuretic, and in particular the diuretic frusemide.”

The Appellant pleaded not guilty to the charge stating as the basis of his defence that the Stewards had not complied with Queensland Racing Limited’s (“QRL”) Drug and Alcohol Policy for Licence Holders and Race Club Officials (“the Policy”) as they did not provide evidence of a chain of custody of the sample from when it was taken to when it was analysed on 3 April 2009 at Racing Analytical Services Ltd in Victoria. The results of the analysis were referred to in Certificate No. RAS09/01789-B (“the Certificate”) and stated that Frusemide was present in the sample analysed.

While the Notice of Appeal to the Tribunal is stated to be lodged on 15 June 2009, that Notice is dated 4 June 2009 which is the day the Appellant first sent the Notice of Appeal together with his Application for a Stay and Credit Card Authorisation by facsimile to the Racing Appeals Tribunal Registry. However, shortly after sending those documents, the Appellant contacted Registry staff and advised that as he had to lodge the Appeal to the First Level Appeal Committee (“First Level”), he asked to “tear up the documents he had faxed”. As his Notice of Appeal was not processed at the time of his phone call, the documents were discarded by Registry staff in accordance with the Appellant’s request.

On 15 June 2009 the Appellant telephoned Registry staff and advised that he tried to lodge his Appeal with the First Level but was told by Queensland Racing that he was out of time and he requested that his Appeal be lodged with the Tribunal as he claimed he was denied natural justice. The Notice of Appeal was accepted by the Registry on 15 June 2009.

On 25 June 2009 the Tribunal Registry received a letter dated 19 June 2009 from Mr Wade Birch, Chief Steward of Queensland stating:-

“RE: Dale Missen Appeal

It has been brought to my attention that the above jockey has lodged an appeal with the Racing Appeals Tribunal in respect of his recent suspension.

I note in the light of the fact that the suspension was for a period of 3 months, Mr Missen has the ability to appeal to the First Level Appeals Committee. He failed to appeal within the time period of 2 days.

In accordance with Section 167(1)(c) of the Racing Act 2002, the Tribunal has jurisdiction to hear appeals from the decisions of stewards ‘if there is no right of appeal to an appeal committee against the decision’. In this case, there was a right of appeal (which was not exercised within the timeframe) and therefore, in my submission, the Tribunal does not have jurisdiction to entertain this appeal.

I would be grateful if you would confirm whether, in light of the foregoing, the Tribunal plans to deal with this matter.”

The matter was set down for hearing by the Tribunal on 29 June 2009 with the Appellant to appear by video conference from Mackay. On that day Mr MacSporran SC appeared for the Respondent but there was no appearance in Mackay by the Appellant and he could not be raised by telephone. The Tribunal decided not to dismiss the matter and then made an order calling on the Appellant to satisfy the Tribunal as to why he should be given leave to extend the date for hearing of the Appeal. Notwithstanding the non-appearance of the Appellant at the first hearing date, the Respondent through Mr MacSporran SC provided an Outline of Submissions dated 25 June 2009 submitting that the Tribunal had no jurisdiction to hear the Appeal. (“Respondent’s First Submissions”).

The Appellant did advise the Tribunal as to why he did not attend on 29 June 2009 and a new Hearing date was notified to the parties for 30 July 2009 with the Appellant again to appear by video conference from Mackay. The Appellant did appear and Mr A. J. Orchard appeared for the Respondent and provided a further Outline of Submissions dated 30 July 2009 (“Respondent’s Second Submissions”).

At this Hearing with respect to the jurisdictional issue the Appellant stated that he did attempt to contact Ms Debbie Toohey at Queensland Racing who holds the position

of First Level Appeals Secretary. The Appellant said that all jockeys in Queensland have Ms Toohey's number and they know to phone her. He said that he attempted to speak to her by telephone on 4 June 2009 but could not raise her and left a message on her voicemail. It appears that documents were faxed by Ms Toohey to the Mackay Turf Club that day but either the Appellant did not enquire or was not advised that the documents were received. In any event it was the following day, Friday 5 June 2009 that the Appellant lodged his Appeal with Ms Toohey. Ms Toohey gave evidence to the Tribunal and stated that when the Appeal was received, she did speak to the Appellant as to whether the Appeal would be accepted. Ms Toohey gave evidence that after discussing the matter with her Appeals Manager Ms Shara Murray, Mr Missen was advised that his Appeal was out of time and would not be heard by the First Level. No evidence was led or given as to the reasons for this decision.

There is no doubt that the Appellant knew of the two day requirement to lodge an Appeal with the First Level. Indeed, Appeal No. RT010-09 by the Appellant was an appeal against a careless riding suspension and was an Appeal from a First Level Appeal Committee's decision of 27 May 2009 and lodged with the Tribunal on 1 June 2009. The Appellant stated that he had blank Racing Appeal Tribunal Notice of Appeal forms which were those he completed and faxed on 4 June 2009. It can only be speculated whether he initially knew in which jurisdiction to lodge the appeal for a suspension period of three months. However, he was a day late with the notice to the First Level and Ms Toohey decided that the Appeal may not be heard. Because of this, the Respondent claims this Tribunal is precluded from jurisdiction to hear the matter.

The arguments on the jurisdictional issue raised by the Respondent in the Respondent's First Submissions are set out in paragraphs 6 to 19 and state:-

- “6. *The Racing Act 2002 (“the Act”), in s.95 provides that the rules of racing may allow a person aggrieved by a reviewable decision to appeal to an appeal committee.*
7. *“Reviewable Decision” is defined by s. 95 relevantly for present purposes, as a decision of the Stewards to suspend a license for a period of not more than 3 months.*
8. *Section 96(d) provides that the rules of racing may stipulate time limits that apply for such an appeal.*

9. *LR 31 sets out the requirements relating to appeals from decisions of the Stewards.*
10. *Relevantly for present purposes LR31 contains the following provisions:-*
 - “(3) The right of appeal to a First Level Appeal Committee is in addition to any right of appeal to the Racing Appeals Tribunal provided by the Racing Act 2002.*
 - (4) If a right of appeal to a First Level Appeal Committee is available to a person, that right of appeal is to be exhausted before the person lodges any appeal to the Racing Appeals Tribunal.*
 - (5) Any person who wishes to appeal to a First Level Appeals Committee (an “Appellant”) must lodge a “Notice of Appeal” in the prescribed form (available on the Queensland Racing website or from Queensland Racings offices) with the First Level Appeals secretary:*
 - (a) by delivery to any regional office of Queensland Racing;*
 - (b) by express post to PO Box 629 Hamilton Central Queensland 4007;*
 - (c) by facsimile to (07) 3852 27818; or*
 - (d) by email to:*
appealssecretary@queenslandracing.com.au
 - (6) A Notice of Appeal must be lodged with the Appeals secretary within 2 working days of the date on which the Stewards made the decision which is the subject of the Appeal.*
 - (7) The date of lodgment for a Notice of Appeal in the prescribed form is the date on which it is received by the Appeals secretary.*
 - (8) Should the First Level Appeals Committee secretary not receive the appeal in the prescribed form within 2 working days*

of the date on which the Steward's decision (which is the subject of the appeal) is made, then the First Level Appeals secretary may decide that the appeal not be heard by any First Level Appeal Committee."

11. *It is clear that in the circumstances where the Appeal Notice is not lodged as required within 2 working days of the decision of the Stewards, the Appeals secretary, in this case Ms Toohey, has a discretion to decide that the appeal not be heard.*
12. *The Appeals secretary exercised her discretion in this case.*
13. *In these circumstances, there was never a valid appeal on foot before the First Level Appeals Committee.*
14. *Although LR 31(3) provides that the appeal to the First Level Appeals Committee is in addition to any right of appeal to the Racing Appeals Tribunal, LR 31(4) provides that the appeal to the First Level Appeals Committee must be exhausted before any right of appeal to the RAT is exercised.*
15. *Because there was never a valid appeal to the Firsts Level Appeals Committee on foot because of the late lodgement of the Notice of Appeal, the right of appeal to the Fist Level Appeals Committee has not been exhausted. There is therefore no additional right of appeal to the RAT.*
16. *The Act in s.167 provides for decisions that may be appealed to the RAT.*
17. *Section 167(1)(c) provides a right of appeal to the RAT against a decision involving the imposition of a monetary penalty by, or other decision of, a Steward of a control body if there is no right of appeal to an Appeal Committee against the decision.*
18. *This section only provides an appeal to the RAT where there is no provision allowing an appeal to the First Level Appeals Committee. It cannot avail the Appellant here because there was an appeal available to him at the First Level Appeals Committee had he lodged his Notice of Appeal within 2 working days of the decision of the Stewards.*

19. *In the end result, it is respectfully submitted that the RAT has no jurisdiction to entertain this appeal.*"

Section 167 of the Act states the decisions that may be appealed to the Tribunal and states:

"167 Decisions that may be appealed

- (1) *Subject to subsection (4), a person aggrieved by any of the following decisions may appeal to the tribunal against the decision –*
- (a) *a control body's decision to –*
 - (i) *refuse to grant or renew a licence; or*
 - (ii) *take disciplinary action relating to a licence; or*
 - (iii) *take an exclusion action against a person; or*
 - (iv) *impose a monetary penalty on a person;*
 - (b) *a decision of an appeal committee made in relation to an appeal against a monetary penalty imposed by, or other decision or, a steward;*
 - (c) *the imposition of a monetary penalty by, or other decision of, a steward of a control body if there is no right of appeal to an appeal committee against the decision;*
 - (d) *another decision of a control body prescribed under a regulation.*
- (2) *A steward of a control body may appeal to the tribunal against a decision of an appeal committee made on an appeal against the steward's decision.*
- (3) *Subject to an order under section 169, if –*
- (a) *an appeal committee refuses to hear an appeal from a decision of a steward of the control body that established the committee; or*

- (b) *within 6 weeks after lodging an appeal mentioned in paragraph (a), the appeal has not been decided by the appeal committee;*

The committee is taken to have decided to dismiss the appeal.

- (4) *Despite subsection (1), an appeal does not lie to the tribunal against any of the following decisions –*

- (a) *a decision relating to the eligibility of an animal to race or the conditions under which an animal can race;*

Example for paragraph (a) –

A Steward's decision is requiring an animal to pass a stated examination or test before being allowed to race.

- (b) *a decision canceling or suspending the licence for an animal, unless the cancellation or suspension relating to that licence relates to –*

- (i) *a decision to take disciplinary action relating to the licence of a licence holder; or*

- (ii) *a decision to take an exclusion action, under the control body's rules of racing, against a person;*

- (c) *a decision about a protest or objection against placed animals relating to an incident that happened during a race or trial;*

- (d) *a decision imposing a penalty of not more than \$250;*

- (e) *a decision relating to a dispute between a racing bookmaker licensed by a control body and a person who placed a bet with the bookmaker for a race at a race meeting held under the control of the control body;*

- (f) *if a decision to stop, restart, rerun, postpone or abandon a race.”*

Furthermore, Section 169 of the Act states:

“169 What happens if appeal committee refuses to hear or fails to decide an appeal

- (1) *This section applies if an appeal committee is taken under section 167(3) to have decided to dismiss an appeal (the dismissal decision) and the appeal committee lodges a written application with the director for an order that the time for consideration of the appeal by the appeal committee be extended.*
- (2) *The tribunal may make the order.*
- (3) *The tribunal may also make any further order relating to the adjournment or otherwise of an appeal made to the tribunal against the dismissal decision that the tribunal considers appropriate.”*

In the Respondent's Second Submissions the Respondent dealt further with the provisions of Section 167(3)(a) of the Act and those submissions are dealt with in paragraphs 2 to 9 of the submissions which state:-

- “2. *Section 167(3)(a) provides that if an appeal committee refuses to hear an appeal from a decision of a Steward of the control body that established the committee, the committee is taken to have decided to dismiss the appeal.*
3. *Section 95(1) of the Racing Act 2002 provides that a control body's rules of racing for its code of racing may allow a person aggrieved by a reviewable decision to appeal against the decision to an appeal committee established by the control body.*
4. *Section 96(a) of the Racing Act 2002 also allows a control body's rules to provide for the establishment of an appeal committee.*
5. *Queensland Local Rule of Racing 31(1) creates an appeal committee.*
6. *Local Rule of Racing 31 also acknowledges the existence of an appeal secretary with Local Rule 31(8) in particular allowing the appeals secretary to decide that, where the prescribed form of appeal is not received within two days of the date on which the Stewards decision is made, the appeal is not to be heard by any appeal committee.*
7. *In these Local Rules of Racing there is a clear distinction between the appeal secretary and the appeal committee. The appeals secretary is not a member of the appeal committee and is not empowered the made decisions on behalf of the appeals committee.*

8. *The appeals secretary in this case exercised her discretion to decide that the appeal not be heard by the appeal committee in accordance with Local Rule of Racing 31 (8).*
9. *In these circumstances, there was no refusal by an appeal committee to hear the appeal within the meaning of Section 167(3)(a) as the appeal was never considered by the appeal committee. Instead, the decision that the appeal not be heard was made by the appeals secretary. It follows that Section 167 (3) has no application to the facts of the current matter.”*

If the Respondent's submissions are correct then the discretionary power given by LR31(8) to the First Level Appeals Secretary in deciding whether the First Level will or will not hear an appeal which is lodged outside of the two working day period not only precludes the First Level from dealing with the matter, but also this Tribunal. While the term "First Level Appeals Secretary" is not defined in the Rules, the Tribunal sees the functions which the Secretary carries out under LR 31 as no more than part of the process of determination of appeals by the First Level. The First Level Appeals Secretary is not a statutory appointment and the Tribunal cannot accept that power given to the Secretary ousts the jurisdiction of the First Level or this Tribunal. As part of the process of determining matters by the First Level, any decision made by the First Level Appeals Secretary must be considered as a decision of the First Level Appeal Committee.

While Section 96 of the Act enables a control body's rules of racing to provide for matters involving an appeal committee, including how an appeal is started and time limits that apply for an appeal those matters deal with the process for determination of an appeal and cannot vest any power in any person outside the powers vested in the First Level. The Tribunal sees no reason to read down the provisions of Section 167(3). The simple facts of this matter are that the Appellant did lodge an appeal with the First Level on 5 June 2009 that has not been heard because of an executive decision and by Section 167(3) the Committee is deemed to have decided to dismiss the Appeal. Any purported "power" given to the First Level Appeal Secretary is subordinate to the right for the Appellant to have the Tribunal determine his Appeal under Section 167(3) of the Act.

The Tribunal is of the view that the reference to "...the appeal not be heard by any First Level Appeal Committee" in LR31(8) is within the scope of "...refuses to hear an appeal..." as referred to in Section 167(3)(a) of the Act.

Furthermore, there is the issue of whether the First Level Appeals Secretary did exercise her discretion. While this is not relevant as the Tribunal has found that the acts of the Secretary are part of the First Level Appeal process and Section 167(3) should not limit the Appellant's right of appeal, the evidence given by Ms Toohey is that she was aware that the Appellant intended to lodge the Appeal within the two day period. No prejudice to the Stewards is shown and there were reasonable prospects of success in the Appeal. It is difficult to see on what basis the Secretary did not accept the Appeal for hearing on its merits.

The Tribunal is of the view that it has jurisdiction to deal with the Appeal.

The substantial issue in the Appeal is whether the evidence before the Tribunal is sufficient compliance with the "documented chain of custody" requirements with respect to the sample taken from the Appellant. The Appellant has submitted that the Respondent has not complied with the Policy. The relevant requirement which the Appellant is referring to in the Policy is at the second paragraph of the third page of the Policy which states:-

"Tests will be conducted in a manner that respects the privacy of the person from whom the sample is being collected. The time, place and name of each person who handles a sample must be recorded so as to provide a documented chain of custody."

At the Inquiry the Stewards responded to the Appellant's submissions of non-compliance with the Policy when finding the Appellant had breached the Rules in the following terms (SIT on 2/06/09 at page 18 from line 18):

"THE CHAIRMAN: Thanks, Jockey Missen. In relation to this matter with your swab sample 41319, the defence that you have put up, that you believe there is a concern with the sample not being your own, the evidence which has been tendered, particularly Exhibit 4 which is the Drug Testing Custody and Control form, which was signed by Dr Vine when the sample arrived in the lab, and he clearly indicates that the condition when received was undamaged when it arrived in the lab.

When samples arrive in the lab, if the seals are broke and/or damaged, we are advised of that. This sample has clearly arrived at the laboratory undamaged and with the seals intact. We therefore feel that the integrity of the sample has not been compromised and therefore believe that it is your sample of urine and believe that we can formally find you guilty as charged."

While the Stewards were dismissive of the Appellant's submission that the Policy has not been complied with, the Tribunal is concerned with the evidence before it that there has been compliance. The evidence relied upon by the Stewards is a printed form from Racing Analytical Services Ltd which is bar coded as No. 41319. That form is titled "Drug Testing Custody and Control Form". There were two exhibits of the relevant form in the Exhibits at the Stewards Inquiry. On Exhibit 1 there is a notation at the foot of the form as "WHITE COPY – CLIENT – DO NOT SEND TO LABORATORY". The form is stated to be in two sections. Section 1 is headed "To Be Completed By Collector At Collection Site" and Section 2 "To Be Completed By Person Providing Specimen". Exhibit 1 refers to a random sample taken at 6:03 pm on 21 March 2009 at Caloundra. The Collector's name was stated as W. Booshand with the Appellant stated to be the person who provided the sample. Exhibit 4 at the Inquiry has at the foot of the form "PINK COPY – LABORATORY – MUST ACCOMPANY SPECIMEN TO LABORATORY". On Exhibit 4, Section 2 of the form is blacked out and there is a Section 3 headed "To Be Completed By Laboratory". Section 3 is completed and has stated the sample was received undamaged and the result being positive and signed by J H Vine with the date being 3 April 2009. There is additional printed wording on Section 3 of the form which states:

"I certify that a sealed pack has been received and was allocated the above laboratory number; that the specimen has the same number as that at the top of this form; that the specimen was examined on receipt; handled and analysed in accordance with established procedures and that the results below are for this specimen."

That endorsement can only be interpreted that the sample was received and analysed on the same date, namely 3 April 2009.

With that endorsement, the Tribunal can only conclude that this states that the Appellant's urine sample was collected on 21 March 2009 at Caloundra and received at Racing Analytical Services Limited in Melbourne on 3 April 2009 which is a period of 13 days.

While at the hearing Mr Orchard was invited by the Tribunal to make submissions regarding custody and control issues, the Respondent chose not to do so, other than relying on the Drug Testing Custody and Control form which were exhibited at the Stewards Inquiry.

The Tribunal has had a number of matters before it where there have been urine samples taken from licensees. In those matters, the procedure with the custody and

control issue was dealt with differently than what has occurred in this matter. In those recent other matters there have been statutory declarations taken by the Stewards as to who had custody of the samples from when they were taken, when they were transported and when they were forwarded to the analytical laboratories.

The Respondent's policy is quite clear in that it requires "...each person who handles the sample must be recorded so as to provide a documented chain of custody". There are simply no details in this matter of "The time, place and name of each person who handles a sample ...". There is no explanation as to what happened to the sample for the thirteen days to when it was signed as being received by Dr Vine of Racing Analytical Services Ltd.

This is a serious charge. The Appellant's livelihood is affected and the Tribunal is of the opinion that the evidence before it must be at the higher end of "reasonable satisfaction" as required by *Brigenshaw v Brigenshaw (1938) 60 CLR*. The Tribunal is not satisfied that the Respondent has complied with its Policy with respect to the taking and analyzing of the Appellant's sample.

The Appeal is upheld at the Appeal Deposit Fee refunded to the Appellant.

Mr Leo Williams AO
Deputy Chairman

Mr Brock Miller
Deputy Chairman

Mr Dennis Standfield
Member