IN THE RACING APPEALS TRIBUNAL

BRAD ELDER
Appellant

v

HARNESS RACING NEW SOUTH WALES
Respondent

REASONS FOR DETERMINATION

Date of hearing:	**16 July 2024**
Date of determination:	**17 July 2024**
Appearances:	**Mr P Morris for the Appellant**
	Ms C Chua for the Respondent
ORDERS:	**1. The Appeal is dismissed.**
	2. The appeal deposit is forfeited.

BACKGROUND

1. By a Notice of Appeal dated 12 October 2023, Brad Elder (the Appellant) appealed against a decision of Harness Racing New South Wales (the Respondent), which was confirmed by the New South Wales Harness Racing Appeal Panel, to impose a period of disqualification of 10 months in respect of each of three breaches of r 190 of the *Harness Racing New South Wales Rules*. The three periods of disqualification which were imposed were ordered to be served concurrently, resulting in a total period of disqualification of 10 months.

2. The appeal was heard on 16 July 2024, following which I reserved my decision. However, by that time (an application for a stay of the determination having previously been refused), the Appellant had all but served the entirety of the disqualification which had been imposed on him. Those circumstances were brought about, in part, by variations in the timetable for the hearing of the appeal which had been made at the Appellant's request. Accordingly, I made orders on 17 July 2024 dismissing the appeal, and indicated that my reasons for making that order would be published in due course. Those reasons now follow.

THE EVIDENCE TENDERED ON THE APPEAL

3. I was provided by the parties with a Tribunal Book which extended to more than 300 pages. My reading of that material prior to the hearing led me to form the view that at least some it was of marginal relevance to the issue of penalty, which was the sole issue raised on the appeal. Whilst I am always grateful for the diligence of parties in preparing material to assist in the determination of any appeal, it is equally important that such material be relevant to the case of one party or another. In the present case, at least some of it was not referred to in the submissions of either party at all.

4. None of these observations are intended, in any way, as a criticism of either party. However, in cases where the issues are limited, and/or where the circumstances of, or background to, the offending are not in dispute, parties to an appeal may wish to consider adopting the practice of formulating a Statement of Agreed Facts,

and supplementing those agreed facts with any other evidentiary material upon which reliance is to be placed. Approaching the preparation of such cases in that way is likely to save time and costs, both for the parties and for the Tribunal.

THE FACTS

5. The facts are not in dispute and I draw the following summary from the submissions of the Respondent.[1]

6. The Appellant was issued with a B Grade Trainer's Licence by the Respondent on 2 September 2022. On 8 September 2022, he commenced training *Lil Ripper NZ* (the horse). Relevantly for present purposes, the horse was presented for competition in 3 races, namely at:

    (i) Newcastle on 4 November 2022;
    (ii) Newcastle on 7 November 2022; and
    (iii) Menangle on 10 December 2022.

7. The horse won each of those races. Post race swabs taken on each occasion were found to contain *Levamisole,* which is a Class 2 prohibited substance.

8. The Appellant was interviewed at length on 12 January 2023.[2] When informed of the presence of *Levamisole* in the samples, the Appellant expressed considerable surprise[3]. Although, in a subsequent enquiry, the Appellant proffered various explanations as to the presence of the substance, it appears from the submissions made on his behalf for the purposes of the present appeal that none of those explanations are relied upon. It follows that I am not able to determine how the prohibited substance came to be present in the horse's system. The significance of that circumstance on the question of penalty is discussed further below.

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[1] Commencing at p. 2.
[2] Transcript commencing at TB 120.
[3] TB 121.29.

9. As previously noted, the Appellant was charged with three separate breaches of r 190, to each of which he pleaded guilty. A disqualification of 10 months was imposed by the Respondent in each case, to be served concurrently. An appeal to the Appeal Panel of Harness Racing New South Wales was dismissed.

THE NATURE OF LEVAMISOLE

10. A Notice issued by the Respondent to industry participants explains the nature of *Levamisole* in the following terms:[4]

> *Levamisole is an anti-parasitic drug which has been implicated in a number of cases involving the detection of prohibited substances.*
>
> *In the horse, Levamisole can be metabolised into a number of derivatives which are performance enhancing and thus prohibited substances.*
>
> *In Australia, Levamisole is not registered for use in horses and therefore is not exempt from the list of prohibited substances.*
>
> *Trainers are advised and Levamisole has a very narrow margin of safety and there are no indications for its use. It should not be used in horses at any time.*
>
> *Any finding of Levamisole derivatives will be viewed most seriously by HRNSW. These derivatives would be considered to be Class 1 drugs and thus make the trainer liable to a period of disqualification of not less than 5 years for a first offence (under the recent penalty guidelines of 3 June 2012.*

11. That Notice is undated, but the final paragraph suggests it was distributed to industry participants in or around 2012. That was, obviously, long before the Appellant was issued with a licence. There is therefore no suggestion that this Notice ever came to the Appellant's attention. That said, the Notice remains relevant for its explanation of the nature of *Levamisole,* and the concerns to which it gives rise in the industry.

[4] TB 246.

SUBMISSIONS OF THE PARTIES

Submissions of the Appellant

12. Many of the submissions advanced on behalf of the Appellant drew upon principles applicable to sentencing for criminal offences. In *Australian Building and Construction Commissioner v Pattinson,*[5] the High Court concluded[6] that the purpose of the civil penalty regime which was then being considered was primarily, if not solely, the promotion of the public interest in compliance with the relevant statutory provisions. In doing so, the Court cautioned[7] those making decisions in the context of such penalty regimes against being distracted by concerns drawn from the criminal law, including the proposition that a penalty must be proportionate to the seriousness of the conduct that constituted the relevant contravention.

13. That is not to say that some principles applicable to sentencing for criminal offences are not relevant when assessing penalty for a regulatory offence. For example, it is generally accepted that considerations of general and specific deterrence are relevant when assessing penalty in matters of the present kind. However, the decision in *Pattinson* makes it clear that great care must be taken in transposing, as a whole and absent scrutiny, sentencing principles drawn from the criminal law to assessing penalties for regulatory breaches.

14. Those observations having been made, the submissions advanced on behalf of the Appellant may be summarised as follows:

    (i) the offending, although serious by its nature, fell towards the lower end of the scale;[8]

[5] (2022) 274 CLR 450; [2022] HCA 13.
[6] At [9].
[7] At [10].
[8] At [3.2]; [3.9].

(ii) the fact that the Appellant could not advance a reason for the presence of the substance in the horse did not render the offending of greater gravity, and did not constitute an aggravating factor;[9]

(iii) although there were three separate breaches, the circumstances (including the fact that the Appellant did not become aware of the presence of the substance until after the commission of the third breach) were such that the offending should be treated as the one episode for the purposes of assessing penalty;[10]

(iv) *Levamisole* is not a performance-enhancing substance;[11]

(v) general deterrence had no role to play in determining penalty;[12]

(vi) there were a series of important subjective circumstances to be considered, including the Appellant's age and, importantly, the psychological impact of the offending on the Appellant;[13]

(vii) the Appellant was remorseful, and entered pleas of guilty at the first available opportunity;[14]

(viii) the need for protection of the racing community, or the harness racing industry generally, was not a relevant consideration;[15]

(ix) the imposition of a period of disqualification was akin (in terms of the criminal law) to a sentence of imprisonment[16] and should therefore be viewed as a penalty of last resort;[17] and

(x) taking into account all relevant factors, the appropriate penalty was a suspension of 6 months.[18]

15. As to the submission in (vi) above, the evidence before me includes a report of Kerry Watson, Psychologist, who examined the Appellant on 15 February 2024 and

[9] At [3.3].
[10] At [3.3].
[11] At [3.4].
[12] At [3.7].
[13] At [4.1].
[14] At [4.3].
[15] At [5.1].
[16] At [5.1].
[17] At [5.2].
[18] At [5.3].

provided a report dated 30 March 2024.[19] Ms Watson diagnosed the Appellant as suffering from a Major Depressive Disorder which, in her opinion, *"directly developed in accordance with the circumstances that have arisen as a result of the allegations against him and the subsequent disqualification from the harness racing industry"*.[20] In other words, it is Ms Watson's opinion that the Appellant's Depressive Disorder is attributable to the charges brought against him, and the associated disciplinary proceedings which resulted in a disqualification being imposed.

Submissions of the Respondent

16. In summary, the Respondent submitted that:

(i) all breaches of the rules surrounding the presence of prohibited substances in horses are serious, and the submission of the Appellant that the offending falls at the lower end of the scale should be rejected;[21]

(ii) the objective seriousness of the offending, and the fact that it does not fall at the lower end of the scale, was evidenced by the fact that:

(a) it involved the presence of *Levamisole,* a class 2 drug;

(b) it involved 3 separate breaches of the relevant rule;

(c) the horse won on each of the 3 races in question; and

(d) the Appellant could not advance any explanation of how the substance had entered the horse's system;[22]

(iii) there was no basis on which to conclude that the Appellant's culpability was reduced (for example, by a finding that he had done everything he could do to prevent the offending);[23]

(iv) although not determinative of penalty, it was relevant that *Levamisole* is:

[19] Commencing at TB 322.
[20] TB 327.
[21] At [17] – [18].
[22] At [20].
[23] At [20].

(a) not registered for use in horses in Australia;

(b) prevalent in the industry;

(c) capable of being put to other uses, for example, as a cutting agent for cocaine;

(v) the factors in (iv) generally increased the Respondent's integrity concerns;[24]

(vi) both general and specific deterrence were relevant considerations on the question of penalty;[25]

(vii) whilst the Appellant's psychological state was relevant, there was no evidence that he had suffered from mental health issues at the time of the breaches, such that there was no causal connection between the Appellant's offending and his diagnosed Depressive Disorder;[26]

(viii) it has been previously recognised by this Tribunal that depressive reactions of the kind experienced by the Appellant are not uncommon in circumstances such as the present;[27] and

(ix) no penalty other than the disqualification which was imposed was appropriate.[28]

Submissions of the Appellant in reply

17. Generally speaking the submissions of the Appellant in reply reiterated the matters previously put, and took particular issue with the Respondent's characterisation of the seriousness of the offending.

CONSIDERATION

18. For the reasons that follow, I came to the view that the appeal should be dismissed.

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[24] At [21].
[25] At [25] – [27].
[26] At [33].
[27] At [35] citing the Tribunal's determination in *Fox v Harness Racing New South Wales* (22 August 2022).
[28] At [43].

19. To begin with, the present case involves a multiplicity of offending. I accept that the Appellant did not become aware of any issue until after the event. It follows that this is not a case in which, having been made aware of a breach, the Appellant proceeded to commit an identical breach on two further occasions. However, where there a multiple breaches the offending will, as a matter of common sense, generally be regarded as being of greater gravity than would be the case where the offending was isolated. That said, I accept that for the purposes of assessing penalty, the three breaches should be viewed as the one episode of offending, particularly in circumstances where only 6 days separated the first breach from the third.

20. The Appellant was unable to provide any explanation for the presence of the substance in the horse's system. In that respect, cases of this kind generally into one of three categories, namely:

    1. where there is evidence of positive culpability (for example, where there is evidence of the participant knowingly and intentionally administering the prohibited substance);
    2. where the participant provides no explanation for the presence of the prohibited substance, or where such explanation which is proffered is rejected, such that the Tribunal is left in a position of having no real idea as to how the substance came to be in the animal's system;
    3. where the participant provides an explanation for the presence of the prohibited substance which the Tribunal accepts, and which supports a conclusion that there is no culpability at all.

21. The present case falls into the second category, the Appellant's initial explanations having seemingly been abandoned for the purposes of the present appeal. Whilst the fact that the Appellant has not provided an explanation is not an *aggravating* factor, it has been recognised that such a case (which falls within category 2 above) may be regarded as being similar to cases in category 1,

depending on the circumstances.[29] The fact that this is so, is somewhat at odds with a finding that the offending falls towards the lower end of the scale.

22. Further, there are objective circumstances which elevate the seriousness of the offending. They include the fact that, consistent with the Notice issued by the Respondent to industry participants many years ago, *Levamisole*:

    (i) is an anti-parasitic drug, but nevertheless one which can be metabolised into a number of derivatives which are performance enhancing;
    (ii) is not registered for use in horses and therefore is not exempt from the list of prohibited substances;
    (iii) has a very narrow margin of safety;
    (iv) has no indications for its use; and
    (v) should not be used in horses at any time.

23. It follows that the very nature of *Levamisole* presents a concern for the industry. In particular, I am unable, having regard to the circumstance in [22](i) above, to accept the submission advanced on behalf of the Appellant that *Levamisole* is not performance enhancing.

24. I should add, however, that whilst it may well be that *Levamisole* can be used for nefarious purposes entirely unrelated to the harness racing industry (for example, as a cutting agent for cocaine), there is absolutely no evidence that such a factor has any application at all to the present case. I accept that circumstances of that kind may well have the capacity to increase integrity concerns on the part of the Respondent. However, it is also important not to attribute to a person in the Appellant's position, circumstances about which they may have absolutely no knowledge, and/or in which they may have absolutely no involvement. There is

[29] See *McDonough* [2008] VRAT 6.

nothing to suggest that the *Levamisole* found in the horse's system in the present case was connected, in any way, with cocaine or any other prohibited drug.

25. It is not necessary, for the purposes of determining penalty, to place the offending at a particular point within a notional range of objective seriousness. However, for the reasons I have expressed, I am unable to accept the submission advanced on behalf of the Appellant that the objective seriousness of the offending in this case falls towards the lower end of the scale.

26. I accept that the Appellant pleaded guilty at the first available opportunity. I also accept that he is genuinely remorseful for what has occurred. Both of those factors have been taken into account in his favour.

27. Aside from those considerations, the Appellant's subjective case is based largely on the report of Ms Watson. There is no reason not to accept Ms Watson's opinion, and I do so. However, it is important to bear in mind that her opinion is to the effect that the Appellant's depressive disorder is a *consequence* of the offending, as opposed to being *causally connected* to its commission. Those two scenarios draw an important distinction.

28. This Tribunal has previously (and properly) recognised that adverse mental and psychological sequelae stemming from disciplinary action are not uncommon.[30] That does not mean that they are irrelevant to the assessment of penalty. What it means, is that there may be some limitations on the weight which can be attributed to them in cases where, as here, they are not causally related to the offending itself. I have approached present case on that basis.

29. I accept, of course, that the Appellant's record is a good one, although that must be viewed in the context of a person who has only held a licence for a short time. Apart from the fact that it draws upon principles of sentencing in the criminal law,

[30] *Fox* at [43].

the submission that the Appellant's youth is a factor to be taken into account is of little or no relevance, given the Appellant's age.

30. There is nothing to suggest that personal deterrence has any particular role to play in determining penalty in the present case. However, offending of this kind strikes at the heart of the integrity of the industry. It has the capacity to erode public confidence, and threatens the fundamental objective to ensure a level playing field amongst participants, a factor which assumes some significance in the present case in view of the fact that the horse won all three races in question. For those reasons, notwithstanding the absolute liability attaching to this offending, general deterrence remains a relevant consideration.

31. In *Ross v Harness Racing New South* Wales[31] I made the observation that as a general proposition, the imposition of a period of disqualification for offending of this kind should be regarded as more likely than not, and that a fundamental consideration in determining penalty in such cases was the need to protect and maintain the integrity of, and public confidence in, the harness racing industry. Whilst it is obviously fundamental that any penalty be determined according to the facts and circumstances of the particular offending, there is nothing which causes me to depart, in the present case, from the general views I have previously expressed, particularly given the multiplicity of breaches by the Appellant. In all of the circumstances, a period of disqualification must be imposed, and the period of 10 months is appropriate.

32. It was for these reasons that I made an order dismissing the appeal.

THE HONOURABLE G J BELLEW SC

9 August 2024

[31] Determination of 22 April 2024 at [78] – [79].