VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST VCAT REFERENCE NO. Z533/2021

CATCHWORDS

Review and Regulation List – *Racing Act 1958* (Vic), s 83OH – Application by stewards to review penalty decision of Victorian Racing Tribunal – Role of Tribunal on review – Decision affirmed.

APPLICANT	Harness Racing Victoria
FIRST RESPONDENT	Ryan Duffy
SECOND RESPONDENT	Victorian Racing Tribunal
WHERE HELD	Melbourne
BEFORE	R. Tang AM, Member
HEARING TYPE	Videoconference Hearing
DATE OF HEARING	21 January 2022
DATE OF ORDER AND REASONS	1 March 2022
CITATION	Harness Racing Victoria v Duffy (Review and Regulation) [2022] VCAT 222

ORDER

The penalty decision of the Victorian Racing Tribunal, made on 9 June 2021, is affirmed.

R. Tang, AM
Member

APPEARANCES:

For Applicant	Ms A Wood of Counsel
For First Respondent	Mr R Jones, representative
For Second Respondent	No appearance

REASONS

1 On 13 April 2019, Mr Ryan Duffy, a licensed harness racing driver, assisted Mr Zac Steenhuis to stomach tube (or drench) a horse ('*Bonnie Kash*') at the Mildura Racing Club in the hours prior to Race 11 at Mildura, in which Mr Duffy had been engaged to ride Mr Steenhuis' horse. When Mr Duffy and Mr Steenhuis were confronted by Harness Racing Victoria (**HRV**) stewards, Mr Duffy ran away. Subsequently, Mr Duffy was interviewed by the stewards and falsely told them that he had not had a discussion regarding the events with Mr Michael Steenhuis (**Mr Steenhuis Snr**) at the race meeting later that day.

2 The HRV stewards laid six charges against Mr Duffy, including that:

- **Charge 1** – in breach of *Australian Harness Racing Rule* (**AHRR**) 193(1), he stomach tubed *Bonnie Kash* within 48 hours of the commencement of a race for which the horse had been nominated.
- **Charge 3** – in breach of AHRR 187(6), he frustrated an investigation by running away and not assisting the stewards with their inquiries into the stomach tubing of *Bonnie Kash*.
- **Charge 4** – in breach of AHRR 187(2), he gave false evidence to the stewards to the effect that he had not had a discussion with Mr Steenhuis Snr on the day.

3 Mr Duffy pleaded guilty to Charge 3, and not guilty to Charges 1 and 4.

4 On 25 February 2021, the Victorian Racing Tribunal (**VRT**) found Mr Duffy guilty on all three charges (with one alternative charge falling away, and the remaining two charges being dismissed). In its decision, the VRT rejected Mr Duffy's defence that he took no part in the stomach tubing, finding:[1]

> We are comfortably satisfied that you were standing near the horse's head, either holding it or otherwise assisting Mr Zac Steenhuis, and when Mr Anderson effectively and unexpectedly announced the arrival of the Stewards, you bolted through the door near the horse's head.

5 The VRT also preferred the evidence of Mr Steenhuis Snr and the stewards that Mr Duffy and Mr Steenhuis Snr had had a discussion about the events at the race meeting on 13 April 2019.[2]

6 On 9 June 2021, the VRT imposed the following penalties on Mr Duffy (**Decision under Review**):

- **Charge 1** – 12 months' disqualification.
- **Charge 3** – 3 months' disqualification (cumulative).

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1 Tribunal Book (**TB**), 1032.
2 TB, 1034.

- **Charge 4** – $1,000 fine.

7 In its penalty decision, the VRT observed that Mr Duffy was 'not the principal participant in or instigator of what occurred', although he 'actively assisted' and 'played an active role' in the attempted stomach tubing.[3] The VRT concluded that, '[i]n essence, [Mr Duffy was] in the wrong place at the wrong time and lent assistance'.[4] In fixing a 12 month period of disqualification for Charge 1, the VRT emphasised the need for both specific and general deterrence.

8 In relation to Charge 3, the VRT found that, by running away, Mr Duffy 'caused confusion [which] led to the Stewards having to expend considerable time and energy in trying to ascertain what had occurred'.[5] The giving of false evidence (Charge 4) was said to be 'another, if lesser, instance of making the job of the Stewards more difficult'.[6]

9 On 2 July 2021, HRV filed an application for review under section 83OH(2) of the *Racing Act 1958* (Vic) (**Racing Act**) on the basis that the penalties imposed in respect of charges 1 and 3 'were, in all of the circumstances, manifestly inadequate' having regard to the circumstances of the offending, the principles of general and specific deterrence, penalties in like cases and other relevant factors. HRV seeks that the periods of disqualification be increased to between 15 to 18 months for Charge 1, and to 12 months for Charge 3.[7] At the hearing, Ms Wood (counsel for HRV) indicated that, if the disqualification periods were amended in line with its submissions, HRV was content for the disqualification period in respect of Charge 3 to be served concurrently with the disqualification period in respect of Charge 1.

10 While Mr Duffy did not initiate the review, he contends that the penalty for Charge 1 should be reduced to a period of six to nine months, and that the fine in respect of Charge 4 ought to be suspended.[8] Alternatively, if the penalties for Charge 1 and Charge 3 are maintained, Mr Duffy contends the disqualification period in respect of Charge 3 should be concurrent with, rather than cumulative to, the disqualification period in respect of Charge 1. Mr Duffy also raises concerns about HRV pursuing an appeal at all, where it is legally represented and he is not.

11 For the reasons that follow, I consider the penalties imposed by the VRT in respect of each charge to be appropriate and will affirm the Decision under Review accordingly.

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3 TB, 1066.
4 Ibid.
5 Ibid.
6 TB, 1067.
7 Outline of Submissions on Behalf of Applicant dated 22 September 2021 (**AOS**) [34] and [50].
8 Respondent's submissions (undated) (**ROS**) [24].

Framework for review

12 As indicated by Deputy President Lambrick in *Harness Racing Victoria v Craven* (***Craven***),[9] the Tribunal's role on review of a penalty decision is to make the correct or preferable decision without any presumption as to the correctness or otherwise of the decision subject to review.[10]

13 In *Craven*, Deputy President Lambrick accepted the parties' position that the purpose of imposing penalties for breaches of the rules is 'primarily protective' in terms of:[11]

> preserving the integrity of harness racing by imposing penalties sufficient to deter a guilty party from repeating their conduct (specific deterrence) and sufficient to send a message to the industry concerning the fate of those who offend against the rules (general deterrence) and to uphold the reputation of the industry with the betting public and the general public.

14 In a similar vein, in *Mifsud v Harness Racing Victorian Racing Appeals and Disciplinary Board* (***Mifsud***),[12] Judge Nixon adopted the view of the relevant Board that the purpose of those rules dealing with prohibited substances included ensuring that harness racing was 'conducted on a level playing field … without the assistance of drugs … [and] fairly from the perspective of the betting public'.

15 On issues of parity, Deputy President Lambrick observed in *Craven* that '[e]ach case must depend on its own facts', particularly in circumstances where it was 'impossible to directly compare most of them' because there was little factual detail in the reasons provided, or the cases were readily distinguishable.[13]

16 Deputy President Lambrick also accepted the submission of the respondent's counsel that 'it is appropriate and relevant to give some weight to the determination of the VRT', given it had the 'advantage of hearing the evidence *viva voce* and made a nuanced determination as to culpability',[14] noting that she was bound by the VRT's findings in this regard.[15]

17 Ultimately, the function of the Tribunal after it completes the review is to affirm, vary or set aside and substitute or remit the decision under review.[16]

18 It should be observed that, unlike an appeal of a criminal sentence, it is unnecessary for HRV to demonstrate that the penalties which were imposed

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9 [2019] VCAT 2040.
10 At [14]-[15], citing *William Galea v Harness Racing Victoria* (Unreported, 3 September 2013) [13] (per Judge Nixon).
11 At [16].
12 [2012] VCAT 1438 [14].
13 At [23].
14 At [30].
15 At [31] (referencing clause 66N of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998* (**VCAT Act**)).
16 VCAT Act, s 51(1).

by the VRT were 'manifestly inadequate' (or, conversely, for Mr Duffy to demonstrate that the penalties were excessive or unjust) in order to succeed.

Charge 1 – stomach tubing

HRV's submissions

19 HRV submits that the penalty in respect of Charge 1 should be increased to between 15 to 18 months based on the following considerations:

- *Purpose of AHRR 193(1)* – as indicated in *Mifsud*, the purpose of AHRR 193(1) is to preserve the integrity of harness racing, ensure a level playing field and that harness races are conducted safely, fairly and without the use of drugs.[17]
- *Circumstances of the offending* – the VRT did not accept Mr Duffy's defence that he was not involved in the stomach tubing, instead finding that he actively assisted and played an active role.[18]
- *Not guilty plea* – by reason of Mr Duffy pleading not guilty, the stewards had to exhaust significant resources to pursue the charges.[19]
- *General deterrence* – stomach tubing is a very serious matter, presents a serious integrity risk and is difficult to detect and, as such, requires a penalty that will deter others from 'taking their chances' and engaging in similar conduct.[20]
- *Specific deterrence* – absence of remorse on the part of Mr Duffy means that the penalty should be designed to deter him from engaging in the conduct again.[21]
- *Comparable decisions* – there have been six cases involving breaches of AHRR 193(1) since 2017, with disqualifications imposed in the range of 12 to 24 months.[22] Further, Mr Zac Steenhuis was disqualified for 18 months, which the VRT indicated would have been longer if he had not pleaded guilty. While it is accepted that Mr Duffy was not the mastermind in this case, HRV suggest this is counter-balanced by his contesting of the charge based on an 'impossible case', as well as the fact that he fled the scene and has shown no remorse.[23] HRV suggests there is a precedent for a disqualification period of two years where a person pleads not guilty.[24]

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17 AOS [14].
18 AOS [15].
19 AOS [19].
20 AOS [20].
21 AOS [21].
22 AOS [22], referencing penalties imposed on Mr Bajada (2 year disqualification), Mr G Douglas (2 year disqualification), Mr J Douglas (12 month disqualification), Mr Justice (12 month disqualification) and Mr Sylvia (15 month disqualification).
23 AOS [28].
24 AOS [31].

Mr Duffy's submissions

20 Mr Duffy contends that the disqualification period is excessive, and 'defies fundamental logic', in circumstances where he was a 'minor player'.[25] He says that he 'fully accepts with extreme remorse' the need to adhere to the rules.[26] He notes that, at the time of the offending, he was not an owner or trainer, but rather a second year 'junior driver' trying to obtain as many drives as possible.[27]

21 Mr Duffy rejects the 'inflammatory description' of his conduct as egregious,[28] suggesting that he panicked at the sight of the stewards and ran away 'based on instinct'.[29]

22 While he pleaded not guilty, based on advice that he received at the time, Mr Duffy suggests he now appreciates that the advice was wrong and that VCAT should allow a 'change of plea'.[30]

23 Mr Duffy says that the cases suggest that the penalty for a first breach of AHRR 193(1) is a disqualification of 12 months, with 24 months being applied for a subsequent breach.[31] He also notes that Mr Zac Steenhuis had a previous history of drenching,[32] and regard should be paid to the fact that Mr Duffy was a 'secondary participant'.[33]

Analysis and conclusion

24 I accept that the purpose of AHRR 193(1) is to ensure a level playing field and maintain the reputation of the harness racing industry, and that both general deterrence and specific deterrence are relevant in this case. These considerations certainly warrant a significant period of disqualification.

25 The VRT heard from both Mr Steenhuis and Mr Duffy and was well placed to assess the respective roles that they each played in the stomach tubing. As already noted, while the VRT did not accept Mr Duffy's defence (ie. that he was not actively involved), it did find that his involvement was largely due to being 'in the wrong place at the wrong time'. That tends to support a period of disqualification somewhat below the upper end of the appropriate range.

26 While Mr Duffy would have been entitled to credit if he had pleaded guilty at an early stage, his failure to do so should not result in any increase in penalty.

27 It is relevant that it was Mr Duffy's first offence and, while his remorse may largely reflect the impact that the disqualification has had on him (eg.

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25 ROS [5]-[6].
26 ROS [8].
27 ROS [10].
28 ROS [11].
29 ROS [12].
30 ROS [15]-[18].
31 ROS [25].
32 ROS [23].
33 ROS [25].

missing out on the chance to ride his father's horse in the Interdominion in Sydney), there is no reason to doubt that he has learnt his lesson.

28 I am also mindful that if the Tribunal were to adopt the lower end of the range proposed by HRV, but make the period of disqualification for Charge 3 concurrent with Charge 1 (whether or not increased), there would be no change to the effective period of disqualification imposed by the VRT.

29 In all the circumstances, I am satisfied that a period of disqualification of 12 months in relation to Charge 1 is the correct or preferable decision.

Charge 3 – running away from the stewards

HRV's submissions

30 HRV submit that the factors relevant to the penalty for Charge 3 are the circumstance of the offending, general and specific deterrence and comparable decisions.[34]

31 In relation to the circumstances, HRV observes that the stewards initially thought it was Michael Steenhuis who had fled and it was not until some six days later that they learnt it was Mr Duffy.[35] Further, HRV notes that, despite Mr Duffy encountering the Chief Steward at the race meeting on 13 April 2019, he did not mention his involvement, instead asking about his fees for the horse that had been scratched.[36] On the positive side, HRV accepts that Mr Duffy admitted responsibility when interviewed by the stewards and entered a guilty plea at the hearing.[37]

32 HRV contends that the Tribunal 'must send a message to the industry that any conduct that frustrates an investigation will be met with a significant penalty', given it 'has the potential to compromise investigations' and hinder regulation of the industry.[38] It also says that the penalty should deter Mr Duffy from engaging in such conduct in the future.[39]

33 HRV refers to the decision in *Bajada* as a comparable situation.[40] In that case, the trainer was caught red-handed in the act of stomach tubing and kicked over a bucket containing the relevant liquid being used while stewards were talking to him, for which he received a disqualification of one year (affirmed on review by VCAT). HRV submits that, unlike Mr Bajada's situation (where enough liquid remained in the bucket for testing), the conduct of Mr Duffy did frustrate the investigation for a period of time.

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34 AOS [37].
35 AOS [39].
36 AOS [40].
37 AOS [41].
38 AOS [42].
39 AOS [43].
40 AOS [46].

Mr Duffy's submissions

34 Mr Duffy contends that, in circumstances where he pled guilty, it was 'reasonable to expect a [fine] as per the minimum penalty guidelines'.[41] He submits that the three month disqualification period is already on the high side and, as such, should be concurrent with the disqualification period for Charge 1.[42]

35 Mr Duffy further suggests that:

- in seeking the quadrupling of the disqualification period, HRV is being 'extremely disrespectful' to the respected and experienced members of the VRT;[43] and
- the submission regarding *Bajada* should be treated 'with contempt and disdain' given it was Mr Bajada's second offence and his 'atrocious behaviour' continued.

Analysis and conclusion

36 Running away from an investigator is serious and has the potential to (and, in this case, did in fact) impact on an investigation. I agree with the VRT that the offending requires a period of disqualification despite Mr Duffy's guilty plea and possibly instinctive reaction.

37 I consider that the imposition of a three month period of disqualification, cumulative to the period of disqualification imposed in respect of Charge 1, achieves the right balance between sending a message to industry participants about not hindering investigations, while maintaining encouragement for them to reflect on their conduct and recognise their wrongdoing (ie. by pleading guilty).

38 Again, I am mindful that if I was to increase the period of disqualification for Charge 3 but make it concurrent with the period of disqualification in respect of Charge 1, it would make no difference to the effective period of disqualification.

39 For these reasons, I consider that the disqualification period imposed by the VRT is the correct and preferable decision.

Charge 4 – giving false evidence

HRV's submissions

40 HRV did not address Charge 4 in their written submissions, presumably on the basis that they did not seek review of the penalty imposed for this charge.

41 ROS [27].
42 ROS [28].
43 ROS [29].

41 In response to a query from me, Ms Wood contended that the review was limited to the periods of disqualification in respect of Charges 1 and 3, although she could not point to any authority in this regard.

42 In reply submissions, Ms Wood noted the fine of $1,000 had been imposed in June 2021 and had not yet been paid. She indicated that the stewards were open to deferring payment until after the period of disqualification expired (such that Mr Duffy might be earning income from harness riding again), but were opposed to any payment plan being ordered (albeit noting that payment arrangements could be agreed administratively).

Mr Duffy's submissions

43 Mr Duffy seeks that the Tribunal wholly suspend the fine for a period of two years, having regard to various financial commitments he has and given that VCAT suspended a large portion of the fines payable by Mr Bajada.[44]

Analysis and conclusion

44 Under section 83OH of the Racing Act, the stewards may apply to VCAT for review of a decision made by the VRT in relation to a penalty. Although the reference to 'a penalty' is expressed in the singular, there is nothing to suggest a legislative intention not to include the plural.[45] Arguably, the converse is true because it will generally be difficult to consider the decision in respect of one penalty in isolation from the remainder of the decision.

45 Further, when undertaking review, the Tribunal steps into the shoes of the decision-maker.[46] Just as it is open to the Tribunal to increase or reduce the penalty outside the parameters contended for by the applicant, so it is that the scope should extend to the entirety of the penalty decision.

46 In this regard (albeit in the context of a different piece of legislation and a review application brought by the regulated person rather than the regulator), I note the decision in *Blige v Motor Car Traders Claims Committee*,[47] where Senior Member Dea held that a review extends to the whole of the decision the subject of the application and not just the elements that the applicant sought review of.[48]

47 For these reasons, I consider the review extends to consideration of the penalty in respect of Charge 4.

48 However, while submissions have been made as to the financial position of Mr Duffy, the evidence supporting those submissions was fairly scant. As such, I consider there is insufficient evidence before me to justify any changes to the fine imposed. It seems to me that a fine of $1,000 is

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44 ROS [23].
45 *Interpretation of Legislation Act 1984* (Vic), s 35(c).
46 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**), s 51(1)(a).
47 [2018] VCAT 3.
48 At [41]-[43].

appropriate given the nature of the charge (giving false evidence), and it should not be suspended. I will leave it to Mr Duffy to negotiate with HRV as to appropriate payment terms, having regard to his financial position.

Other matters

49 Mr Rick Jones, who represented Mr Duffy at the hearing, contended that the Tribunal should take account of the 'enormous disadvantage faced by Mr Ryan Duffy' in terms of:[49]

- HRV having '3 qualified solicitors/barristers and unlimited funds for appealing penalties', compared to
- Mr Duffy, who is the 'sole provider for his partner and their 2 children' and who cannot afford professional legal representation.

50 In effect, Mr Jones raises a concern about the 'inequality of arms'.

51 It is important to recognise that the Tribunal has no role in determining whether solicitors are employed by a party or what work they do in preparing filing applications for review or preparing documentation for hearing: that is a matter for each party.

52 While leave may strictly be required for a party to be legally represented at hearing,[50] it is relevant to note that Ms Wood (the Counsel that represented HRV) also appeared at the VRT hearing (at which Mr Duffy was legally represented) and it does not appear that any concerns were raised by Mr Duffy about the HRV's representation at any point prior to the filing of his submissions.

53 It is evident that Mr Jones helped with Mr Duffy's submissions and apparently acted and appeared for him free of charge. As such, Mr Duffy was represented and, although Mr Jones is not a lawyer, I understand he has considerable industry experience and seemed more than capable of advancing arguments on Mr Duffy's behalf.[51]

54 I am satisfied that Mr Duffy had a fair hearing, despite not having legal representation.[52]

R. Tang, AM
Member

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49 ROS [1]-[2].
50 VCAT Act, s 62.
51 This was so despite the fact that he was also driving jockeys to and from the racetrack while the hearing was taking place.
52 VCAT Act, s 97 and 98.