

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE NO. Z688/2016

CATCHWORDS

Harness racing, administration of anabolic androgenic steroid, *Australian Harness Racing Rules*, rule 109AA, Penalty.

APPLICANT	Mr Luke Kilduff
RESPONDENT	Harness Racing Victoria Racing Appeals and Disciplinary Board
WHERE HELD	Melbourne
BEFORE	Gerard Butcher, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	5 December 2017
DATE OF ORDER	5 December 2017
CITATION	Kilduff v Harness Racing Victoria Racing Appeals and Disciplinary Board (Review and Regulation) [2017] VCAT 2068

ORDER

- 1 The decision of the Harness Racing Victoria Racing Appeals and Disciplinary Board made on 4 August 2016 is varied to the extent that in relation to charge 3 the applicant is disqualified for a period of two years commencing immediately.
- 2 For the avoidance of uncertainty the decision that terms of disqualification be served concurrently in relation to all three charges is affirmed.
- 3 The time between the commencement of the disqualification imposed by the Harness Racing Victoria Racing Appeals and Disciplinary Board and the granting of a stay by the Tribunal, being 20 days, is to be reckoned.
- 4 The stay ordered on 1 September 2016 is revoked.

Gerard Butcher
Senior Member



APPEARANCES:

For Applicant

Mr David Hallows of Counsel

For Respondent

Mr Adrian Anderson of Counsel

This is an edited version of reasons delivered orally at the conclusion of the hearing.

REASONS

- 1 The applicant in this matter, Luke Kilduff, is a registered trainer of harness racing horses. Before the Harness Racing Victoria Racing Appeals and Disciplinary Board Mr Kilduff was charged with three offences. Two in relation to the presence of a prohibited substance in samples taken from his horse and one charge in relation to administration.
- 2 Mr Kilduff sought a review of this Tribunal in relation to that third charge of administration. He having pleaded guilty to the first two charges.
- 3 The Racing Appeals and Disciplinary Board imposed 18 months disqualification on Mr Kilduff in relation to the third charge and in passing I observe that each of the first and second charges were the subject of a six month disqualification. The Racing Appeals and Disciplinary Board ordered that all of these three dispositions be concurrent.
- 4 On 1 September 2016, this Tribunal granted a stay in relation to the disqualification. It is a matter of some uncertainty as to whether a stay could have been granted in relation to the disqualification imposed in relation to the first two charges, however as a matter of practical application, it is seen as being a stay of all three dispositions and it is appropriate to deal with the stay as well as the question of concurrency or cumulative nature of the dispositions as part of this decision.
- 5 The hearing of the substance of this matter took place before the Tribunal and ultimately Mr Kilduff was found guilty of the third charge. It now becomes the function of the Tribunal to determine the disposition in relation to that charge.
- 6 Mr Kilduff is aged 33 years. He has three young children aged 7 years, 6 years and six months. He is a plumber by trade and owns his own business. In 2009 or thereabouts he became involved in harness racing industry and in 2010 obtained his B grade trainer's licence, followed in 2011 by a B grade driver's licence. He has had seven horses in training and at the time of the offences had three. I am now told that he does not have any horses at present.
- 7 In 2015 he purchased a property at Romsey with the aim of operating his own training track and to that end he purchased machinery to work on his own and other properties. This machinery was purchased at considerable expense, however he has not developed his own track.
- 8 Mr Kilduff was a hobby trainer and has made it known to the Tribunal that harness racing is his passion.
- 9 Several character references were produced in written form from persons who have long association with the harness racing industry and in addition verbal evidence was given by Mr Patcik Driscall who has a substantial

investment in the industry and who described Mr Kilduff as being a person who was of a disposition to help others and who in the opinion of Mr Driscall, was out of character in relation to the administration. Mr Driscall was not cross-examined.

- 10 It was submitted that Mr Kilduff is a man of otherwise good character and there has been no evidence to the contrary so I do accept that. It was conceded on his behalf that the administration is a serious offence.
- 11 The offence of administering the prohibited substance is one which carries its own reference in the prohibited substances section of the Australian Harness Racing Rules. Rule 109AA, under the heading 'anabolic steroids' provides:
 - (1) A horse must not in any manner at any time be administered an anabolic androgenic steroid.
 - (2) Any person who administers an anabolic androgenic steroid attempts to administer an anabolic androgenic steroid or causes an anabolic androgenic steroid to be administered and/or is a party to the administration of or attempt to administer an anabolic androgenic steroid to a horse is guilty of an offence.
- 12 Previously, it was not contrary to the Rules to administer this substance. However on 1 May 2014 the Rule was introduced specific to these substances. It has been submitted on behalf of Harness Racing Victoria that this offence having regard to the fact that it has a specific reference in the Rules is at the top end of the spectrum and as such can be seen as a particularly serious offence. It was also submitted that the integrity of the industry hinges upon the deterrence of administration of performance enhancing substances. The very fact that the rules specifically prohibit the administration of this and similar substances points to the fact that:
 - (a) It is performance enhancing; and
 - (b) that its administration must be deterred.
- 13 The authorities which were referred to by counsel on behalf of Harness Racing Victoria include that of *Mifsud*¹. This is a well-known decision by His Honour Senior Member Nixon sitting as a member of the Tribunal. This was in the Occupational and Business Regulation List.
- 14 At paragraph [12] His Honour stated:
 - [12] As the Tribunal stated in an application by Mr Leon Corstens for a review of a decision of the Racing Appeals and Disciplinary Board, the power to impose a penalty for a breach of the rules is primarily protective to preserve the integrity of racing; but such penalties are also, by their nature, punitive. Whilst that review involved thoroughbred racing, the same principles apply to the harness racing industry.

¹ *Mifsud v Harness Racing Victoria Racing Appeals and Disciplinary Board* [2012] VCAT 1438.

- 15 I make the observation that in all matters to do with regulation of various occupations and professions the same principle stands. The primary function is a protection one not a punitive one. His Honour went on to say at paragraph [13]:
- [13] In determining an appropriate penalty it is necessary to balance and weigh up the principles of just punishment, specific and general deterrence, denunciation, the preservation of the integrity of racing and the prospects of rehabilitation of the offender.
- 16 His Honour there is taking the view which he may well have taken in his days as a Judge hearing criminal matters. The general principles, however, are applicable.
- 17 At paragraph [14] His Honour went on to say that in relation to the Racing Appeals Disciplinary Board decision in *Mifsud*, he adopted the Board's statement which is:
- ... that the purpose of those rules was as follows:
- (i) to ensure that the integrity of harness racing was protected.
 - (ii) to ensure that harness racing was conducted on a level playing field.
 - (iii) to ensure that harness racing was conducted without the assistance of drugs.
 - (iv) to ensure that harness racing was conducted safely – safely with respect to the horse itself and also with respect to other drivers and horses involved.
 - (v) to conduct harness racing fairly from the perspective of the betting public so that a horse's performance will not vary from start to start depending on whether or not a particular substance/medication has been administered to it.
- 18 I adopt those statements of the purposes of the Rules.
- 19 Further, in relation to the administration of performance enhancing drugs, His Honour stated:
- I am satisfied that these are serious offences due, in particular, to the nature and effect of this drug and the potential for the drug to damage the integrity of the harness racing industry.
- I again endorse those words in relation to the nature of the offence.
- 20 His Honour went on:
- The integrity of the racing industry is an important consideration and public confidence in the industry is critical. Any loss of public confidence in the honesty and integrity of the industry has the potential to imperil the very lifeblood of the industry due to negative publicity throughout the media associated with the detection of any of the prohibited substances in this rule.

Again, I endorse those words.

- 21 I have already made reference to Mr Kilduff's positive qualities. I will now touch on the question of the seriousness of the administration of the prohibited substance. The principles I have just quoted from the case of *Mifsud* are particularly applicable in this case. It has been submitted on behalf of Harness Racing Victoria that general deterrence is magnified in relation to the administration and the reasons that that is the case are those reasons which I have just outlined in relation to the purpose of the rules. There is also the aspect of specific deterrence.
- 22 In relation to specific deterrence this is the aspect of the disposition which applies directly to deterring Mr Kilduff from repeating such an offence and general deterrence is the message sent to the industry generally and in particular to other trainers that this is a practice which is condemned and which is not to be emulated by others and which if it is so emulated will attract a serious disposition.
- 23 The Tribunal does not have a great deal of assistance from precedent in relation to this specific offence given that it has been told that this is the first decision regarding this particular prohibited substance. Again, it has been said that general deterrence looms large.
- 24 The Harness Racing Victoria has stated that it does not quibble with Mr Kilduff's character references or his personal circumstances. However, it returned again to the aspect of general deterrence. I agree that general deterrence is a particularly significant aspect of this case.
- 25 It was submitted on behalf of Mr Kilduff that the period of disqualification should be reduced, however I am unable to find any grounds for doing such. The question then is, do I maintain the period of disqualification imposed by the RAD Board or do I increase it?
- 26 On behalf of Harness Racing Victoria, counsel submitted that the total penalty should be three years. The question I have is whether I can impose any alteration to the affect of the dispositions in relation to charges 1 and 2 and I conclude that I cannot. This is a review in relation to charge 3 only.
- 27 The question of whether the dispositions should be cumulative or concurrent, I think is answered by the circumstances. They do relate in a sense to the same course of action. The presentation and finding of a prohibited substance effectively are subsets, albeit separate charges or consequences of the administration. I am therefore reluctant to impose a cumulative aspect to the disposition, however in terms of the appropriate disposition for charge 3, I am guided to a degree by the submission made below by Harness Racing that the appropriate period of disqualification was 18 months to two years despite the fact that it is now said that the total in relation to all three should be three years. Having said that I will not accumulate them, that would effectively mean three years on charge 3.

- 28 Having regard to all of the requirements of the considerations in relation to the imposition of the appropriate penalty. Having regard to the seriousness of the offence and having regard to the mitigating information that has been provided in relation to Mr Kilduff, I order that the decision of the Harness Racing Victoria Racing Appeals and Disciplinary Board made on 4 August 2016 is varied to the extent that in relation to charge 3 the applicant, Mr Kilduff is disqualified for a period of two years. For the avoidance of uncertainty the decision that terms of disqualification be served concurrently in relation to all three charges is affirmed. The time between the commencement of the disqualification imposed by the Racing Appeals and Disciplinary Board and the granting of a stay by the Tribunal being 20 days is to be reckoned.

Gerard Butcher
Senior Member



