

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

VCAT REFERENCE NO. Z683/2021

REVIEW AND REGULATION LIST

CATCHWORDS

Harness racing driver—improper interference with another driver in stable area at track contrary to Rule 231(1)(f) of the *Australian Harness Racing Rules*—flicking whip between her thighs—review of penalty imposed by Victorian Racing Tribunal—*Racing Act 1958 ss 83OH(1), cl 66N* of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998*.

APPLICANT	Michael Bellman
RESPONDENT	Harness Racing Victoria
WHERE HELD	Melbourne
BEFORE	Jonathan Smithers, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	2 March 2022
DATE OF ORDER	8 March 2022
CITATION	Bellman v Harness Racing Victoria (Review and Regulation) [2022] VCAT 249

ORDER

- 1 The decision of the Victorian Racing Tribunal of 17 August 2021 is affirmed.
- 2 The stay of that decision, by order of 19 August 2021, is vacated.

Jonathan Smithers
Senior Member

APPEARANCES:

For Applicant	Mr S Thomas of counsel
For Respondent	Mr A Anderson of counsel



REASONS

- 1 On 9 October 2020, an incident occurred in the stable area at a Geelong Harness Racing meeting. Mr Michael Bellman, a licensed harness racing driver, approached another driver (the ‘Other Driver’) while she was putting gear on a horse. She had her back to him. He flicked his whip between her thighs and made a reference to her not wearing a facemask. She was greatly upset and angered by his action with the whip, and shortly after, reported it to the stewards, who conducted an inquiry.
- 2 This led to disciplinary charges being brought against Mr Bellman under the *Australian Harness Racing Rules* (the Rules). These are made under the *Racing Act 1958* (the Act). Ultimately, Mr Bellman pleaded guilty to a single charge under Rule 231(1)(f) of the Rules. As the charge was for a ‘serious offence’, it was heard by the Victorian Racing Tribunal (VRT).
- 3 Before the VRT, it was submitted for Mr Bellman that no penalty be imposed. For the stewards, it was submitted that Mr Bellman should be suspended for between three and six months.
- 4 On 17 August 2021 the PRT imposed a penalty of three months’ suspension.
- 5 Mr Bellman has brought this application for review by VCAT of that penalty decision. He submits there should be no further action taken, alternatively, a reprimand or caution should be imposed, alternatively, that any suspension imposed should itself be wholly suspended.
- 6 The respondent, Harness Racing Victoria (HRV) submits that the VRT’s decision to suspend Mr Bellman for three months should be affirmed.
- 7 VCAT’s jurisdiction in relation to decisions of the VRT is limited to reviewing penalties imposed. Section 83OH(1) of the Act states:

Review by VCAT of decisions of Racing Appeals and Disciplinary Boards

...

- (1) A person whose interests are affected by a decision made by the Victorian Racing Tribunal may apply to VCAT for review of that decision in relation to a penalty imposed on the person by the Victorian Racing Tribunal.

- 8 Clause 66N of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) states:

66N Tribunal bound by findings of fact made by Victorian Racing Tribunal

Despite section 51, in determining a proceeding for review of a decision of the VRT under section 83OH of the *Racing Act 1958* in relation to a penalty imposed by the VRT, the Tribunal is bound by the findings of fact that were made by the VRT.



- 9 Given that VCAT is bound by the findings of fact made by the VRT, and because its decision of 17 August 2021 sets out information relevant to this matter in a convenient form, it is appropriate to set out the VRT’s decision in full:

Charge:

Australian Harness Racing Rule (“AHRR”) 231(1)(f) states:

A person shall not otherwise interfere improperly with anyone employed, engaged or participating in the harness racing industry or otherwise having a connection with it.

Particulars of charge:

1. You were, at all relevant times, licensed by HRV and bound by the Australian Harness Racing Rules.
2. On 9 October 2020, you were engaged to drive ‘*Gilty By The Beach*’ at the Geelong Harness Racing meeting in Race 10, the ‘*Jack Rabbit Winery 3YO Pace*’.
3. On 9 October 2020 Mr Bellman was engaged to drive at the Geelong Harness Racing meeting. Sometime between race 9 and race 10, Mr Bellman approached another licensed female driver, from behind, flicked his whip between her thighs, and said "where's your face mask". COVID-19 restrictions were in place requiring participants to wear masks and socially distance.

DECISION

Mr Michael Bellman, you have pleaded guilty to breaching Australian Harness Racing Rule 231(1)(f) which reads “a person shall not otherwise interfere improperly with anyone employed, engaged or participating in the harness racing industry or otherwise having a connection with it.”

At the Geelong harness race meeting held on 9 October 2020, you interfered improperly with a female driver by coming up from behind her whilst she was in the stable area, flicked your whip between her thighs saying “Where is your mask?”. COVID-19 restrictions requiring the wearing of masks were in place at the time.

By your actions, you caused considerable distress to the female driver. It is relevant that you committed this act at her workplace and in circumstances where she had every right and expectation that she would be treated properly by you. Your actions were more than just stupid. They were completely wrong. In our opinion, during the relevant period you made only a qualified apology to the female driver for your behaviour

Your personal circumstances. You started as a 16 year old in the harness racing industry in 1997. It would be fair to say that your whole family, including your grandfather, father, mother and other family members, has been involved in harness racing industry for a considerable period of time. You are a very successful driver and have been for a long time. It is clear you love the industry and you have



obtained awards. You have made strong contributions to public welfare and have raised money for many causes, including breast and prostate cancer. You have excellent character references, which speak highly of you as a role model. They describe you as being loyal, approachable and one who gives assistance to people in their professional and private lives. You have also borne the pressures of a domestic dispute involving custody of your children.

We have taken into account your plea of guilty, your personal circumstances and your good history within the harness racing industry.

The principle of general deterrence is relevant in determining an appropriate penalty. Those working in the industry must be deterred from interfering with their fellow workmates whilst they are going about their normal duties.

Mr Hannan, on behalf of Mr Bellman, submitted that the victim being female has no relevance. We do not accept that submission. We are of the opinion that it does have relevance. Putting a whip between a female's thighs from behind and using it in a flicking motion is totally unacceptable. The purpose of the Rule is to protect those working in the harness racing industry. It is also important that women of all ages are encouraged to participate in the industry without having to deal with improper interference.

In all the circumstances, we impose a penalty of 3 months suspension. The suspension will commence at midnight on Tuesday, 24 August 2021.

Principles

10 The principles applicable to s 83OH(1) penalty reviews are well understood. These were described in the following passage from HRV's submissions, by reference to various decisions which are frequently referred to, without demur from Mr Bellman:

10. The role of the Tribunal is to make the correct or preferable decision on penalty based on the findings of the VRT.¹
11. The purpose of imposing penalties under the AHRRs is primarily protective, to preserve the integrity of harness racing by imposing penalties sufficient to deter a guilty party from repeating the conduct HRV (specific deterrence), 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.²

¹ *Harness Racing Victoria v Craven* [2019] VCAT 2040 at [14].

² *Ibid* at [16]; *Bartley, Jack & Pitt v HRV Racing Appeals and Disciplinary Board* [2018] VCAT 1981 at [58]; *Shayne Cramp v HRV Racing Appeals and Disciplinary Board* [2017] VCAT 471 at [78]; *Corstens v Racing Victoria Limited* (Occupational and Business Regulation) [2010] VCAT 1106 at [19].



12. 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.³

13. The Racing Appeals Tribunal (NSW) in *Bennett v Harness Racing New South Wales*⁴ considered the balancing of the protection of the integrity of the industry with favourable subjective circumstances, stating:

It is important to emphasise that in certain cases the facts and circumstances of the objective seriousness of a matter warrant a penalty which is not reduced by, or only marginally reduced by, any favourable subjective circumstances. That is particularly so in a civil disciplinary proceeding where the Tribunal is finding appropriate penalties on the facts and circumstances with a view to the protection of the integrity of the harness racing industry and not with an aim of punishment.

In finding the appropriate protection to the industry, the Tribunal must look to what message is to be given to this appellant in respect of the conduct in which he engaged, the message to other industry participants, the message by way of guidance to the stewards and other regulators, and the message that will be received by the betting and non-betting public generally as to the consequences that will flow to those who seek to engage in similar conduct. It is emphasised that the integrity of the industry is the key focus.⁵

14. A failure of an offender to understand the error of his ways and demonstrate insight into his offending are relevant to the nature and purpose of disciplinary proceedings and the appropriate penalty.⁶

15. The weight that should be attached to the VRT's decision on penalty depends upon the particular circumstances.⁷ It is open to the Tribunal to attach some weight to the decision of members of the VRT with specialist expertise who are "eminently fitted" to determine the proper penalty.⁸

³ *Mifsud v Harness Racing Victoria Racing Appeals and Disciplinary Board* (Occupational and Business Regulation) [2012] VCAT 1438.

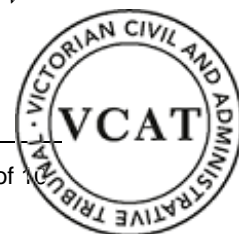
⁴ Racing Appeals Tribunal NSW, 21 March 2017.

⁵ *Ibid* [61]–[62].

⁶ *Hannebery v Legal Ombudsman* [1998] VSCA 142 at [22].

⁷ *Ha v Pharmacy Board of Victoria* [2002] VSC 322 at [77]; *The Salvation Army Southern Territory v Brett Jarvis* [2016] VSC 34 at [50]; *Secretary to the Department of Education and Training v Paul* [2020] VSCA 280 at [139].

⁸ *Re Hodgekiss* [1962] SR (NSW) 340 at 343 (Owen J, Maguire J agreeing). See also *Harness Racing Victoria v Craven* [2019] VCAT 2040 at [30].



16. The Tribunal will take into account penalties in comparable cases, mindful that consistency is important.⁹ However, each case must be decided on its own facts and circumstances.¹⁰
- 11 The range of penalties available to VCAT is broad. Section 50ZE(1)(b) enables the making of any decision which is required in the interests of justice, including the imposition of any penalty under the Rules. Under s 50A, ‘penalty’ means a fine, suspension, disqualification or warning off.

HRV’s submissions

- 12 HRV submitted as follows:

Taking into account Mr Bellman’s good record, his references and the matters advanced on his behalf, HRV submits that the sanction imposed by the VRT was the correct or preferable decision based upon the findings of fact of the VRT taking into account the following matters:

- (a) The offending took place in [the Other Driver]’s workplace;
 - (b) [The Other Driver] was approached from behind and was not expecting the contact with the whip;
 - (c) The offence caused considerable distress to [the Other Driver];
 - (d) General deterrence looms large as a key consideration concerning the standard of conduct required within the industry towards female participants and all fellow participants;
 - (e) The effect of the conduct on the reputation of the harness racing industry and message to be sent to the public about the attitude of the harness racing industry towards such conduct;
 - (f) The ongoing description of Mr Bellman’s conduct at the VRT as “a storm in a teacup”;¹¹
 - (g) The regard which may be had to the decision reached by a specialist VRT constituted by Judge Hicks and Mr Gleeson of considerable expertise and experience within the racing industry.
- 13 HRV also noted that harness racing had for years been a male dominated occupation, but is now less so. It was said the industry seeks to encourage and nurture female participation in order to enable its ongoing viability and success.

Mr Bellman’s submissions

- 14 On behalf of Mr Bellman it was submitted as follows:

⁹ *Romeo v Racing Victoria Limited* (Review and Regulation) [2021] VCAT 473 at [33].

¹⁰ Ibid.

¹¹ Section 49 materials p78. Although this was the expression used by Mr Bellman’s counsel during the VRT hearing, HRV submitted that this did reflect the approach adopted generally by Mr Bellman during the disciplinary process.



- There was/is no suggestion that the actions of Mr Bellman carried any sexual connotation.
- Nor could it be said that the conduct involved violence in any way.
- Consequently, the gender of Mr Bellman, or the complainant driver, remains irrelevant to the penalty determination by this Tribunal.
- The actions of Mr Bellman were to gain her attention and warn her to wear her mask, given the fact that stewards were around and had been known to issue \$200 fines for breach of Covid-protocols.
- By his plea, Mr Bellman acknowledges the use of the whip as being improper interference with the complainant driver.
- Mr Bellman is a stalwart of the industry. He comes from a family which is steeped in harness racing. Counsel appearing for him at the VRT and VCAT both used the expression harness ‘royalty’. He has a clean record (aside from minor offences such as driving breaches).
- Eight references were provided—all from female participants in the industry. Their tenor is generally consistent with the description given in the VRT decision of 17 August 2021, set out above. Mr Bellman is described as a cheerful senior driver who gives practical and emotional support to younger drivers, a role model. A number of the referees specifically state that as women, they feel comfortable in his presence, that he is respectful and trustworthy. His support for breast and prostate cancer charities is mentioned with appreciation.

15 In relation to the appropriate penalty, the following submissions were made:

- Mr Bellman had pleaded guilty, which has led to a saving of time and money, and avoided the Other Driver having to go through the experience of revisiting the incident, and being cross-examined about it.
- He had given a full apology.
- In this matter, he has suffered extra-curial punishment, by the tarnishing of his reputation, but also by the threat/assault inflicted upon him by the complainant driver’s then partner as a direct result of this offending. Such offending against Mr Bellman was at his workplace.
- Significant reliance is placed upon Mr Bellman’s impeccable record and good character in the industry, including his charitable work for “Pacing for Pink Jane McGrath Month, and Prostate Awareness (his participation having been suspended as a result of the original charge and VCAT appeal).
- The particular circumstances of this case are unique and do not represent a good example for the principle of general deterrence. Mr



Bellman need not be punished for the purposes of specific deterrence—the reputational fall from grace being significant in the circumstances.

Prior relevant decisions

- 16 For Mr Bellman it was submitted that there are no prior cases that can properly be described as comparable, given the nature of the interference in this case being without malice or sexual connotation.
- 17 However, reference was made to the outcome of the disciplinary proceeding brought against the Other Driver’s then partner, which arose from the same incident. That person made threats against Mr Bellman in the drivers’ room the following day, 10 October 2020, at Tabcorp Park Melton. On 21 April 2021 he pleaded guilty of a charge under Rule 231(1)(a) and fined \$500 (agreed penalty). The VRT said there were ‘strong mitigating factors’ in that person’s case.¹² It was submitted that a suspension for Mr Bellman, which would have a vastly more significant financial impact, due to loss of income, and was disproportionate in this context.
- 18 HRV referred to various potentially comparable cases. First was the 2019 Western Australian case of *Steele*. This involved an assault of a steward by striking him on the forearm, for which 9 months’ disqualification was imposed. Additionally, there were two charges of leaning into the steward’s personal space and engaging in conduct of an aggressive nature. Disqualifications of 3 months were imposed for each of those two charges. All penalties were concurrent, hence an effective disqualification of 9 months was imposed.¹³
- 19 Second, the 2017 King Island case of *Jakowenko* and *Styles* was referred to. This involved a fight between two drivers in the stabling area. Mr Jakowenko was fined \$1,000 (\$750 suspended for two years) and Mr Styles \$500 (wholly suspended for one year).¹⁴
- 20 The third case involved use of a whip. This was the 2008 Victorian matter of *Murphy*. There, the driver pleaded guilty to three charges. First, striking another driver with a whip as the horses were leaving the track after a race. Second, grabbing the other driver and causing him to fall over. Third, engaging in conduct detrimental to the industry. The penalties were 6, 12 and 12 months’ disqualification respectively, all concurrent.¹⁵
- 21 Fourth was the 2022 Victorian case of *Moran*. He was charged under Rule 231(1)(f) with interfering with another driver (being his then partner and mother of their children) by lifting up her sulky and causing her to fall to the ground. There were numerous mitigating factors. There were also two different charges relating to the same circumstances, an assault and false

¹² The VRT said: ‘We accept, as did the Stewards, that there was perceived provocation and that you issued the threat, which, in essence, related to possible fisticuffs, the outcome of which would be a victory for yourself’.

¹³ Section 49 materials p 109-110.

¹⁴ Section 49 materials p 111-2.

¹⁵ Section 49 materials p 113.



report charge against the driver who had been involved with his partner. For the Rule 231(1)(f) breach, Mr Moran was suspended for six months (with two months of that period suspended, making an effective total of four months).¹⁶

- 22 I agree that the first three prior matters referred to by HRV are not of specific relevance, although they do contribute to the general context within which charges concerning inappropriate interactions with other industry participants have been dealt with. The fourth matter, *Moran*, is of more relevance, being the only other Rule 231(1)(f) charge referred to.
- 23 In contrast to all the above matters, the conduct here did not involve direct physical violence, in the sense of inflicting physical pain or injury, or the threat of it. It was of a different nature, as discussed below.

Consideration

- 24 As noted, VCAT is bound by the findings of fact made by the VRT. In terms of the precise conduct which Mr Bellman engaged in, the relevant findings of the VRT are that he:
- ‘flicked [his] whip between [the Other Driver’s] thighs saying “Where is your mask?”’, and
 - ‘put...a whip between a female’s thighs from behind and use[d] it in a flicking motion’.
- 25 For Mr Bellman it was accepted that the whip did make contact with the Other Driver. (His counsel said it was accepted that he ‘... hit her on the thigh’.)
- 26 For Mr Bellman it was argued that his action was not sexual, and that the gender of the person the object of it is irrelevant.
- 27 In my view, that over-simplifies the position. The fact is that Mr Bellman is an experienced male driver, in what has traditionally been a male-dominated occupation. His victim was a younger female driver. His action involved invading her personal space (indeed, her intimate personal space) in a manner akin to the way in which power, or domination, has in the past frequently been expressed, to the detriment of the victim, who occupies a weaker position. The connotations of flicking a whip between the thighs of a woman from behind cannot be ignored—even if at the time, it was done carelessly or without much thought as to the import of such an action.
- 28 Mr Bellman’s response is consistent with the paradigm referred to in the above paragraph. In describing his response to the Other Driver’s reaction to the whip being flicked, he said, ‘...*I just said wow. Just take a chill pill is what I said when I walked off*’, inferring it was nothing serious, and she was

¹⁶ VRT decision of 7 February 2022.



over-reacting. He also said, *'I was sort of gobsmacked by the response to be honest'*.¹⁷

29 Nor does the fact that he was apparently warning her to put a mask on (to avoid being fined by the stewards) mitigate his conduct. Obviously he did not need to use the whip to convey that message.

30 Mr Bellman did say at the Stewards' inquiry three days later, and in the Other Driver's presence:

I didn't intend it to be taken the wrong way of if I have done anything like that that has made her feel uncomfortable I apologise profusely but at the time I didn't [apologise].¹⁸

31 He further said:

So yes I could have handled the situation better at Geelong and went back after I drove me horse and said look if I've offended you I'm sorry and I'm sorry that I didn't do that now because we probably wouldn't be in the situation we're in now.¹⁹

32 In light of all the totality of the material, I agree with the conclusion of the VRT and the submission by HRV that Mr Bellman's apology was not unqualified. More significantly, however, in my view, his response indicates something less than full insight. So specific deterrence is of some relevance.

33 Further, general deterrence clearly has an important role to play here. It is necessary to send a message to drivers and other participants in the industry that conduct of this type is not acceptable, and will attract an appropriate sanction. This supports the reputation of the industry, and so promotes its ongoing viability and success. More fundamentally, it reinforces contemporary standards of workplace conduct and safety for all participants, including women.

34 Mr Bellman is entitled to credit for his plea of guilty, the insight he did show (albeit not full insight), his clean disciplinary record, his contributions to the industry, and support of his colleagues and charitable causes.

35 However, ultimately, I have determined that the nature of the conduct, as described above, and its implications in terms of workplace safety and the reputation of the industry, require the imposition of a penalty which involves exclusion from driving for a period. I determine that Mr Bellman should be suspended for three months, the same period as was imposed by the VRT.

Jonathan Smithers
Senior Member

¹⁷ Section 49 materials p 21.

¹⁸ Section 49 materials p 21.

¹⁹ Section 49 materials p 24.

