

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE NO. Z530/2015


CATCHWORDS

Breach of Rules 192(1), 193(1) and 190B(1) of *Australian Rules of Harness Racing* – guilty plea – review of the decision of the Racing Appeals and Disciplinary Board with respect to fines for charges under Rule 193(1) totalling \$8000 – fines imposed for other charges not in dispute – whether fines for charges under s.193(1) are excessive – decision of Board with respect to charges under Rule 193(1) set aside and instead applicant fined total of \$4000 with \$2000 suspended for 12 months.

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| APPLICANT | Mr John James McDermott |
| RESPONDENT | Harness Racing Victoria |
| WHERE HELD | Melbourne |
| BEFORE | Her Honour Judge S. Davis, Vice President |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 17 September 2015 |
| DATE OF ORDER AND REASONS | 28 September 2015 |
| CITATION | |

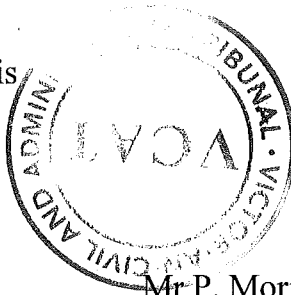
ORDER

- 1 The decision of the Racing Appeals and Disciplinary Board in relation to charges 2, 3, 4, and 5 is set aside.
- 2 The applicant is fined \$1,000 in respect of each of charges 2, 3, 4 and 5, totalling \$4000, with \$2,000 of the \$4,000 suspended for a period of 12 months.


Her Honour Judge Davis
Vice President

APPEARANCES:

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|----------------|---------------|
| For Applicant | Mr P. Morison |
| For Respondent | Mr A. Rogers |



REASONS

- 3 On 17 June 2015, Mr John McDermott pleaded guilty before the Racing Appeals and Disciplinary Board (RAD Board) to charges under Rule 192(1) (charge 1), 193(1) (charges 2-5) and 190B(1) (charge 6) of Australian Rules of Harness Racing (the Rules). He was fined \$5,000 in relation to charge 1 (\$3,000 of which was suspended for 12 months). On each of charges 2, 3, 4 and 5 he was fined \$2,000 (a total of \$8,000). On charge 6, he was fined \$200.
- 4 Mr McDermott does not take issue with the decision of the RAD Board on charges 1 and 6¹. He applies for review of its decision in respect of charges 2-5. Specifically, he says that the magnitude of the fine on these charges is excessive in all the circumstances of the case. These circumstances include, firstly, that the offending, which was documented in his logbook, occurred due to a mistaken belief, honestly held, that the relevant Rule prohibited stomach tubing of a horse 24 hours (rather than 48 hours) before a race.² This mistaken but honestly held belief explains all the offending and it is therefore unfair to fine him in multiples of \$2000. Secondly, he says that his training activities are his sole source of income, that his taxable income on his last taxation return was in the order of \$10,000 and that he does not have the capacity to pay such a large fine. Thirdly, he has no prior matters for offending of this kind. Finally, he says that the fine imposed on charges 2-5 should be an aggregate fine of \$4,000, of which \$2,000 should be suspended for 12 months.
- 5 Harness Racing Victoria Stewards (HRV Stewards) says that its decision on charges 2-5 should be affirmed because the offences are serious offences and could have attracted disqualification or suspension, but resulted in fines because of the mitigatory effect of Mr McDermott's long clear record and the fact that the offending was disclosed in his logbook records. In addition, HRV Stewards says that the magnitude of the fine on each charge, that is, \$2000, is consistent with decisions in similar cases³, and reflects the seriousness of the offending in terms of its capacity to affect the integrity of racing. It was submitted that by his offending, on 12 different occasions in relation to 4 different horses, he had effectively cheated and the total quantum of the fine was appropriate recognition of the magnitude of his offending, for which ignorance of the Rule change in 1999 was no excuse. It was submitted that under the Rules, all licence holders are deemed to be aware of the Rules, and that a copy of the Rules is provided by HRV to each trainer annually.

¹ At the commencement of the hearing, Mr McDermott abandoned his challenge to the penalty imposed by HRV on charge 1.

² Rule 193(1) was amended in 1999, making it an offence to administer alkalizing agents to horses via stomach tubing within 48 hours before a race.

³ HRV's representative referred me to a number of cases, including, relevantly: *Pekin v Harness Racing Victoria Racing Appeals and Disciplinary Board* [2013] VCAT 1266; *Vincent and Joseph Costa*, HRV RAD Board Hearing, unpublished, 13 May 2015; *Salerno (HAR) App 13 2008* [2009] VRAT 1.

- 6 The parties were represented at the hearing, and their representatives tendered court books and made submissions. I have considered all of the material tendered as well as the submissions made at the hearing.
- 7 I refer briefly to Mr McDermott's personal circumstances. He worked full time for his father on the family farm training horses and doing farm duties from the age of 14. He helped support the family after his father had a race fall. He worked for a bakery in Bendigo for 21 years in various roles until he was made redundant in late 2012. While working at the bakery, he also worked part-time with a horse trainer. From 2012 he has worked full-time as a horse trainer, earning about \$10,000 per annum. His wife, an accountant, who used to work 3 days a week, has increased the number of days she works to support the family. They purchased a house in late 2013, but I have no information as to his equity in that property.
- 8 Mr McDermott's training base is based at his mother's farm. He and his wife have spent over \$120,000 rebuilding a home, at their own expense, for his mother to live in. They have also spent considerable money on keeping the training facility going there.
- 9 Mr McDermott is one-third owner of a horse, Waikare Patricia, which has earned \$103,525.00 in prize money in the financial years July 2012 to 30 June 2015, but I was not provided with any information as to Mr McDermott's income from this horse. I also note from an HRV spreadsheet⁴ that the horses he trained over this period have won 12 races (and 34 placings) from 172 starts. In season 2014/15, the horses he trained won 6 races (and 11 placings) from 78 starts.
- 10 He has held a Trainers Licence since 1990 and an A Grade Trainer/Driver licence since 1992. Prior to 1997, he received a number of suspensions for careless driving type offences but it has been more than 10 years since his last suspension. Since 2005, he has received only a \$50 fine and four cautions. He provided two references which attest to his decency, trustworthiness and love of harness racing.
- 11 I was referred to a number of cases by HRV Stewards. HRV Stewards submitted that the most relevant comparable cases, as well as the decision which is under review before me, demonstrated that the appropriate quantum of a fine imposed for a single breach of Rule 193(1) is in the order of \$2,000.
- 12 On 13 May 2015, the RADB heard a number of charges against Vincent Costa and Joseph Costa. The charges against Vincent Costa included three charges of administering a prohibited substance in breach of Rule 196A(1), and two charges of breach of Rule 193(1). Mr Vincent Costa pleaded guilty to all charges. On the charge under Rule 193(1), which concerned stomach

⁴ Spreadsheet of season by season performance for John McDermott as a trainer, appended to Application to VCAT filed 13 July 2015.

- tubing within 24 hours of a race in circumstances where he believed that to be the permissible time range, he was fined \$4,000 with \$2,000 suspended.
- 13 In the RADB hearing on 4 April 2013 concerning Gary Pekin, the RADB, inter alia, imposed a fine of \$4,000 in respect of one breach of Rule 193(1) of the Rules, and suspended \$2,000 of that fine for 12 months, noting that it gave due weight to Mr Pekin's excellent record over 35 years in the industry, his service to the industry in various capacities and personal circumstances. On review to VCAT, the various penalties imposed were affirmed.⁵
 - 14 In the RADB hearing on 18 September 2012 concerning Michael Stanley, Mr Stanley pleaded guilty to three charges: breach of Rule 190(1), for which he was fined \$8,000; breach of Rule 193(1) for which he was fined \$4,000 (\$2,000 of which was suspended for 12 months); and breach of Rule 190B, for which he was fined \$250. His horse returned a positive pre-race sample for excessive total carbon dioxide concentration and he then admitted stomach tubing the horse within the previous 48 hours. In suspending \$2,000 of the fine of \$4,000, the RAD noted that it gave "due weight to Mr Stanley's guilty plea and were also mindful of his forthright evidence".
 - 15 I note that the power to impose a penalty for a breach of the Rules is primarily protective, to preserve the integrity of racing, but that such penalties may by their nature appear punitive. I also note that the use of precedents in setting penalties (whether, for example, by disqualification, suspension, or fine) is of limited value. The exercise to be performed in each case is to apply the relevant principles to the facts and circumstances of that case and to make the appropriate disposition.
 - 16 In making the appropriate determination in this case, I take into account, among other things, the length of time that Mr McDermott has served in the industry without relevant prior breaches of the Rules, the need to maintain industry standards and public confidence and the need to deter others from his conduct. I also take into account the need to deter him for persisting in the conduct, the need to express disapproval of his conduct, and to convey a message to the industry that such behaviour will be met with appropriate sanctions.
 - 17 In deciding the quantum of the fine to be imposed for the conduct the subject of charges 2-5, I must also take into account Mr McDermott's financial circumstances and his capacity to pay the fines. For if the size of the fine is beyond the offender's reasonable capacity to pay, and the offender is unlikely to pay it, then the imposition of a fine will have no general deterrent effect.

⁵ *Pekin v Harness Racing Victoria Racing Appeals and Disciplinary Board* [2013] VCAT 1266.

- 18 It is also relevant to consider the total quantum of the fines imposed.
- 19 I note that, if left undisturbed, the total fines imposed on Mr McDermott in relation to his offending conduct are in the sum of \$13,200 (of which \$3,000 has been suspended for 12 months). That sum is one-third more than his total taxable income for the most recent financial year.
- 20 In determining the appropriate quantum of the fines in respect of charges 2-5, I have taken into account a number of factors, including: that his conduct, albeit serious, was not deliberate flouting of the Rule but an honest albeit mistaken belief that the 24 hour Rule still applied; that, based on that belief, each of the offences was part of the same course of conduct over a relatively short period of time; that detection was made possible by his rigorous record keeping which documented his stomach tubing activities; the absence of previous similar offending over a long career; his limited income and relatively poor capacity to pay a heavy fine; and the very high amount of the total fines imposed.
- 21 In all the circumstances, I consider that it is appropriate to impose a fine of \$1,000 in respect of each of charges 2, 3, 4 and 5, and to suspend \$2,000 of the \$4,000 total for a period of 12 months.

CONCLUSION

- 22 The decision in relation to charges 2, 3, 4, and 5 is set aside and in its stead I impose a fine of \$1,000 in respect of each of charges 2, 3, 4 and 5, with \$2,000 of the \$4,000 total suspended for a period of 12 months.



Her Honour Judge Davis
Vice President

