

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE NO. Z869/2018

CATCHWORDS

Rule 193(1) of the Australian Rules of Harness Racing – stomach tubing within 48 hours of a race – guilty plea - application for review of period of disqualification.

APPLICANT	John Justice
RESPONDENT	Harness Racing Victoria
WHERE HELD	Melbourne
BEFORE	A Dea, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	13 February 2019
DATE OF ORDER	27 February 2019
CITATION	Justice v Harness Racing Victoria (Review and Regulation) [2019] VCAT 276

ORDER

- 1 The stay order made on 21 September 2018 is set aside.
- 2 Under section 51(2)(a) and (c) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic):
 - a. the Racing Appeals and Disciplinary Board's 20 September 2018 decision to disqualify the application for 12 months is affirmed; except
 - b. that decision is varied such that the disqualification period will be taken to have commenced on 13 February 2019.



A Dea
Senior Member



APPEARANCES:

For Applicant

Mr D Sheales, counsel

For Respondent

Mr D Brown, solicitor

REASONS

Agreed facts¹

- 1 For more than 40 years, Mr John Justice has been a licensed driver and trainer with Harness Racing Victoria (HRV).
- 2 On 27 January 2018, HRV Stewards attended his property to conduct a stable inspection.
- 3 After entering the property, Stewards approached the rear barn in their vehicle where a horse, which was later identified as Carload, was observed at a tie-up rail. Carload was engaged to race later that evening at the Tabcorp Park Melton harness racing meeting in Race 1 *'The Coggs Pace'*.
- 4 Mr Justice was observed immediately in front of the horse Carload. Next to Mr Justice and Carload were items generally used to stomach tube a horse namely a green bucket, a clear plastic tube with a black funnel attached and a small white bucket filled with a green/yellow liquid.
- 5 The Stewards left the car and immediately walked towards Mr Justice at which time when he stated to the Stewards *'Yep you've caught me. I put my hands up'*.
- 6 The Stewards formed the view on approaching Mr Justice that he was in the preparatory stages of stomach tubing Carload.
- 7 The Stewards then conducted an interview with Mr Justice, at which time he made admissions that he intended to stomach tube Carload.
- 8 At the time Mr Justice was preparing to stomach tube Carload he did not intend to scratch the horse from its engagement in Race 1 at Tabcorp Park Melton on 27 January 2018. Carload was declared a late scratching by order of Stewards at 1:40pm.
- 9 I was told at the hearing there was no dispute Mr Justice intended to stomach tube the horse with a substance intended to address the fact Carload appeared to be heat affected and dehydrated. In doing so, Mr Justice was intending to return him to his usual state of health rather than to improve his performance in the race.

The charge

- 10 On 26 March 2018, Mr Justice was charged with breaches of two Australian Harness Racing Rules (Rules).
- 11 While the second charge proceeded before the Racing Appeals and Disciplinary Board (RAD Board), at the hearing before me, I was informed that the other charge had been withdrawn.

¹ The summary is based on the parties' statement of agreed facts handed to the Tribunal at the hearing.

12 As a result, the sole charge before me was the alleged breach of Rule 193(1) which says:

A person shall not attempt to stomach tube a horse nominated for a race or event within 48 hours of the commencement of the race or event.

13 The Stewards relied on the following particulars:

1. The horse 'Carload' was engaged to compete in Race 1 at Tabcorp Park Melton on 27 January 2018;
2. At the relevant time you were the trainer of 'Carload';
3. On 27 January 2018, HRV Stewards attended your registered training establishment and observed you preparing to stomach tube 'Carload' which was engaged to race at Tabcorp Park Melton later that day;
4. You did attempt to stomach tube the horse 'Carload', a horse nominated for a race within 48 hours of the commencement of that race.

14 On 20 September 2018, after taking account of Mr Justice's guilty plea to the above charge and his good record over about 40 years, the RAD Board found Charge 1 proven and disqualified Mr Justice for 12 months.

15 On 21 September 2018, on Mr Justice's application, this Tribunal ordered by consent that the RAD Board's decision be stayed until the final determination of his application for review.

The issue before the Tribunal

16 At the hearing before me Mr Justice confirmed he accepted the charge had been proven and conceded that, at the time he was about to stomach tube the horse, he intended that it would run that night, provided it was well enough to do so.

17 Mr Justice also conceded it was appropriate for a period of disqualification to be imposed but he contended it should be for six months. Mr Justice's counsel, Mr Sheales contended that was the appropriate period of disqualification having regard to:

- The nature of the substance used – that is, not one directed at improving performance;
- Mr Justice's early guilty plea;
- Training is Mr Justice's sole source of an income; and
- Mr Justice's significant contribution to the industry over 40 years.

18 HRV maintained the appropriate sanction was the 12 month disqualification imposed by the RAD Board.

- 19 As a result, the sole question was to determine the appropriate period of disqualification standing in the shoes of the RAD Board and exercising all of its powers.²

Mr Justice's evidence

- 20 Mr Justice gave brief evidence before me about his current circumstances, the impact the RAD Board's decision had already had and how he anticipated a period of disqualification would affect him in future.
- 21 In short, as at late January 2018, Mr Justice was training 15 to 20 horses. By the time of the hearing before me, he only had three horses. As he put it, he was in effect already doing time. He stated that, once the period of disqualification ended he anticipated getting a couple of the horses back but the others would likely continue with their new trainers.
- 22 As to the personal effects to date, Mr Justice referred to stress and financial consequences for him and his family. He said his income had already been reduced by about a quarter and that he would now need to start looking for another job to support his family and to supplement his wife's part time income.
- 23 HRV did not cross examine Mr Justice on his evidence.
- 24 Mr Justice stated that he would cease training with effect from the hearing date and the parties agreed that would be the appropriate commencement date for the period of disqualification.

Mr Justice's record and references

- 25 There was no dispute between the parties that Mr Justice had a good record over his around 40 years in the industry. A number of positive personal references were provided and HRV did not seek to cross examine their authors or make submissions about the weight to be given to them.

Relevant cases

- 26 In its materials and in submissions, HRV relied on past cases of stomach tubing and contended they supported a disqualification period of 12 months. In summary:
- In *Smithers*,³ the trainer denied stomach tubing the horse, contending that blood a vet observed in its nostrils was caused by a bump to its head. The NSW Racing Appeals Tribunal found against Mr Smithers and disqualified him for 18 months;

² See section 51 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) and section 83OH of the *Racing Act 1958* (Vic).

³ 22 November 2016.

- In *Bajada v Harness Racing Victoria*,⁴ her Honour Judge Harbison found Mr Bajada guilty of charges including one relating to stomach tubing. For that offence, he was disqualified for 12 months;
- In *Lynn and Paris*,⁵ the trainers stomach tubed a horse in a horse float, on the side of the road on their way to the race. The trainers' contention that they acted in response to a legitimate welfare concern for the horse was not accepted. The Western Australian Racing Penalties Appeal Tribunal imposed disqualification periods of 15 months on each trainer;
- In *Devcic*,⁶ Mr Devcic pleaded guilty and co-operated with Stewards – a 9 month period of disqualification was imposed which was reduced to four months by this Tribunal. There were no written reasons for decision available to me and so I am not aware of the basis on which the disqualification period was reduced;
- In *Sylvia v Harness Racing Victoria*,⁷ this Tribunal affirmed the RAD Board's decision to imposed a 15 month disqualification for stomach tubing a horse on race day. Mr Sylvia denied doing so and refused to produce equipment to stewards.

27 Mr Justice's counsel, Mr Sheales referred me to Judge Jenkin's decision in *Pekin v Harness Racing Victoria Racing Appeals and Disciplinary Board*.⁸ In that case, Mr Pekin had admitted stomach tubing the horse but said he was unaware of the 48 hour rule, believing the relevant period was 24 hours. The Tribunal imposed a fine of \$2,000 which was suspended for 12 months. The Tribunal expressly noted that penalty was within the range of those imposed in other similar cases;

Decision

28 I noted that, in *Lynn and Paris*, the Tribunal considered a contention that they should distinguish between stomach tubing '*simpliciter*' and stomach tubing '*with a nefarious intent*'. Member Nash noted that there was nothing in the Rules which distinguished between these matters for the purposes of assessing penalty and that the Rule did not contain any element of intent or purpose. Member Nash then went on to say:

The difficulty I have with the dichotomy the Appellants contend for, is that it fails to recognise the gravamen of the offence of stomach tubing a horse within 48 hours of a race. *There is no proper purpose to stomach tube a horse within 48 hours of a race and continue to thereafter leave it nominated as a runner. If, for welfare reasons, a horse needs to have administered a stomach tube within 48 hours of a race, the only action a trainer and those involved can take is to*

⁴ 21 February 2017.

⁵ 6 July 2017.

⁶ 12 September 2017.

⁷ 7 February 2018.

⁸ [2013] VCAT 1266.

immediately notify the Stewards and request the horse be scratched as a runner. Otherwise, the very action bespokes impropriety. (my emphasis)

- 29 On the question of the purpose of stomach tubing Carload, I adopt the same approach: in my view there is no proper purpose for stomach tubing a horse when it is intended that it will race within the following 48 hours and it matters not whether it was for welfare or other reasons. If a horse requires treatment of that kind so close to a race, it ought to be scratched.
- 30 I noted the challenges Mr Justice has faced since the RAD Board's decision in September 2018 and in particular the fact that the effects of disqualification have already been felt as the horses he had been training have been largely moved away by the time of the hearing before me despite the stay order he obtained the day after the RAD Board's decision. I accept that there will be a delay in Mr Justice building his business again once the disqualification period has been completed. However, one might reasonably assume that is a typical consequence for any trainer disqualified for a breach of the Rules. I do not regard these matters provide a basis for mitigation.
- 31 As I understood it, there was no dispute that Mr Justice has a lengthy and good record in Harness Racing and is regarded as being a significant contributor to the industry. His references were certainly to that effect. It would appear the circumstances leading to charge 1 were an example of a once off, poor decision.
- 32 Mr Justice is entitled to credit for the fact that, from the outset, he admitted he breached Rule 193(1).
- 33 Having said that, Mr Justice was less frank with the Stewards and the RAD Board as to his plans to scratch the horse. Prior to the hearing before me, Mr Justice's position was that he intended to scratch the horse at the time he attempted to stomach tube the horse. As noted earlier, by the time the matter was before me, he conceded he did not intend to scratch the horse, apparently provided that Carload had revived sufficiently to run.
- 34 While noting the decisions in *Pekin* and *Devcic*, it appears the current range of penalties for a breach of Rule 193(1) is disqualification for a period of 9 to 15 months, subject to the particular circumstances. As written reasons for the Tribunal's decisions in *Bajada* and *Sylvia* were not available, I was unable to closely compare the circumstances in those cases and this and so identify how the time periods were identified.
- 35 Having considered all of the material before me, I am satisfied that it is appropriate to affirm the RAD Board decision, giving weight to its expertise,⁹ the nature of the breach and the penalties this Tribunal has applied in like cases since early 2017.

⁹ See the Court of Appeal's decision in *Macedon Ranges SC v Romsey Hotel Pty Ltd* (2008) 19 VAR 422 at 437.

36 As agreed between the parties, the 12 month disqualification will commence with effect from the date of the hearing before me, 13 February 2019.



A Dea
Senior Member



