

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

VCAT REFERENCE NO. Z996/2019

REVIEW AND REGULATION LIST

CATCHWORDS

Harness racing trainer—plea of guilty to one charge of presenting a horse to race which was not free of prohibited substances, contrary to rule 190(1) of the Australian Harness Racing Rules—review of penalty imposed by Harness Racing Appeals and Disciplinary Board—*Racing Act 1958*, s 83OH.

APPLICANT	Ms Ellen Tormey
RESPONDENT	Harness Racing Victoria
WHERE HELD	Melbourne
BEFORE	Jonathan Smithers, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	25 July 2022
DATE OF ORDER	9 August 2022
CITATION	Tormey v Harness Racing Victoria (Review and Regulation) [2022] VCAT 905

ORDER

- 1 The decision of the Harness Racing Appeals and Disciplinary Board of 19 December 2019 disqualifying Ms Tormey for 12 months, in relation to her breach of Rule 190(1) of the Australian Harness Racing Rules concerning the presentation of the horse *Fremarksgonzo* in Race 10 at Mildura on 13 April 2019, is set aside.
- 2 Ms Tormey’s trainer’s licence is suspended for a period of 12 months, with 8 months of that period being suspended for a period of 12 months, on condition that she does not commit any further ‘serious offence’ (as defined in the Harness Racing Victorian Local Rules) during the period of suspension.

Jonathan Smithers
Senior Member



APPEARANCES:

For the Applicant

Mr D Sheales of counsel

For the Respondent

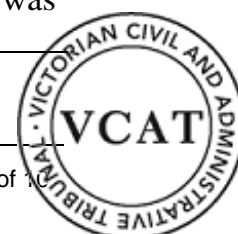
Mr A Anderson of counsel



REASONS

- 1 Ms Ellen Tormey is a licensed harness racing trainer. On 13 April 2019, a horse trained by her, *Fremarksgonzo*, competed in a race at Mildura. A blood sample revealed a plasma total carbon dioxide (**TCO₂**) concentration in excess of the allowable threshold. The threshold is 36 millimoles per litre (**mmol**) of plasma.¹ The first laboratory reading was '>39 mmol'. A second laboratory reading was 37.8 mmol.
- 2 Ms Tormey was charged with breaching Rule 190(1) of the Australian Harness Racing Rules (**Rules**). This provides that a horse shall be presented for a race free of prohibited substances. The charge referred to the horse being presented not free of alkalising agents, as evidenced by the TCO₂ levels recorded.
- 3 Ms Tormey entered a plea of guilty at an early stage. On 19 December 2019, penalty was handed down by the Harness Racing Appeals and Disciplinary Board (**HRAD Board**).
- 4 This occurred at the same time as the penalty was handed down for another unrelated charge, concerning her involvement, together with Mr Glenn Douglas, in the alleged stomach-tubing of a horse within 48 hours of a race contrary to Rule 193(7) (being *The Boss Man*, which ran at Melton on 1 December 2018).
- 5 The penalties imposed were linked, in the sense that concerning *The Boss Man*, a disqualification of 18 months was imposed, and concerning *Fremarksgonzo*, a disqualification of 12 months was imposed, with 6 months of that being concurrent with the penalty in the *Boss Man* case. Hence the total effective disqualification period was 2 years.
- 6 Ms Tormey then brought this VCAT proceeding, for review of the finding of guilt in relation to *The Boss Man*, and also review of the penalty in relation to *Fremarksgonzo*.
- 7 By agreement between the parties, the question of the penalty in relation to *Fremarksgonzo* was deferred until the review of the finding of guilt for the stomach-tubing charge concerning *The Boss Man* was completed. Following a long process (see below) the charge concerning *The Boss Man* was ultimately withdrawn, and an order dismissing that charge was made on 25 July 2022.
- 8 Accordingly, the only remaining matter is the review of the penalty imposed for the Rule 190(1) 'presentation' charge concerning *Fremarksgonzo*. That is what this decision deals with.
- 9 While for most of the time from December 2019 to the present, various stay orders by VCAT and the Supreme Court were in place, with the effect that the disqualification was put on hold, there were 'gaps' amounting to 49 days in total when Ms Tormey was in fact subject to disqualification. It was

¹ Under r 188A(2)(a) of the Australian Harness Racing Rules.



common ground that those 49 days need to be taken into account in this review of penalty.

- 10 The HRV submits that the original penalty of 12 months' disqualification should be affirmed.
- 11 Ms Tormey submits that there should be a suspension only, and that such suspension should be wholly suspended (aside from the 49 days already served).

The course of the review concerning *The Boss Man*

- 12 The explanation for the delay in this matter coming before the Tribunal is as follows. With effect from 1 August 2019, the *Racing Act 1958* was amended so as to remove VCAT's jurisdiction to review decisions on liability under the Rules. VCAT's jurisdiction is now limited to reviewing the penalty imposed only.²
- 13 On 19 May 2020, following a jurisdictional hearing, the Tribunal found that the applicable transitional provisions did not provide Ms Tormey and Mr Douglas with a right to have the HRAD Board's decision on liability in relation to *The Boss Man* reviewed.³
- 14 The applicants took that decision on appeal to the Supreme Court, which upheld the Tribunal's decision.⁴ They appealed again, to the Court of Appeal. This time, they were successful, and the matter was remitted to VCAT for a review of the HRAD Board decision on liability.⁵ As noted, that hearing process concluded on 25 July 2022.

Submissions of HRV

- 15 Concerning this review of the penalty relating to *Fremarksgonzo*, the HRV relies on the following matters:
 - When a horse is presented not free of prohibited substances, the industry is undermined. Competition needs to be on a level playing field, and not influenced by drugs. People must have confidence that when they place a bet on a horse, it will contest the race on its merits.⁶
 - The Serious Offence Guidelines, introduced on 1 January 2019, indicate for a first offence under Rule 190, a minimum penalty of 18 months' disqualification. These are non-binding, but they are one factor to be considered in determining penalty. I was referred to an

² See s 83OH of the *Racing Act 1958*. Under clause 66N of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998*, VCAT is now bound by the findings of fact made by the VRT (which has replaced the HRAD Board).

³ *Tormey v Harness Racing Victoria* [2020] VCAT 572 (19 May 2020), Dea SM.

⁴ *Douglas v Harness Racing Victoria* [2020] VSC 568, (8 September 2020), Richards J.

⁵ *Douglas v Harness Racing Victoria* [2021] VSCA 128, (13 May 2021), McLeish, Niall and Kennedy JJA.

⁶ See *Misfud v Harness Racing Victoria* [2012] VCAT 1438.



article in Harness Racer Magazine (October/November 2018) in which the HRV Acting Chairman of Stewards Brett Day said:

HRV Integrity Council, VTDA⁷ and the Chairman and Deputy Chairman of the RAD Board were consulted in regard to these guidelines. These guidelines should assist licensed participants on possible penalties that may be sought by the stewards, however penalties have the capacity to be decreased significantly for various factors. They are guidelines only and should only be treated as such, but provides transparency in relation to the range of penalties that may be sought by stewards for serious offences.

- The readings obtained for *Fremarksgonzo* are ‘very high’, compared to other cases.
- Ms Tormey was given a warning by Stewards relating to the same category of substance, and the same horse, on 6 August 2018. On 4 June 2018, it ran at Charlton, and recorded a TCO₂ levels around the threshold level of 36mmol/L (namely, readings of 36.6, 36.1 and 35.9 mmol/L). HRV’s stated position on that occasion was that she had not breached the Rules. But Ms Tormey was warned to review her feeding and treatment regime, to avoid results like that occurring again.

16 HRV placed particular emphasis on the fact that Ms Tormey had received a warning concerning high TCO₂ levels 8 months earlier, together with the particularly high TCO₂ levels recorded, as warranting disqualification in this instance.

Submissions of Ms Tormey

17 Ms Tormey relies on the following matters:

- Her early guilty plea.
- The lack of any relevant prior breaches of the Rules during the period she has been licensed as a driver (since 2005) and as a trainer (since 2011).
- The six written references provided on her behalf. These refer particularly to Ms Tormey’s love of horses and concern for their welfare, characteristics of honesty, reliability and trustworthiness derived from a solid family background, and contributions she has made to community and charitable organisations. Several referees also emphasised the extent of the distress the charges have caused Ms Tormey, and accordingly, the force of the lesson she has learned, and the unlikelihood of her reoffending. One referee noted that she had reviewed her training and feeding regime, and also, by December 2019, removed *Fremarksgonzo* from her stable.

⁷ Victorian Trainers & Drivers Association.



- The fact that if she is disqualified, Ms Tormey will not only be unable to train and drive horses, but she will also be unable to continue to earn income in the separate role she has had working at the retail horse racing supplier, Garrards. This is because their premises are physically located on the track at Bendigo. Disqualification requires her not to associate or communicate with persons connected with the harness racing industry for purposes relating to that industry, nor to enter onto any racecourse.⁸⁹
- The effect of the ordeal which she has been through in relation to the prosecution concerning *The Boss Man*, which was ultimately withdrawn three and a half years after the initial stewards' inspection¹⁰ (as described above) in terms of the lengthy delay in arriving at the ultimate outcome, the associated stress and expense, and the consequent deterrent impact. Ms Tormey was ultimately successful, both in establishing that the Tribunal had jurisdiction to conduct merits review in relation to *The Boss Man*, and also in having the stomach-tubing charge against her withdrawn. Yet the overall effect of the proceedings on her has been for her training operations to be scaled back significantly, while she awaited the completion of the disciplinary processes relating to *The Boss Man*, before the outcome relating to the presentation charge for *Fremarksgonzo* is determined.

This has impacted her particularly over the last two years, as demonstrated by the reduction in the number of starters trained by her shown in the official figures. While she had 108 starters in 2020, this fell to 55 in 2021, and to only 3 in 2022 to date.

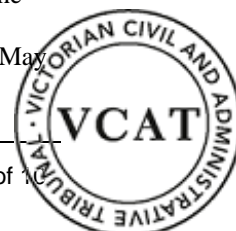
It was acknowledged that over the last two years, Ms Tormey has been able to continue to operate as a driver, and with some success, albeit on the country harness racing circuit. However, on the basis that a driver only takes 5% of the winnings, plus \$65 per drive (as opposed to the 12.5% she could earn as a trainer/driver) this has not amounted to a substantial income.

Also, during 2020, there were two periods, during June and October-November respectively, amounting in total to 45 days, when the disqualification ordered by the HRAD Board was actually in effect, due to gaps in operation of the various stays of the disqualification which have been ordered.

⁸ Rule 259 of the Australian Harness Racing Rules.

⁹ On 28 September 2020, a request had been made for Ms Tormey to be released from her disqualification to the extent necessary to enable her to continue to work at Garrards. This was as part of discussions about a stay sought pending a possible appeal to the Court of Appeal. HRV refused this request. So during the periods (amounting to 49 days in total) when no stay was in place, Ms Tormey was not able to work there. I was also told she worked lesser hours when she returned to Garrards, at least initially.

¹⁰ The process commenced with an inspection on 1 December 2018. The charge was laid on 22 May 2019. It was ultimately withdrawn on 25 July 2022.



- Related to this, particularly the aspect of delay, it was submitted that considerations of mercy should apply here. Reference was made to statements by King CJ in *R v Osenkowski*¹¹ and Tadgell JA (with whom Winneke P and Charles JA agreed) in *R v Miceli*.¹² The submission was that Ms Tormey’s particular circumstances are unique, or at least very unusual.
- In terms of the comparable cases, it was said that, to the extent there was anything in the nature of a standard ‘tariff’, it was 12 months’ suspension, with that itself often being suspended for varying periods, depending on the circumstances.
- In particular, it was said that the penalty of disqualification for 18 months, referred to in the Guidelines for a first offence, has rarely been imposed in practice.

Comparable cases

- 18 A number of decisions relating to presentation of a horse not free of prohibited substances, in breach of Rule 190, were referred to by the parties, for the purposes of consideration of parity. I refer to the most relevant of the prior decisions below. In relation to the first four, suspensions were imposed. For the last two, disqualification was imposed.
- 19 *Ahmed Taiba* (14 February 2020) was suspended for 12 months, with 6 months of that period being suspended. In that case, there was a timely plea of guilty, full cooperation, a good disciplinary record, Mr Taiba was well regarded in the industry, and the charges were said to have had a devastating impact on him, considering that harness racing was his sole source of income.
- 20 *Alfio Grasso* (10 March 2021) received a suspension for 12 months, with 3 months of that suspended, from the Victorian Racing Tribunal (VRT). On review, this was upheld by VCAT.¹³ As with most cases (including the present case) there was no real indication of what caused the horse to record TCO2 levels above the threshold. Similarly to Ms Tormey, Mr Grasso had a clean record as far as Rule 190 was concerned. The readings recorded were less than Ms Tormey, at 37.9 and 36.3 mmol/l. Mr Grasso however only decided to plead guilty at the start of a scheduled two-day contested hearing.
- 21 *Cassandra O’Brien* (30 April 2021) was a 25-year-old, whose horse returned a positive swab after she had been registered as a trainer for only two months. She pleaded guilty at an early stage. A 12 month suspension was imposed with 9 months of that period being suspended.

¹¹ (1982) 30 SASR 212 at 212-3.

¹² [1997] VSC 22; [1998] 4 VR 588 at 592-4.

¹³ *Grasso v Harness Racing Victoria* [2021] VCAT 657.



- 22 The VRT recited the extensive health problems suffered by Ms O'Brien. She had a rare blood disease requiring fortnightly blood transfusions. She had had three strokes and had spent more than half her life in hospital, on one occasion on life support for six weeks. At times she had been despairing and suicidal. The VRT appeared to give significant weight to those health issues. In determining penalty it referred to her 'almost unique' circumstances.
- 23 *Rick Holmes* (22 July 2021) was suspended for 18 months, with 6 months of that suspended. By the time of the hearing, he no longer trained any horses. Similarly to Ms Tormey, his horse recorded a TCO₂ level in excess of 39 mmol/l. He also had a good record, and entered an early guilty plea. He supplemented his income as a farm hand with work as a farrier. In not disqualifying Mr Holmes, the VRT recognised this would have prevented him from continuing to work as a farrier.
- 24 *Jeff Tabone* (6 May 2019) was disqualified for 26 months.¹⁴ He had a poor disciplinary record, including two previous prohibited substance offences and other serious offences, as well as prior warnings about his conduct and husbandry practices.
- 25 In the matter of *Peter O'Brien* (11 November 2021), the VRT imposed an 18 month disqualification. He showed no remorse or insight, and had a history of breaches. He was unlicensed at the time of the hearing, and did not intend to return to the industry.

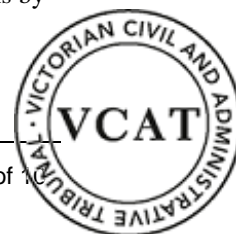
Consideration

- 26 Under the Harness Racing Victorian Local Rules, presenting a horse to race whilst not free of alkalinising agents is a 'serious offence'.¹⁵ This means it is not determined at first instance by the stewards, but must be referred to the VRT.¹⁶
- 27 Further, while there are some breaches of the Rules where a higher minimum penalty is suggested, breach of Rule 190 is more towards the higher end of the range of the 'serious offences' referred to in the Guidelines.
- 28 As stated, the Guidelines are not binding. Each case will be determined on its own merits, and as the decisions show, applicable considerations have on many occasions (but not always) given rise to lesser penalties than those stated in the Guidelines.
- 29 The effective operation of the harness racing industry depends on public confidence. In circumstances where not every horse which races can be

¹⁴ Mr Tabone received a 36 month disqualification from the HRAD Board, reduced to 26 months by consent at VCAT.

¹⁵ Victorian Harness Racing Local Rules- Definitions.

¹⁶ *Racing Act 1958*, s 500.



swabbed, there has to be a strong deterrent to presenting horses not free of prohibited substances, which could confer an unfair advantage.

- 30 Accordingly, general deterrence is important.
- 31 Specific deterrence is also relevant, but less so, given Ms Tormey's early guilty plea and the indications that she is chastened by this experience. However I do note the relatively high TCO2 readings recorded, and the fact that she received a warning in August 2018.
- 32 In Ms Tormey's favour are her contributions to the community and the statements by referees to the effect that she is held in good regard in the industry.
- 33 In terms of determining a fair and appropriate penalty, in my view, the very significant delay and disruption to her operations as a trainer over the last three and a half years, and over the last two years in particular, is an important factor. While she has been allowed to train horses, she has generally been restricted to doing so on financially disadvantageous terms—mostly for family members, and certainly not on the same commercial basis as she operated before. So in practical terms, she has already experienced restrictions on her ability to operate, over a significant period, even while the disqualification has been stayed.
- 34 In addition, she has of course actually been prevented from operating as a trainer at all during the three periods together amounting to 49 days during which stay orders have not been in operation.
- 35 In my view, Ms Tormey is entitled to consideration being given in her favour in the light of these matters.
- 36 I do *not*, however, see any basis for concluding that the respondent has in some way treated Ms Tormey unfairly (in relation to its conduct of her appeals to the Supreme Court and Court of Appeal, and of the VCAT review hearing, concerning *The Boss Man*) as was inferred in the oral submissions made on her behalf.
- 37 In all the circumstances, I conclude that a suspension is appropriate here, not disqualification. This is because I do not see disqualification as necessary for general deterrence in the light of the mitigating factors applicable, and also because of the disproportionate adverse impact disqualification would have on Ms Tormey with regard to her other employment.
- 38 In terms of the period of suspension, I determine that 12 months is appropriate, given considerations of parity. This was also the period specified by the HRAD Board (albeit that was a disqualification, partly concurrent with a greater period of disqualification on the now dismissed Rule 193 stomach-tubing charge.)
- 39 Finally, in light of all the considerations referred to above, including the fact that her training activities over the last two years have been



substantially restricted, and then factoring in the 49 days' disqualification already served, I determine that a significant component of the suspension should itself be suspended, namely, 8 months. This recognises that the restrictions Ms Tormey has already experienced have in practice had an impact which would, in broad terms, equate to a significant period of suspension in itself.

- 40 That 8 month suspension will be conditional on Ms Tormey not committing any further 'serious offence' (as defined in the Harness Racing Victorian Local Rules) for 12 months from the date of this decision.

Jonathan Smithers
Senior Member

