

TASMANIAN RACING APPEAL BOARD

Appeal No12 of 2015/16 – SCOTT FORD

Panel:	Mrs Kate Brown (Chair) Mr Rod Lester Mr Graham Elliott	Appellant:	Mr Scott Ford
Appearances:	Mr Greg Barns on behalf of the appellant Mr Tony Murray, Director of Racing, in person	Decision to which this appeal relates:	Not to grant and Driver A or Driver B licence
Heard at:	Launceston		
Hearing One:	1 February 2016	Result:	Upheld
Hearing Two:	12 February 2016		

REASONS FOR DECISION

1. The appellant has appealed against a decision of the Director of Racing not to grant him a Driver A or Driver B licence. The appellant had his licence revoked by the Integrity Assurance Board (IAB) in September 2014 after an incident at a race meeting on 31 August 2014, during which the IAB determined he behaved in a physically threatening manner to a steward (No 1 of 2014/15). In the context of the appellant's record as a licensed person, that incident was categorised as the culmination of long term difficulties with dealing appropriately with stewards and within the Rules of Racing generally thus the IAB determined the appellant was no longer considered a fit and proper person to hold a licence within the racing industry. That characterisation of the basis upon which Mr Ford's licence was revoked was accepted in subsequent dealings between the appellant and the Office of Racing Integrity and in this hearing by the Tasmanian Racing Appeal Board (the Board).
2. On 11 February 2015 Mr Ford was granted a non-race day stablehand's licence, having sought a Driver A licence.
3. On 15 September 2015 Mr Ford lodged an application for a Driver A or Driver B licence. For some reason (which was not explored at the hearing) that application was re-lodged on 30 November 2015. Mr Ford was invited to meet with the Director of Racing to discuss the merits of that application, as is normal procedure, and that meeting occurred on 9 December 2015. By letter of 23 December 2015, Mr Ford was advised his application was unsuccessful.
4. Mr Ford appealed and the appeal was heard on 1 February and 12 February 2016.
5. The material before the Board consisted of:
 - (a) Application for a Driver A or B licence for the 2015/16 season.
 - (b) Correspondence from Mr Scott Ford dated 30 November 2014 to support application together with statement by Mr Glyn Spaulding, Psychologist dated 17 August 2015
 - (c) Correspondence from Mr Anthony O'Connell to Mr Scott Ford dated 24 December 2015.
 - (d) Correspondence from Mr Tony Murray to Mr Scott Ford dated 20 July 2015.
 - (e) Integrity Assurance Board Reasons for Decision dated 22 September 2014.

6. Additional material was provided at the hearing as follows:
 - (a) A record of Mr Ford's "Season by Season Performance" as a driver noting that between 1985 and 2012 he had 6262 starts.
 - (b) Mr Ford's "Offence Report" record which ran to some 40 pages.
 - (c) A default notice issued against Mr Ford's wife by a mortgagor which was indicated to relate to their primary place of residence.
 - (d) The CV of the psychologist Glyn Spaulding.
 - (e) A statement provided by Mr Ford dated 10 February 2016.
7. It was common ground at the hearing that the refusal to grant a driver's licence was not due to Mr Ford's failure to meet any licensing requirement other than he be a "fit and proper person" to hold a licence. That was the focus of the hearing. It was specifically accepted by the Director of Racing that the only basis to refuse to grant the licence sought concerned Mr Ford's ability to work within the Rules of Racing in terms of managing his behaviour when he is under pressure or challenged by stewards.
8. It is important to note the parameters of an appeal to this Board as set out in s.30 of the *Racing Regulation Act 2004*. In Hillier (No 1 of 2013/14), the Board noted:

*"...the following propositions may be drawn from this statutory scheme: (a) An appeal from the stewards to this Board is not an appeal in the strict sense, nor is it an appeal de novo. (b) The appeal is in the nature of a re-hearing with this Board exercising its own discretion. (c) The appeal is decided upon the materials before the stewards, together with any further evidence the Board may see fit to receive. (d) The Board has full power to receive further evidence and, in deciding whether or not to do so, will be guided by what it considers to be the interests of justice in the particular circumstances. (e) The power or discretion to receive further evidence, whatever its form, is unfettered. (f) No error on the part of the stewards need be demonstrated before an appeal can succeed. (g) It will remain for the Board to be comfortably satisfied, having regard to the evidence before it, that the appellant was in breach of any particular rule or rules (See *Briginshaw v Briginshaw* (1938) 60 CLR 336)."*
9. That formulation is accepted and adopted by the Board as convened in this hearing.
10. The Australian Harness Racing Rules r.90(6) provides (amongst other matters) that:
 - (6) A licence may be suspended or cancelled:
 - (a) by the Controlling Body or the Stewards for breach of a term or condition of the licence, or
 - (b) by the Controlling Body where the Controlling Body is satisfied that the person holding the licence is not a fit and proper person to be associated with harness racing.
11. "[F]it and Proper person" is not defined. That is no doubt intended to enable a full and unfettered consideration of each case on its own facts. The High Court of Australia has stated that the expression "fit and proper" "*takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities*" - Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 380. It can be concluded that in the context of the racing industry that term encompasses an ability to uphold the integrity of the industry generally with all that goes with that, to work within the

Rules of Racing, and pertinently, to deal with other participants in a professional and respectful manner.

12. Mr Ford came before this Board with a long history of involvement in the racing industry. He had been driving since 1985 when he was 20 years of age and had been consistently active since. The exception to his consistent level of activity notably was when he has been suspended or disqualified, or had been unlicensed as he was for the period of five months from 3 September 2104 when his licence was revoked as set out above. It is accepted that his offence report, while being lengthy, must be seen in the context of his level of activity within the industry. The fact that Mr Ford has 27 convictions for misconduct offences is noted.
13. Mr Ford continues to be licensed as a non-race day stablehand. In response to a specific enquiry, Mr Ford's counsel indicated that Mr Ford was not seeking that the Board consider any other category of licence other than a Driver A or Driver B. It was the position of the Director of Racing that Mr Ford ought be licensed at a lower category in order to demonstrate his ability to work within the rules of the racing industry and particularly (given the circumstances which lead to the removal of his licence in 2014) his ability to accept the authority of stewards. Mr Ford's counsel submitted that a lower category of licence would not afford the appellant any real opportunity to do that under race conditions and would therefore serve no real purpose.
14. In determining whether Mr Ford was now a fit and proper person to be licensed the Board considered what had changed since his licence had been removed in 2014, and what he could further do to demonstrate his fitness to be a licensed person. The Board had regard to the very serious circumstances of his misconduct which gave rise to that removal, but noted that he was not at that time charged with misconduct; rather his conduct was dealt with as a licensing matter rather than a breach of any rules.
15. As to what had changed since Mr Ford's licence was revoked there were a number of matters to be taken into account. The evidence as to Mr Ford's efforts to ensure he addressed his ability to control his temper when challenged by stewards was limited to a report from a psychologist Glyn Spaulding. Mr Spaulding concluded that "*Scott seemed to have good awareness and decision making regarding his anger management. Scott showed good knowledge of triggers, early-warning-signs,[sic] planning, analysis and problem solving relating to anger. I have no concerns re his management of his anger in normal situations.*" This report was not challenged by the Director, Mr Spaulding was not required to make himself available to be cross examined, and there was no contrary evidence called.
16. However, the Board notes that Mr Spaulding had been told Mr Ford had 19 counts of misconduct within the racing industry in 30 years, "*the last being approximately 5 years ago. [Mr Ford] described these incidents as him 'giving someone a spray'(verbally)*". The evidence before the Board was in fact that Mr Ford had some 27 counts of misconduct in his 30 years in the industry, and while it may be technically right to describe the incident on 31 August 2014 as not a proven misconduct charge, a more candid response would have included it. It also appears that the only information Mr Spaulding had about that incident was the description from Mr Ford in which he apparently refers to having been "set up". Those factors tend to undermine the weight of Mr Spaulding's opinion.
17. The other factors which were submitted by Mr Ford's counsel to be of relevance as to whether or not Mr Ford should be granted a Driver A or B licence went to him effectively having felt the effects of the removal of his licence, and therefore having "learnt his lesson".
18. Mr Ford has been without the income he had derived from driving for almost 18 months and has suffered financial difficulties. The approximate amount either net or gross that he has missed the opportunity to earn was not particularised, and beyond the general reference to the family home (in his wife's name) being subject to a default notice by the mortgagor, his

debts and liabilities were not particularised either. The Board can only generally take into account that he has been affected negatively by the removal of his licence.

19. Mr Ford's counsel also made reference to Mr Ford suffering embarrassment and humiliation within the industry by the removal of his licence and return to the industry as a stablehand. This is of some, although not substantial, weight.
20. It is proper to take into account that Mr Ford has for three decades worked within that industry, and has been one of its senior participants. This is something of a double-edged sword for Mr Ford however: he may feel greater humiliation than a younger participant at losing his licence, but likewise that long experience ought to have underlined to him the importance to the industry as a whole of respecting the role played by the stewards in enforcing the Rules of Racing. If participants do not deal appropriately with stewards who are charged with enforcing the Rules of Racing, then the industry as a whole is undermined.
21. It is appropriate at this point to comment on the context of Mr Ford being unlicensed. When dealing with an appeal against a licensing decision the Board is not acting in a punitive role (as it is when determining an appeal from a decision as to guilt of a breach of the Rules, or the penalty imposed) but rather, in an administrative role. It is important to note that Mr Ford's licence was removed not as result of a conviction of a misconduct charge and therefore as a punishment, but rather, because as a result of behaviour (that could properly have formed the basis of such a charge) which was considered to be inconsistent with his continued participation in the industry; behaviour which, in the context of his long history of similar behaviour, rendered him no longer a fit and proper person to hold a licence to participate. If he had been charged with misconduct he would have faced a set period of disqualification. As it is, and given that it was common ground between the parties that his fitness was the only live issue, he need only demonstrate that he is now a fit and proper person to move back into the Racing Industry.
22. It follows that because it was conceded that the only issue was fitness and propriety, (not skills, understanding of safety or the like), if Mr Ford was able to demonstrate on the balance of probabilities that he had addressed that issue, then the Board has no proper basis not to grant him a licence. The Board accepts the submission of Mr Ford's counsel that unless fitness and propriety are specifically referred to in the conditions for granting a particular licence (as seems to be the case with the distinction between categories of trainer's licence in that more is expected of trainer for the general public) then the level or fitness and propriety to be licensed is the same across the industry and encompasses considerations of character and ability to work within the industry's regulated environment, and general integrity.
23. It is noted that Mr Ford already has been granted a stablehand licence and has therefore presumably satisfied the licensing authorities that he is a fit and proper person for the purpose of that licence. There are no particular criteria pertaining to either that licence category or the Driver A or B category that would give rise to the expectation that the meaning of fit and proper should be defined differently for each. That determination of the licensing authorities for the purpose of the application for a stablehand licence is not binding on the Board with respect the application before it, but it is relevant.
24. Also of relevance is a consideration of what more Mr Ford could do to demonstrate his fitness to re-enter the industry at the level of a driver, other than that which he has already done. If the Board were to find that he is not now a fit and proper person, it may be then argued that he could never be so considered. Conversely, if he is now accepted to be a fit and proper person, having consulted with an expert as to his anger management issues, if he is subsequently guilty of misconduct in similar circumstances, he would almost certainly be unable to persuade a licensing authority that he is ever capable of addressing the behavioural issues. The latter proposition was put to Mr Ford through his counsel and was accepted as being the case.

25. It is noted that there were submissions made by the Director that Mr Ford ought to adhere to a prescriptive timetable before reaching the licensing level of Driver A or B. This was not accepted by the Board for two reasons. In imposing such a timetable, a licensing authority is improperly fettering its discretion to consider a future application in all of the circumstances that exist at the time the application is made. This arguably may be appropriate if it is only the progression to one higher level that is contemplated, as presumably the possible variables between the imposition of that condition and the time the upgrade is actually sought, are limited. It could however only apply where there is some proper factual basis, responsive to the particular circumstances of that case, for so doing. For instance, if some skill set needs to be developed and demonstrated.
26. The Board took the view that in this case the timetable, which was sought to be imposed as a condition, was not a proper condition in all the circumstances for the reasons above and because of the particulars of Mr Ford's misbehaviour which lead to the revocation of his licence. In any event it sought to extend much further than could properly be done.
27. It should be borne in mind that the only further way Mr Ford can demonstrate he is fit and proper, beyond having done what the expert evidence was that he had already done, is to participate in the industry as a licensed person.
28. The Board was not unanimous in its decision. Taking into account all the evidence before it, two of the three sitting members were of the view that on balance Mr Ford ought to be granted a driver's licence. That decision was reached taking into account the factors noted above, but particularly what the requirement of fit and proper means, the expert evidence of Mr Spaulding, and Mr Ford's particular circumstances.
29. The majority of the Board were of the view that as Mr Ford was removed from the industry on the basis of his inability to manage his temper in line with requirements of participants; that the expert opinion is that Mr Ford now has an understanding of his weakness in this area and strategies to manage that; that there was no evidence that he was otherwise unfit or improper, and indeed he was already accepted as being fit and proper for the purposes of a stablehand licence. That conclusion was not reached lightly. While the Board has reservations about licensing a participant with such an extensive history of misconduct, the way the parties ran their cases and the limitations of the evidence before it, lead the majority of the Board to conclude that a proper application of the law to the evidence before it, could only result in the issue of that licence. Given what has been stated above about "fit and proper" with respect to licence categories, the Board considered that it was not appropriate to distinguish between the "fitness" required of a stablehand and of a driver. Further, given the basis upon which the licence was revoked and that the concerns which lead to that incident have, according to the expert evidence, been addressed, it is appropriate that the appellant be granted the same level of licence that he had prior to that incident, that being a Driver A licence.
30. Mr Ford should be aware that in light of the way he ran his case before the Board, in that he accepted that he had now done all he could to address the basis upon which his licence was revoked, and had effectively addressed that problem, that should he breach the rules in that way again, he is unlikely to be able to persuade a licensing body that he is capable of reform or rehabilitation (although such a matter would necessarily turn on the circumstances at the time).
31. The Board orders that the appellant have his deposit returned to him pursuant to Section 34(2)(e) of the *Racing Regulation Act 2004*. The appeal having been successful the Board makes no order as to transcription costs.