

TASMANIAN RACING APPEAL BOARD

Appeal No 13 of 2014/15

Panel:	Mr R Foon (Chair) Mr G Elliott Mr W Burnett	Appellant:	Mr I Swain
Appearances:	Mr D Hayes on behalf of the appellant Mr A O'Connell on behalf of stewards	Rule:	Australian Harness Rule AR231(1)
Heard at:	Launceston	Penalty:	(1) A fine of \$250 (\$150 wholly suspended for 12 months) (2) A fine of \$500 (\$400 wholly suspended for 12 months)
Date:	19 March 2015	Result:	(1) No jurisdiction to hear appeal (2) No jurisdiction to hear appeal

REASONS FOR DECISION

1. The appellant, Mr Swain, is a licensed harness trainer who attended trials at the Carrick Park Pacing Club on Saturday, 24 January 2015 with his horse *Timely Sovereign*. The horse was competing in trial 3.
2. After the trial the Chairman of Stewards, Mr Adrian Crowther, advised the appellant that his horse had not qualified because it had tired badly.
3. Two exchanges took place between Mr Swain and Mr Crowther. Mr Crowther then advised Mr Swain that he took exception to what Mr Swain had said to him and advised him that it sounded like a threat and that the matter would be referred to another steward and Mr Swain may be required to attend an inquiry.
4. A stewards' inquiry was subsequently convened on 10 February 2015 and Mr Swain was found guilty of two charges under AR231(1) which relevantly provides that:

“A person shall not threaten, harass, intimidate, abuse, assault or otherwise interfere improperly with anyone employed, engaged or participating in the harness racing industry or otherwise having a connection with it.”

5. Stewards summarised the charges as follows:

“We do charge you with two charges under that rule the first one being that on the 24th of the first 2015 at the Carrick Trials you directed a comment to Chairman of Stewards, Mr Adrian Crowther, which in the opinion of stewards’ was abusive. Charge two – that on the 24th of the first 15 at the Carrick Trials you directed a comment to Chairman of Stewards, Mr A Crowther, that in the opinion of stewards’ was threatening.”

6. The penalties imposed were as follows:

Charge one – A fine of \$250 (\$150 wholly suspended for 12 months on condition that Mr Swain not breach this rule during that time).

Charge two – A fine of \$500 (\$400 wholly suspended for 12 months on condition that Mr Swain not breach this rule during that time).

7. Mr Swain has appealed both conviction and penalty on both charges. Given the issues that determine this appeal it is not necessary to repeat what was allegedly said.
8. There are two preliminary matters that determine the outcome of this appeal. The first issue is whether or not the appeal was lodged in time and secondly the issue of the effect of a lack of procedural fairness/natural justice in relation to the original inquiry.
9. The issue of procedural fairness was raised by the appellant’s advocate, Mr Hayes. In relation to charge one, the stewards conceded that there had been some degree of unfairness as Mr Crowther was not present to be cross-examined at the inquiry although he could have been made available. In relation to the second charge, they were also very much of the view that his non-attendance did not potentially affect the outcome at all.
10. The Board in Appeal No 1 of 2013/14 considered natural justice. It held as follows at para 4 to 5:

“The hearing of appeals for this Board is prescribed by statute. Relevantly, s.30 of the Racing Regulation Act 2004 (“the Act”) provides:

- (6B) *An appeal is to be heard and determined upon the evidence at the original hearing when the decision or finding appealed against was made, but, if the presiding member considers it to be proper, expert or other evidence may be required or admitted.*
- (6C) *The appellant may request the TRAB to admit any expert or other evidence that the appellant considers necessary.*
- (6D) *The TRAB -*
- (a) *is to make a full and thorough investigation in open court, without regard to the forms, requirements or solemnities that might have been appropriate in legal proceedings; and*
 - (b) *may inform itself on any matter in such manner as it think fit, and admit any evidence considered by the presiding member to be relevant notwithstanding that that evidence would not be admissible in a court of law; and*
 - (c) *may take into account any matters relating to, or to the administration of, racing that are within the knowledge or experience of a member of the TRAB or which have arisen in or as a result of other proceedings or appeals before the TRAB.*

In our view, 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)."*
11. In our view the decision of the Board in that case means that the Board, when hearing an appeal, can correct any perceived deficiencies in natural justice or procedural fairness by way of hearing the evidence in the re-hearing.
12. However, the Board's ability to make orders and re-hear matters is one created by statute and can only be exercised if the matter is brought before it in accordance with the statute. The Board's view is there is no ability for orders made at an inquiry to be declared invalid for lack of procedural fairness or natural justice if the jurisdiction of the Board is not engaged.
13. That brings us to the critical matter in the appeal and that is whether or not the appeal is instituted in time.
14. s.29 of the Act states:

How and when should persons appeal?

- (1) *An appeal is instituted by lodging a notice of appeal with the secretary.*
- (2) *The notice of appeal –*
 - (a) *is to be in a form approved by the TRAB; and*
 - (b) *must specify the parties to the appeal, the relevant decision and the grounds of appeal.*
- (3) *The notice of appeal must be lodged with the secretary within –*
 - (a) *In the case of a minor appeal, 7 days after the taking of the relevant decision; or*
 - (ab) *In the case of any other appeal, 14 days after the taking of the relevant decision; or*

(b) *if section 28(1)(a) applies, 14 days after the day on which the person is issued with the warning-off notice.*”

15. A minor appeal is defined under the Act as “*a fine not exceeding \$500 or, a suspension for a period not exceeding 30 days.*”
16. It was raised as a preliminary issue before the Board whether or not the first charge was able to be appealed as the stewards submitted it was a minor appeal. Submissions were made by the stewards that each of the charges is a separate charge and penalty and therefore when determining whether or not the appeal was a minor or other appeal, you looked at each of them in isolation and not together.
17. The submissions of the appellant were that the charges and fines related to one incident. The penalty notice ultimately listed one fine and it was in fact one appeal. When combining the fines together it wasn't a minor appeal.
18. Subsequent to the Board reserving its decision it was realised that the second fine would in isolation also constitute a minor appeal. In light of the submissions which were made by both the stewards and the appellant on the hearing day the Board determined that it was unnecessary to hear further submissions as to the same point as the submissions could only mirror what had already been put.
19. In isolation the fine imposed on Mr Swain of \$250 is clearly a minor appeal and as the Notice and Grounds of Appeal was lodged 14 days after the penalty was imposed by stewards it is out of time and not a valid appeal. The second fine imposed on Mr Swain of \$500 is in isolation also a minor appeal and as the Notice and Grounds of Appeal was lodged 14 days after the penalty was imposed by the stewards it is out of time and consequently not valid.
20. The Board is of the view that at the inquiry concerned the appellant was fined with respect to two separate charges. Although the fine and notification of penalty gives a total amount of the fine, the notice does make a distinction between the two charges and the two penalties.
21. The Board is of the view that the two penalties cannot be combined to make this matter up other than two minor appeals. However, the fine notice and the comments at the inquiry may have misled the appellant as to the time limited for an appeal –

Chairman - You'll have for that one \$500 would be a major ... so charge two I think you get fourteen and fine one, being the \$250, I think you get seven days but I can just confirm that because they do differ between the Codes but if you wanted to wait outside I'd be able to let you know about those. It would only take me a couple of minutes just to look up the actual forms and that's your notice there. Thank you.
22. If the Board had the power to do so, it would have heard and determined the appeal on its merits, however, the Board is a statutory body and there is no power under the legislation for us to extend time to appeal.
23. There is no jurisdiction to hear the appeal.
24. As there is no jurisdiction the appeal deposit should be returned in full.