TASMANIAN RACING APPEAL BOARD

Appeal No 16 of 2018/19

Panel:	**Kate Brown (Chair)** **Rod Lester (Member)** **Wendy Kennedy (Member)**	**Appellant:**	**Michael Dornauf**
Appearances:	**Anthony O'Connell (On behalf of the Appellant)** **Steven Shinn (on behalf of the Stewards)**	**Rules:**	**1. AHRR 196A (1)(ii)** **2. AHRR 190 (1)(2)(4)**
Heard at:	**1 Civic Square LAUNCESTON**	**Penalty:**	**1. Disqualified for nine months** **2. Disqualified for six months** **(to be served concurrently)**
Date:	**4 July 2019**	**Result:**	**Appeal against conviction charged under 196A (1) (ii) – upheld** **Appeal against penalty charged under 190 (1)(2)(4) – varied to 6 months suspension**

REASONS FOR DECISION

1. On the 4th of July 2019 the Tasmanian Racing Appeal Board heard an appeal from Michael Dornauf arising from the taking of a positive swab from *Jimmy de Panda* which ran in Launceston Pacing Club meeting on the 9th of December 2018. The appeal had been filed within time but due to delays around further analysis of samples the matter could not be heard earlier. The appeal was initially against conviction and penalty in each case. However the appellant sought to amend the grounds of Appeal as follows:

   a) The appeal against conviction for breach of AHRR 190 was withdrawn as the appellant accepted it was a strict liability offence; and
   b) The appeal against conviction for breach of AHRR 196A be amended by striking out the ground as filed and substituting the following:

   -That stewards erred by failing to lay a particular charge or particularise the breach there of and
   -That stewards failed to articulate the relevant rule.

c) The appeal against penalty in each case was on the basis that the penalty imposed was manifestly excessive and that the stewards had failed to give adequate reasons.

2. Stewards did not oppose those amendments and the Board considered in the circumstances of the case it was just to allow those amendments, as permitted by s.30(5)of the *Racing Regulation Act 2004*.

3. With those amendments made to the grounds of appeal, the appellant's advocate then submitted that the Board should determine the new ground of appeal against conviction of AHRR 196A (point b. above) as a preliminary point on the basis that if that point was successful the hearing of the balance of the arguments on that point would not be required. While the Board considered proceeding in this manner, it determined that to do so without any further consideration and on the basis of nothing more than the basic submission of the appellant and absent any forewarning to the respondent to do so would be unfair.

4. The hearing then proceeded as an appeal against both conviction and penalty with respect to the alleged breach of Rule 196A and penalty only with regard to the breach of Rule 190.

Appeal against conviction

5. The substance of the appellant's submissions on this ground was the failure to sufficiently particularise the charge to be answered. The particulars of the charges alleging a breach of rule 190 and rule 196A are set out on page 42 of 50 pages of transcript:

> "…rule 190 (1)(2)(4) which says, 1 is - *a horse shall be presented for a race free of prohibited substances*, sub section 2 is - *if a horse is presented for a race otherwise in accordance with sub rule 1 the trainer of the horse is guilty of an offence* and sub section 4 is - *an offence under sub rule two or sub rule three is committed regardless of the circumstances of which the prohibited substance came to be present in or on the horse.* We will be issuing a further charge today, that charge being 196A, the first part of that is 1 and it says *a person shall not administer or cause to be administered to a horse any prohibited substance* and section ii of that is *which is detected in any sample taken from such horse prior to or following the running of the race,* the particulars of all these charges today are that you, as the trainer of *Jimmy De Panda* did present the horse to race and to win a race at the LPC on the 9th of December 2018 where he subsequently returned a positive result to Cobalt."
>
> "The other charge is 196A … Sub rule 1 and it says *a person shall not administer or cause* 47 *to be administered to a horse any prohibited substance* and sub rule 2 is, *which is detected in any sample taken from such horse prior to or following the running of a race."*

6. The only "particular" given it to either charge is

> *"that you, as the trainer of Jimmy de Panda did present the horse to race and win a race at the LPC on 9 December 2018 when he subsequently returned a positive result to cobalt".*

7. A defendant is entitled to know not only the legal nature of the offence with which he is charged, but also the act or omission giving rise to the charge. In *Johnson v Miller*, Dixon J stated that a criminal complaint must specify "*the time, place and manner of*

the defendant's acts or omissions" (1937) 509 CLR 467 at 486. Of course these are not criminal proceedings. The Tasmanian Racing Appeal Board is constituted under Part 5 of the *Racing Regulation Act 2004*. Section 30 governs its proceedings and pertinently s.30(6) provides (with underlining added):

> *6) On the hearing of an appeal, the TRAB –*
> *(a) is to proceed with as little formality and technicality, and with as much expedition, as a proper consideration of the appeal permits; and*
> *(ab) is to act according to equity, good conscience and the substantial merits of the case; and*
> *(b) must observe the rules of natural justice; and*
> *(c) may adjourn the hearing from time to time or from place to place as it thinks fit; and*
> *(d) except as provided by this Act, may otherwise regulate its own proceedings.*

8. Although it is not explicitly stated in the Act or the rules, it is implicit that Stewards are, like the Board, bound by the rules of natural justice: *It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it ….The reference to "right or interest" in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests*: *Kioa v West* (1985) 159 CLR 550 per Mason J at 582.

9. The particulars noted above are sufficient with respect to the breach of rule 190 which is a strict liability offence. However, despite repeating rule 196A no further particulars of that charge are identified immediately or in the subsequent eight pages of transcript. Rule 196A (1)(ii) provides *"a person shall not administer or caused to be administered to a horse any prohibited substance … which is detected in any Sample taken from such horse prior to or following the running of any race"*. It is abundantly clear that a key element of any breach of that section is the administration of the prohibited substance, and that the rules of natural justice require the identification of the particulars of that alleged administration.

10. It very much appears that the Stewards believed those same facts that rendered Mr Dornauf guilty of the strict liability offence of presentation of horse were also sufficient to make him guilty of the administration offence; that is, they failed to identify any difference between the requirements of the two separate charges. At no point in the process have stewards identified of the how/when/where/who by of the administration of the prohibited substance, which is the additional element required to be proven for the second offence. The effects of this failure to identity the difference between the two offences and properly particularise include:

    - Mr. Dornauf being (erroneously) found guilty of two charges on exactly the same set of facts.

    - Mr Dornauf cannot know what it is he has is alleged to have done or failed to have done with respect to administering the prohibited substance, and therefore cannot mount a defence to the allegation with any specificity.

11. Natural justice requires that a person standing accused of something must know what it is that they are accused of in sufficient detail to allow them to respond. The reasons for

this are noted in the cases above. That has not occurred in this case. Had it occurred, stewards might also have identified the lack of their own evidence around the administration of the prohibited substance, beyond Mr Dornauf's own evidence of legal supplementation. The effect of that has meant that the inquiry proceeded on the basis that Mr Dornauf had to disprove administration of anything which may have contributed to the reading rather than stewards positively proving and act or a mission omission on his part. This becomes particularly confusing in the circumstances of this case where the evidence is of legal vitamin B12 supplementation which more than likely was responsible for the reading, and where the concurrent charge is the strict liability offence of presentation of a horse.

12. It is noted that this inquiry was held on 10 April 2019. The swab had been taken on 9 December 2018. The preliminary certificate of analysis was received on 14 January 2019. The certificate of analysis with respect to the second sample was received on the 18th of February 2019. The stable inspection was undertaken on 16 January 2019 at which time a bundle of photographs were taken, including photographs of the supplements Mr Dornauf said he had given *Jimmy de panda*. Accordingly stewards had ample opportunity to consider and formulate the appropriate charges. Even when the inquiry commenced on 10 April, they failed to advise Mr Dornauf of the charges he was facing until 42 pages into a 50-page transcript.

13. The failure to particularise the details of the administration has prejudiced the ability of Mr Dornauf to defend himself, and has confused the process to the extent that proper consideration of where the onus of proof should lie, and what if any coherent evidence there was to support the charge, has been entirely lost. The Board upholds the appeal against conviction of administering a prohibited substance on the basis that the charge was insufficiently particularised and the appellant was not accorded natural justice on that basis.

Appeal against penalty

14. The Board is therefore left with the appeal against the penalty imposed for the breach of rule 190. Eventually after hearing from two experts the Board was able to ascertain from the parties that there was no dispute between them as to the factual basis upon which the reading of some 180 ug/l was obtained. Mr Shinn who was responding to the appeal on behalf of the Stewards was specifically asked if it was disputed that the reading in each of the Certificates of Analysis was substantially attributable to supplementation with vitamin B12 and he accepted that.

15. It was then common ground that the reading came about as a result of Mr Dornauf using a number of different legal B12 supplements at the same time without regard to the possible cumulative effect of those, particularly in terms of the likely elevation of cobalt levels over the permitted level. It is noted that AHRR 188A(2)(k) provides that cobalt is prohibited at a concentration of 100 micrograms per litre in urine or above.

16. Cobalt as a prohibited substance has a somewhat troubling history within the racing industry. The issues around it have been and continue to be debated. This Board is concerned however only with Mr Dornauf's culpability with respect to presenting a horse to race with an excessive cobalt reading where that reading is accepted to have come about by virtue of legal supplementation. There is in this case neither evidence nor submission of anything other than Mr Dornauf's failure to consider how his cumulative supplementation might impact on *Jimmy de Panda*'s cobalt levels. That is

the basis upon which penalty ought to have been considered by Stewards and was considered by the Board.

17. The appellant's advocate referred to the following factors:

- The cobalt level on analysis was not a significantly high one;
- The appellant has been a participant in the racing industry for some 45 years and his worst previous offending occurred in 2016 when he was fined $100 for wearing the incorrect number. It was submitted that his record is an excellent one;
- The appellant has over many years done much voluntary work for the industry
- At this point training is more of a hobby for the appellant and it is not his primary source of income;
- The automatic disqualification of Jimmy de Panda from the race meant that the appellant lost $8000 in stake money and breeders bonus; and
- The disqualification period imposed required that the appellant remove all the horses from his property.

18. The Board was referred to a number of local and interstate cases, and it was argued that the local cases of Blacker (Appeal No. 30 of 2018/18) and Rattray (Appeal No. 22 of 2018/19) were far more aggravated than that of the appellant. It was submitted that a more on par Tasmanian case was that of Dalco which involved theobromine and in which a three months suspension was imposed. It was also submitted that the characterization of cobalt and its impact on integrity issues has changed and that penalties imposed in older cases where cobalt is the prohibited substance are of reduced value in determining the current tariff (Hughes RAT NSW31 August 2018 per Amarti at paragraph 245). The case of Scott v Queensland Racing Integrity Commission (No 2) [2018] QCAT 301 was referred to and relied upon, noting that the cobalt reading in that case was 280 ug/l when the permitted level was 200 ug/l. Ms Scott was at first instance disqualified for 15 months but on appeal that was reduced to a three-month suspension and a $6000 fine.

19. In response, stewards relied upon a notice published by ORI in 2016 as part of the notification of the change of permitted level from 200 ug/l to 100 ug/l, which included a warning to avoid simultaneous use of products containing vitamin B12. It was submitted that the cases of Zane Medhurst and Rattray were closely aligned with this one and the penalties imposed in those cases ought be considered as setting the tariff in this state. With respect to Medhurst it was noted that the initial penalty was reduced to an 8-month disqualification. It was further noted that the appellant could have taken some veterinary advice, and the point of the rules around prohibited substances is to ensure a level playing field. The Board considered all the submission and the cases referred to. With particular respect to Mr Medhurst it is noted that he was in position of trust as Clerk of the Course when he offended, although there are some similarities around the nature of the offending.

20. The Board considers the penalty imposed in this case manifestly excessive. The record of the appellant is long and almost unblemished. There was no evidence that the breach was attributable to anything but excessive and inadvertent supplementation of vitamin B12. While the appellant pleaded not guilty that is of itself not aggravating, but rather removes the element of mitigation he would have been entitled to had he entered a guilty plea. It is also noted that when the matter came to hearing Mr Dornauf had served nearly three months disqualification and that some seven months had elapsed since the swab had been taken, through which period the matter had clearly

been playing on Mr Dornauf's mind. Mr Dornauf was also clearly affected by the reputational damage of a conviction for a prohibited substance. The level of culpability was low.

Determination

21. The Board has determined to vary the penalty by substituting a penalty of 6 months suspension for the disqualification period which had been imposed by Stewards for the breach of AHRR 190. That period of suspension is to be calculated from the 10th of April 2019. The appeal against conviction for the breach AHRR 196A is upheld.

22. The Appellant will forfeit 25% of the prescribed deposit and pay 25% of the transcript costs.