THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON (CHAIRPERSON)

APPELLANT:	**PETER GILES GRAHAM**
APPLICATION NO:	**A30/08/426**
DATE OF HEARING:	**7 DECEMBER 1998**
DATE OF DETERMINATION:	**12 FEBRUARY 1999**

IN THE MATTER of an appeal by Mr PG Graham against the determination made by Western Australian Turf Club Stewards on the 20 July 1998 imposing an 18 month disqualification for breach of Australian Rule of Racing 178.

Mr TF Percy QC assisted by Ms C White, instructed by Karp & Monaghan, represented the appellant.

Mr RJ Davies QC represented the respondents.

Background

On the 20 July 1998 the Stewards inquired into a report from the Australian Racing Forensic Laboratory in Sydney that strychnine had been detected in a urine sample taken from TILLYUP LADY following its win in Race 7 over 1400m at Kalgoorlie on the 13 June 1998. Mr Graham is a licensed trainer with the Western Australian Turf Club and at the relevant time was the trainer of TILLYUP LADY. The evidence before the Stewards was that the post race swab which had been tested contained a low reading of strychnine. This substance is regarded as a prohibited substance under the Rules of Racing being both a central nervous system and a spinal cord stimulant. At very low dose rates it is reputed to be a tonic or an appetite stimulant with very doubtful performance enhancing qualities. Mr Graham was not able to provide any explanation as to how the substance came to be in the horse.

The Stewards decided to charge Mr Graham with a breach of Australian Racing Rule 178 which reads:

> *'When any horse which has been brought to a Racecourse for the purpose of engaging in a race is found by the Committee of the Club or the Stewards to have been administered to it any prohibited substance as defined in AR.1, the Trainer and any other person who was in charge of such horse at any relevant time, may be punished, unless he satisfy the Committee of the club or the Stewards that he had taken all proper precautions to prevent the administration of the prohibited substance.'*

Mr Graham pleaded not guilty to the charge. After further inquiry the Stewards came to the following conclusion:

> *'Mr. Graham, Stewards have given consideration to the evidence before us, we've listened to your submissions and obviously taken into account everything that's put before us. By your own admission you have presented the horse and you do agree that the sample has shown the substance strychnine to be contained, which is a prohibited substance as defined in the Rules. Also on questioning in regards to stable security, you have in your own evidence stated, that it is possible for someone to get in. While you also said that honest people wouldn't get in, those who didn't want (sic) to get in could get in. We have given consideration to those matters. Taking that all into account and your submissions, Stewards do believe the charge to be substantiated and formerly (sic) find you guilty as charged. Now that we've found you guilty as charged, we now have the task of determining penalty, or if any penalty should be, or what would be the appropriate penalty if any to be handed down. This is now your opportunity to obviously to speak to us with regards to penalties. As you would be well aware under the Rules we have the power to disqualify, suspend or fine. If you would like to address us on those issued (sic) by all means thank you?'*

Mr Graham told the Stewards he would prefer a fine in view of his personal circumstances. He explained he had been a trainer since he was 21 and had been with horses 36 years. The Chairman asked him if he had a record. He admitted *'Yeah I've had previous convictions in which I've done my time and since, since the last lot which has been a fair long time ago, must be 11, 12 years ago...'*. The Chairman then asked him how many charges there were. Mr Graham admitted to 3 prior, to which the Chairman responded *'We'll, will have a look at that. We've covered obviously your financial situation, the*

horses, the stable hands, record is there anything else that you want to put before us - that you can think of that we haven't covered or anything else which may assist us?'. Mr Graham answered *'Just nothing...'.*

After some further discussion the Stewards retired and then came to the following conclusion:

> *'Mr. Graham, Stewards have given consideration to the matter of penalty and in considering penalty, we've listened to your submissions and I understand your personal circumstances, both financially and obviously a family aspect of it and I do feel for you in that regard. I have a family myself and I understand the pressures family can be. We have taken that into account. Also we have taken into account the financial circumstances, the amount of horses you have, the stable hands you have. Also I do understand what you mean about, Saturday coming up and I probably feel for you in that regard as well, I mean we were all here when I say we were all here, Mr. Nalder was here that day too. It's a very trying situation. We've also considered your record and as you said, you have previous charges, whilst we don't necessarily take that to be like a bad record and view that as a bad record in determining the appropriate penalty, we believe those circumstances don't allow a discount. So in considering all the matters, it's been a very hard decision, we've weighted it very heavily and it's been obviously discussed at great length as you would appreciate while you've been waiting. In all the circumstances we understand your request for a fine, unfortunately we can't acceded to that request. We do believe a period of disqualification of 18 months to be appropriate. Now against that decision you have the right of Appeal. Now if I can make a suggestion, I mean if you decide to Appeal, and obviously the significance of Saturday is important to you, should you decide to Appeal and apply for a Stay of Proceedings, what I would do is make reference to that and particularly explain the significance of next Saturday to the Tribunal. It's not for me basically, maybe I'm doing the wrong thing by saying that to you, but I believe in the circumstances I at least owe it to you and to the person who is not here with us any more. So if you do decide to Appeal, which is your right and you apply for a Stay, mention to them the significance of the Saturday coming up and why it is so important.'*

The *'Saturday coming up...'* , *'the trying situation...'* and the *"... The person who is not here with us any more"* refers to the tragic death of the appellant's apprentice for whom a memorial race was held at the racetrack.

Mr Graham initially appealed against both the conviction and the penalty but prior to the appeal hearing abandoned his appeal against conviction.

Mr Percy QC advances a very credible argument in support of the proposition that the appropriate penalty which should have been imposed is a fine. In summary, the main points presented were that in closely scrutinising penalty (Polletti Appeal 206) the penalties imposed in other States (McPherson Appeal 208) must be taken into account. Disqualification, being the most serious penalty, should not be imposed unless there is no realistic alternative (McPherson and O'Donnell Appeals 263 and 264). A fine may still be appropriate despite previous convictions for similar offences. The effect the drug had on the horse is an important consideration. Where there is no performance enhancing effect a fine should be imposed in the absence of any seriously aggravating factors (Kennewell (4.4.1997) (SAJC)).

Senior counsel for the appellant submits factors which may aggravate an offence concerning a prohibited substance may include significant betting support for the horse, a high drug level, actual or potential enhanced performance, failure to cooperate with the Stewards and the prevalence of the offence. On the other hand mitigating factors may include lack of betting support, a low level, no proven performance enhancing effect, cooperation with the Stewards, the prevalence of the particular offence and the need for specific deterrence, compassion and personal financial circumstances and the specific effect on the offender of the disqualification.

In applying these various aspects to the relevant facts it is argued strongly that in the present case there were a number of significant mitigating factors. These include lack of betting support, absence of performance enhancement, a low dosage and cooperation by Mr Graham. The offence is not prevalent nor did strychnine need to be specifically deterred. The appellant is a full time trainer with no other source of income. From a compassionate perspective there are *'massive consequences'* for the appellant and those associated with him. Finally it is said, in all of the circumstances, the matter falls at the lowest end of the scale. Specifically, in his written outline of submissions senior counsel makes the following allegations as to errors in the handling of the matter on the part of the Stewards:

'10. (a) *The penalty imposed by the Stewards failed to adequately taken into account or reflect the many mitigating factors.*

(b) *The Stewards in imposing the penalty said that they had taken a number of factors into account, but erred in failing to* ***specifically*** *take into account the three most important factors, namely:-*

(i) *the low level of the substance, and*

(ii) *the non performance enhancing effect of the substance.*

(iii) *where the offence fell in the range of offences relating to prohibited substances.*

11. *In addition the Stewards erred in finding that despite the most recent conviction of the appellant being some 12 years ago there was no reason to "..allow a discount." (p.36)*

12. (a) *The Stewards findings of facts do not clearly emerge and it is difficult to ascertain the precise factual basis upon which the penalty was imposed.*

(b) *Whilst it is not uncommon for no specific findings of fact to be made in respect of charges under rule 178 the appellant was entitled to be dealt with on the version of the facts most favourable to him, namely that he had not deliberately given or caused the substance to be given to the horse: see* ***Cunningham*** *(SAJC).*

13. *The Stewards erred in failing to have specific regard to penalties previously reviewed by this Tribunal, and to penalties imposed elsewhere for similar offences:* ***McPherson.***

14. *Relevant cases in which fines were seen as being appropriate (after an initial period of disqualification had been imposed) included:*

(a) ***Polletti*** *- Appeal 206*

(b) ***Harrison*** *- Appeal 166 175(h)(ii) $5,000*

(c) ***Miller*** *- Appeal 137*

(d) ***McPherson*** *- Appeal 208 (and cases referred to therein)*

(e) ***Corstens*** *(SAJC) 35/96 (1997)*

(f) ***Hall*** *(SAHRB) 33/94 (1994)*

(g) ***Kennewell*** *(SAJC) (1997)*

15. *The only documented case of the use of strychnine was the case of* ***Clingham****, (1984) VRC. A suspension for three months was reduced to a $1000 fine on appeal.*

Whilst the particulars of the case are largely unknown, it gives some insight into where the drug strychnine falls in the scale of seriousness.'

As to the appropriate penalty the written outline asserts:

'16. (a) *The appropriate penalty would have been a fine.*

(b) *The offence itself, when viewed in the light of the mitigating features was clearly at the very bottom of the scale of offences for prohibited substances, whether presentation or administration.*

(c) *Fines have been imposed in cases where the degree of criminality was far more pronounced than in the present case; and in circumstances where the appellant was a repeat offender see:* ***McPherson*** *Appeal no. 208*

17. (a) *If only disqualification was appropriate, which is denied, the period of 18 months was manifestly excessive.*

(b) *Significant deterrent penalties must be reserved for offences where there is some high degree of criminality or cheating; or where there has been an attempt to bend the rules to "patch up" an unsound horse.*

(c) *Periods of disqualification of around six months are commonly imposed for serious breaches of the rules relating to prohibited substances. In imposing a crushing penalty of 18 months the stewards have seriously misconstrued the position of this case in the spectrum of offences,*

(d) *Given that the record of the appellant was not seen as an aggravating factor, there was no need for a deterrent penalty, which was not warranted by the circumstances of the case.*

18. *Given the period of disqualification served to date, the penalty to the appellant has been the equivalent to the imposition of a very large fine (together with the loss of all his horses, clients, and staff) and in the event of the appeal being allowed no further penalty would be called for in the circumstances.'*

Interestingly, in reply Mr Davies QC graciously concedes the correctness and relevance of all of the matters raised on behalf of Mr Graham. But senior counsel then goes on to state:

> *'There is a much wider picture in this case and a picture which puts pressure on this Tribunal in the sense that it heightens exactly the role of the Tribunal in the widest picture of the history of the involvement of a trainer with the industry. I need to examine that against the rules in question and to examine some of the propositions put by my learned friend in the light of that. In the light of the review process, in the light of his observations about failing to find certain facts or make findings explicit on certain facts and in the light of his observations for example heightened by the colourful one.'*

Mr Davies then distinguishes between the rule dealing with administering a prohibited substance (Rule 175) and the presenting rule (Rule 178) in these terms:

> *'What are the salient features of this case? A horse was presented to race. It was found to have in it something which is widely thought to and perhaps is capable of being an appetite stimulant. It was a horse that had an appetite problem. Horses with appetite problems don't stand up to work too well and it's difficult to get them to race at all or successfully. If they fall in a heap because they don't eat enough with the stress of work or racing, they are not a lot of use to you. "Ah!" You say and Mr Chairman and members with respect "But we don't know whether that is what's happened". In response to which we say "You rarely do". In rule 178 cases, the rule is predicated upon the fact that you will not be likely in the bulk of cases to find out exactly what happened and who done what. Otherwise, you wouldn't need it. You could stick with 175 and you take your chances whether you could prove the elements of that.'*

The record of the appellant revealed a disqualification under Rule 175(A) and (H) (morphine) for 5 years in 1973, a $1,000 fine under Rule 117(A) (dexamathozone) in 1984, and 4 years disqualification reduced to 3 years under Rule 178 (bufrenorphine) in 1986. The latter penalty expired in May 1989.

In July 1989 Mr Graham was issued a stable employees licence which was renewed until the middle of 1994. A permit to train was applied for but not granted early in 1994. The Committee resolved not to issue a trainer's licence in December 1994. Eventually a restricted trainer's licence was issued in March 1995. The licence which issued was not only for limited periods of time but was restricted both as to location and entitlement. In July and subsequently November 1995 the licence was extended on limited bases.

Broadly speaking I agree with the proposition put for the Stewards that this matter is somewhat different from a run of the mill drug case. Consequently, I have given more than the usual consideration to the propositions put both orally and in writing on the appellant's behalf. But I am not persuaded by them in the end.

I am satisfied that the Stewards have not erred in failing to take into account the *'so called three most important factors'* as alleged in ground 10(b). Whilst they may not have made specific mention of each and every factor which they actually took into account in deliberating and ultimately arriving at their conclusion it is clear at least that the Stewards acknowledged that they listened to the submissions and considered all of the matters raised. The Stewards are not obliged to particularise every fact and circumstance which they have taken into consideration in arriving at a penalty. I am not persuaded by the argument that there was anything wrong with the way the Stewards dealt with the various mitigating factors. Whether any or all of the 3 factors identified in the ground are potentially the most important depends on the weight given to all of the particular facts and circumstances of the individual case.

Ground 11 does not quote the transcript in full which reads that *'whilst we don't necessarily take that to be like a bad record and view that as a bad record'* . It is clear from what the Stewards are actually saying regarding the refusal to allow a discount that they mean that although they are not treating Mr Graham as a seasoned or hardened offender, they nevertheless consider that no concessions should be made for him in view of the fact that he is a repeat offender.

There is nothing to suggest that the appellants have not dealt with Mr Graham on the version of the facts most favourable to him despite the allegation in ground 12. Indeed in view of the range of penalties potentially open to the Stewards as analysed in O'Donnell (supra) it was open to the Stewards to impose a harsher penalty.

I am not persuaded that the Stewards have erred in failing to have specific regard to penalties previously reviewed by this Tribunal as alleged in ground 13. I am satisfied that the Stewards have dealt with the matter appropriately in the light of my reasons in O'Donnell. O'Donnell was heard and determined subsequent to the other West Australian Appeals referred to in ground 14. As explained in that appeal this Tribunal is not obliged to follow the decisions of other jurisdictions where clearly other factors and considerations come into play which are not necessarily relevant to this State. The penalties imposed in Victoria are considerably different from those in Western Australia as the reasons in O'Donnell make clear.

I am not persuaded that a fine is appropriate in circumstances of a repeat offender such as Mr Graham. The justification for that is clearly O'Donnell. I do not agree that this offence was at the very bottom of the scale of offences and that the period of 18 months disqualification was manifestly excessive. I am satisfied in the case of a repeat offender that the penalty is appropriate and that the Stewards have not erred in their handling of the matter. There is no place in racing for prohibited substances of any kind as the Rules are presently framed. Those who are in a position of authority, such as trainers, have a strong obligation not to bring horses to the racecourse to race with a prohibited substance having been administered. Unless all proper precautions are demonstrated to have been taken to prevent the administration they must suffer the consequences including being banned from further participation for lengthy periods if they are repeat offenders. In my reasons in D Harrison (Appeal 215) I stated:

As Judge Goran stated in V P Sutherland and the Owners of The Horse "Red Poco" (referred to in NSW Racing Appeals Record of Decision Vol 1 at p.146) dealing with the drug rules in racing:

'What the racing legislators were doing was setting up a method of controlling drugs in racing. They made no attempt to control the use of therapeutic substances. They simply forbade their use in races. In doing so they threw the onus upon trainers to ensure that when horses came to race they were completely free of such substances even though they had been used in therapy. In this context the question of whether, or to what extent, the substance affected the performance of the horse, becomes completely irrelevant and misleading.'

The drug free racing policy, which is encapsulated in the relevant Rules of Racing is designed to prevent positive swabs on race day occurring and are intended to punish those who offend. As stated by Owen and Anderson JJ in Harper v The Racing Penalties Appeal Tribunal of Western Australia (1995) 12 WAR 337 at 347 in the context of a drug offence:

'...the need to maintain integrity in horse racing and to do so manifestly, is easily seen to be imperative and of paramount importance.'

The seriousness with which I deal with drug offenders in racing should be clear from my reasoning in O'Donnell (supra).'

In all those circumstances I would dismiss the appeal against the penalty imposed on Mr Graham.

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of W.A.

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APPEAL - 426

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MS P HOGAN (MEMBER)

APPELLANT:	**PETER GILES GRAHAM**
APPLICATION NO:	**A30/08/426**
DATE OF HEARING	**7 DECEMBER 1999**
DATE OF DETERMINATION:	**12 FEBRUARY 1999**

IN THE MATTER of an appeal by Mr PG Graham against the determination made by Western Australian Turf Club Stewards on the 20 July 1998 imposing an 18 month disqualification for breach of Australian Rule of Racing 178.

Mr TF Percy QC assisted by Ms C White, instructed by Karp & Monaghan, represented the appellant.

Mr R J Davies QC represented the respondents.

I have read the draft reasons of Mr D Mossenson, Chairperson. I agree with the reasons and the conclusions and I have nothing to add.

Seal of the Racing Penalties Appeal Tribunal of WA

PAMELA HOGAN, MEMBER

APPEAL - 426

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR J HEALY (MEMBER)

APPELLANT:	**PETER GILES GRAHAM**
APPLICATION NO:	**A30/08/426**
DATE OF HEARING	**7 DECEMBER 1999**
DATE OF DETERMINATION:	**12 FEBRUARY 1999**

IN THE MATTER of an appeal by Mr PG Graham against the determination made by Western Australian Turf Club Stewards on the 20 July 1998 imposing an 18 month disqualification for breach of Australian Rule of Racing 178.

Mr TF Percy QC assisted by Ms C White, instructed by Karp & Monaghan, represented the appellant.

Mr R J Davies QC represented the respondents.

I have read the draft reasons of Mr D Mossenson, Chairperson. I agree with the reasons and the conclusions and I have nothing to add.

Healy

Seal of the Racing Penalties Appeal Tribunal of W.A.

JOHN HEALY, MEMBER