APPEAL 494

DETERMINATION AND REASONS FOR DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**MIRANDA ROSITA MAGDALENA HOUGHTON**
APPLICATION NO:	**A30/08/494**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)** **MS K FARLEY (MEMBER)** **MR A MONISSE (MEMBER)**
DATE OF HEARING:	**26 APRIL 2000**
DATE OF DETERMINATION:	**7 JUNE 2000**

IN THE MATTER OF an appeal by Ms M R M Houghton against the determination made by the Western Australian Greyhound Racing Authority Stewards on 7 March 2000 imposing nine months disqualification for breach of Rule AR109(7) of the Rules of Greyhound Racing.

Mr S Davies, instructed by D G Price & Co, appeared for the appellant.

Mr C Martins appeared for the Western Australian Greyhound Racing Authority Stewards.

This is a unanimous decision of the Tribunal.

Following a complaint received on 29 January 2000 from Mr Renton, a Swab Steward and Kennel Attendant against Miranda Rosita Magdalena Houghton, a licensed Owner/Trainer, the Stewards opened an inquiry. At the inquiry Mr Renton stated his complaint in the following terms:

> *"Well each time I've been standing on the door when Mandy's been coming through I've been getting one in the ribs from her elbow. Tonight was the fifth night. Up till now I've had no-one there to see it happen. I told Raylene tonight if I'm on the door just keep an eye on what happens and sure enough it happened again, I got one into the ribs with her elbow."*

After hearing evidence from the complainant, Mr Denton, Ms Houghton (Mandy) and three Kennel Attendants, Ms Fowler (Raylene), Mr Denham and Mr Costa, the inquiry was adjourned.

By letter dated 7 February 2000 the Stewards charged Ms Houghton for breach of Rule AR109(7) of the Rules of Greyhound Racing.

The letter to Ms Houghton stated:

> *"Having considered the evidence received at that time, the Stewards have decided to lay a charge against you under Rule AR109(7) which reads:*
>
> ***AR109. Offences***
>
> *Any person (including an official) who:*
>
> *(7) assaults, obstructs, impedes, abuses, threatens or insults the Board/Commission, any member of the Board/Commission, a club, any member of the committee of a club, any Board/Commission steward, any steward or any other official of the Board/Commission or a club*
>
> *shall be guilty of an offence and liable to a penalty pursuant to rule 111.*
>
> *The component of this Rule applicable in this instance is "assaults an official".*
>
> *The specifics of the charge are that in the kennel building at Cannington on Saturday, 29 January, 2000 you, Ms Houghton, assaulted Kennel Attendant, Mr D Renton, by deliberately elbowing him."*

At the resumption of the inquiry on 23 February 2000, Ms Houghton pleaded not guilty.

Mr Pollard, who was standing near to Mr Renton at the time of the alleged incident, then gave evidence on behalf of the appellant.

After hearing further evidence on 4 March 2000, the Stewards found the charge against Ms Houghton proved. The finding of guilt was in the following terms:

> *"Ms Houghton, this inquiry was as a result of a complaint lodged by Mr Renton that whilst he was performing his duties at Cannington Greyhounds in the kennels on 29 January, 2000 you had deliberately elbowed him in the ribs.*
>
> *We have heard evidence from three eye witnesses...eye witnesses who have stated that they clearly saw you deliberately elbow him. From our knowledge of the kennel area and after viewing the kennel security video it is quite obvious that all three witnesses were in positions that afforded them a clear view of this incident. Their view was uninterrupted and like...unlike the view of your witness Mr Pollard, they were not side-on to Mr Renton and yourself at the time the incident was said to have occurred. The descriptions of the incident given by the three eye witnesses is very clear and consistent and from what we have heard from them, there is nothing to suggest that...suggest any inaccuracies in their description in regard to the elbowing or indeed that their descriptions are anything but the truth. You have suggested that discrepancies exist in their descriptions, however, you have only highlighted the discrepancy in regard to the behaviour of the greyhound that you were handling at the time. We do not find that this distracts from the voracity (sic) of their statements as they are all certain that the contact between Mr Renton and yourself was initiated by you alone and that it was deliberate.*
>
> *The evidence of your witness Mr Pollard is in conflict with that of the witnesses and we have considered carefully the evidence given by him. Given that the elbowing as described by the other witnesses was clearly not a vicious attack, we do not find it unusual that Mr Pollard did not witness any reaction from Mr Renton. Furthermore, as stated earlier Mr Pollard*

was on the other side of you when you exited the kennels and from that position it would not be surprising that he would not necessarily see a subtle elbow being lifted and contact being made with Mr Renton. This is not to say that the elbowing indulged in by you was anything other than an assault as it clearly was deliberate and intended for the purpose of causing discomfort to Mr Renton. The fact that it was not vicious or very hard makes it no less an assault on his person.

There has been no evidence that indicates there is any substance to your allegation of a vendetta against you by Mr Renton.

You have not offered any reasons why the evidence of the eye witnesses would not be correct. On the contrary, you have stated that you have always got on well with Ms Fowler, Mr Costa and Mr Denham. There is therefore no reason why these three persons should report such an incident if in fact it did not occur.

We therefore find that the specifics of the charge have been met and accordingly find you guilty as charged."

The Stewards' inquiry then proceeded to hear submissions in respect of penalty. The inquiry was adjourned to enable the Stewards to consider those submissions.

The Stewards advised Ms Houghton by letter dated 7 March 2000 of the imposition of the penalty of nine months disqualification.

The relevant parts of that letter from the Chairman of the Inquiry are:

"I refer to the Stewards inquiry conducted at Cannington Greyhounds on 4 March 2000 where the Stewards reserved their decision in respect of penalty.

The Stewards have now reached a finding on the question of penalty and our findings in this respect are as follows;

The Stewards have taken into account the following:

1) *Your length of involvement in the industry.*
2) *Your personal situation in that you are a full-time student who has some dependence on income derived from being involved in greyhound racing.*
3) *Whilst you only own three greyhounds, we recognise that greyhound racing plays a large role in your life.*
4) *Your previous record whilst registered with the Authority.*

The Stewards however are extremely concerned with the offence which you have been found guilty of. Firstly we simply do not tolerate any person's assaulting any other person's, especially officials who are employed to complete tasks to ensure the efficient running of racemeetings. Your failure to acknowledge the offence in the face of overwhelming evidence or indeed to apologise for it, does nothing to assist your cause on the question of penalty. In addition there does not appear to be any provocation of any kind leading up to the assault on Mr Renton on the night in question. It appears that at the very least you had premeditated your actions towards Mr Renton on the night in question as there has been no evidence of any confrontation of any description that night which led to your attack. It is, however, in our experience most unusual for a person to commit an offence such as you did without some form of provocation or reason. It is fact that Mr Renton reported to the stewards some weeks earlier an incident which ultimately led to you pleading guilty to a

charge under AR109(15) and being fined $75.00 for essentially striking a greyhound with an open hand. According to Mr Renton, from that time you proceeded to exact a form of retribution for his reporting of your behaviour by repeatedly making physical contact on his person. He was clearly concerned enough about your behaviour to report it to his fellow kennel workers so that they could watch your behaviour towards him. What they ultimately witnessed led to this inquiry and finding of guilt. We make no determination on whether in fact these previous encounters constituted any breaches of the Rules or were in fact any form assault. It would be improper of us to now impose a penalty that carried any weight for incidents that remain unproven. There is, however, a compelling suggestion that this incident which is the basis of our guilty finding has resulted from the fact that you took exception to Mr Renton's reporting of the previous incident and have thus struck out against him in the manner described to us. The kennel staff of this Authority can be described as the eyes and ears of the Stewards during the running of the racemeeting. They are in the kennel area amongst the trainers and handlers far more than the Stewards and Stewards rely on them to report any suspicious, improper or undesirable behaviour. As such they deserve to be protected from intimidation and assault and participants in the sport of greyhound racing need to be aware that there are serious consequences should they attempt, or indulge in, behaviour such as that committed by you. Behaviour such as yours has the very real possibility of discouraging kennel attendants from reporting incidents to the Stewards if they are likely to be open to retaliations. As officials they are not in a position where they can avoid the possibility of retaliations and as this case illustrates they are prone to cowardly attacks either verbal or physical when the perpetrator believes that no one can see. This penalty therefore must clearly reflect the distaste we have for your actions so that it serves as a deterrent to others. Whilst we are conscious of previous incidents of this nature we believe that these are of little assistance in determining the matter as the circumstances of each instance are essentially unique and each case should be judged on its own merits. We do not see that a fine of any value is appropriate for an offence such as this. In view of all the circumstances we feel that the appropriate penalty is a disqualification of nine months effective immediately."

Ms Houghton originally appealed against both the conviction and penalty. The appeal against conviction has now been abandoned.

The amended grounds of appeal are:

"The penalty imposed by the Stewards was excessive in all the circumstances of the case.

Particulars

(i) The penalty failed to reflect the finding of the Stewards that the raising of the Appellant's elbow resulted in a relatively minor assault.

(ii) The penalty failed to adequately reflect the Appellant's previous good record in the industry.

(iii) The penalty was excessive having regard to penalties imposed in other cases for similar offences."

THE LAW - APPEALS

The imposition of a penalty is a matter of discretion. An appeal body will only set aside a penalty if it can be demonstrated that the sentencing authority made an error of principle or of fact, or that the

penalty imposed was so far outside the range of penalties commonly imposed as to be manifestly excessive.

In this case, it is our opinion that the material before us demonstrates an error of principle on the part of the Stewards who imposed the penalty. The error is that the Stewards did not turn their minds to the necessary task of determining the relative seriousness of the particular offence so as to fix an appropriate penalty. The findings of fact were open to the Stewards and cannot be successfully challenged. However the Stewards should have gone on to consider whether the particular assault was in such a category as to be disserving only of disqualification as a penalty, or whether some lesser penalty may have been appropriate. Close analysis of the Stewards' reasons enables us to conclude that the Stewards were of the view that *all* offences of assaulting an official are to be dealt with by disqualification. That approach is wrong and demonstrates an error of principle.

GROUNDS OF APPEAL

The appellant has made out the assertion set out in the particulars of her grounds of appeal numbered (i). However, as indicated above, that particular is not one which forms part of any finding that the penalty was manifestly excessive. Rather, it states the error of principle to which we have referred. The appellant has not, however, made out the assertions particularised as (ii) and (iii).

Particular (ii) asserts that the penalty failed to adequately reflect the appellant's previous good record in the industry. That assertion, as a ground of appeal, cannot succeed. All that is required is that the Stewards be aware of the appellant's record, and take it into account. Having done that, it is up to the Stewards to determine what weight should be attached. The Stewards prefaced their reasons for imposing the penalty with an outline of the appellant's personal circumstances, including her record.

Particular (iii) asserts that the penalty was excessive having regard to penalties imposed in other cases for similar offences. This ground amounts to another way of saying that the penalty was manifestly excessive and it has not been made out in this case. That is so for the simple reason that there are a limited number of previous cases from which to determine a range of penalties.

Counsel for the appellant referred us to a number of cases in which disqualification had been imposed as a penalty, but that was on conviction for drug offences. We were also referred to a number of decisions on convictions for assault in the racing and trotting codes. Penalties were imposed ranging from disqualification to fines. We do consider that any of these cases provide much assistance in determining a range of penalties in this case.

Both counsel for the appellant and Mr Martins on behalf of the Stewards acknowledged that the case of NATHAN PHILLIPS was relevant to the question of an appropriate range of penalties. In that case, the Stewards imposed a penalty of warning off for assaulting 2 officials, and a penalty of 6 months disqualification for assaulting another official. The circumstances of those assaults were far more serious than the circumstances before us here.

We drew the attention of the parties to the case of ALLAN HOWELL, a decision of the Racing Appeals Tribunal of South Australia delivered 17 April 2000. In that case, the Tribunal was dealing with an appeal against a penalty of two years disqualification for an offence against the same rule as under consideration here. The Tribunal reduced the penalty from 2 years to 6 months disqualification. The circumstances of that case place it in almost exactly the same category of seriousness as the assault under consideration here.

With the PHILLIPS and HOWELL cases in mind, it cannot be said that the penalty here is so outside the range of penalties commonly imposed as to manifest error, so the appeal cannot succeed on that ground. However, for the reasons given below, we think that the appellant should succeed because there was an error of principle made by the Stewards in carrying out the sentencing exercise.

ERROR OF PRINCIPLE

The penalties available to the Stewards are as set out in Rule AR111. Rule AR111 is in the following terms:

> *"(1) Any person found guilty of an offence under these rules shall be liable to, in the sole and absolute discretion of the Board/Commission or the stewards:*
>
> *(a) a fine not exceeding not exceeding $5,000 for any 1 offence; and/or*
> *(b) suspension; and/or*
> *(c) disqualification; and/or ..."*

In our opinion, it is clear that those penalties range from the least serious to the most serious. Generally, a fine is a lesser penalty than disqualification. A suspension is a greater penalty than a fine, and lesser than disqualification. The availability of a fine of up to $5,000 is an important factor in leading us to that conclusion. That monetary amount was set by the Greyhound Racing Rules 1998, which came into operation on 1 January 1999. Prior to that, the maximum monetary penalty available for any offence was $100. The increase in the maximum monetary penalty available was clearly made so as to give the Stewards a wider discretion in the imposition of penalties, in the sense of making available a fine of/with substance. Given the marked increase in the maximum monetary penalty, the Stewards can now also impose fines with real deterrent value.

It is accepted law in the exercise of imposing a penalty that the penalty should be proportionate to the gravity of the offence. It is also accepted that for each type of offence, there are categories of seriousness (***Veen – The Queen* (No2) (1988) 164 CLR 465**). In this case the Stewards have fallen into error by not determining the category of seriousness of this particular offence of assaulting an official. It was pointed out that there was no provocation, the officials perform an important function, and the officials need to be protected in carrying out their duties.

In our opinion, the only differentiating factors in this case indicate that the assault in this case was in a lesser category of seriousness, certainly less than the type of assault in the case of NATHAN PHILLIPS. Here, there is no allegation of serious physical harm at all, or intention to cause such harm. The appellant's assault was a relatively minor form of retribution for a previous report by the official. The assault was certainly not a vicious attack, or in any way capable of constituting an offence of the most serious category.

As we have found that the sentencing discretion has miscarried, it is for us to exercise the discretion again. In accordance with what we have said above, we are of the opinion that the offence in this case falls into the category of the least serious offence of assaulting an official. As such, the imposition of a fine is an adequate penalty. This is a case which falls squarely into the category of offences for which the recently extended monetary penalties are appropriate.

For all of the above reasons, we will allow the appeal against sentence. Accordingly, we set aside the penalty of nine months disqualification and in lieu of that penalty, impose a fine of $2,000.

Seal of the Racing Penalties Appeal Tribunal of WA

PATRICK HOGAN, PRESIDING MEMBER