DETERMINATION OF

THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT:	**MAXWELL KEITH RONEY**
APPLICATION NO:	**A30/08/558**
PANEL:	**MR P HOGAN (PRESIDING MEMBER)**
DATE OF HEARING:	**5 MARCH 2002**
DATE OF DETERMINATION:	**5 MARCH 2002**

IN THE MATTER OF an appeal by M K Roney against the determination made by the Stewards of the Western Australian Turf Club on 22 January 2002 imposing a fine of $500 for breach of Rule 8(e) of the Australian Rules of Racing.

Mr T F Percy QC appeared for the Appellant.

Mr J A Zucal appeared for the Stewards of the Western Australian Turf Club.

This is an appeal against conviction and penalty.

On 22 January 2002 the Stewards opened an inquiry into a report received from Racecourse Investigator, Mr Phil O'Reilly, in relation to an incident which occurred at the Bunbury racetrack on Thursday, 17 January 2002. That report, which was read into the inquiry, stated as follows:

> *"I am the Racecourse Investigator for the Western Australian Turf Club and Special Constable with the Western Australian Police Service.*
>
> *On Thursday morning January 17th 2002, I attended the Bunbury Racecourse in the course of my duties to conduct random drug testing of licensed persons in accordance with the Australian Rules of Racing.*
>
> *I approached three riders who had just finished working horses on the track, one of who was Mr Roney, and requested all three persons to participate in a drug test at their convenience sometime during their morning track work.*

At 7.40 am I was approached by Mr Roney in the jockeys room at the Bunbury racecourse where I was conducting the tests.

Mr Roney said he refused to participate in the test. I clarified with Mr Roney that he was refusing my request of him to take a drug test and he again stated he was not going to take the test.

Mr Roney then protested that I was not conducting tests of females and added that he had spoken to Fin Powrie concerning the issue last year. Mr Roney stated Mr Powrie had given him an assurance that future drug testing conducted at Bunbury would include a nurse to enable females to also undergo testing. I am not aware of this arrangement being put in place however I did inform Mr Roney that the testing of females was a matter that I was dealing with.

I informed Mr Roney that if he refused to participate in the test I would be obliged to advise the Stewards of his failure to do so.

Mr Roney accepted that and said he would talk to the Stewards later in the day.

At 9.10 am Mr Roney returned to the racecourse and approached me in the office area. He stated he would now participate in the test but the issue was not over.

Mr Roney then participated in the drug test.

I duly reported this matter to the Stewards.

From the time of his refusal to the time the test was taken did not inconvenience me as I was in attendance at the racecourse during that period conducting drug tests of other licensed persons.

Forwarded for the information and consideration of the Stewards Panel."

Also read into the inquiry was a letter from Mr Roney dated 17 January 2002 addressed to the Racing Manager at the Western Australian Turf Club. That letter sets out Mr Roney's concern that no female track work riders were requested by Mr O'Reilly to provide urine samples on the day in question. The matters raised were all put forward by Mr Roney at the Stewards' inquiry. The letter was in these terms:

"I refer to urine testing conducted at Bunbury race track on 17 December (sic) 2002.

Initially I refused to give a sample because I believe it is discriminatory to insist that all male persons riding horses on the track give a urine sample. After seeking advice about the situation, I later attended the Bunbury racetrack and provided a urine sample.

On a previous occasion around March 2001, when testing had been conducted at the Bunbury race track, I approached Steward, Finn Powrie and discussed the situation with him, expressing my concerns that only male riders were requested to provide a urine sample and Mr. Powrie explained that female riders were not tested on that occasion because it was necessary for the female riders to be accompanied by a Club Representative of the same gender. It was my understanding from those discussions that on the next occasion a Club Representative of female gender would attend to ensure that all riders would be tested.

It is my understanding the testing is carried out to ensure the safety of all riders and horses at track work. I support this course of action, however it is my opinion, if all riders are not tested, it would seem pointless to conduct the testing at all as safety is not ensured if only male riders are tested.

I have been provided with a copy of Regulation 8 (jj) and am satisfied the testing has been carried out in accordance with the provisions of this Regulation. However, it is my opinion that in testing only male riders, this raises the issue of sexual discrimination.

I have made initial enquiries with the Equal Opportunity Commission in relation to the options available to me should the urine testing be conducted in a similar fashion in the future.

I have been advised that under the provisions of the Equal Opportunity Act and Sex Discrimination Act it is unlawful to disadvantage a person on the basis of their gender and for a person to receive less favorable (sic) treatment than someone else in the course of their employment on the basis of their gender.

I seek your written assurance that in the future all riders will be tested, regardless of gender and the WATC will take all steps necessary to ensure representatives of both genders are present at testing.

I am hoping this situation can be resolved amicably as I believe it is ultimately in the best interest of racing to ensure that all riders are tested in the future.

I look forward to receiving your response in the near future."

The Chairman of the inquiry acknowledged that he had received a copy of that letter.

After hearing evidence, the Chairman announced that the Stewards were charging Mr Roney with a breach of Australian Rule of Racing 8(e). That Rule states:

"8. To assist in the control of racing, Stewards shall be appointed according to the Rules of the respective Principal Clubs with the following powers.

...

(e) To punish any person committing a breach of the Rules or refusing to obey, or failing to obey any proper direction of any Official, or whose conduct or negligence has led, or could have led, to a breach of the Rules."

The requirement for a rider to provide a urine sample on request is found in ARR 81(iii), in this case, read with Local Rule 12A. Those Rules state:

"81A Any Jockey, Apprentice or Rider who:

...

(iii) refuses or fails to deliver a sample whether urine or otherwise when requested by the stewards may be punished."

"LR. 12A. Any investigator or investigators appointed by the Committee of the Club shall have the powers mutatis mutandis as are given to the Stewards under Australian Rule of Racing 8B, 8C, 8D, 8(j) and (jj)..."

Mr Roney pleaded not guilty to the charge. In finding the Appellant guilty, the Chairman stated:

"Mr Roney we've considered all that you've placed before us and we have considered the charge. By your own admission you refused a proper direction of an official, accordingly we fine you guilty as charged."

The Appellant was then invited to make submissions in respect of penalty. The penalty of a fine of $500 was announced in the following exchange:

CHAIRMAN Mr Roney the Stewards have discussed the matter of penalty in this matter. We have taken into account all that you have placed before us. We believe that it is imperative for control of racing that licensed personal follow the proper directions of officials. We are conscious of the fact that you did return to submit to the test some one and a half hours after the request. We also believe there are other just as effective avenues for you to voice your disapproval of the procedures for the selection criteria for testing.

RONEY How many times do you gotta voice that sir. How many times do you need to voice that before something comes into place? Will it come into place after this time? Or has this all just been another waste of time?

CHAIRMAN No well, just let me finish…

RONEY Okay.

CHAIRMAN And then I'll answer your question.

RONEY Okay.

CHAIRMAN After considering all factors, we believe, that you should be fined the sum of $500.

The Amended Grounds of Appeal are:

A. CONVICTION

1. The Stewards erred in convicting the Appellant as the direction made by the Racecourse Investigator to the Appellant was not a "proper" one for the purposes of Rule 8(e).

Particulars

(1) The racecourse investigator is not a Steward.

(2) There is no generalised power for other "Officials" to make a request to provide a urine sample.

(3) Failure to comply with a request to provide a urine sample will only be an offence when the request is made by a Steward: Rule 81A(iii).

(4) For there to be an offence committed under rule 8(e) the Official must have some standing under the Rules to make the specific request.

(5) Given that rule 81A which specifically deals with urine testing requirements only penalises the failure to provide a sample when the request is made by a Steward, the Rules by implication require any valid or proper request to be made by a Steward.

(6) In the circumstances it could not be said that the request was a proper one or that any offence had been committed.

2. The Stewards erred in convicting the Appellant as the request was not a "proper" one in that it was unlawful in the circumstances in which it was made.

Particulars

(1) The request to provide a sample was made only to male riders, as had been the case in the past and which had been brought to the attention of the Stewards in the past by the Appellant.

(2) The request was discriminatory towards male riders for the purposes of sections 8 and 16 of the *Equal Opportunity Act* (1984) (WA) in that the decision to subject only male riders to testing treated them less favourably than female riders.

(3) The request was accordingly unlawful and not a "proper" one for the purposes of rule 8(e).

(4) Even if the request was not specifically unlawful, it was unreasonable to require the Appellant to comply and was accordingly not a "proper" request.

B. PENALTY

3. The penalty imposed was excessive in all the circumstances of the case.

REASONS FOR DETERMINATION

On 5 March 2002, I heard the appeal and delivered brief oral reasons for my decision. Those reasons are set out from the transcript as follows:

This is an appeal against conviction. Mr Roney appeals against his conviction for breach of Rule 8(e). The allegation was that Mr Roney refused to obey a proper direction of Mr O'Reilly and the specific charge was at page 18 of the transcript and it reads this:

"You are charged under that Rule for refusing to obey a proper direction of an official, that being a direction from the Racecourse Investigator, that you submit to a urine sample at Bunbury Racetrack on the 17th January, 2002."

Ground 2 of the amended grounds of appeal asserts that the Stewards erred in convicting Mr Roney, as the request was not a proper one in that it was unlawful in the circumstances in which it was made. In support of that ground reliance is placed on sections 8 and 16 of the Equal Opportunity Act.

In my view, ground 2 is made out. It appears to be no or little dispute on the evidence that was given at the inquiry. It appears that on the day, in the morning and at the relevant time, only persons requested to provide a sample were male persons. It appears also from the evidence at pages 3 and 4 that there were female persons present at track work that morning and none of them had been asked. That evidence was given by Mr Roney. On the face of it then this appellant was treated less favourably than other persons and he was treated less favourably because he was male. So for those very short reasons, at this stage I find that ground 2 is made out.

I haven't reached a decision as to whether ground 1 is made out but that will become apparent when I do some written reasons. So for those reasons the appeal is allowed.

Because this is an exceptional case in that the penalty imposed was not all that great and because of other reasons which might become apparent in the written reasons, I order the refund of the lodgement fee.

Following are my more detailed written reasons.

GROUND 1

None of the evidence was in dispute. 17 January was a Thursday. There was to be trackwork that morning, and races in the afternoon. There was to be trackwork the next morning as well, Friday 18 January.

The first matter of significance was that Mr O'Reilly went to Bunbury Racecourse to conduct random drug testing of licensed persons. It is understood that the particular test which was proposed was a urine test. The person requested was to provide a sample of urine for later testing at laboratories. At the racecourse, however, Mr O'Reilly did not conduct random testing. He requested only male riders participate in a drug test. That was a deliberate decision, made for reasons that became apparent when Mr O'Reilly gave evidence to the inquiry.

Mr Roney refused to participate in the test. Mr Roney refused because he believed that the request was discriminatory (letter 0f 17 January, T7, T9-10). It was discriminatory because female riders were not made the subject of the same request.

There were female riders present. In fact, on Mr Roney's unchallenged evidence, there are commonly more female riders than male riders present on Thursday mornings (T9). Mr Roney went to ask if any of them had been the subject of a request. None of them had been asked (T4). Mr O'Reilly told Mr Roney that he did have an intention to deal with the matter of testing of females (T3). The intention was to deal with the testing of females by going back to Bunbury trackwork the next day, Friday, and testing the females then (T12).

It was implicit in the evidence that testing of females is carried out in the presence and with the assistance of a nurse. Mr O'Reilly intended to make arrangements on the Thursday for the presence of a nurse on the Friday (T12). The proposed arrangement for the nurse to be present on the Friday in fact turned out to be not feasible. Not enough females were present on the Friday for the proposed testing to be of any use (T12).

With that factual background, I turn now to consider ground 1. Section 8 of the *Equal Opportunity Act* (1984) (WA) is in the following terms:

> **8. Sex discrimination**
>
> (1) For the purposes of this Act, a person (in this subsection referred to as the "**discriminator**") discriminates against another person (in this subsection referred to as the "**aggrieved person**") on the ground of the sex of the aggrieved person if, on the ground of –
>
> (a) the sex of the aggrieved person;
> (b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or
> (c) a characteristic that is generally imputed to persons of the sex of the aggrieved person,

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

(2) For the purposes of this Act, a person (in this subsection referred to as the "**discriminator**") discriminates against another person (in this subsection referred to as the "**aggrieved person**") on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition –

(a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply;
(b) which is not reasonable having regard to the circumstances of the case; and
(c) with which the aggrieved person does not or is not able to comply.

In my opinion, the Stewards, through Mr O'Reilly, discriminated against Mr Roney on the ground of his sex. They did so because Mr Roney was treated less favourably than, in circumstances that were the same or were not materially different, they treated female riders. The requirement to provide a sample was an imposition on Mr Roney's otherwise free right to go about riding trackwork within the confines of the Rules. Any person who provides a sample on request is treated less favourably than a person who is not so required. The circumstances were the same for the female riders who were there on the Thursday morning. There was nothing different about them or what they were doing apart from their gender.

Section 16 of the Act is in the following terms:

16. Qualifying bodies

It is unlawful for an authority or body that is empowered to confer, renew, extend, revoke or withdraw an authorisation or qualification that is needed for or facilitates the practice of a profession, the carrying on of a trade or business or the engaging in of an occupation to discriminate against a person on the ground of the person's sex, marital status or pregnancy –

(a) by refusing or failing to confer, renew or extend the authorisation or qualification;
(b) in the terms or conditions on which it is prepared to confer the authorisation or qualification or to renew or extend the authorisation or qualification; or
(c) by revoking or withdrawing the authorisation or qualification or varying the terms or conditions upon which it is held.

In my opinion, the request made of Mr Roney was unlawful. It was unlawful because Mr Roney was required to comply at the risk of losing his licence as a jockey. Rule 81(4) of the Australian Rules of Racing makes it clear that it is a condition precedent to the holding of a licence that the licensed person submit to testing on request. Section 16(b) of the Act applies. The discrimination referred to above was in the terms or conditions on which the Stewards were prepared to permit Mr Roney to keep his qualification to ride.

It follows as a matter of course that as the request was unlawful, one of the necessary parts of the offence under Rule 8(e) was not made out. Certainly Mr Roney failed to obey the direction of Mr O'Reilly. But the direction was not a proper one. For that reason, ground 1 is made out.

It should be noted that none of the above facts and circumstances in any way relate to the practices, procedures or policies of the Stewards in relation to drug testing

generally. The discrimination which I have found to have occurred in this case was limited to Bunbury trackwork on the morning of 17 January 2002.

GROUND 2

Rule 81A(iii) requires that the request be made by a Steward. Rule 8(jj) empowers the Stewards to make or cause to be made tests to determine the presence of drugs. Local Rule 12A gives the investigator (Mr O'Reilly) the powers which the Stewards have under Rule 8(jj). Local Rule 12A does not go so far as to give the investigator the power to make the request under Rule 81A(iii). In my opinion, nothing turns on the point. Rules 8(jj) and 81A(iii) should be read together, rather than separately. Read together, they do bear a meaning capable of achieving the obviously desirable purpose of the Rules relating to drug testing. The Racecourse Investigator for all intents and purposes becomes a Steward for the application of Rule 8(jj). It follows as a matter of common sense that he would have to be able to make the request in order to begin the procedure which he is empowered to carry out under Rule 8(jj). Although it may be a matter which could be clarified in drafting, I am of the opinion that where the word "Stewards" appears in Rule 81A(iii) it means and includes the Racecourse Investigator referred to in Rule 12A. The necessary link is provided by Rule 8(jj).

For these reasons, I find that ground 2 is not made out.

For all of the above reasons:

1. the appeal is allowed,
2. the conviction is quashed, and
3. the fee of $250 paid on lodgement will be refunded.

PATRICK HOGAN, PRESIDING MEMBER

Seal of the Racing Penalties Appeal Tribunal of WA