

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: MS SHARRON HOWIE

APPLICATION NO: 21/3957

PANEL: MR P HOGAN (PRESIDING MEMBER)

DATE OF HEARING: 1 NOVEMBER 2021

DATE OF ORAL DETERMINATION: 1 NOVEMBER 2021

IN THE MATTER OF appeals by Sharron HOWIE against the determinations made on 12 August 2021 by the Racing and Wagering Western Australia Stewards of Harness Racing to disqualify SECRET REACTION under HRR 195 and applying a 12 months restriction of racing under HRR 190AA(4) and on 17 September 2021 disqualify SECRET REACTION from relevant races for breach of HRR 65 under Harness Rule of Racing.

Mr M Howie appeared for the Appellant.

Mr D Borovica and Mr J Zucal appeared for the Racing and Wagering Western Australia Stewards of Harness Racing.

VERBATIM REASONS FOR DETERMINATION ON THE DAY OF HEARING:

1. My decision is the appeals in this case be dismissed. In giving my reasons, which I'm about to do, I don't intend to make any comment on matters of fairness, to be blunt. If I was to do so from this position here it might impinge upon what the authorities and the trainers and the organisations do in the future or to speak to each other about the rules and what they should say so I won't say anything about that and therefore I'll leave the field open to whoever wants to take it up in the future, if anyone ever does.

2. With that introductory comment then, I turn to the merits of the appeals. When I say appeals, this hearing today is a hearing concerning six appeals, not one and not two but six. As a matter of efficiency and common sense, the cases have been dealt with by the stewards as a group of two, but there were two because there were two disqualifications, and second of all, as a matter of efficiency and common sense, the four appeals were dealt with as another group at another time and here in the tribunal as a matter of efficiency and common sense all six appeals are being heard together, technically as one often hears in criminal courts, there could be six different decisions, there could possibly be two different decisions but there couldn't be six.
3. So everything has travelled together as a matter of common sense and efficiency which is the right way to do things. The facts of the cases aren't in dispute. It began back on 14 March 2021 when a post-race urine sample was taken from Secret Reaction after it won Race 3 at Williams on 14 March. Testosterone at a concentration in excess of 56 micrograms per litre was detected which then made the testosterone a prohibited substance and then the stewards opened an inquiry, wrote to the presenting trainer, Mr De Campo, in May, on 12 May, letting him know an inquiry was under way. Mr De Campo arranged for some veterinary evidence and it had become apparent as early as 17 May from a letter from Dr McGregor that the testosterone levels were caused by cancer and that preliminary opinion was looked into in some depth and it remained the same, that's what caused the elevated level and a surgical procedure was undertaken in early June.
4. Veterinary steward, Dr Medd, looked into it and let Mr Borovica know by letter or email of 12 July that all of that was quite correct, it was cancerous but along the way the other post-race sample from which was found on 21 March came in and was the same result, elevated level.
5. So the two results came to the one inquiry which I said earlier is common sense and the proper approach was that the grounding facts were the same. There was then the inquiry on 5 August which took place. Mr De Campo went to the hearing and so did the owner, Ms Howie, the appellant. The stewards in their absolute discretion did not charge Mr De Campo which they were perfectly entitled to do, charge him or not charge him, they didn't. They then went on to consider rule 195 and 190 AA(4), as I read them out earlier in these reasons.
6. Secret Reaction then was disqualified from those two races. Williams on 14 March and Bridgetown on 21 March and then rule 190AA(4) was enacted and the horse was not permitted to start for 12 months.
7. Importantly the rule reads, "From date of collection of the sample," there were two of them. It doesn't matter I suppose, it goes back to the first one. The appellant was advised of right to appeal to this tribunal but in 14 days which would have been end of August. However, there was an interruption to that as set out in the letter of 19 August but pausing for the moment then and stopping at those first two disqualifications, the reasons for my decision on those first two disqualifications are different than what will come shortly. Those first two disqualifications, and indeed the 190AA, not permitted to start, were done because of the mandatory requirements of the rules.

8. The rules of harness racing are delegated legislation of the State of Western Australia, they are not contractual anymore as they used to be, they're now delegated legislation. That being so, the interpretation Act applies to section 56 of the Interpretation Act of Western Australia. Section 56(4) which reads:

Where in a written law, the word 'shall' be used in conferring a function, such word shall be determined to mean that the function so conferred must be conformed.

9. It's mandatory, there's no discretion once the facts of power must happen. It's not a matter of statutory interpretation, it just says so.
10. Rule 190AA, despite not using the word "shall" is in the same category, is not permitted, it is mandatory. Both of those actions taken by the stewards in both of those races, 14 March at Williams and 21 March at Bridgetown, there was no discretion, it had to happen and matters advanced by the appellant in the email of 13 October and expanded upon by Mr Howie today cannot overcome that.
11. The position is different in relation to the second group of disqualifications, the four disqualifications: Bunbury 27 March; Wagin 1 April; Pinjarra 12 April; and Bunbury 24 April. Those disqualifications were imposed pursuant torule 65 which itself was based on the mandatory rule 190AA and rule 65 says:

If the stewards find that a horse or trainer was ineligible to compete in any race they may disqualify a horse from the race or declare such a horse a no-starter and make any subsequent changes.

12. The stewards reasoning in their letter to the appellant on 19 August was that as a result of the 12-month embargo effective 21 March, Secret Reaction was therefore ineligible to start. The stewards then went onto consider whether or not SECRET REACTION should be disqualified from those four races because they were in that case exercising a discretion because of the word "may" which is also mentioned in the *Interpretation Act* section 56(1) which reads:

Where in a written law the word 'may' is used in conferring a power such words shall be interpreted to imply the power so conferred may be exercised or not at discretion.

13. That's the difference, put shortly, between the two different ways SECRET REACTION was dealt with over this period of time. So the stewards then exercised their discretion to disqualify in the four races and set out their reasons in the letter of 17 September.
14. The only way the appellant could succeed on the second group of disqualifications is to demonstrate we demonstrated an error in the classic way about determining whether there were errors in discretionary decision-making or something irrelevant taken into account or something relevant not taken into account or was there acting on a wrong principle.
15. The appellant hasn't demonstrated any of those things in relation to the stewards' reasons in the 17 September letter because the appellant has taken an overall view, one of unfairness. That's of course a matter for the rule writers and the industry as a whole which takes me back to what I said at the beginning, I don't intend to trespass on anyone's ground and making unwarranted statements about what should be or what shouldn't be or what anyone might do in the future.

16. All I do here today is say there was no demonstrated error in the stewards' discretionary decision as set out in their letter of 17 September to the appellant. For those reasons, the appeals against the decisions set out in the 17 September letter, in relation to those four races, is also dismissed.
17. So in formal terms to conclude, what I say, is to dismiss the appeals against the disqualifications imposed on 12 August 2021 when SECRET REACTION raced at Williams on 14 March 2021 and Bridgetown 21 March 2021, I grant leave to appeal and dismiss the appeals against disqualifications imposed 17 September 2021 in relation to Bunbury 27 March, Wagin 1 April, Pinjarra 12 April and Bunbury 24 April.
18. If there's nothing further the tribunal will now adjourn.



PATRICK HOGAN, PRESIDING MEMBER

