

DECISION

Racing Integrity Act 2016, section 252AB

Review application number	RAP-49	
Name	Justin Downey	
Panel	Mr Kerry O'Brien AM (Chairperson) Mr Ken Waller (Panel Member) Mr John McCoy OAM (Panel Member)	
Code	Harness	
Rule	Australian Harness Rules of Racing 231(1)(e) A person shall not assault anyone employed, engaged or participating in the harness racing industry or otherwise having a connection with it.	
Penalty Notice number	PN-008716	
Appearances & Representation	Applicant	Mr J Murdoch KC
	Respondent	Mr M Copley KC instructed by QRIC
Hearing Date	1 September 2023	
Decision Date	19 September 2023	
Decision	Pursuant to 252AH(1)(c) of the <i>Racing Integrity Act 2016</i> the racing decision in as far as it relates to penalty is set aside and a fine of \$10,000 is substituted for the penalty of 12 months warning off.	

Reasons for Decision

Decision

- [1] Mr Justin Downey is a harness racing owner. On 22 August 2023, following an inquiry conducted by stewards, Mr Downey was found guilty of an offence against Australian Harness Racing Rule (AHRR) 231(1)(e). He had entered a plea of guilty to the charge and by way of penalty was warned off for a period of 12 months pursuant to AHRR 256(2)(d).
- [2] Pursuant to Section 252AB of the *Racing Integrity Act 2016* Mr Downey now seeks a review of that decision, both as to the determination of guilt and as to the severity of the penalty involved.
- [3] AHRR 231(1)(e) provides as follows:
- A person shall not assault anyone employed, engaged or participating in the harness racing industry or otherwise having a connection with it.*
- [4] The particulars of the charge against the Applicant allege that he had assaulted one Adam Russo in 'The Creek' bar at Albion Park Raceway on the 23rd of July 2023.
- [5] As indicated, the Applicant seeks this review on two bases. Firstly, that the conduct alleged does not constitute an offence for the purposes of AHRR 231(1)(e) as Russo was not someone "employed, engaged or participating in the harness racing industry or otherwise having a connection with it".
- [6] Secondly, that the penalty imposed was in any event excessive, having regard to all the relevant circumstances.

Background

- [7] The harness racing program at Albion Park on 22nd July 2023 saw the running of the feature race 'Blacks A Fake', a notable grand circuit race on the Australian Harness Racing calendar.
- [8] The winning horse Swayzee was part owned and trained by the Applicant's friend, Mr Jason Grimson. The winner upset the short priced Queensland based favourite Leap To Fame, which finished second
- [9] Entry into the Albion Park Raceway was free and several bars, including 'The Creek' were open around the grounds.
- [10] Mr Grimson's horse had won race 8, which had been run at 8:50pm. The final race of the program, race 10, was run at 9:51pm and the incident that is the subject of this Application occurred at approximately 12:30am on the morning of the 23rd of July 2023.
- [11] After Swayzee had raced, the Applicant and a group of his friends went to the bar where they remained celebrating the win. The Applicant had charge of the dress rug presented to the winning horse and had the rug draped around his shoulders.
- [12] The man Adam Russo had also been in attendance with a group of friends at the race day. By his own admission he had placed a number of bets and consumed a good deal of alcohol.
- [13] At around 12:30am Russo approached the Applicant and following an altercation between them a widespread melee developed. Several people, not all of whom have been identified, became involved.

The Evidence

- [14] A single Steward's Inquiry was held into the incident and evidence was taken from 4 persons only – this Applicant, Grimson, Russo, and a fourth man Jack Trainor.
- [15] All were present throughout the Inquiry, which in addition to oral testimony included some CCTV footage taken within the bar area.
- [16] All four men were subsequently charged with an offence against AHRR 231(1)(e).
- [17] The evidence taken by the Stewards is set out in some greater detail in the decision of this Panel in Grimson -v- The Queensland Racing Integrity Commission¹ and it is not necessary to repeat that evidence in detail here. The one body of evidence had relevance to all four cases.
- [18] So far as the involvement of this Applicant is concerned however, a useful and uncontroversial summary of his involvement is set out in the Respondent's outline of submissions as follows:

What led up to the assault was the following. A woman approached the Applicant and made what he said were 'unsavoury comments to him'². Russo said 'what's with the flag around your neck?'. However, Russo claimed that another person joined the Applicant and got into Russo's face' and said that Russo was getting smart³. Russo denied that he was and claimed he was just asking a question⁴

However, the Applicant said that comments were made about Grimson being 'a cheat'⁵ which comment was made by Russo's female friend⁶. The Applicant told Russo that if he did not get out of his face he would slap him⁷.

According to the Applicant and Trainor the Applicant slapped Russo⁸. Trainor said Russo then starting swinging punches in the direction of the Applicant or 'sort of us'⁹. Grimson's version was that during the night comments had been made to him or about him that he was a cheat¹⁰. Although he did not hear any discussion about the flag, he did notice the Applicant and Russo in each other's faces¹¹. He walked over and told them to stop, he went to order drinks and heard them talking about cheating. He heard the Applicant say he would slap Russo and ended up doing so. He said Russo started striking the Applicant¹²

The CCTV footage shows interaction between Russo and the Applicant over about 45/50 seconds before 00:12:50. At 00:12:50 the Applicant struck Russo to the right side of Russo's face. He used his left hand to do this. From the footage it is difficult to determine if he used an open hand or a fist. The Applicant said that he hit Russo with an open hand slap¹³

¹ RAP-48 19 September 2023

² Transcript page 5, lines 119-120

³ Notwithstanding his evidence before the Stewards, in evidence given before the Panel the Applicant denied this particular incident involving another person. Nothing of consequence turns upon that issue.

⁴ Transcript page 5, lines 122-124

⁵ Transcript page 6, line 162

⁶ Transcript page 7, line 185

⁷ Transcript page 6, lines 165-166

⁸ Transcript page 6, line 166 and page 8, line 214

⁹ Transcript page 8, line 216-217

¹⁰ Transcript page 10, lines 280-282

¹¹ Transcript page 10, lines 288-290

¹² Transcript page 11, lines 293-299

¹³ Transcript page 18, line 505

- [19] The only additional evidence placed before this Panel was by the Applicant in the form of a short video recording, apparently taken from a mobile phone, which shows the start of the incident and the Applicant striking Russo.
- [20] Counsel for the Respondent has fairly conceded that it is not possible from the CCTV footage to determine whether the blow delivered by the Applicant involved a closed fist or an open-handed slap.
- [21] Having regard to the Applicant's account and the requirements of proof in these matters, as well as the mobile phone recording, the Panel should proceed on the basis that it was a slap delivered in the circumstances described by the Applicant.

The Charge

- [22] As is clear to make out an offense against AHRR 231(1)(e) the Respondent must establish not only that the Applicant assaulted Russo, but also that Russo was a person "employed, engaged or participating in the harness racing industry or otherwise having a connection with it".
- [23] Mr Murdoch KC, who appears for the Applicant, has argued that Russo was not someone who fell within that class of person and, in any event, the incident in the bar was so remote from harness racing as to remove it from the ambit of the Steward's power.
- [24] Mr Copley KC, who appears for the Respondent, has argued to the contrary. His submission. In essence, is that in the circumstances Russo was "participating in" the harness racing industry, or at the very least was "otherwise" demonstrating a connection with it
- [25] This identical issue was argued fully before the Panel in Grimson -v- Queensland Racing Integrity Commission¹⁴ and counsel have adopted those same arguments for the purposes of this Application.
- [26] In Grimson, the Panel held that, in the circumstances as they prevailed on this occasion, Russo was a person who fell within the ambit of AHRR 231. For the reasons outlined in the decision in Grimson, the Panel applies the same conclusion in determining the present Application and is satisfied that, even if Russo was not participating, he was at least 'otherwise' exhibiting a connection with the harness racing industry at the relevant time.

Penalty

- [27] As indicated above, the penalty imposed on the Applicant was one of a 12 months warning off.
- [28] The term warning off is defined as follows:
- a decision or penalty prohibiting a person from entering any racecourse or place under the control of a club or the Controlling Body and a person "warned off" shall be subject to the same prohibitions as a disqualified person mentioned in rule 259 sub-rule (1)
- [29] In imposing penalty the Stewards comments included the following¹⁵:
- Thank you for the evidence that you've provided to the inquiry today, it was of assistance and we acknowledge your guilty plea in regards to rule 231, part 1, section E. The stewards have to determine the objective seriousness of the conduct and have regard to the facts and circumstances of that matter*

¹⁴ RAP-48 19 September 2023

¹⁵ Transcript, page 47 lines 1384-1393

when determining what should be an appropriate penalty. Obviously, this was a serious offence. We conducted what was a very successful winter carnival and this certainly had a negative impact on the harness racing industry by virtue of the fact that it made media and was witnessed by folk who were at the races to have a good night out.

- [30] The Queensland Harness Racing Penalty Guidelines (QHRPG) provides no starting penalty for an offence against AHRR 231. AHRR 256 however makes it clear that a range of penalty options exist for offences against the rules.
- [31] The authorities recognise that the purpose of imposing penalties in proceedings such as these is one of deterrence and not of punishment¹⁶
- [32] The Penalty Guidelines are said to have been designed with ideals of both specific and general deterrence in mind¹⁷.
- [33] Among the considerations relevant to penalty are the following;
- Circumstances of the offence including any mitigating or contributing factors. Contributing factors are other matters relating to an incident which may have a bearing on penalty. Mitigating factors are factors or details about the offence intended to reduce the severity of penalty.
 - The degree of culpability and degree of personal or moral blameworthiness of the offender
 - An early plea of guilty
- [34] The Applicant is someone with no prior history of any rule breaches who has been associated with the harness industry for a long period of time.
- [35] He pleaded guilty at an early stage before the Stewards. He was not legally represented on that occasion, and the fact that a legal challenge is now mounted to the validity of the charge should not deprive him of that early acknowledgement of his involvement in the subject incident.
- [36] It can be accepted that the Applicant had acted in response to the provocative and aggressive conduct of Russo. That of course cannot excuse his reaction, but it does provide some explanation for it.
- [37] The penalty guidelines make reference to human rights considerations and the obligation on public entities to give consideration to the matters listed in section 13(2) of the *Human Rights Act 2019* in determining whether a limitation on a person's human rights is reasonable and justified.
- [38] A penalty which involves a warning off has significant consequences for the recipient¹⁸ and in the case of this Applicant would affect his right to property in the form of income derived from his ownership of horses, as well as his right to reputation.
- [39] The Panel accepts the submission of Counsel for the Applicant that a warning off penalty should be reserved for the most egregious of rule breaches.
- [40] The purpose of imposing a penalty in these proceedings has been referred to above. It is the Panel's view that in this case those purposes can be achieved by the imposition of a penalty other than a warning off.

¹⁶ Australian Building and Construction Commission -v- Pattinson 2000 96 ALIR 426[15]

¹⁷ QHRPG, paragraph 3

¹⁸ AHRR Part 16; R259-R267

- [41] We have been referred to a number of comparative decisions in which penalties ranging from fines¹⁹ to disqualifications²⁰ have been imposed
- [42] Notwithstanding those matters of mitigation in this case, the Panel considers that the Stewards were correct in viewing this as a “serious offence”²¹. The Applicant was involved in the commencement of the incident. A report from the security firm responsible for security on that night indicated that once the incident started approximately six people became involved, throwing punches, and another 20-30 people in the main area/dance floor were caught up in the altercation, pushing and becoming otherwise involved. For the Applicant to have engaged in an assault in a public area so closely associated with harness racing can only serve to diminish public confidence in the industry and impact upon its integrity.
- [43] In the Panel’s determination a fine of \$10,000 represents an appropriate penalty in this case
- [44] Pursuant to Section 252AH(c) the Racing Decision subject to this Application is set aside and a fine of \$10,000 is substituted for the penalty of 12 months warning off.

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¹⁹ Anna Bakos -v- Mandy Radecker QRIC Stewards Report 2 February 20 2021, Schweidae -v- Qld Racing QCAT5 22 January 2004

²⁰ Ryan -v- Queensland Racing 2007 QRAT 11 ,22 May 2007 and Wearne -v- Queensland Racing 2007 QRAT 10, 3 May 2007

²¹ Transcript page 47, lines 1389-1390