QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Smith v Queensland All Codes Racing Industry Board* [2017] QCAT 7
PARTIES:	Don Smith (Applicant) v Queensland All Codes Racing Industry Board (Respondent)
APPLICATION NUMBER:	OCR046-16
MATTER TYPE:	Occupational regulation matters
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Member Deane**
DELIVERED ON:	13 January 2017
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. Don Smith is to pay a fine in the sum of $5,000 by 4:00pm 31 March 2017.** **2. Any application for costs is to be made by a party by filing in the Tribunal one (1) copy and providing to the other party one (1) copy of any submissions and evidence upon which the party wishes to rely by 4:00pm 31 January 2017.** **3. If any application for costs is made in accordance with order 2:** **a. the other party must file in the Tribunal one (1) copy and provide to the applying party one (1) copy of any submissions on costs including any evidence in reply by 4:00pm 14 February 2017.** **b. The application for costs will be determined on the papers unless a party requests an oral hearing not before 4:00pm 14 February 2017.** **4. If no application for costs is made in accordance with order 2, there will be no order as to costs in this proceeding.**
CATCHWORDS:	PROFESSIONS AND TRADES – LICENSING

OR REGULATION OF OTHER PROFESSIONS, TRADES OR CALLINGS – Harness Racing Trainer – contravention of Australian Harness Racing Rule 193(3) by administering '*medication'* on race day – factors to be considered in determining appropriate penalty

AB v The Queen (1999) 198 CLR 111
Wallace v Racing Queensland [2007] QDC 168
Bita v Queensland All Codes Racing Industry Board t/as Racing Queensland [2014] QCAT 460
Queensland All Codes Racing Industry Board v Thomas [2016] QCATA 82
Abbott v Racing Queensland Limited [2012] QCAT 230

APPEARANCES:

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act).

REPRESENTATIVES:

APPLICANT:	represented by Mr S Neaves of Counsel
RESPONDENT:	represented by Mr A. James of Counsel instructed by Fowler Lawyers

REASONS FOR DECISION

[1] Mr Smith was the trainer of the standard bred, 'A Good Chance', on 16 May 2015 when it competed at Albion Park and finished third. A pre-race blood sample was taken and analysed. The sample showed total plasma carbon dioxide (TCO2) concentration of 36.0 mmol/L and the reserve sample showed 35.5 mmol/L.

[2] Following a Stewards' inquiry Mr Smith was found to have breached rule 193(3) of the Australian Harness Racing (AHR) Rules in that he administered or allowed or caused to be administered medication, meaning a treatment with drugs or any other substances, on race day. The Stewards disqualified 'A Good Chance' from its finishing position and fined Mr Smith $5000 because they found that the horse had received an alkalising agent on race day.

[3] Mr Smith appealed to the Queensland Racing Disciplinary Board (the Board), which dismissed the appeal both on conviction and penalty.

[4] On 1 December 2016 on review, I set aside the Board's decision and substituted my own decision that Mr Smith had contravened AHR 193(3) for different reasons to that found by the Stewards and the Board. I found that he had contravened the rule because he administered or caused GB-10 to be administered to the horse in the afternoon prior to the race as it was administered to the horse to treat his nervous stomach condition.

[5] Mr Smith contends that, in the circumstances, the appropriate penalty is the loss of $7,500 in prize money because:

a) he has been a full time trainer for a lengthy period without previous similar conviction;

b) the consequence of a contravention of AHR 193(3) as provided by AHR 193(5) is that the horse will be disqualified and Mr Smith will be penalised by loss of the prize money;

c) he was successful in overturning the finding of a contravention as particularised by the Stewards i.e. the administration of an alkalising agent and he has incurred significant cost in doing so;

d) the adverse finding resulted from Mr Smith's own evidence so that he should be granted leniency because he has assisted the administration of justice;

e) he simply followed a daily feeding regime of supplements, which were designed to promote the health of the horse and acted on an honest and reasonable but mistaken belief that his actions were appropriate.

f) in the absence of a specific policy in Queensland in relation to the interpretation of AHR 193, given that the Victorian policy is widely available it constitutes grounds for understanding Mr Smith's conduct.

[6] The Board submits that a fine of $5,000 in addition to loss of prize money remains appropriate.

[7] The evidence is, and I accept, that Mr Smith:

a) has been training for about 20 years and has not previously '*had any drug related incident'.*[1]

b) and his wife derive their living from harness racing.[2]

[8] I accept that Mr Smith will incur a penalty in relation to the loss of prize money. The Board submits that if loss of prize money is the only penalty that, in the current circumstances, it would undermine the purpose of the rule and would not act as a deterrent to other trainers. I accept that the loss of prize money is a factor to be considered in assessing penalty.

[9] Mr Smith points to his success in overturning the finding of a contravention as particularised by the Stewards i.e. the administration of an alkalising

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1 Exhibit 4, page 39 at line 36 – 37.

2 Exhibit 4, page 40 at line 19 – 37.

agent and the cost in doing so. I accept that if upon review the original particulars of the contravention had been established this may have been relevant to penalty as a form of '*aggravating circumstances'* in that a contravention had been successfully established on prior occasions and Mr Smith had persisted in the face of those previous findings. The '*success'* and the costs incurred to achieve may be more relevant to an application for the award of costs than to the penalty to be imposed.

[10] Mr Smith relies upon the principle in *AB v The Queen*[3] to contend that Mr Smith should be granted leniency in penalty as he assisted the administration of justice by giving evidence, upon which the contravention was found.

[11] I am not satisfied that leniency should be granted under this principle.

[12] The circumstances are substantially different to that in *AB v Queen,* where the conviction arose from a confession about offences the person committed, of which the prosecuting authority was unaware and to which the person plead guilty thereby avoiding cost and expense. Mr Smith conceded causing GB-10 to be administered. He did not concede a contravention of the rules. In contrast, he argued that it did not amount to a '*medication'* or '*treatment*' for the purpose of the rules.

[13] Mr Smith relies upon the decision of *Wallace v Racing Queensland*[4] in relation to the issue of blameworthiness. The Tribunal has previously accepted[5] in considering appropriate penalties that it is useful to have regard to McGill DCJ's views at [69]

> In my opinion, however, there is a difference between a case where there is evidence to show a specific mitigating circumstance, and simply an absence of evidence of an explanation, either mitigating or aggravating depending upon the extent to which it shows an absence or presence of blameworthiness on the part of the trainer. Cases where the trainer was able to show a specific explanation which did not involve any blameworthiness on his part are really examples of the situation where the trainer has for the purpose of the penalty been able to show a mitigating circumstance. It may well be appropriate for such cases to be treated more leniently than what might be described as the ordinary case, where there is no explanation for the elevated reading, and therefore no indication as to whether or not there is any personal blameworthiness on the part of the trainer. Obviously the third category of case would be one where there was some explanation which did show moral blameworthiness on the part of the trainer, which I would expect justify a more severe penalty.

[14] Mr Smith contends that an assessment of the blameworthiness of his conduct should be assessed having regard to the fact that:

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3 (1999) 198 CLR 111.
4 [2007] QDC 168.
5 *Bita v Queensland All Codes Racing Industry Board t/as Racing Queensland* [2014] QCAT 460.

a) he gave evidence that he simply followed a daily feeding regime of supplements, which were designed to promote the health of the horse; and

b) he acted on an honest and reasonable but mistaken belief that his actions were appropriate.

[15] Mr Smith also relies upon *Queensland All Codes Racing Industry Board v Thomas.*[6]

[16] *Wallace* and *Thomas* related to '*presentation offences'* under the rules. In those cases there was a consideration of whether the trainer was able to show that something or someone outside of their control and knowledge was responsible for the horse presenting with a '*prohibited substance* ' in its system or showing that they had done all they could to prevent the horse from testing positive to a '*prohibited substance'*.

[17] In this case, Mr Smith knew of and authorised the administration of GB-10 on race day. These circumstances do not involve an absence of blameworthiness on the part of Mr Smith.

[18] Mr Smith relies upon the Harness Racing Victoria's Race Day Treatment Policy (the Policy)[7] as a mitigating factor in the absence of a Queensland policy or press release in relation to the interpretation of AHR 193. The submission, as I understand it, contends that the Policy forms a basis for a reasonable and honest belief that administering or causing to be administered the substance GB-10 on race day was not in breach of AHR 193 such that some leniency in penalty should be granted.

[19] There is no evidence before me that Mr Smith was aware of the Policy prior to 16 May 2015. Mr Smith's representative attached a copy of the Policy to the written submissions handed up at the end of the hearing before me. I am not satisfied that this is a relevant mitigating factor.

[20] Mr Smith did not provide any submissions on comparative penalties.

[21] The Board has provided a copy of a schedule detailing penalties imposed for contraventions of the rule. The schedule reveals that the penalties imposed for a contravention of this rule between 15 December 2011 and 15 December 2016 has been a $5,000 fine in four cases[8] and a four month disqualification in another case. There are no details before me as to whether or not the circumstances of each of these cases are otherwise comparable.

[22] The Tribunal has previously recognised that

> It is a matter of fairness and natural justice that we should strive to achieve the greatest possible degree of consistency. This can never be perfect,

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6 [2016] QCATA 82.

7 Forms part of Exhibit 9.

8 Including Mr Smith's before the Stewards.

> and in this case we are at some disadvantage because the full facts of comparable cases were not available before us.[9]

[23] Taking into account all of the factors advanced by Mr Smith and the Board, I consider the appropriate penalty is a fine of $5,000 in addition to loss of the prize money. In view of Mr Smith's lack of a previous similar contravention, I allow an extended period of time for payment.

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9 *Abbott v Racing Queensland Limited* [2012] QCAT 230 at [30].