QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Smith v Queensland All Codes Racing Industry Board* (No. 2) [2017] QCAT 118
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:	4 April 2017
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. The Application for costs is dismissed.** **2. Each party is to bear their own costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS - COSTS – GENERAL MATTERS – POWER TO AWARD GENERALLY – STATUTORY BASIS GENERALLY – where both parties partially successful – whether in the interests of justice to award costs *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 100, s 102 *Ascot v Nursing & Midwifery Board of Australia* [2010] QCAT 364

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 Rule 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] On 13 January 2017, I ordered Mr Smith to pay a penalty of $5,000 and made directions in respect of submissions and evidence regarding costs. The respondent seeks its costs, pursuant to the QCAT Act provisions, in the sum of $8,639.20. It has provided copies of counsel's memoranda of fees and an invoice from the instructing solicitors in support of the claim.

[6] Mr Smith contends that the appropriate order is that each party bear their own costs.

[7] The QCAT Act provides, '*other than as provided under this Act or an enabling Act, each party to a proceeding must bear the party's own costs for the proceedings.*'[1]

[8] The Tribunal may make an order requiring a party to pay all or a stated part of the costs of another party if the interests of justice require.[2] Section 102

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1 QCAT Act, s 100.

2 QCAT Act, s 102(1).

sets out a number of matters to which the Tribunal may have regard in deciding whether to award costs.

[9] The then Deputy President, Judge Kingham in *Ascot v Nursing & Midwifery Board of Australia*[3] stated at [9]:

> The considerations identified in s102 (3) are not grounds for awarding costs. They are factors that may be taken into account in determining whether, in a particular case, the interests of justice require the tribunal to make a costs order.

[10] Those considerations are largely in the nature of what may be regarded as '*entitling*' or '*disentitling*' factors. Of the factors set out in section 102 the respondent particularly relied upon the relative strengths of the claims[4] and the catch all '*anything else the tribunal considers relevant."*[5]

Is it in the interests of justice to exercise the discretion to award costs?

[11] I consider each of the factors in section 102 of the QCAT Act.

<u>The relative strengths of the claims</u>[6]

[12] I am not satisfied that this is a factor in favour of an award of costs to the respondent.

[13] The respondent submits that Mr Smith's position that feeding GB-10 did not constitute a breach of AHR Rule 193(3) was weak as:

a) there was nothing complex or ambiguous about the interpretation given to AHR Rules 193(3) and (6);

b) when given their plain meaning it was apparent that feeding the horse GB-10 on race day would amount to a contravention of AHR Rule 193(3), in particular in view of Mrs Smith's evidence before the Stewards about the reason for giving the horse GB-10.

[14] Essentially, the respondent submits that Mr Smith should not have persisted with the review once he admitted to the horse being fed GB-10 on race day and should have made it clear at the Inquiry when GB-10 was administered.

[15] Mr Smith points to his success in overturning the finding of a contravention as particularised by the Stewards and the cost in doing so. Mr Smith was at least partially successful in the review. I accept that this is a factor to be weighed against the ultimate outcome of the review.

[16] Mr Smith contends that the relevant rule was sufficiently confusing that another state's body had published guidelines and that it had not previously

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3 [2010] QCAT 364.
4 QCAT Act, s 102(3)(c).
5 *Ibid,* s 102(3)(f).
6 *Ibid,* s 102(3)(c*).*

been tested in Queensland such that it was not doomed to fail even though ultimately Mr Smith was unsuccessful on this point.

[17] As indicated in my reasons for the penalty decision, I accept that if upon review the original particulars of the contravention had been established this would likely have been relevant to costs in that a contravention had been successfully established on prior occasions and Mr Smith had persisted in the face of those previous findings. Those are not the circumstances before me.

Anything else the tribunal considers relevant [7]

[18] I am not satisfied that this is a factor in favour of an award of costs to the respondent.

[19] The respondent submits, and I accept, that this factor is very wide and permits a consideration of fairness and in this regard submits that:

a) Mr Smith failed to make it clear at the initial Inquiry that the horse was fed GB-10 prior to racing on race day.

b) The fact that Mr Smith chose to give oral evidence at the Tribunal hearing '*confirms that prior to the hearing starting he knew that the respondent was of the understanding that the horse had not been fed GB-10 prior to racing on Race Day'.*

c) Despite this knowledge and despite Mrs Smith's evidence he still sought to contest liability and put the respondent to the cost of the hearing and the costs of preparing submissions as to penalty.

[20] Mr Smith essentially relies upon the matters raised in respect of the strength of the claims factor.

[21] The transcript of the Inquiry and the proceedings before the Board were in evidence before me. There is nothing in them to suggest that Mr Smith or Mrs Smith were deliberately evasive in not disclosing that the '*evening*' feed had been given to the horse prior to taking the horse to the track.

[22] It was open to the Stewards and to the Board to make a specific enquiry about the timing of the evening feed on race day. I note that I had intended to ask Mr Smith when the horse last received GB-10 prior to the race and would have done so if Mr Smith had not volunteered this evidence.

Whether a party acts in a way that unnecessarily disadvantages another party [8]

[23] No matters were identified in the submissions, which might give rise to a consideration of this factor. This is not, therefore, a factor which I consider further.

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7 QCAT Act, s 102(3)(f).

8 *Ibid*, s102(3)(a).

The nature and complexity of the dispute [9]

[24] Both parties were legally represented, which is some indication of its complexity but is not determinative of whether costs should be awarded.

[25] There was significant expert evidence presented to meet the particulars of the contravention alleged by the Stewards. This indicates a level of complexity. Given that the contravention, as particularised by the Stewards, was set aside this is not a factor in favour of an award of costs to the respondent.

The financial circumstances of the parties [10]

[26] This is not a factor in favour of an award of costs in favour of the respondent.

[27] No matters were specifically identified in the costs submissions in relation to this factor. However, there is evidence in these proceedings that:

a) Mr Smith and his wife derive their living from harness racing;[11]

b) Mr Smith has lost $7,500 in prize money, has had a $5,000 penalty imposed and has incurred legal costs and expert witness costs in successfully setting aside the contravention as particularised by the Stewards.

Summary

[28] Both parties enjoyed a measure of success. Having considered all of the factors I am not satisfied that it is in the interests of justice to order Mr Smith pay the respondent's costs. Each party ought to bear their own costs.

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9 QCAT Act, s 102(3)(b).

10 *Ibid,* s 102(3)(e).

11 Exhibit 4, page 40 at line 19 – 37.