QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Graham v Queensland Racing Integrity Commission* [2018] QCAT 182
PARTIES:	**DARREL WILLIAM GRAHAM** (applicant) **v** **QUEENSLAND RACING INTEGRITY COMMISSION** (respondent)
APPLICATION NO/S:	OCR200-17
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	21 June 2018
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Member Olding
ORDERS:	**1. Queensland Racing Integrity Commission must pay to Darrel William Graham costs in the amount of $853.60, by: not later than 23 July 2018.** **2. Unless either party submits otherwise in writing by not later than 4-00pm on 6 July 2018, the application for review of decision filed by Darrel William Graham on 13 September 2017 will be dismissed without a further decision by the Tribunal.**
CATCHWORDS:	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where harnessing racing driver applied for review of decision of Queensland Racing Integrity Commission – where Tribunal invited Commission to reconsider decision – where Commission set aside decision – where general rule that parties bear their own costs – whether interests of justice require award of costs *Australian Harness Racing Rules*, r 149(2) *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 23, s 32, s 100, s 102 *Medical Board of Australia v Alroe* [2016] QCA 120 *Queensland All Codes Racing Industry Board v Abbott (No 2)* [2016] QCATA 49

Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2) [2010] QCAT 412

REPRESENTATION:

Applicant: Self-represented

Respondent: Self-represented

APPEARANCES:

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

REASONS FOR DECISION

[1] These reasons concern a claim for a costs order by the applicant, Mr Graham, in respect of his application for review of a decision of the respondent Commission.

[2] Mr Graham is a harness racing trainer-driver. He was convicted by the Stewards of driving a horse in a race 'in a manner which in the opinion of the stewards is unacceptable' pursuant to r 149(2) of the *Australian Harness Racing Rules*.

[3] When the respondent Commission confirmed that decision on internal review, Mr Graham applied to the Tribunal for review of the Commission's decision. After Mr Graham filed and served his witness statements, the Tribunal, pursuant to s 23 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act'), invited the Commission to reconsider its decision, whereupon the Commission found that Mr Graham did not breach r 149(2) and set aside the Stewards' decision.

[4] Mr Graham says that he should never have been charged and that, although he was not represented by a lawyer, it is unfair for him to be out of pocket for filing fees and other costs incurred in bringing his application for review.

The incident

[5] The particulars of the charge as stated by the Stewards were:

> . . . that as the driver of Corrinyah Conman in Race 3 at Albion Park on Tuesday, 15 August 2017, Mr Graham drove in a manner which in the opinion of the stewards was unacceptable in that shortly after the start he restrained that gelding from a favourable one out one back trailing position to a less favourable position three back on the marker peg line to finish in sixth place beaten 8.8 metres.

[6] Mr Graham maintained that he made a judgement to position the horse where he did to give it the best chance of success. Mr Graham's statement that this was a sound tactic for a horse of Corrinyah Conman's perceived abilities was supported by statements of two highly experienced trainer-drivers.

[7] Although a stable mate of Corrinyah Conman won the race, the Stewards confirmed that the betting had been investigated and nothing unusual was found.[1]

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1 Stewards' Inquiry transcript 21 August 2017, page 12, lines 13-14.

The legal framework

[8] Section 100 of the QCAT Act states:

> 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 proceeding.

[9] However, s 102 allows the Tribunal to make a costs order 'if the interests of justice require it to make the order'.

[10] Section 102(3) goes on to state that, in deciding whether to award costs, 'the tribunal may have regard to' the factors set out in s 102(3)(a) to (f), which are addressed below.

[11] It has been held that these provisions require the Tribunal to ask itself whether the circumstances relevant to the discretion inherent in the phrase 'the interests of justice' point so compellingly to a costs award that they overcome the strong contra-indication in s 100 against costs being awarded.[2]

[12] The principle in civil litigation that generally 'costs follow the event' does not apply. In other words, success in the litigation does not create a prima facie case for a costs award.[3]

Consideration

[13] I start by addressing each of the factors to which, by virtue s 102(3), the Tribunal may have regard in deciding whether to award costs.

(a) whether a party to a proceeding is acting in a way that unnecessarily disadvantages another party to the proceeding, including as mentioned in section 48(1)(a) to (g)

[14] Section 48(1) is concerned with behaviours, such as failing to comply with Tribunal requirements, causing adjournments, deception and vexatiousness, that disadvantage another party. There is no suggestion that the Commission acted in a way that unnecessarily disadvantaged Mr Graham, either in these or any other ways, nor of any untoward conduct by Mr Graham. This factor does not point in favour of the proposition that the interests of justice require an order for costs.

(b) the nature and complexity of the dispute the subject of the proceeding

[15] Although perhaps daunting for Mr Graham as an unrepresented applicant, there is nothing particularly complex about the application for review. Aside from sanction, the single issue raised by the application was whether Mr Graham's acknowledged conduct in the race was or was not 'unacceptable'. The level of complexity of the dispute is at best a neutral factor.

[16] The nature of the dispute raises a little more difficulty because of the lack of specificity in r 149(2) in relation to basis for formation by the Stewards of an opinion that the manner in which the horse was driven is 'unacceptable'. This calls for a

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2 *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2)* [2010] QCAT 412, [29].
3 *Medical Board of Australia v Alroe* [2016] QCA 120, [19].

judgement, which, of course, is not to be made lightly, but upon which in particular circumstances reasonable, informed minds might differ.

[17] The element of subjective judgement required points to a need for particular care in reaching a decision but also care in not rushing to draw adverse conclusions from the decision being set aside. In that regard, while the decision of the Stewards was ultimately set aside by the Commission, it does not appear that there was any lack of due care by the Stewards. I note that the Stewards' hearing was adjourned to allow time for consideration of the matter.

[18] These factors do not weigh in one direction or the other, but provide some context for the next factor.

(c) the relative strengths of the claims made by each of the parties to the proceeding

[19] Mr Graham's claims are supported by his own consistent position since the Stewards' inquiry began along with statements by the two experienced trainer-drivers. From the Commission's decision to set aside the conviction, it is reasonable to conclude that the balance in the relative strengths of the parties' claims favoured Mr Graham.

[20] This factor – which weighs in favour of an award of costs, but against the background that success in an application for review, as mentioned, does not bring with it a prima facie case for costs - is discussed further below.

(d)(i) whether the applicant was afforded natural justice by the decision-maker for the decision

[21] Mr Graham was given an opportunity to be heard at the Stewards' hearing and to make submissions to the internal review decision-maker. There is no suggestion that he was denied natural justice. This factor does not support a claim for costs.

(d)(ii) whether the applicant genuinely attempted to enable and help the decision-maker to make the decision on the merits

[22] I have reviewed the transcript of the Stewards' hearing. It is clear that Mr Graham readily acknowledged the action that he had taken during the race and attempted to clearly articulate his reasons for doing so, and continued to do so upon internal review. It is difficult to see what else he reasonably could have done in the circumstances to assist. I conclude that Mr Graham did genuinely attempt to assist the decision-maker.

(e) the financial circumstances of the parties to the proceeding

[23] There is no specific financial information before the Tribunal. I therefore make no finding regarding Mr Graham's financial position. The Commission's finances *may* be superior to Mr Graham's but are not unlimited.

[24] The Commission points out that Mr Graham was able to continue to train and drive horses throughout the proceeding. It is not a case where there is evidence that the conviction has impacted severely on Mr Graham's financial position. The costs incurred, as noted below, are, while not insignificant, relatively modest.

[25] In these circumstances, I do not consider that the parties' financial position favours the making of a costs order.

(f) anything else the tribunal considers relevant

[26] Under this heading, the Commission pointed out that it is funded by licensing fees paid by racing industry participants. I am, with respect, unable to see how the Commission being funded by industry participants, rather than from consolidated revenue, is relevant, other than by underlining, as already noted, that its funds are not unlimited. Otherwise, whether the financial burden of making an award of costs is spread only among industry participants or across the body of taxpayers as a whole, does not seem to be particularly relevant to whether the interests of justice require a costs order.

[27] In this regard, the Commission went on to note that the Appeal Tribunal has observed:[4]

> It is often the case in this Tribunal that the financial circumstances of the parties differ markedly. The Tribunal hears many disciplinary proceedings. In all cases, the regulatory body is funded by fees imposed on the registration to the profession or industry. In many cases the registrant appears before the Tribunal with little or no financial support and is prevented from earning in the profession the subject of the proceeding. That circumstance is not a reason for making an order for costs.

[28] I take the Appeal Tribunal's comments to mean that such circumstances are not in themselves sufficient to warrant an award of costs. I do not take them to mean that an applicant's financial circumstances are irrelevant. Similarly, where the Tribunal has observed that impecuniosity is not a ground for a costs award,[5] I do not take that reasoning to mean that an applicant's financial circumstances are irrelevant, for that would be inconsistent with the statutory directive that the Tribunal may take into account the parties' financial circumstances.[6]

[29] Having regard to the state of the evidence before the Tribunal on financial matters, I do not need to reach any definitive conclusions on these matters, other than to observe that the source of the Commission's funding does not, in my view, weigh significantly against an award of costs in this case.

Conclusion on whether costs should be awarded

[30] While giving full weight to judicial statements about the contra-indication in s 100 against the awarding of costs, I must not be distracted from answering the ultimate statutory question: do the interests of justice require the making of a costs order?

[31] With one exception, in my view the factors outlined above, when weighed up collectively, are broadly neutral and do not make a case for the interests of justice requiring an award of costs. The exception is the relative strength of the parties' claims.

[32] There is no argument about where Mr Graham positioned the horse during the race. This is not a case where factual findings requiring choices between contradictory evidence of witnesses needed to be made. Mr Graham did not deny, in fact openly acknowledged, that he had done what the Stewards thought had been done from their

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4 *Queensland All Codes Racing Industry Board v Abbott (No 2)* [2016] QCATA 49, [18].
5 Ibid [21].
6 QCAT Act, s 102(3)(e).

viewing of the race video. Nor is it a case where a range of factors had to be weighed up, some for and some against, in deciding whether a statutory discretion should be exercised.

[33] In this case, in the face of Mr Graham's long record, which the Chairman of Stewards described as 'exemplary' in relation to r 149(2),[7] and having confirmed that there was nothing unusual in betting patterns for the race, the Stewards, and the Commission on internal review, rejected Mr Graham's clear, consistent and repeated explanation of the reasons for his positioning of the horse during the race.

[34] While it is difficult for the Tribunal to judge the validity of such an explanation, I was able to form the view that the reasons given by Mr Graham seemed credible and rational. I observe that they were also consistent with the statements of the experienced trainer-drivers, although I give their statements little weight, as they were not tested in a hearing. In any case, the Commission no longer asserts that Mr Graham's conduct in the race was unacceptable.

[35] These circumstances, in my view, set this matter aside from the general run of matters in which a decision-maker, upon an application being made to the Tribunal, reviews a decision, with or without the benefit of further evidence, and comes to a view that a different decision is required. Decision-makers are to be encouraged to do just that in an appropriate case.

[36] In this case, because of the particular circumstances I have outlined, I cannot but agree with Mr Graham that it would be unfair for him to bear the cost of bringing the application for review. In my view, the 'interests of justice require' an award of costs. In coming to the view that an award should be made, I have taken into account the relatively modest sum involved.

Amount

[37] Mr Graham has claimed the following amounts:

QCAT fee on application for review	$ 326.80
QCAT fee on application for stay of decision	326.80
Time costs	750.00
Parking fees	100.00
Travelling expenses	100.00
Total:	**$ 1,603.60**

[38] I accept that the first two items being mandatory application fees were unavoidable costs.

[39] Mr Graham claimed he had spent approximately 15 hours preparing documents, attending the Tribunal and so on, for which he claimed $50/hour, totalling $750. While

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7 Stewards' Inquiry transcript 21 August 2017, page 18, line 19.

the time estimates and rate are reasonable, there is no basis on which I may allow a notional amount.

[40] From my own experience of Brisbane CBD parking costs, I accept that the amount of $100 for three trips to the Tribunal is reasonable. As Mr Graham resides at Fernvale, which is approximately 70 kilometres from Brisbane, his estimate of $100 for fuel costs for travelling to Brisbane on these occasions is also reasonable.

[41] Accordingly, I will not allow the claim for $750, but will allow the balance totalling $853.60.

Disposition of the matter

[42] Since the Commission has set aside the decision under review, it appears the application for review has no further utility and should therefore be dismissed to bring the proceeding to an end. I will give the parties time to submit otherwise if they disagree.