QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Scott v Queensland Racing Integrity Commission* [2018] QCAT 284
PARTIES:	**RACHEL LEIGH SCOTT** (applicant) **v** **QUEENSLAND RACING INTEGRITY COMMISSION** (respondent)
APPLICATION NO/S:	OCR252-16
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	28 May 2018
HEARING DATE:	23 May 2018
HEARD AT:	Brisbane
DECISION OF:	Member Olding
DIRECTIONS:	**1. The respondent must deliver to Mr Ross Wenzel, Senior Scientist, Trace Elements Laboratory, Level 5, Acute Services Building, Royal North Shore Hospital, Pacific Highway, St Leonards NSW 2015 part or all of the reserve sample of urine sample 394099 collected from the horse "*Nolonga Your Choice NZ*" at Redcliffe on 2 April 2016 for the purpose of identifying:** **(a) the urine specific gravity of the sample;** **(b) the respective proportions of the element cobalt held in the sample in inorganic and organic form.** **2. The applicant must pay the respondent's reasonable costs of delivering the sample to Mr Wenzel.**
CATCHWORDS:	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where applicant sought review of Queensland Racing Integrity Commission decision to confirm conviction and penalty for presenting a horse for racing not free of the permitted concentration of the prohibited substance cobalt – where conviction based on conclusive evidence certificates as to cobalt concentration in urine samples – where applicant sought directions that remnant urine sample be delivered

for testing for urine specific gravity and proportions of organic and inorganic cobalt – whether Tribunal has power to make the directions – whether appropriate for the directions to be made

Australian Harness Racing Rules, rr 190(2), 190(4), 190(7), 191
Queensland Civil and Administrative Tribunal Act 2009 (Qld), ss 3(b), 19, 20, 21, 24, 28, 95(1)(a), 97(1)(b) and 98(1)(c)
Racing Integrity Act 2016 (Qld), s 246

Day v Harness Racing New South Wales [2014] NSWSC 1402
Hope v Racing Victoria (No 1) (Review and Regulation) [2018] VCAT 642

APPEARANCES & REPRESENTATION:

Applicant:	S Murdoch QC, instructed by O'Connor Ruddy & Garrett Solicitors
Respondent:	P Williams, instructed by Landers & Rogers Lawyers

REASONS FOR DECISION

[1] The applicant, Ms Scott, is a licensed horse trainer. On the basis that standard tests of urine samples from the horse 'Nolonga Your Choice NZ' which she presented for racing revealed cobalt in excess of permitted concentration levels, Ms Scott was convicted by the Stewards of presenting a horse to race not free of prohibited substances, contrary to Rule 190(2) of the *Australian Harness Racing Rules* (the Rules)[1], and disqualified for a period of 15 months. The respondent Commission confirmed that decision, both as to conviction and penalty, on internal review.

[2] Ms Scott has applied to the Tribunal for review of the internal review decision, which has been stayed pending the outcome of the review.

[3] To support her application for review, and acting on scientific advice, Ms Scott wishes to have the remnant urine sample further tested. Having made multiple requests to the Stewards and the Commission over an extended period for the sample to be made available for that testing, which were declined, she now seeks directions by the Tribunal requiring the sample to be delivered to a nominated facility for the purpose of testing specified in the proposed directions, with Ms Scott to bear the reasonable costs of such delivery. Ms Scott would also bear the costs of the testing.

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1 All legislative references are to the Rules unless otherwise indicated.

[4] The Commission opposes the making of the directions on the ground that the Tribunal lacks the power to make such directions or, if it has the power, that it is not appropriate for the directions to be made.

[5] I have decided to make the directions. My reasons follow.

Summary of legislative framework for Rule 190(2) offences

[6] The offence against Rule 190(2) for which Ms Scott was convicted is a strict liability offence: if a horse is presented to race other than free of the prohibited substances, the offence is committed without more. This is clear from Rule 190(4), which states that 'the offence is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse'.

[7] Thus, the trainer's intention is irrelevant to establishing whether the offence was committed. However, it may be relevant to determining the appropriate penalty.

[8] Under Rule 191, the offence may be proved with evidentiary certificates. Broadly, the rule has the effect that production of testing certificates revealing positive results from two samples is conclusive evidence of the presence of the prohibited substance. The Commission relies on evidentiary certificates revealing cobalt in excess of the permitted threshold as conclusive evidence of commission of the offence.

[9] However, under Rule 191(7) certificates cannot be relied upon 'where it is proved that the certification procedure or any act or omission forming part of or relevant to the process resulting in the issue of the certificate was materially flawed'.

Why does Ms Scott seek to have the testing carried out?

[10] The directions sought would provide for the remnant urine sample to be produced for testing for two purposes:

(a) identifying the urine specific gravity (USG) of the sample; and

(b) identifying the respective proportions of cobalt contained in the sample in inorganic and organic form.

[11] Ms Scott wishes to identify the USG of the sample as she maintains, on the basis of scientific advice, that testing without adjusting for USG may result in an inaccurate measure of the cobalt concentration. Mr Murdoch, who appeared for Ms Scott, foreshadowed a submission that the testing was therefore materially flawed. It would follow that the evidentiary certificates could not be relied upon to conclusively prove the offence occurred. Even if the conviction stands, Mr Murdoch submitted that the impact of USG on the measure of cobalt concentration might be put forward as relevant to the level of penalty.

[12] The position in relation to the proportions of organic and inorganic cobalt is different. As Mr Murdoch explained it, organic cobalt occurs naturally in mammals, while inorganic cobalt does not. However, the rules make no distinction between organic and inorganic cobalt, which, as will appear, is said to be because the threshold is set at a level that is intended to take into account organic cobalt levels. It follows that, even if the concentration of inorganic cobalt was found, upon testing,

to be below the threshold for commission of the Rule 190(2) offence, the offence would be committed if the cobalt (inorganic and organic) concentration exceeded the permitted level.

[13] Subject to a reservation that, as he put it, the scientific understanding is evolving, Mr Murdoch therefore accepted that the results of testing for proportions of organic and inorganic cobalt could not be relevant to whether the offence was committed. However, Mr Murdoch submitted that it may be relevant to the appropriate penalty.

[14] It is self-evident that the impact of the disqualification on Ms Scott, if it stands, will be severe, as it will prevent her carrying on her training business. As a matter of fairness, Mr Murdoch submits that Ms Scott should be able to access the testing to enable her to put her case to the Tribunal.

Summary of the Commission's submissions

[15] The Commission submitted that:

(a) The Tribunal does not have the power to make the directions; or alternatively the directions should not be made because:

(b) The testing results would lack probative value or otherwise be of no utility for various reasons; and that

(c) Permitting the testing would unduly delay the hearing of the review, and extend its duration (and, I infer, costs), as there would be a need for further scientific evidence in response.

Does the Tribunal have power to make the directions?

[16] Mr Williams, who appeared for the Commission, helpfully handed up written submissions in which he pointed out that the decision the subject of the Tribunal's review is the internal review decision.[2] Mr Williams went on to submit that, as the Commission on internal review does not have any investigative, inquisitorial or evidence-gathering powers, and the Tribunal stands in the shoes of the Commission in undertaking the review, the Tribunal's review by way of rehearing 'is therefore limited to the powers of the internal review decision maker'.

[17] As Mr Williams acknowledged, his submission is not supported by any authority; I would add, either in the current context or relating to the Tribunal's broad and diverse administrative review jurisdiction or its analogues in other jurisdictions.

[18] I am unable to understand how it follows, from the role of the Tribunal in hearing and deciding a review by way of rehearing on the merits, that the Tribunal's powers are limited to those of the decision-maker of the decision under review, especially in the face of the various unqualified grants of power contained in the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act).

[19] Mr Murdoch referenced a number of provisions of the QCAT Act said to relate to the power of the Tribunal to make the directions: ss 19, 20, 21 (especially ss 21(2),

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2 *Racing Integrity Act 2016* (Qld), s 246.

(3) and (6)), 24, 28 (especially ss 28(2) and (3)(c) and (e)), 62(1) and (3), s 95(1)(a), 97(1)(b) and 98(1)(c). Some of these provisions would not, in their terms, authorise a direction of the type sought, but they do illustrate the range of powers that would be rendered inoperative if Mr Williams' submission were to be accepted.

[20] Section 62(1) provides that 'The tribunal may give a direction at any time in a proceeding and do whatever is necessary for the speedy and fair conduct of the proceeding'.[3]

[21] Mr Williams submitted that making the directions would not promote 'speedy' conduct of the review and indeed would delay and extend the review. Mr Murdoch emphasised the requirement for 'fair' conduct of the proceeding, pointing also to the statutory requirements to 'act fairly and according to the substantial merits of the case' (s 28(2); to 'observe the rules of natural justice' (s 28(3)(a)); and to 'ensure, as far as practicable, that all relevant material is disclosed to the tribunal to enable it to decide the proceeding with all the relevant facts' (s 28(3)(e)).

[22] I am satisfied that the power under s 62(1) to make directions is sufficiently broad to authorise, in an appropriate case, the making of a direction of the type sought. I turn now to consider the reasons why, in any case, the Commission says the directions should not be made.

Is it appropriate to make the directions?

[23] Mr Murdoch's submission on why the directions should be made is straightforward: for the reasons already outlined, the results may be relevant to whether the testing certificate procedure was materially flawed and therefore to whether the offence was committed and may also be relevant to the appropriate level of penalty. In those circumstances, fairness would demand that Ms Scott have the opportunity to put her case with the benefit of the further testing.

[24] A submission that the testing procedure was flawed by the absence of adjustment for USG could be made on the basis of expert evidence of the kind already submitted, without evidence of actual testing for USG. However, I accept that, if absence of USG adjustment is evidence of a flaw in the testing, the results of testing the sample for USG may be relevant to the materiality of the flaw. Absent a material flaw in the testing procedures, the further testing cannot be relevant to whether the offence was committed. However, to the extent that it might reveal the cause of the cobalt concentration readings, it may be relevant to Ms Scott's culpability and therefore to the appropriate level of penalty.

[25] Subject to the reservation noted, Mr Murdoch accepted that the results of testing for proportions of inorganic and organic cobalt could not be relevant to whether the offence was committed, since the threshold does not distinguish between organic and inorganic cobalt. However, again, to the extent that the results might assist in

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[3] Without limiting that provision, s 62(3) provides that the Tribunal may give a direction 'requiring a party to the proceeding to produce a document or another thing . . . to . . . the Tribunal . . . or another party to the proceeding'. Given the breadth of s 62(1), and that s 62(3) is expressed to be without limitation to s 62(1), it is not necessary for me to consider whether the power in s 62(3) to require a thing, here the sample, to be produced to the Tribunal is broad enough to allow a direction that the sample be delivered at the Tribunal's direction to a specified testing facility.

determining the cause of the cobalt readings, they may be relevant to Ms Scott's culpability and hence to the appropriate level of penalty.

[26] After hearing Mr Williams' detailed submissions on why the directions should not be made – relating mainly to the alleged, but contested, lack of probative value/utility of the proposed further testing – I asked Mr Williams why the Commission was concerned to oppose the directions. I asked that question against the background that administrative review is not traditional litigation; the Commission as a model litigant, does not take on an adversarial 'win-at-all-costs' stance, but rather in keeping with its statutory duty is concerned to assist the Tribunal to produce the correct and preferable decision. This was not for a moment to suggest that the Commission's approach to the review is other than entirely proper, but rather to try to better understand the reasons for resisting the directions being made.

[27] In that regard, on the uncontested evidence, I noted that the testing would be able to be undertaken promptly and relatively inexpensively (and in any case would be at Ms Scott's expense). If the Commission wanted to contest the veracity or relevance of the testing, that could occur at the hearing of the review. Why not simply facilitate the further testing and deal with the utility or otherwise of the evidence at the hearing?

[28] Mr Williams response was that, on the basis of his submission that the potential evidence would have no probative value, allowing for the testing and production of the test results would unduly delay the hearing, noting that it would likely be necessary for the Commission to obtain further expert assistance to respond to any evidence relating to the results of any further testing.

[29] I accept that making directions of the kind sought may, and almost inevitably would, delay and extend the hearing and that this is a matter for consideration in deciding whether to make the directions. However, speediness is a relative concept, and in the conduct of a proceeding there is commonly a tension between ensuring fairness, on the one hand, and speedy conduct of the proceeding, on the other.

[30] While s 62(1) refers to speedy *and* fair conduct of a proceeding, because of the obvious competing considerations, it must be implicit that a balancing exercise is required. I did not understand Mr Williams to submit otherwise. This need to balance speed with other requirements for the proper consideration of a matter is recognised in s 28(3)(e) which requires the Tribunal to act with 'as much speed as the requirements of this Act, an enabling Act or the rules and a proper consideration of the matters before the tribunal permit'.

[31] Mr Williams pointed to aspects of the expert reports put forward on behalf of Ms Scott and in particular to contradictory responsive reports of other experts engaged by the Commission. It is not necessary for me to determine which of the competing evidence is to be preferred, nor is it appropriate to do so in the context of the application for the directions. These are matters for Tribunal member hearing the review, with the benefit of oral evidence and cross-examination.

[32] However, it is necessary to consider whether the expert evidence indicates that the results of the proposed testing potentially would be relevant to whether the testing procedure was materially flawed or to the cause of the cobalt readings. For various

reasons, Mr Williams submitted that they would not. To understand those submissions, it is necessary to briefly outline the expert evidence and Mr Williams' submissions in relation to the veracity of the evidence.

The expert reports

[33] A report of Professor Colin Chapman, Emeritus Professor of Pharmacy at Monash University, filed by Ms Scott, noted that urine samples produced by horses will have different USGs as a result of climatic variables and the practice of some trainers to withhold water on race days. Professor Chapman opined that 'USG can profoundly influence the amount of cobalt detected'.

[34] On this basis, Professor Chapman concluded that 'stewards could not be comfortably satisfied that the amount of cobalt detected in the urine sample' collected from Nolonga Your Choice NZ exceeded the threshold, unless the USG of the sample and the method/s used to determine that USG are taken into account.

[35] A report by Dr John Vine criticised Professor Chapman's calculations and failure to qualify the source data used in his report. Dr Vine's report also asserts that the threshold for cobalt takes into account variables for cobalt absorption because the sampling data underpinning the decision on the level at which to set the threshold would have included samples with varying USG levels. This is supported by comments of Professor Paul Mills who also opines as to the very low probability of a sample from a horse that has not had cobalt administered to it exceeding the threshold.

[36] A calculation included in Dr Vine's report suggests that taking into account USG involves taking the cobalt concentration level and adjusting for the impact of USG on the cobalt concentration level, rather than USG being a factor in determining the concentration level itself. This seems to be confirmed by a report of Mr Ross Wenzel, the expert who would undertake the additional testing, who says that specific gravity 'is used to correct for urine dilution', which suggests the actual concentration level is notionally adjusted for urine dilution.

[37] It is also consistent with a reference in a second report by Professor Chapman that 'the amount of cobalt detected in urine' may be affected by a number of factors, including USG. This comment is difficult to reconcile with Professor Chapman's opinion that the stewards could not be satisfied that the concentration threshold was exceeded without taking into account USG.

[38] If Professor Chapman intended to convey that the amount of cobalt actually detected may be affected by USG and should therefore be adjusted to a notional concentration, it is difficult to see how testing for USG could be relevant to whether the threshold was exceeded in this case. As Dr Vine points out, the threshold is an absolute measure; it does not contemplate adjustments for any reason. Whether the threshold level is fair or otherwise is not for the Tribunal to consider.

[39] Ms Scott postulates that feed supplements containing vitamin B12, given both proximate to the race and over the longer term, contributed to the cobalt concentration readings. Professor Chapman reported that 'it is probable that there is "dumping" of large amounts of vitamin B12 and with it large amounts of "organic" cobalt, after giving additional vitamin B12 to horses which already have lots of

vitamin B12 in their blood and in their kidneys from previous long-term administration of supplements containing vitamin B12'.

[40] However, this is speculative, as the necessary research apparently has not been undertaken. Professor Chapman acknowledges that 'conventional wisdom would say it contributed little' but goes on to say that 'the actual contribution should be determined to ensure factual information is obtained'. Against this background, Professor Chapman recommends that the urine sample be tested for proportions of organic and inorganic cobalt to clarify the circumstances leading to the elevated cobalt readings.

[41] While Mr Williams points to Professor Chapman's statement as a concession that vitamin B12 contributes little to cobalt levels, I do not accept that that is an accurate reading of the comments in their context. Professor Mills also contradicts Professor Chapman on this issue, but again it is not for me to resolve this competing evidence in considering this application.

Case authorities

[42] Mr Williams pointed out that an earlier attack on the cobalt threshold was dismissed by Adamson J in *Day v Harness Racing New South Wales* [2014] NSWSC 1402. That case relevantly involved a direct challenge to the validity of the threshold on proportionality and irrationality grounds. As already noted, the level at which the threshold was set is not a matter for the Tribunal. Additionally, Adamson J's decision was based on the then available evidence before the Court. For these reasons, the case is unhelpful in the current matter.

[43] Mr Murdoch drew attention to the decision of Garde J, sitting as President of the Victorian Civil and Administrative Tribunal, in *Hope v Racing Victoria (No 1) (Review and Regulation)* [2018] VCAT 642. His Honour directed that urine samples be delivered to a testing authority for the purpose of identifying the respective proportions of cobalt in organic and inorganic form, noting that this was necessary to provide procedural fairness to the applicant in that case.

[44] Mr Williams submitted that this decision should be disregarded because the offence in question required proof of the purpose of administration of the prohibited substance, whereas in the current case the offence is, as noted, one of strict liability. This would be a valid distinction if the testing were sought only for the purpose of challenging the conviction, but as already noted, Ms Scott seeks testing for inorganic/organic proportions of cobalt as potentially relevant to the level of penalty if the conviction is maintained.

Other considerations

[45] Mr Williams also submitted that Ms Scott's explanation that the cobalt levels were caused through vitamin supplementation 'requires no corroboration'. However, in the context of administrative review, it is for the Tribunal hearing the review to determine what factual findings should be made, based on the evidence before it. In my view, it is not appropriate for me to pre-empt consideration of whether evidence yet to be given and tested should be accepted without corroboration. In any case, Ms Scott is not able to give expert evidence regarding *the extent* to which

supplementation may have contributed to the cobalt concentration levels, which may be revealed by the proposed testing.

[46] Mr Williams also noted that the proposed testing facility is not approved by a racing controlling body. However, absence of such approval does not render evidence of the testing results to be of no probative value. Similarly, Mr Williams pointed out that the facility is attached to the Royal North Shore Hospital and is not accredited for equine testing. Mr Wenzel, who would carry out the testing, has listed his relevant qualifications and experience. The Commission did not directly challenge his competence to carry out the testing or interpret the results. Again, it is a matter for the Tribunal member hearing the review to determine the weight to be given to any test results.

[47] In contrast, evidence of Ms Samantha Ellis, Principal Chemist at the Racing Science Centre, indicates that the methods used in the Commission's testing have been independently assessed and certified against international standards. Mr Murdoch pointed out that Ms Ellis' evidence in this regard was generic and did not refer specifically to testing for cobalt. Again, it is not my role in the current application to determine the veracity or otherwise of any testing.

[48] Mr Williams also referred to the potential for degradation of the sample due to the passage of time since the sample was taken on 2 April 2016. There was no evidence from which to determine the extent or impact of any degradation that might have occurred. A similar point was raised in the *Hope* case. Garde J considered that whether degradation of the sample was a significant risk was a matter for the testing laboratory to consider and address in its report.[4]

[49] Given that the extent of any impact is not known, I do not consider that the possibility of degradation of the sample is a reason to refuse to make the directions, but rather would be a matter going to the weight to be given to evidence of the further test results to be determined by the Tribunal on the hearing of the review, with the benefit of the test report and any other relevant evidence. Further, the Commission itself has produced a certificate of further testing of the sample by another laboratory in early 2018, without any apparent concerns about degradation.

Conclusion

[50] For the reasons outlined, it seems to me to be relatively clear that the results of testing for the proportions of organic and inorganic cobalt may be relevant to determining the appropriate level of penalty, in that they may assist in determining the extent to which supplementation caused cobalt concentration to reach the levels revealed by the tests carried out for the Commission.

[51] The results of testing for USG may also be relevant to penalty if, with accompanying explanation, they also cast some light on the reasons for, or provide some context for, the concentration levels.

[52] To what extent, if any, such results may actually be relevant in these respects is a matter to be determined at the hearing of the review, but they do seem likely to be capable of relevantly informing the Tribunal.

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4 *Hope v Racing Victoria (No 1) (Review and Regulation)* [2018] VCAT 642 at [11].

[53] It is less clear that the USG testing could be relevant to whether Ms Scott's conviction should be confirmed or set aside. If, as Mr Murdoch maintains, Professor Chapman's evidence is that failure to take into account USG may lead to an inaccurate reading of the absolute amount of cobalt, then I would conclude that the results of the further testing may be relevant to whether the testing procedure is materially flawed.

[54] However, if, as appears on one reading, Professor Chapman merely asserts that the actual concentration should, as a matter of fairness, be notionally adjusted for USG, I cannot see how evidence of USG levels would be relevant to whether the testing is flawed. Testing that produces an accurate measure of cobalt concentration would not be flawed, even if it is accepted that the concentration so measured is affected by USG levels.

[55] Ultimately, what the relevant parts of his report mean may need to be clarified by Professor Chapman if it is to be relied upon. It is not necessary for me to finally determine this because, for the reasons that follow, I would in any case make the directions on the basis of the potential relevance of the results of further testing to the appropriate level of penalty if the conviction is confirmed.

[56] In that regard, I have carefully considered Mr Williams' point that allowing for the further testing will delay and potentially extend the hearing and associated costs. It is a valid point in view of the statutory command for the Tribunal to conduct proceedings speedily[5], particularly having regard the uncertainty regarding the ultimate value of any further test results, which will depend on the nature and expert explanation of the implications of the test results.

[57] However, having regard to the severe consequences of an extended period of disqualification for Ms Scott, I consider that in this case the balance in the tension between the objective of speedy and inexpensive proceedings on the one hand, and fairness to Ms Scott on the other, lies in facilitating the further testing.

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5 QCAT Act, s 28(3)(d). See also s 3(b).