

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: MR MALCOLM HANCOCK

APPLICATION NO: 22/3659

PANEL: MR ROBERT NASH (CHAIRPERSON)

DATE OF HEARING: 9 AUGUST 2022

DATE OF DETERMINATION: 23 AUGUST 2022

IN THE MATTER OF a preliminary determination in respect of an appeal by MALCOLM HANCOCK against a determination made by Racing and Wagering Western Australia Stewards of Harness Racing imposing a \$1,000 fine (\$500 suspended for a two year period) for breach of Rule 231(2) of the Rules of Harness Racing

Mr Hancock self-represented.

Mr Ron Davies QC represented the Racing and Wagering Western Australia Stewards of Harness Racing.

Background

1. Malcolm Hancock (“Mr Hancock” or “the Appellant”) is a RWWA Licensed Trainer in the WA Harness Racing Industry.
2. Mr Hancock was charged by the RWWA Stewards (“Stewards”) with a breach of Rule 231(2) of the Rules of Harness Racing (“Rules”).
3. Rule 231(2) provides: ‘A person shall not misconduct himself in any way.’
4. The charge against Mr Hancock was in the following terms:
[that] ‘in a phone call [Mr Hancock] made to Racing and Wagering Western Australia on 26 May 2022, which was answered by Mr Tyler Hares, a recently appointed receptionist, [Mr Hancock] spoke in an offensive manner and used profanities during the conversation.’

5. The matter initially came before the Stewards, namely Mr BW Lewis and Mr JA Zucal, on 14 June 2022, to inquire into the matter ('Inquiry'). Mr Hancock appeared at the Inquiry via a telephone conference call.
6. A tape-recording of Mr Hancock's phone call to Mr Hares, which was the subject of the charge, was played at the Inquiry.
7. At the Inquiry, Mr Hancock stated that he accepted that his conduct towards Mr Hares was '*disgraceful*' (T5.9). He claimed that Mr Hares was the unfortunate victim of his longstanding frustrations with the RWWA Administration (T6.1). He said that Mr Hares was also a victim of the fact that it was almost impossible to raise integrity issues with RWWA (T6.2).
8. The Inquiry transcript reveals that Mr Hancock's frustrations, grievances and disappointments included, amongst other things:
 - (a) his sense of being disrespected and ignored by RWWA despite the contributions he has made to Harness Racing over many years (T5.9);
 - (b) that it had become impossible for him to raise integrity issues with RWWA (T6.2);
 - (c) that he had been put forward by the Breeders, Owners, Trainers and Reignspersons' Association (BOTRA), and had been supported by WACTA (which I understand is a reference to the Western Australian Country Harness Racing Association), to be the representative for Harness Racing on the RWWA Board, but for reasons unknown to him he was not appointed even though there were no other nominations '*on the table*' (T11.7);
 - (d) there has been a progressive reduction in Harness Racing's proportionate share of the funds available for distribution from 36% to 15% despite the substantial amounts of money he, and presumably others, have been investing in Harness Racing (T10.7);
 - (e) there has been a lack of resources being provided to Harness Racing which he considers is due to the RWWA Board having the view that Harness Racing has no future (T10.9);
 - (f) that he '*can't even make a phone call to RWWA and get any information back as to why our distribution is being held back like it is*' (T11.3);
 - (g) that there was no passion in RWWA to improve Harness Racing (T13.5); and
 - (h) that the legislation had been amended which had impacted on the share of distributions received by Harness Racing.
9. Mr Hancock said to the Stewards that he understood they were investigating the phone call, adding '*but I'm raising issues that are very, very important to the ...security and future of harness racing as an industry in the state...*' (T13.3).
10. It is apparent that the Stewards listened to Mr Hancock's concerns, acknowledged his passion for the Harness Racing industry, and accepted that he had made some 'salient points' in the grievances and concerns he was expressing (T12.8, 15.2, 18.3, 18.7).

11. It was pointed out to Mr Hancock by Mr Zucal, that it was not that the Stewards did not care about the matters he was raising, but that the Stewards role was concerned with the integrity of racing, not to investigate the issues Mr Hancock was raising (T15.3). In fact, Mr Zucal went so far as to provide recommendations to Mr Hancock as to how, and with whom, he might go about raising the issues he had (T15.6, 18.4).
12. It was apparent that the Stewards accepted that Mr Hancock's built-up grievances and frustrations were genuinely and not unreasonably held, and accepted those grievances provided the context for his conduct during the phone call with Mr Hares. (T19.2)
13. After a short period of deliberation at the end of the Inquiry, the Stewards advised Mr Hancock that they considered he had a charge to answer under Rule 231(2) (T19.8).
14. After putting the charge to him, Mr Hancock stated that he could not argue with it, that he pleaded guilty, and said his actions were under 'duress' (T20.4). The Stewards accepted the plea acknowledging that the reference to 'duress' was understood by them to be the grievances and frustrations Mr Hancock had explained in detail during the course of the Inquiry, which Mr Hancock acknowledged was correct (T20.4-5).
15. Mr Hancock said he was sorry for having 'paid out' on Mr Hares (T20.7)
16. After a further short adjournment to consider penalty, the Stewards contacted Mr Hancock again and advised him that in considering the penalty they took into account:
 - a. that Mr Hancock had apologised to Mr Hares;
 - b. his expressed remorse;
 - c. his prior good record;
 - d. his passion and frustrations (which the Stewards said they understood), albeit misguidedly expressed on the occasion in question; and
 - e. his assurance that he would conduct himself properly in the future.
17. The Stewards imposed a fine of \$1,000 with half the amount (\$500) being suspended on condition that for a period of two years he not offend the conduct related Rules of Harness Racing.

Appeal

18. Mr Hancock filed an appeal against the Steward's determination by Notice of Appeal dated 30 June 2022.
19. The grounds of the appeal are:

'I do not believe due consideration was provided to the issues leading up to my conduct. I believe my treatment by RWWA Administration is directly attributable to my political beliefs and is attempting to silence my criticism of RWWA's integrity. I believe I can prove this. TBA. Also, no consideration to my input for Harness Racing for over 50 years.'

Application to summons witnesses

20. By email to the Registrar of the Tribunal dated 4 August 2022 ('Email'), Mr Hancock applied to have six witnesses summonsed to give evidence at the hearing of the appeal ('Application').
21. By the Application, Mr Hancock sought to have the following witnesses called:
- a. Mr John McGrath, the former Minister for Racing and Gaming;
 - b. Mr Ian Edwards, the CEO of RWWA;
 - c. Mr Brad Lewis, the Chairman of Stewards;
 - d. Mr Michael Radley, Chair of Harness Racing's approved representative group;
 - e. Mr Warren Robinson, President of BOTRA; and
 - f. Mr Steve Spallarossa, Registrar of the Racing Penalties Appeal Tribunal.
22. I directed that Mr Hancock's Application be dealt with as an application under section 17(3) of the *Racing Penalties (Appeals) Act 1990* ('Act'), and would be dealt with as a preliminary issue. No party objected to that course.
23. Section 17(3) of the Act provides:
- 'The Tribunal may by summons signed by the Registrar before or during the hearing of an appeal call upon any person to appear before it to –*
- (a) give evidence in such manner as may be directed,*
 - (b) produce such papers, documents, exhibits or other things; and*
 - (c) furnish such information,*
- as the Tribunal determines to be necessary or proper for the purpose of the hearing.*' (my underlining).
24. In considering the Application under section 17(3), I have also had regard to section 11(3)(c) of the Act, which relevantly provides:
- 'At any proceedings:*
- ...
- an appeal shall be heard and determined upon the evidence at the original hearing when the decision or finding appealed against was made, but, if the member presiding considers that to be proper, expert or other evidence may be required or admitted.'*
25. In the Email, Mr Hancock affirmed his appeal was against the severity of the penalty. Further, at the outset of the preliminary hearing on 9 August 2022, Mr Hancock re-affirmed that his appeal was against penalty.
26. The preliminary hearing took place on 9 August 2022. In attendance by video link were Mr Hancock, representing himself, and Mr Davies QC, Mr Borovica and Mr Zucal, representing the Stewards.
27. At the preliminary hearing, Mr Hancock explained that for most of his life he has been totally committed to Harness Racing. He said the matters he had been seeking to raise with RWWA

and which had resulted in his conduct on the phone with Mr Hares, had been very upsetting for him and had affected him personally. It was apparent from Mr Hancock's presentation at the preliminary hearing that he is deeply passionate and upset by the issues he has been seeking to raise with RWWA. I observed during the course of the hearing that at times he found it hard to contain his emotions.

Mr Hancock's submissions

28. Mr Hancock made oral submissions at the preliminary hearing which supplemented the written submissions he made in the Email.
29. At the preliminary hearing, Mr Hancock conceded that it was not necessary for Mr McGrath to be called, since what he was seeking to establish from Mr McGrath was that the applicable legislative provisions relating to industry support had changed, which I pointed out to him could be established by simply referring to the applicable legislative text and the prior version of it, without the need to call a witness.
30. Mr Edwards was sought to be called to be questioned in relation to what directions or advice he had given to staff at RWWA to manage Mr Hancock's concerns about Harness Racing. Mr Hancock also wanted to question him on what role he had in relation to the potential appointment of Mr Hancock to the RWWA Board as the nominated representative of the Harness Racing industry.
31. Both Mr Radley and Mr Spallarossa were sought to be called to be questioned about the appointment process to the RWWA Board and whether there were any known '*idiosyncrasies*' or irregularities in the process that may have resulted in Mr Hancock, being the Harness Racing Industry nominee, not being appointed.
32. Mr Brad Lewis was sought to be called to '*substantiate the responsibility*' he and his department took when Mr Hancock '*could not get fair advice*' from junior RWWA administrative staff, and how Mr Hancock had to go to the Stewards in order to express his concerns and raise issues, there being no Harness Racing manager at RWWA appointed to deal with his issues.
33. Mr Warren Robinson was sought to be called in his capacity as President of BOTRA, to give evidence about the apparent concerns Mr Robinson was said to have about the process followed in respect of the appointment of a Harness Racing industry representative to the RWWA Board.

Stewards' submissions

34. On behalf of the Stewards, Mr Davies QC submitted that Mr Hancock's application to call witnesses in relation to the matters he was seeking to raise should be refused because the evidence sought to be adduced could have no relevant effect on the penalty imposed. He submitted that it would be a pointless task for the Tribunal to allow witnesses to be called for the purpose that Mr Hancock advanced, and it would be an unnecessary '*spectacle*'.

Consideration

35. The starting point for dealing with any appeal is that the Tribunal will hear and determine the matter upon the evidence at the original hearing before the Stewards. Only where the Tribunal

considers that it is necessary or proper for the purpose of determining the appeal, will the Tribunal permit additional or further evidence to be adduced.

36. By his grounds of appeal, Mr Hancock asserts that the Stewards failed to:
 - a. give due consideration to the issues leading up to his conduct, namely his treatment by RWWA Administration (as set out in his grounds of appeal); and
 - b. give consideration to his input to Harness Racing for over 50 years.
37. The witnesses Mr Hancock seeks to have called, based on his Email and the submissions made at the preliminary hearing, could only possibly relate to the first ground above. That ground asserts due consideration was not given by the Stewards to the issues he claims led up to his conduct.
38. There was no application by Mr Hancock to have any of the witnesses he now seeks to have called, called at the Steward's Inquiry. Even if there had been, it wasn't necessary, since in considering the penalty to be imposed, the Stewards were quite willing to accept and take into account that Mr Hancock's conduct on the phone to Mr Hares was in the context of him experiencing considerable frustration, concern and disappointment about the various complaints he had about the RWWA Administration.
39. The Stewards clearly accepted that Mr Hancock was genuine and sincere about those matters. That acceptance was sufficient to provide the contextual explanation that Mr Hancock sought to advance for his conduct, albeit it could not altogether excuse the conduct. Mr Hancock accepted that was so by pleading guilty and apologising for his behaviour.
40. It was neither necessary, nor could it have assisted in dealing with the charge before them, for the Stewards to investigate the matters that they were willing to accept were the source of Mr Hancock's frustration, concern and disappointment.
41. Given the above, Mr Hancock's various complaints about the RWWA Administration, the treatment of the Harness Racing industry, and his concerns about the process adopted for the appointment of a Harness Racing industry representative to the RWWA Board, were not matters, even if investigated by the Stewards, that could have relevantly affected the penalty they imposed. For that reason, an investigation of those matters by calling witnesses before this Tribunal could not cogently advance the merits of Mr Hancock's appeal.
42. In the circumstances, I do not consider that it is either necessary or proper for the purpose of determining this appeal, that any of the six witnesses Mr Hancock seeks to have called, be summonsed to give evidence before the Tribunal at the hearing of this appeal.
43. Mr Hancock's application under section 17(3) is accordingly dismissed, and the appeal will proceed on a date to be fixed after conferral with the parties about availability.



ROBERT NASH, CHAIRPERSON



RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: MR MALCOLM HANCOCK

APPLICATION NO: 22/3659

PANEL: MR ROBERT NASH (CHAIRPERSON)

DATE OF HEARING: 3 October 2022

DATE OF DETERMINATION: 14 October 2022

IN THE MATTER OF an appeal by MALCOLM HANCOCK against a determination made by Racing and Wagering Western Australia Stewards of Harness Racing imposing a \$1,000 fine (\$500 suspended for a two year period) for breach of Rule 231(2) of the Rules of Harness Racing

Mr Hancock self-represented.

Messrs Denis Borovica and John Zucal represented the Racing and Wagering Western Australia Stewards of Harness Racing.

Background

1. The Appellant, Malcolm Hancock (“Mr Hancock” or “the Appellant”) is a RWWA Licensed Trainer in the WA Harness Racing Industry.
2. Mr Hancock was charged by the RWWA Stewards (“Stewards”) with a breach of Rule 231(2) of the Rules of Harness Racing (“Rules”).
3. Rule 231(2) provides: ‘*A person shall not misconduct himself in any way.*’
4. The charge against Mr Hancock was in the following terms:

[that] ‘in a phone call [Mr Hancock] made to Racing and Wagering Western Australia on 26 May 2022, which was answered by Mr Tyler Hares, a recently appointed receptionist, [Mr Hancock] spoke in an offensive manner and used profanities during the conversation.’
5. A tape-recording of Mr Hancock’s phone call to Mr Hares, which was the subject of the charge, was played during the hearing of the matter before the Stewards (T4).

6. Mr Hancock stated that he accepted that his conduct towards Mr Hares was ‘disgraceful’ (T5.9). He pleaded guilty to the charge and said his actions were under ‘duress’ (T20.4) and said he was sorry for having ‘paid out’ on Mr Hares (T20.7).
7. The Stewards imposed a fine of \$1,000 with half the amount (\$500) being suspended on condition that for a period of two years he not offend the conduct related Rules of Harness Racing. The transcript reveals that in considering the penalty the Stewards took into account:
 - a) that Mr Hancock had apologised to Mr Hares;
 - b) his expressed remorse;
 - c) his prior good record;
 - d) his passion and frustrations (which the Stewards said they understood), albeit misguidedly expressed on the occasion in question; and
 - e) his assurance that he would conduct himself properly in the future.
8. Mr Hancock filed an appeal against the Steward’s penalty determination by Notice of Appeal dated 30 June 2022.
9. The grounds of the appeal set out in the Notice of Appeal are:

‘I do not believe due consideration was provided to the issues leading up to my conduct. I believe my treatment by RWVA Administration is directly attributable to my political beliefs and is attempting to silence my criticism of RWVA’s integrity. I believe I can prove this. Also, no consideration to my input for Harness Racing for over 50 years.’
10. On 23 August 2022, I published my reasons in respect of a preliminary issue (“Preliminary Issue Decision”), being the Appellant’s application under section 17(3) of the *Racing Penalties (Appeals) Act 1990* (“Act”) to have six witnesses summonsed to give evidence at the hearing of the appeal. The detailed factual background to this appeal is set out in full in the Preliminary Issue Decision and it is unnecessary to repeat those matters.

Consideration

11. An appeal to this Tribunal against a penalty imposed by the Stewards is an appeal against a discretionary determination.
12. Murray J in *Danagher v Racing Penalties Appeals Tribunal (1995) 13 WAR 531 at 554*, said that the Tribunal is to review discretionary determinations made by the Stewards in the same way an appellate court reviews a discretionary decision of a lower court where the appeal is by way of rehearing. There is a strong presumption in favour of the decision being appealed from and that the decision should be affirmed unless the Tribunal is satisfied that it is wrong.
13. In order to succeed, an appellant must establish that the primary decision maker expressly or impliedly made a material error of fact or law: *House v The King (1936) 55 CLR 499 at 505*. Failure to give adequate weight, or giving too much weight, to a relevant consideration does not give rise to a relevant error unless the failure really amounts to a failure to exercise the discretion that has been entrusted to the primary decision maker: *Lovell v Lovell [1950] HCA 52; (1950) 81 CLR 513 at 519*.

14. As I stated in the Preliminary Issue Decision, Stewards were clearly sympathetic to Mr Hancock's circumstances and accepted that Mr Hancock's conduct in question was attributable to his strong sense of grievance as to how he regarded he had been dealt with by RWWA. Those matters were accepted by the Stewards as the contextual explanation for Mr Hancock's conduct on the phone to Mr Hares. Accordingly, it cannot be said that the Stewards did not give those matters due consideration.
15. Mr Hancock also contends that no consideration was given by the Stewards to his input into the Harness Racing Industry for over 50 years.
16. In determining penalty, the Stewards accepted that Mr Hancock had a good record in the industry.
17. During the appeal hearing, Mr Hancock gave considerable background to his long history and substantial contribution to the Harness Racing Industry over many years. I accept that Mr Hancock has made an enormous contribution to the Harness Racing Industry over many years at considerable personal cost and accept that he genuinely felt that he was not being accorded the respect or courtesy he considered he was entitled to when he sought to raise issues with the RWWA Administration. For the reasons explained in the Preliminary Issue Decision, it is not necessary for this Tribunal to make any factual findings about those matters.
18. I am willing to accept that when one has regard to both:
 - a) his substantial contribution over many years to the Harness Racing Industry; and
 - b) his genuine and strong sense of personal grievance about how he apprehended that he was being treated by the RWWA Administration,

that Mr Hancock was entitled to the benefit of considerable mitigation when the Stewards were considering what penalty should be imposed.

19. At the hearing of the appeal, the Stewards tendered a summary of penalties (Exhibit 1) that have been imposed for improper behaviour, where the conduct involved using offensive or threatening language. It is evident from Exhibit 1 that penalties ordinarily imposed for this type of conduct range from fines in the region of \$1,000 (net of any suspended component) up to 3 months disqualification. It is, therefore, apparent that in imposing a fine of \$1,000 with \$500 suspended on Mr Hancock, the Stewards imposed a penalty that was very much at the lower end of the range of penalties ordinarily applied.
20. In considering penalty, the Stewards were required to have regard not only to the mitigating factors that Mr Hancock emphasised, but also the statutory duty imposed on all licensed trainers in the Industry to conduct themselves in accordance with the Rules: *s.45(6) Racing & Wagering Western Australia Act 2003, Zucal & Ors v Harper [2005] WASCA 76, [30] et seq.* The penalty imposed not only operates as a specific deterrent to Mr Hancock from conducting himself in the same manner again, but it serves as a general deterrent to other industry participants that, no matter what one's standing in the Industry is and no matter what accolades and respect one deserves for contributions made to the Industry, a licensed person cannot engage in improper or offensive behaviour without consequence.

21. It is truly saddening that Mr Hancock, after all his years of passionate service and commitment to the Industry, has allowed his frustrations to boil over in the manner they did. Admirably, and with considerable humility, he accepted the determination of the Stewards at the time they imposed the penalty.
22. It seems, however, that Mr Hancock subsequently formed the view that he needed to appeal to this Tribunal as a matter of principle, which he (perhaps understandably) thought may provide a forum for him to have the issues he has with the RWWA Administration investigated.
23. This Tribunal's jurisdiction is defined by Part 2 Division 2 of the *Racing Penalties (Appeals) Act 1990*. It has no jurisdiction to deal with or make judgments about the veracity or otherwise of Mr Hancock's complaints about the RWWA Administration. It is sufficient for the Tribunal's purposes in considering the appeal against penalty, to accept that Mr Hancock, at the relevant time, had a genuine sense of grievance about the matters he has raised.
24. Ultimately, the Tribunal must consider whether Mr Hancock has established that the Stewards erred in the penalty they imposed, bearing in mind it is a review of an exercise of a discretion. It is not the Tribunal's role to merely substitute its own opinion for that of the Stewards. There is a strong presumption in favour of the correctness of the Stewards' determination unless the Tribunal is satisfied that there has been a demonstrated error of law or fact which has been material to the penalty imposed.
25. Having considered carefully all of the matters raised, I am not satisfied that Mr Hancock has established that the Stewards' discretion miscarried in imposing the penalty they did, and accordingly I must dismiss the appeal against penalty.



ROBERT NASH, CHAIRPERSON

