

TRNT Appeals Committee

APPEAL of Mr Mathew Penney

APPEAL COMMITTEE: Mr P McIntyre (Chair), Mr S Stirling

DATE of HEARING: 18 April 2023

REASONS FOR DECISION

Appearances

At the Appeal;

- a. Mr Mathew Penney appeared via Teams from Alice Springs with his representative Ms Kerry Petrick.
- b. Mr David Hensler represented the Stewards and assisted with video technology.

Background

1. Mathew Penney (the Appellant) appealed against the penalty imposed on 27 March 2023 following his conviction by the Stewards on a charge under AR 139(1)(a) to which he had plead guilty.
2. The particulars of the breach by the Appellant were that:
 - a. On 13 February 2023, he was licensed as a track rider with TRNT and therefore classified as a rider under the Australian Rules of Racing.
 - b. At the direction of the Stewards, he did provide a sample of his urine at the Alice Springs Turf Club on the abovementioned date.
 - c. A banned substance under the Rules of Racing, namely cannabis was detected in that urine sample.
3. The penalty imposed upon the Appellant was the disqualification of his license as a track rider for a period of three months.
4. Prior to the hearing of this appeal the Appeals Committee had the benefit of considering:
 - a. the Notice of Appeal dated 29 March 2023.
 - b. the Transcript of the Stewards Inquiry conducted on 27 March 2023 (the Transcript).
 - c. TRNT Stewards Report 27 March 2023 (the Stewards Report.)

Common Ground at the hearing

5. At the hearing it was common ground between the Appellant and Mr David Hensler that the consequences of the disqualification of the Appellant's licence as a track rider would have at least the following effects upon him:
 - a. prohibiting the Appellant from providing his services as a farrier to the horse racing industry.
 - b. prohibiting the Appellant from continuing to reside upon the Alice Springs racecourse grounds.
 - c. The penalty would have a dramatic impact upon the Appellants earning capacity and personal circumstances.
6. The Appellant did not challenge the evidence before the Stewards on 27 March 2023 that:
 - a. A banned substance, namely cannabis metabolite, was detected in a urine sample provided by Mathew Penney to the Stewards on the 13 February 2023.
 - b. The analysis was conducted by the Australia Racing Laboratory Racing NSW (ARLR NSW), revealing a concentration of 1531 micrograms per litre.
 - c. That concentration was described by Mr John Keledjian, General Manager, ARLR NSW, as 'High range'.

The Appellant's Submissions at the Hearing

7. The Appellant submitted that the penalty imposed was too harsh and should set aside because:
 - a. The 'High range' concentration was not inconsistent with the Appellant's evidence of having ingested the banned substance on the Friday prior to the Monday when he provided the urine sample.
 - b. The penalty will cause the loss of his ability to earn a living, as his ability to earn income as a farrier outside of the racing industry in Alice Springs is not realistic.
 - c. The penalty harms his personal relationships.
 - d. The loss of farrier services formerly provided by the Appellant to the Alice Springs racing industry causes a significant financial burden to horse owners and trainers due to the scarcity of such providers in Alice Springs.
 - e. An appropriate penalty would have been a suspension of the Appellant's licence because that would have prevented him operating as a track rider but permitted him to continue as a racing farrier in Alice Springs.

The Submissions of Mr D Hensler at the Hearing

8. Mr D Hensler submitted:
 - a. That the time of ingestion of the banned substance is not relevant to either the conviction or the penalty.

- b. That the urine sample concentration was ‘High range’ on the Monday after the Appellant had conducted trackwork and then provided the urine sample to Stewards.
- c. Whether doing trackwork, working as a stable hand or doing farrier work in the racing industry, anybody having such a high concentration of a banned substance in his system as did the Appellant, would have constituted a dangerous risk to the safety of the public and participants involved in the horse racing industry (including the horses).
- d. The Transcript reveals¹ that the Appellant undertook trackwork on the Monday knowing that the banned substance ingested by him on the previous Friday would still be in his system. When asked why he had nevertheless ridden, the Appellant replied, ‘I didn’t think I was going to get tested’.
- e. The Stewards were aware when they imposed the penalty that it was the first occasion in the Northern Territory that a licence disqualification would apply in relation to the ingestion of cannabis but considered that to be both reasonable in the circumstances of the offending and after consideration of penalties imposed in other jurisdictions.

Consideration of the Submissions

9. Time of Ingestion

In making the Appellant’s submission at paragraph 7. a. above Ms Kerry Petrick, relied upon an article written in October 2008 and published by the U.S. National Institutes of Health which she tendered. A perusal of the article reveals that the focus of its attention is long detection times following urine tests of frequent drug users. There is no evidence that the Appellant is or was a frequent drug user. The Transcript reveals that the Appellant on two occasions denied being a frequent user.² In any event, the date of ingestion is irrelevant and played no part in the Stewards consideration on penalty. We agree with the submission of Mr D Hensler at paragraph 8.a. above.

The date of ingestion is irrelevant. The Appellant did not point to anything that may have revealed that this issue in any way informed the decision-making of the Stewards. There is no evidence that the Stewards drew an adverse inference against the Appellant regarding the date of ingestion. The transcript simply reveals³ an observation by Mr Hensler to the effect that the reading seemed to him to be high on the Monday if the relevant ingestion had been on the previous Friday. This became the subject of further discussion at the hearing between Mr D Hensler and the Appellant⁴ to which we shall make reference below. This submission of the Appellant does not advance his appeal.

¹ Transcript page 14 at point 24.

² Transcript page 8 point 19 and page 12 at point 11.

³ Transcript page 9 point 5-10.

⁴ Transcript page 14 point 24.

10. Impact of Penalty upon the Appellant

Income: That the penalty imposed would have a serious impact upon the Appellant was apparent to the Stewards on 27 March 2023 as is disclosed in the Transcript.⁵ This was not something that the Stewards failed to take into account. The Appellant submits that the Stewards relied upon an ‘unrealistic’ imagined ability of the Appellant to obtain adequate work as a farrier outside of the racing industry in Alice Springs.

The Transcript reveals that the Appellant had informed the Stewards, prior to the imposition of the penalty, that he had never had employment outside of what he described as ‘the horse industry’. His remark was made to clarify he had previously worked outside of the horse racing industry referred to by the Stewards.⁶ There is no reference in the Transcript to the Appellant working as a farrier in Alice Springs outside of the racing industry.

The penalty does not prevent the Appellant from obtaining other paid work in or around Alice Springs.

It is apparent from the exchange between the Appellant and the Stewards revealed in the Transcript and referred to in footnote 3 that the Appellant was aware at the time that he provided his urine sample that it would return a positive sample. When asked by the Stewards why then had he ridden, he replied ‘I didn’t think I was going to get tested’.

It is not some ‘unrealistic’ assumption by the Stewards that has interrupted the Appellant’s source of income in the horse racing industry, but rather his conscious decision to ignore the rules that regulate this complex industry to promote safety for the public and the participants (including the horses).

Personal relationships: The transcript reveals⁷ that the Appellant was given an opportunity to raise any other matters that he wished the Stewards to take into account beyond the impact of an interruption of his employment in the horse racing industry. His response was to say, ‘No. I think we’ve covered all bases sir.’ This exchange occurred after it had been made clear to the Appellant that the penalty imposed may require him to obtain employment outside of the horse racing industry. The Stewards could hardly have been clearer when the Appellant had been told ‘We look at suspension reprimand or disqualification, we know the ramifications of a disqualification, in your instance you are currently suspended because we are awaiting on the a police clearance.’⁸

It is no doubt correct that the penalty has had a dramatic impact upon the personal and professional life of the Appellant.

Tragic as that may be, it is the Appellant who has brought those ramifications upon himself by his own conscious choices.

⁵ Transcript pages 15-16.

⁶ Transcript page 15 at point 20.

⁷ Transcript page 16 at point 16.

⁸ Transcript page 15 at point 10.

11. Impact of penalty on local Alice Springs racing industry

The Appeals Committee does not accept the Appellant's submission that the penalty imposed was too harsh because of its impact on the availability of local racing farriers. To do so, would be to impose an improper constraint upon the exercise by the Stewards of their regulatory responsibilities. In this case, were this submission accepted, the Appellant would obtain an immunity from disqualification. Such an outcome would undermine the rules of racing.

This submission does not advance the Appellant's appeal.

12. The penalty should have been a suspension of the Appellant's licence as a track rider

The Stewards report reveals that the Stewards had taken into account the following matters in determining the penalty.

- a. The seriousness of the offence
- b. The nature of the banned substance and the high level detected
- c. His guilty plea and personal circumstances
- d. His previous offence under this rule in 2013
- e. Mr Penney's license had been placed on hold by the Stewards since 27 February 2023 due to his continued failure to meet licensing requirements.

The Appellant did not submit (and could not reasonably have submitted) that these were inappropriate matters to have been taken into account in sentencing.

That this was the first occasion in the Northern Territory, where a disqualification was imposed for this offence, is not a reason to interfere with the Appellant's penalty.

It cannot be ignored, that the Appellant's circumstances include his conscious decision to have ridden while under the influence of a banned substance.

In the opinion of the Appeals Committee, the imposition of a suspension rather than a disqualification would have had little to no impact upon the Appellant. Such a penalty would have accordingly, been inadequate.

This submission does not advance the Appellant's appeal.

13. Submissions of Mr D Hensler

With one proviso, and for the reasons set out in paragraphs 9-12 above, the Appeals Committee accepts the submissions of Mr D Hensler.

The proviso is that whilst the opinion set out as his submission at paragraph 8.c. above, may be readily accepted, it is not relevant to the disposal of this appeal.

The Appeals Committee re-visits this issue at paragraph 14 below.

Identification of an anomaly in the NT Rules of Racing

14. Late in the hearing, the Appeals Committee sought submissions from the parties about the apparent anomaly in the NT Rules of Racing that has the effect of exempting farriers from the regulatory oversight of the Stewards, particularly in the context of abuse of banned substances.
15. It became common ground between the parties, that the Stewards do not have authority to drug test racing farriers unless they are otherwise licenced to work in the racing industry. That is because farriers are not required in the Northern Territory to be licenced.
16. There are variations between the regulatory frameworks, but it is significant that the horse racing industry requires farriers to be licenced in all Australian states.
17. Whilst this appeal did not turn on the issue, the Appeals Committee agrees and adopts the expression of opinion set out in paragraph 8.c.
18. The Appeals Committee takes this opportunity to point out that farriers have been regulated in India since 1965.⁹
19. In the opinion of this Appeals Committee, the fact that racing farriers remain unregulated and outside the ambit of the oversight of the Stewards, is unsafe and an embarrassment to the local racing industry.
20. This Appeals Committee strongly recommends that a regime of licencing of (at least) racing farriers be implemented in the Northern Territory as a matter of urgency.

⁹ Prevention of Cruelty to Animals (Licensing of Farriers) Rules 1965 (India).

Determination of this Appeal

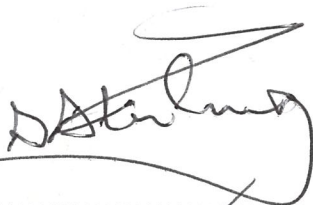
21. On 18 April 2023 the Appeals Committee dismissed the Appeal for reasons to be published.

22. These are those reasons.

Dated the 25th day of April 2023



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P F McIntyre (Chair)



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Mr S Stirling