JUDICIAL CONTROL AUTHORITY
FOR RACING
TE MANA WHAKAHAERE Ā-TURE MŌ TE PUREI

Appeal C A Gately v RIU - Reserved Decision of Appeals Tribunal dated 4 February 2019 - Chair, Mr G Jones

Rules:

Repondent(s)/Other parties:

Name(s):

Decisions:

BEFORE AN APPEALS TRIBUNAL OF THE JUDICIAL CONTROL AUTHORITY

UNDER THE RACING ACT 2003

AND IN THE MATTER of the New Zealand Rules of Thoroughbred Racing

BETWEEN

Mr C A GATELY

Licensed Track Work Rider

Appellant

AND THE RACING INTEGRITY UNIT

Respondent

APPEALS TRIBUNAL: Mr G Jones (Chairman), Mr N McCutcheon (Member)

APPEARING: Mr Dollimore (Counsel for the Appellant), Mr O Westerlund (RIU), for the respondent

RESERVED DECISION OF APPEALS TRIBUNAL DATED 4 FEBRUARY 2019

Introduction

[1] This is the Appeals Tribunal reserved written decision of the appeal against the sentence imposed on Mr Gately ("the Appellant") following the penalty hearing at the Te Rapa racecourse on 6 December 2018.

[2] By way of guilty plea, the Appellant admitted a charge of misconduct pursuant to Rule 340 of the New Zealand Thoroughbred Rules (NZTR) of Racing.

[3] As the Appellant admitted the breach, the charge against him was deemed proved (R 915 (1)(d)) refers.

[4] In accordance with the available sentencing options contained within Rule 803(1), the Judicial Committee ("the Committee") issued its reserved written decision on 17 December 2018 and imposed a 4 month disqualification, commencing on Monday 24 December 2018, and concluding on 24 April 2019.

[5] The Appellant filed a Notice of Appeal, which is dated 28 December 2018.

[6] At the hearing on 6 December 2018 the Appellant was represented by Mr P Cornege. His counsel for this appeal hearing was Mr W Dollimore, (hereafter referred to as "counsel for the Appellant")

[7] At a teleconference convened at 1.05 pm on Monday 14 January 2019 a number of issues were raised and resolved concerning the conduct of this appeal. These included; (a) confirmation of the scope of the appeal; (b) that the summary of facts was confirmed and agreed; and (c) it was also confirmed that the various relevant documents have been disclosed except for the hearing transcript. This was subsequently documented and made available to all parties prior to this appeal hearing.

Scope of appeal

[8] The grounds and scope of this appeal are:

a) That the penalty was manifestly excessive; and / or;

b) That the penalty was wrong in principle; and

c) That the JCA assumed the role of prosecutor (subsequently rescinded)

[9] During the teleconference referred to above [7] the Appellant agreed to submit written submissions in support of his appeal and the respondent also agreed to provide written submissions in response. These were both made available to the tribunal prior to the hearing.

The Rules

[10] As Mr Gately is the holder of a Track Work Riders Licence issued by NZTR he is bound by NZTR Rules. He was charged with breaching Rule 340 which relates to misconduct. Rule 803(1) provides the range of penalties that may be imposed for breaching Rule 340.

[11] Rule 340 (misconduct) provides that:

A Licensed Person, Owner, lessee, Racing Manager, Official or other person bound by these Rules must not misconduct himself in any matter relating to the conduct of Races or racing.

[12] The charging document – (Information No A8469) alleged that:

On Wednesday the 17th October 2018 at the Racing Te Aroha race meeting, did misconduct himself when he assaulted Licenced Class B –Track Work Rider <Name Suppressed> in breach of Rule 340 of the New Zealand Rules of Thoroughbred Racing and is therefore subject to the penalty or penalties which may be imposed pursuant to Rule 803(1) of the said Rules.

[13] Rule 803(1) – (the penalty provisions) provide that:

"A person who, or body or other entity which, commits or is deemed to have committed a breach of these Rules or any of them for which a penalty is not provided elsewhere in these Rules shall be liable to:

(a) be disqualified for a period not exceeding 12 months; and/or

(b) be suspended from holding or obtaining a Licence for a period not exceeding 12 months. If a Licence is renewed during a term of suspension, then the suspension shall continue to apply to the renewed Licence; and/or

(c) a fine not exceeding $20,000.00."

Appeals procedure

[14] Rule 1001 (3) (b) provides than an appeal may be against:

(i) the findings of the Judicial Committee;

(ii) if applicable, the order for or the penalty ordered, or both; and/or

(iii) if applicable, the order or the amount of the costs ordered to be paid, or both.

[15] Rule 1005 empowers the Appeals Tribunal:

(1) To conduct the hearing of an appeal in such manner as it thinks fit"…….. and

(2) At (3) provides that *All appeals shall, except when and to the extent that the Appeals Tribunal otherwise directs, be by way of rehearing based on the evidence adduced at the hearing conducted by the persons or body whose decision is appealed against.*

[16] As this is an appeal against penalty Rule 1007 (2) applies. This Rule provides that in the case of an appeal against penalty the Appeals Tribunal may:

(*a) confirm the penalty and dismiss the appeal;*

(b) if the penalty (either in whole or in part) is one which the Tribunal imposing it had no jurisdiction to impose, or is one which is inadequate or inappropriate or manifestly excessive, either:

(i) quash the penalty and impose such other penalty permitted by these Rules (whether more or less severe) in substitution therefore as the Appeals Tribunal considers ought to have been imposed or deal with the Appellant in any other way that such Tribunal could have dealt with him or it on finding the information or charge proved;

(ii) quash any invalid part of the penalty that is separable from the residue; or

(iii) vary, within the limits imposed by these Rules, the penalty or any part of it or any condition imposed in it;

Comment

[17] Although the Rules do provide some guidance in terms of an Appeals Tribunal's range of resolution options; they essentially afford some discretion for Tribunals to establish their approach in terms of the conduct of the hearing. This very point has been highlighted in a number of Appeals Tribunal (precedent) decisions. This Tribunal has taken cognisance of the approach adopted by the Tribunal in the appeal decision *RIU v Breslin* (2017) (Appeal Tribunal decision *RIU v Breslin* (2017) at para [4] and [5]) where it emphasised at paragraphs [4] and [5] that:

[4] The Rules are silent as to the applicable approach on appeal. Were the appeal one against sentence in the ordinary courts, an appeal court should only intervene if:

(a) for any reason, there is an error in the sentence imposed on conviction; and

(b) a different sentence should be imposed.

In any other case, the court must dismiss the appeal (Criminal Procedure Act 2011, s 250).

[5] On an appeal against sentence by the prosecutor, the court is concerned with whether the sentence imposed can be said to be manifestly inadequate. This is to be assessed by reference to the maximum sentence available for the particular offence, a consideration of comparable sentences, and the totality of the offending and the offender's culpability: R v Wilson [2004] 3 NZLR 606 (CA) at [41]. The court will be reluctant to interfere in borderline cases; it must be clear that the sentence was manifestly inadequate or based on a wrong principle.

[18] We note that the appeal referred to above was lodged by the prosecution (the informant) which is in contrast to this appeal. However, we believe that the Appeals Tribunal commentary is still nonetheless helpful to the extent that it provides this Tribunal with a useful decision making framework for us to consider and reference in terms of our approach.

[19] Given that this is a rehearing this Tribunal is aware of our responsibilities to make a fresh assessment of the facts, the evidence and the submissions and then form our own conclusions as to an appropriate penalty. In doing so we must also have due regard for the decision of the Judicial Committee; particularly their decision making criteria in determining and arriving at the penalty they imposed.

Standard of Proof

[20] It is well settled the standard of proof to be applied by tribunals of this nature is (on) the balance of probabilities, which simply means more probable than not.

[21] The decision of the Supreme Court *Z v Dental Complaints Assessment Committee* SC 22/2007 [2008] NZSC 55 is the leading authority. In the joint judgment of Blanchard, Tipping and McGrath JJ it determined that the standard of proof to be applied by the Tribunal when hearing the disciplinary charges is the civil standard of balance of probabilities as opposed to the criminal standard of beyond reasonable doubt.

[22] And at paragraph [97] it was stated

"…..the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned".

[23] In thoroughbred racing, the standard of proof in judicial proceedings is said to be met when the Judicial Committee is satisfied, on the basis of credible evidence, that the charge has been proved.

Background facts

[24] The summary of facts, which was prepared and submitted by the RIU, has been agreed. This, as well as submissions from both parties were extensively canvassed in the Committee's reserved decision. We do not propose to repeat in full the summary of facts.

The incident (salient points summarised)

[25] The incident that gave rise to the charge against the Appellant occurred at the Te Aroha Racecourse on Wednesday the 17th October 2018. It involved Mr Gately and a female staff member ("the victim") employed by Mr Tony Pike's racing stable.

[26] The Pike racing stables had five horses engaged to race at Te Aroha race meeting. The horses concerned were a colt, two geldings and two fillies.

[27] The stable staff, which included Mr Gately and the victim, was responsible for the care of the horses and their safe transportation to and from the races.

[28] Mr Gately, who was the more experienced stable hand, was responsible for leading the animals onto the truck and for driving them back to the stables safely.

[29] At about 3.20pm Mr Gately issued instructions that the horses can be loaded and stressed that the colt and a gelding be loaded first as one of them could become fractious and difficult to handle. The two fillies were to be loaded next with the other gelding last.

[30] The victim assisted in loading the horses onto the truck and she loaded the horses in contradiction to Mr Gately's instructions. She loaded the colt and a gelding first and was about to load the second gelding on when Gately challenged her failure to heed his instructions. The fractious gelding which was being led onto the truck started to play up.

[31] At that time, Mr Gately became quite angry and directed obscene language at her.' An argument ensued and voices were raised. Abusive and obscene language was used by both parties during the argument.

[32] Mr Gately then grabbed the victim by the collar and pushed her against the side of the truck. He clenched his fist and was about to punch her. She escaped his grip and ran to the swabbing officials nearby and reported the incident.

[33] As a result of the assault she was frightened and upset.

[34] Mr Gately was spoken to on the 21st October 2018. He freely admitted his involvement in the incident and in explanation stated that he was angry because the victim did not follow his instructions regarding the loading of the horses in the order that he had instructed. He further stated that the victim does not seem to take instructions and orders kindly and probably thought that she knew better. He has had previous words with her regarding her behaviour.

[35] Mr Gately was apologetic for his actions and regretted that the incident ever occurred. He indicated that he would apologise to the victim and to his employer Mr Pike.

[36] The victim did not suffer any significant injury and did not seek medical treatment.

[37] Mr Gately has been in the racing industry for 30 years in New Zealand and has no previous Rule breaches for this type of occurrence.

[38] He has had a previous Rule breach for a drug related matter, namely cannabis.

Penalty – written submissions for the Appellant

[39] Prior to this hearing Mr Dollimore provided the Tribunal with an extensive synopsis of the Appellant's submission. Appellate submissions are set out below:

Introduction

[40] The Appellant, Mr Carl Gately, is a Class B Track Work Rider pursuant to the Rules of the New Zealand Rules of Thoroughbred Racing.

[41] The Appellant pleaded guilty to Information number A8469, namely on 17 October 2018 at Racing Te Aroha race meeting, did misconduct himself when he assaulted Licensed Class B Track Work Rider in breach of Rule 340 of the New Zealand Rules of Thoroughbred Racing and is therefore subject to the penalty or penalties which may be imposed pursuant to Rule 8031 of said Rules.

[42] The offence creating penalty provision is contained in Rule 8031. The penalty provisions are repeated elsewhere in this decision and are not required to be repeated (*our words*).

[43] The Appellant pleaded guilty at the first opportunity and cooperated with the authorities. An agreed Summary of Facts was filed and read to the Judicial Control Authority.

[44] The decision of the Judicial Control Authority was to impose an end disqualification sentence for a total period of four months. The period of disqualification commenced from 24 December 2018.

[45] The Appellant appeals against that sentence. The Appellant contends that:

(a) The penalty was excessive and/or inappropriate;

(b) The penalty was wrong in principle and that the JCA Panel assumed the role of prosecutor. *[This ground of the appeal was subsequently rescinded].*

The facts

[46] The Appellant has admitted the breach of the Rules in relation to the incident at the Racing Te Aroha meeting on 17 October 2018 at the first opportunity. There was cooperation with the Racing Integrity Unit.

[47] The background offending is contained in the Summary of Facts which has been presented to the Judicial Control Authority at the first penalty hearing.

[48] The penalties which may be imposed are fully detailed in the Charge Rule and provisions documents which have been previously filed.

[49] The Informant, the Racing Integrity Unit, at the Judicial Control Authority hearing presented helpful and accurate penalty submissions.

[50] The Appellant's position at the penalty hearing was that a fine is the appropriate penalty, albeit at a lower level than what the Informant was seeking. The Informant submitted that a fine in the range of $2,000 would be appropriate.

[51] The Appellant contends that a fine in the range of $500 to $750 would be the appropriate penalty in this case. This was the position of counsel for the Appellant at the penalty hearing.

[52] The Racing Integrity Unit correctly identified the aggravating features and acknowledged the mitigating features.

[53] The case precedents filed in support of the penalty submissions included the following cases:

a) *RIU v D Crozier* – misconduct himself by acting in a disorderly manner. Total fine imposed of $2,000.

b) *RIU v Peter Rudkin* – misconduct himself by acting in a disorderly manner. Total fine imposed of $2,000.

c) *RIU v McNab* – misconduct, assaulting another jockey. One month disqualification.

d) *RIU v T Cowan* – misconduct, involved in a physical altercation with a security guard. Total fine imposed of $450.

e) *RIU v V.*

[54] In counsel's submission the five cases submitted in support of the penalty submissions are apposite and are relevant to the present offending. Counsel contends that in fact the offending is less serious than the cases cited by the Racing Integrity Unit.

[55] Counsel refers to the appeal decision of *D Dwyer*, an appeal decision of the Judicial Control Authority. That case involved Mr Dwyer, a licensed trainer, assaulting the Plating Inspector. He was found guilty following a defended hearing before the Judicial Control Authority and was found guilty of breaching Rule 304, namely that a licensed trainer did assault a Plating Inspector. That person was officiating at the meeting as an official.

[56] On appeal it was noted that the defendant defended the charge. The evidence was that Mr Dwyer assaulted the race day official by elbowing him with some force into his kidney region. It was also argued that the original fine of $750 imposed at the first hearing by the Judicial Control Authority was excessive. It was determined that the actions of a Licensed Trainer barging in or sideswiping a race day official who is going about his legitimate business is unacceptable and was a serious offence.

[57] The Chairman, Murray McKechnie, an experienced Appeal Judge, reviewed the penalty and found that the Judicial Control Authority's first penalty of a fine of $750 was excessive. The starting point advanced was a fine of $1,000. The Chairman found that a fine of $400 would have been appropriate. It is respectfully submitted that the *Dwyer* case is more serious because it involves a serious assault against a race day official at a race meeting. The level of violence was higher. The defendant defended the charge. The decision of Murray McKechnie, Chairman, was that the finding of misconduct was upheld. The fine of $750 was substituted with a fine of $400. There was no Order as to costs.

[58] The penalty submissions advanced by the Racing Integrity Unit correctly identified the principles of sentencing:

"Penalties are designed to punish the offender for his wrongdoing. They are not meant to be retributive in the sense the punishment is disproportionate to the offence but the offender must be met with punishment.

In a racing context it is extremely important that a penalty has the effect of deterring others from committing similar offences.

A penalty should also reflect the disapproval of the JCA for the type of offending in question.

The need to rehabilitate the offender should be taken into account."

[59] Those principles were correctly identified by the Racing Integrity Unit.

Mitigating Features

[60] Counsel for the Appellant respectfully refers to the following:

(a) That the Appellant pleaded guilty at the first opportunity, cooperated with the authorities.

(b) That he fully cooperated throughout the process.

(c) That he was remorseful for his actions and regretted the incident had ever occurred.

(d) He has offered his apologies to the fellow worker and to his employer, Mr Pike.

[61] Counsel respectfully submits that the least restrictive outcome was a fine. Counsel, at the first hearing, submitted a fine in the range of $1,000.

[62] This was a very short and brief incident. The Appellant on the day in question was the truck driver. It has to be recorded that he wasn't a Foreman. The incident was said to be brief. The incident happened on the back of a truck. It did not take place in a public area.

[63] The Appellant sought to arrange a meeting to apologise.

[64] The whole issue arose because the victim was not following the instructions that the Appellant had issued regarding which horses were to be loaded onto the truck first. The Appellant perceived that potentially there was risk to the horses and his co-worker due to the order that she was placing the horse on the truck. The incident happened very quickly. There was an exchange of abusive language both ways for a matter of seconds in the range of 20 seconds at most. The purpose of pushing the victim by the collar was to move the victim out of the way so he could take control of a horse that was being led and then take it off the truck, so that he could put

the horse on the truck in the correct, safe order.

[65] It is submitted that the Appellant's actions were not to grab, then shove against the wall as the way intended as an attack or an assault. It was to move her out of the way for the purposes of taking control of the relevant horses. At the time the horses were fractious and not all the horses were going to the same location and that's why there had been a sequenced loading direction. Put briefly, he had simply pushed her out of the way and taken the horses off the truck.

[66] Her perception may have been that he was clenching his fist and about to punch her, but counsel for the Appellant submits that the Appellant had a brace on.

[67] The Appellant refers the Committee to the fact that the Appellant was suspended from his duties at Pike Stables as soon as he arrived back to the stables and continued to be suspended.

[68] It is noted at paragraph 31 of the decision of the Judicial Control Authority that Mr Westerlund, who is the prosecutor, with full knowledge of the matter, maintained *"I still believe that the circumstances in Crozier and Rudkin were in parallel with the Gately matter".* That is a submission counsel for the Appellant agrees with.

[69] Counsel for the Appellant submits that this incident was at the lower end of the scale. It is at a very minor level. It is respectfully submitted that this appeal Committee needs to focus on what had occurred and then compare that with the circumstances of the other cases. In the *Crozier* and *Rudkin* cases it is contended that there was a physical fight and it was plainly more serious than the current matter.

[70] Counsel for the Appellant emphasises the very brief length of the incident.

[71] The Appellant has more than 30 years in the industry. It is acknowledged that he should have dealt with the matter better.

[72] Counsel submits that the victim impact statement is understandable but most of the concerns seem to relate to how others reacted to the incident which is nothing to do with the Appellant's responsibility.

[73] The Appellant has been apologetic and remorseful. He was willing to apologise to the victim. He would have been keen to attend any mediation or restorative process. It is respectfully submitted that the Appellant has shown genuine remorse. The Committee can be assured that this mistake will not happen again.

[74] The Judicial Control Authority at paragraph 46 sought to introduce cases which obviously had been obtained before the hearing started. The Committee referred to three cases – *B, Thornton* and *Bothamley*. Those cases were raised by the Judicial Control Authority. Unfortunately these cases were not circulated and provided to counsel or the Informant. It follows that unfortunately counsel were not able to distinguish three cases that the Committee had obtained prior to the hearing. That is unfortunate because having now read the three cases relied upon and referred to in paragraph 46, they are materially different. The facts are distinguishable. Counsel now for the first time wishes to illustrate that point. The opportunity to read these cases was not carried out.

[75] The Committee referred to the case of *B* which is a far more serious case with a punch to the owner's head in the context of a race meeting.

[76] The case of *T D Thornton* has been relied upon. The case is plainly more serious than the present case. Jockey Thornton was charged with a breach of Rule 304, the misconduct charge. The senior Licensed Jockey seriously assaulted an apprentice jockey, Corey Parish. Of note, Ms Thornton denied the allegations and the matter proceeded to a defended hearing where witnesses were called. The defendant physically grabbed Mr Parish with both hands in the region of his neck, swearing and abusing him as she forced him back into the Males' Jockey Room, up against a locker. There was no retaliation. An independent witness observed the defendant come to the Males' Jockey Room, grabbed the apprentice, Corey Parish, around the neck area, using obscenities directed at Parish and saw her force Parish inside the jockey room up against the locker. An independent witness also observed a punch being thrown. The JCA found the charge proved. There was clear evidence there was an unprovoked assault by the defendant upon an apprentice jockey at the Males' Jockey Room. There was abuse and obscene language.

[77] Counsel observes that the factual assault was far more serious. The charge was defended. There was no remorse shown. Of significance, the defendant had a previous misconduct in 1992 for which the defendant received three months' disqualification. The end sentence was two months' disqualification. That decision was not appealed. The *Thornton* decision is plainly and materially more serious.

[78] Counsel refers to the decision of *Daniel Bothamley*. This case is plainly more serious than the present case. The defendant pleaded not guilty initially and later changed his plea to guilty. This case involved a serious assault where there was an attack to the head. Mr Cameron George, representing the Informant, sought a four to six week disqualification. After balancing all factors he was disqualified for one month.

[79] Again, plainly the facts are far more serious than the present case. At paragraph 63 of the Judicial Control Authority's decision, they refer to the decision of *Thornton*. It is not acknowledged that the allegations were more serious than the present case. It is not acknowledged or appreciated that the defendant denied the charge and a defended hearing proceeding. There was no cooperation

with the authorities. The JCA did not appreciate plainly that she had a previous serious, relevant aggravating feature in that she had been disqualified for three months for serious offending.

[80] It is respectfully submitted that the Judicial Control Authority failed to carefully consider the relevant authorities. Counsel for the Appellant contends that a fine was the least restrictive outcome and appropriate.

[81] At paragraph [67] of the decision, the Judicial Control Authority (the Committee) has arbitrarily determined a starting point of six months' disqualification as the appropriate starting point. Such a starting point is not supported by any of the decisions that the Chairman referred to.

Conclusion

[82] It is respectfully submitted that the sentence of four months' disqualification is excessive and wrong. The least restrictive outcome in counsel's submission was a fine in the range of $1,000.

[83] It is noteworthy that the Informant/Investigator, who was well aware of all the circumstances of the case, fairly submitted that a fine was appropriate.

[84] The appeal should be allowed and the Disqualification Order should be substituted with a fine.

Penalty –written submissions for the respondent

[85] The respondent (RIU) filed the following submissions in response to the Appellant's submissions.

[86] The facts are not in dispute.

[87] The hearing was conducted in a fair and reasonable manner.

[88] All information and matters relevant to the hearing were disclosed by the RIU to all parties and that we answered all questions put to us with sincerity and to the best of our knowledge and belief to be true and correct and that any matters that were unsure of were duly declared.

[89] The RIU have no reason to doubt the veracity and truthfulness of all statements made by all parties at the hearing.

[90] The RIU will abide by and respect all judgements, issued by the JCA and/or Appeals Tribunal regarding this matter.

[91] In respect of the grounds and scope of appeal, the RIU wish to submit as follows:

That the penalty was manifestly excessive:

[92] We sought a monetary fine of $2000 rather than a term of disqualification

[93] In support of our submissions, we relied on previous decisions handed down by the JCA in the matters of

a) *RIU v Crozier* and *RIU v Rudkin* (Same incident)

b) *RIU v McNab*

c) *RIU v Cowan*

d) *RIU v Vince*

[94] *Crozier* and *Rudkin* were licensed Thoroughbred horse trainers who were involved in fisticuffs on 2 x separate occasions on the same day for a dispute relating to the removal of a horse from a tie-up horse box.

[95] *McNab* was a licensed jockey who punched another jockey at a trials meeting.

[96] *Cowan* was a licensed open horseman who became involved in an altercation with a security guard when asked to leave a sponsor's area.

[97] *Vince* was a licensed harness trainer who became involved in a scuffle with a licensed harness driver who suggested that Vince's partner was an incompetent horsewoman.

[98] All these parties pleaded guilty to charges brought against them and with the exception of *McNab*, all were dealt with by way of a fine.

Crozier $2000

Rudkin $2000

Vince $750

Cowan $450 plus costs of $250

McNab was sentenced to a period of disqualification of one month.

[99] In all these matters, assault was a common theme.

[100] In our experience, no two incidents involving assault are the same. There are usually factors that when fully examined and explored will reveal the true reasons for such assault. Matters like domestic disputes, personal enmity, use of obscene language or swearing and lack of respect just to name a few.

[101] Usually the reaction is an immediate physical response which is then regretted. Human beings are not angels and we all react differently when riled.

[102] In this matter, we believe that the Appellant, given his age, gender physique and position of responsibility, could have handled the situation in a different manner but the incident did occur and to his credit he immediately regretted his actions, acknowledged his wrongdoing and was remorseful and apologetic.

[103] We still contend that a monetary penalty/fine is a fair and appropriate sentence for this matter. However, the JCA have made their decision and we must abide by it.

[104] At the hearing the Chairperson of the JCA raised several case laws/previous decisions namely; *Thornton*, *Bothamley* and *B.*

[105] I was not personally aware of these matters and informed the JCA accordingly.

[106] Since the hearing I have read the decisions and can say that circumstances of those events differ greatly to Mr Gately's offending.

[107] There is a degree of premeditation of actions by all these parties. *Thornton* was aggrieved and went to the jockeys' room to call Parish out. *Bothamley* was spoken to advisedly by the Stewards when they became aware of the incident. However, subsequent investigation revealed a lot more wrongdoing than that to which *Bothamley* initially admitted to. *B* appears to be a domestic related dispute that festered and culminated in an extreme retaliatory reaction by the offender.

[108] The *Thornton* matter was a defended hearing. She also had a previous history of similar offending. The two months Disqualification and $1550 cost seems light.

[109] In the *Bothamley* matter, he argued that he faced 'double jeopardy'. He was conveniently silent until the full facts were discovered. A senior jockey assaulting an apprentice deserves a term of disqualification.

[110] In the *B* matter, it appears that the complainant may have developed an unhealthy attraction to *B* and when he was rebuffed, matters between them deteriorated to the extent that a serious assault with a weapon ensued.

[111] **'That the penalty was wrong in principle'**

i. The RIU are not tasked to provide legal opinions and as such we are unable to offer any meaningful submissions regarding this assertion.

ii. The RIU seek guidance from the Appeals Tribunal and will provide all investigative assistance to the tribunal to enable them to determine and settle this matter.

[112] **That the JCA assumed the role of Prosecutor'**

i. The RIU has no objection to the JCA asking searching questions and reasonable of all parties involved in a hearing if the purpose was to gather all relevant information that would assist all parties with submissions before the JCA makes a determination and/or impose sentence.

ii. In this matter, the RIU submits that the JCA conducted the enquiry in a fair and reasonable manner and obtained all the information which enabled them to sentence the Appellant to 4 months disqualification.

Conclusion

[113] The RIU submits that the conduct of the hearing into this matter was fair and reasonable and all parties were afforded ample time and ability to present all relevant information to assist the JCA in making its determination regarding sentence.

[114] The RIU believes that the JCA acted responsibly and did not assume the role of prosecutor. JCA decision refers.

[115] The RIU have no objection to any change in sentence and will abide by the Tribunal's ruling.

[116] The RIU offers all assistance it could provide to all parties in the interest of upholding the integrity of the Racing Industry.

The appeal hearing

[117] At the commencement of the appeal hearing the Tribunal outlined the proposed procedure. This was agreed to by parties.

Oral submissions for the Appellant

[118] Counsel for the Appellant opened and handed out the cases relevant *(Bothamley (2008), Thornton (2008), Dwyer (2007), Vince (2018))* to his submissions.

[119] Counsel submitted that after now having the benefit of reading and reviewing the transcript of the hearing he would not be pursuing the ground for appeal relating to the JCA assuming the role of prosecutor, but rather he sought to raise concerns about the conduct of the hearing in terms of process and procedure.

[120] Counsel argued that during the hearing Mr Cornege was placed at a significant disadvantage. In support, referencing the transcript of the hearing, he submitted the Committee made inquiries and asked questions of the prosecutor during his penalty submissions. For example it was said that the prosecutor was asked several times why he had not raised cases other than those he had already submitted. Counsel said that line of questioning continued before Mr Cornege was able to present his mitigating submissions or reference any relevant cases on behalf of his client. He said it was of particular concern that the Committee produced cases suggestive of them having done their own research prior to the hearing and in doing so identified cases where the penalty was one of disqualification.

[121] Counsel further submitted that Mr Cornege had to turn his mind to the fresh cases that were introduced by the Committee without being afforded the opportunity to read those cases, as they were not handed out to either party. He stressed Mr Cornege was disadvantaged and this was a procedural error. He highlighted the fact that in open court or during other judicial hearings it is normal practice at sentencing if a judge or judicial officer wish to refer to cases or authorities for their decision, they circulate those decisions so that they may be reviewed or researched by counsel. He said this did not occur on this occasion.

[122] Again referring to the transcript of the hearing, counsel referred to examples of where the question was put at least twice to the prosecutor *"are you sure you want a fine".*

[123] Counsel argued that the Committee wrongly drew an inference that there was an imbalance of power due to the employment relationship between the Appellant and the victim. He submitted he wanted to make it quite clear the Appellant was employed as a track-work rider and truck driver. He produced the Appellant's employment contract which confirmed his employment status. He accepted that due to his seniority, on the day he was not a foreman but he was the senior employee responsible to loading the horses onto the truck. Counsel further argued that it was this inference drawn by the Committee that led to questions being asked by them that went well beyond what was agreed in the summary of facts.

[124] Counsel continued to make further submissions concerning the introduction of the precedent cases by the Committee suggestive of them having researched like cases prior to the hearing and predetermining the result prior to hearing all submissions.

[125] A further concern raised by counsel was around the discussion relating to the categorisation of the offence. In this regard he referred to the discussion relating to category 1 and category 2 offences and submitted this was not a Police or open court matter and even if it was other charging options would include assault (Summary Offences Act), Common Assault (Crimes Act) and Male Assaults Female. And, he submitted, in open court a number of choices would be made available to dispense with the case ranging from a pre-charge warning, diversion, and discharge without conviction etc.

[126] In his final submission on this point counsel said that the Committee seemed to be focused on the categorisation of the assault in terms of the Criminal Procedure Act rather than a racing matter and that this was a theme evidenced within the transcript.

[127] With reference to the agreed summary of facts counsel said that this case was not one of serious assault, but rather one of grabbing around the collar. He said the Appellant moved in to take control of a fractious horse in the truck. He added that when you are loading horses onto trucks things get stressed and pointed out the following mitigating factors for the Tribunal to consider:

a) The Appellant is remorseful and he knows he has done wrong;

b) The incident occurred on the back of the truck as opposed to in open public;

c) There was foul language from both the Appellant and victim;

d) The Appellant accepts he did not handle the situation properly and without trying to minimise the incident it happened quickly and there were no injuries sustained by the victim.

[128] Counsel submitted that he agreed with cases submitted by the Informant at the hearing; namely *Crozier, Rudkin, McNab, Cowan* and *Vince*. He repeated the points previously outlined in his written submissions and stressed that the level of violence in the precedent cases was far more serious than the present case.

[129] Counsel also reiterated his submissions which were outlined in the written synopsis in relation to the *Bothamley, Dwyer,* and *Thornton* decisions. He pointed out areas of similarity, comparative offending and points of difference. He added that the Dwyer decision was perhaps the most relevant; albeit more serious than the present assault. He said that on appeal Mr Dwyer's $750 fine was reduced to one of $400.

[130] In concluding his comments on the precedent cases counsel said that each case is different and each one stands on its own facts. He said that it was his submission that a fine would be the most appropriate penalty in this case because the Appellant:

a) Entered a guilty plea;

b) Has had no relevant previous breaches of the misconduct rule;

c) With reference to the Victim Impact Statement the Appellant has no control over what others may have said about the incident;

d) He offered to meet with the victim

e) He has apologised to Mr Pike; and

f) The incident happened very quickly in a stressful working environment and there was no injury and the Appellant made a poor decision.

[131] Moving to the Appellant's current circumstances counsel submitted that he was suspended by his employer immediately. Since his suspension and from the date his disqualification came into force he has lost potential earning by not being able to drive the horse float or enter onto a race track.

[132] Counsel submitted the effect of the disqualification was *"draconian"*. He said a fine was the most appropriate outcome compared to the comparative cases and he agreed with the approach suggested by the RIU that a fine was appropriate, albeit the RIU suggested a $2000 starting point whereas the Appellant felt $1000 would suffice.

[133] Counsel submitted that the 6 month disqualification starting point adopted by the Committee is inconsistent with case law. He said that very few people in the racing industry have received a penalty anywhere near 6 months for breaching the rules.

[134] At the conclusion of counsel's submissions Mr Gately was offered the opportunity to address the Tribunal. He declined on the basis that counsel had covered off everything that needed to be said on his behalf.

Oral submissions for the RIU

[135] Mr Westerlund on behalf of the RIU submitted there was very little he could add to his written submissions. He highlighted the cases previously referred to during the hearing and in his submissions, namely *Crozier, Rudkin, Cowan* and *Vince.* He confirmed the RIU's position that these cases are the most relevant to the matter before the Tribunal.

[136] He said the JCA raised the cases of *B, Bothamley* and *Thornton* and the conduct of the hearing on the day was governed by the JCA Committee.

[137] The concluding submission from counsel for the Appellant was that Mr Gately has limited financial means, but he could pay a fine.

[138] The concluding comment from Mr Westerlund was that the Judicial Committee conducted the hearing in a fair manner.

Discussion and analysis

Tribunal queries

[139] After hearing their submissions both parties were invited to offer any thoughts or comments on 3 issues the Tribunal believed worthy of further analysis. They included:

1) First, the nature of the sentencing principle(s) referred to and relied on by both parties.

2) Second, an apparent discrepancy between the Victim Impact Statement (VIS) and summary of facts in relation to injuries sustained by the victim.

3) Thirdly, the characterisation of the assault; particularly as it relates to an assault on a female by a male.

Sentencing Principles

[140] In response to our query concerning the sentencing principles relied on by both parties, counsel for the Appellant submitted that traditionally in racing jurisdictions Committees and Tribunals have relied on long standing principles that evolved from a decisions over the years. Counsel was not sure whether or not the principles set out in the Sentencing Act (The Purpose and Principles as set out in s. 7 and 8, Sentencing Act, 2002) would apply in matters heard under the Racing Act, but conceded it is something he would need to give further consideration.

[141] The RIU agreed the 3 principles cited in their submissions were well established within racing.

[142] At the conclusion of the discussion on this point the Tribunal advised that it would be guided by purpose and principles of the Sentencing Act as they were very helpful to the extent they provide direction and assistance in establishing a decision making framework for setting an appropriate penalty.

The Victim Impact Statement

[143] In her VIS the victim states *"The day after the assault my throat was sore from the impact of Carl grabbing me. This took 3 days to settle down".* Whereas in the summary of facts it is said "(the victim) *did not suffer any significant injury and did not seek medical treatment.*

[144] In response to this query Mr Westerlund submitted that the victim did not suffer an injury requiring medical attention, and this was outlined in the summary of facts, but when she completed her VIS some time later, she disclosed to him that she had suffered soreness to her throat.

[145] Counsel for the Appellant submitted that although the Victim of Offences Act applies in open court, the Appellant cannot be held to account for how the victim feels about what others say concerning the incident. He further submitted that the comments recorded in the VIS about what others have said may not even be admissible. In his written submissions Counsel submitted that "*the victim impact statement is understandable but most of the concerns seem to relate to how others reacted to the incident which is nothing to do with the Appellant's responsibility".*

[146] Counsel had nothing further to say about the reference in the VIS concerning the injuries to the victim.

[147] We have highlighted the apparent discrepancy between the summary of facts and VIS as these are matters we must consider as part of the overall contents of the VIS when assessing penalty. We think the Appellant does have to take some responsibility for any resultant emotional effects or harm arising from this assault.

[148] In our analysis it is matter of fact that the victim did suffer soreness to her throat and has suffered emotionally from the ordeal.

[149] The Victims Rights Act (S 17AB Victim Rights Act 2002 purpose of VIS) sets out the purpose of VIS's, which include (to):

a. enable the victim to provide information to the court about the effects of the offending; and

b. assist the court in understanding the victim's views about the offending; and

c. inform the offender about the impact of the offending from the victim's perspective.

[150] As to the contents of the VIS we accept the contents must be factual, *R v Haddon* (*R v Haddon* (1990) 6 CRNZ 508 (CA) at 511) and it is of note that the VIS is uncontested in relation to her claim to having suffered soreness to her throat. In relation to her feelings about how others may have perceived the incident, Crown Law guidelines provide some assistance, citing *R V Ofakineiafu (R v Ofakineiafu C*A 301/04, 8 December 2004 at [10]) *the Court of Appeal have noted that if victim impact statements are stripped of all emotive language, there is a risk they will not authentically express the views and feelings of the victims.*

[151] Balancing the Act, the authorities and the contents of the VIS we are of the view that her statement is both relevant and admissible.

The characterisation of the assault

[152] Our third query related to how the assault has been variously characterised. The Tribunal sought perspectives on whether we treat an assault by a male on a female differently given that the precedent cases referred to us, except for *Thornton*, were male on male.

[153] On this point counsel for the Appellant submitted there are various categories of assault and most likely had this matter been referred to open court, at most the charge would have been one of common assault. He referred to the *Thornton* case which was an assault by a woman rider on a young male apprentice rider. He added that in his own practice on many occasions he has negotiated a downgrade on assault charges with Police; resulting in lesser charges or discharge without conviction. He further added in some cases he has managed to have assault matters dealt with outside the court system where the charge was of a relatively minor nature and there was a risk of loss of livelihood; as is the case with the Appellant on this occasion.

[154] The RIU's response to this query was that Police would generally seek a harsh penalty in cases of male assaults female.

The nature of the assault

[155] In assessing culpability it is necessary for the Tribunal to examine the nature of the assault.

[156] Counsel for the Appellant freely accepts the victim was assaulted, but submits that the Appellant's actions *were not to grab, then shove against the wall as the way intended as an attack or an assault. It was to move her out of the way for the purposes of taking control of the relevant horses. At the time the horses were fractious and not all the horses were going to the same location and that's why there had been a sequenced loading direction. Put briefly, he had simply pushed her out of the way and taken the horses off the truck.*

Counsel added *her perception may have been that he was clenching his fist and about to punch her, but counsel for the Appellant submits that the Appellant had a brace on.*

[157] In our view what the victim perceived was about to happen and; or whether or not the Appellant had a brace on does not diminish his liability. The definition of assault is outlined in the interpretation section of the Crimes Act 1961 (s. 2 Crimes Act 1961 z (Interpretation Section) and means an assault is:

The act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other person to believe on reasonable grounds that he has, present ability to effect his purpose; and **to assault** (our emphasis) *has a corresponding meaning.*

[158] In the various submissions; during the judicial hearing and in course this appeal hearing numerous references were made characterising the assault as being of a minor nature.

[159] Counsel for the Appellant submitted this incident was at the lower end of the scale.

[160] We accept that the level of violence inflicted was at the lower end. But the Appellant did apply force, it was intentional; he gestured and therefore by definition this is an assault by a male on a female victim.

[161] In setting penalties the law recognises the clear distinction between a fight, a common assault and an assault by a male on a female. The points of difference are obvious: for example, participants in a fight generally do so willingly and the penalty (S 7 Summary Offences Act 1981) ($1000 fine) reflects the fact that it is viewed a minor offence. Whereas, within common assault there are degrees of seriousness as contained within both the Summary Offences Act 1981 (S 9 Summary Offences Act 1981) and Crimes Act 1961(S 196 Crimes Act 1961) and they carry maximum penalties ranging from 6 months / $4000 fine and 1 year respectively.

[162] On the other hand the crime of male (S 194 Crimes Act 1961 provides being a male assaults any female) assaults female carries a maximum penalty of 2 years imprisonment.

[163] In our view by any measure, in any jurisdiction whether it is within the context of racing, the workplace, home or any other place; an assault by a male on a female must be viewed more seriously than a fight or a common assault. This was not fight and the victim was not a willing participant.

[164] The Committee in their reserved written decision considered the fact that this case was one of male assaults female and treated this as an aggravating factor. We agree with this assessment.

[165] There has been considerable discussion on how Police or open court would have viewed the nature of the assault. In the final analysis this is a racing matter and we must deal with it in the context of the Rules of Racing.

The Judicial Committee assumed the role of prosecutor

[166] As identified earlier in this decision, at the commencement of this hearing, the Appellant withdrew his appeal ground alleging the Committee 'assumed the role of prosecutor'. However, counsel for the Appellant did level some criticism at the Committee in terms of process and procedure; specifically that the Committee introduced additional precedent cases, and asked questions of the Informant which he submitted disadvantaged counsel appearing for Mr Gately (refer counsel submissions at the commencement of this hearing).

[167] Notwithstanding this aspect of the appeal was withdrawn, given the criticism and for the sake of balance and completeness we feel compelled to comment. On this point Counsel referred to commentary in the hearing transcript and argued that Mr Cornege' approach to the delivery of his submissions was put at a disadvantage as a result thereof.

[168] We have closely examined the hearing transcript to determine not only what was said but also the context. Clearly the Committee did ask questions of the informant and they did introduce precedent cases during penalty submissions.

[169] There are a number of authorities that deal with this very issue including *E H Cochrane v MOT* [1987] 1 NZLR 146, (1987) 3 CRNZ. In Cochrane the issues of judicial interventions was thoroughly canvassed. In delivering the judgment of the three CA judges (Cooke P, McMullin J and Sommers J) Cooke J said (p5):

Since the wording of Barker J's judgment left room for argument about the precise test applied by him, we think it right to add that, applying the test that we have stated, we do not ourselves think that questioning, although of unnecessary length, was objectionable. It did not reach a stage where there was a real danger that the hearing was unfair and the conviction unsafe. The impression made on us by the transcript is that early in the hearing, which regrettably extended over different days and venues, counsel for the defendant signalled or the District Court Judge sensed that the defence was to be run purely on technicalities. Not unnaturally, the judge, expert in road transport law, was put on his mettle. Something of a battle of wits ensued between him and defence counsel and witnesses. We do not disagree with the apparent opinion of Barker J that some of this would have been better left to the perfectly competent counsel for the informant, but the judges foray's appear to us to bespeak a determination to elicit the truth and expose specious arguments, rather than unfairness. We can see no way in which his intervention prejudiced the conduct of the defence. The point and lines of questioning open to the Queens Counsel who conducted the defence were less than strong, but he appears to have been not at all diverted from pursuing them as actively as they permitted.

[170] The test determined in *Cochrane* for such cases as bias and judicial intervention remain current and has been referred to in a number of subsequent cases including the New Zealand Supreme Court in *Saxmere* (Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (no2) [2009] NZ SC 122, 1 NZLR 76 (SC) and *Muir.*

[171] *Saxmere* adopted the 'fair minded observer' test as to whether there was a real possibility of the Tribunal being biased.

[172] In Muir In the New Zealand Court of appeal decision in *Muir v the Commissioner of Inland Revenue* (MUIR v CIR AND ANOR CA CA46/06 7 August 2007), Hammond J on behalf of the Appellant Judges (William Young P, Hammond and Wilson JJ) stated at (64):

[64] It is not possible or desirable to create a catalogue of disqualifiers for judges in which a reasonable apprehension of bias may arise, but some broad principles can be stated. First, a judge should not decide a case on purely personal considerations. Secondly, there should not reasonably be room for a perception that the judge will decide the case on anything but the evidence in front of him or her. Thirdly, a judge must be in a position to consider all potentially relevant arguments. Fourthly, there may conceivably be a series of events or rulings which reasonably warrant an inference that the challenged judge's perception is warped in some way.

[173] We looked at and carefully considered the interventions by the Committee as well as the introduction of the cases. We are satisfied that although the fresh cases of *B, Thornton* and *Bothamley* were introduced by the Committee, it is clear from the transcript that they was raised after Mr Cornege delivered his submissions; not before as was stated by counsel.

[174] With the benefit of hindsight, when the fresh cases were introduced by the Committee, it would have been most useful for the hearing to have adjourned to enable all parties to consider those cases in light of the submissions already given. Perhaps an objection should or could have been raised at the time. It is regrettable that this did not occur, but we do note that fair and reasonable opportunity was subsequently given for additional submissions to be made – (refer below to the penultimate page of hearing transcript):

TU Thank you for that. Mr Westerlund, the precedents that you have provided indicate the majority of fine.

OW Yes.

TU Have you reviewed other precedents within the thoroughbred code that have resulted in anything other than a fine?

OW No.

TU IE you haven't, you didn't review, or you're not aware of any?

OW I'm not aware of any.

TU So just that I am clear, the position of the RIU and of the respondent is that consideration of a period of disqualification, albeit an assault somewhere on the scale, is not the appropriate penalty?

OW I am open to whatever penalty Mr Gately is given, if that makes any sense. I'm only based on what I've read on the precedents that I have submitted and that's always been a fine, apart from the McNabb case where he was disqualified for a month.

NM This one with Miss B, who is, she …, she was killed in a race fall …

OW Yes, yes.

NM She was suspended for six months after assaulting an owner. There was Mrs Thornton assaulting a jockey, she was disqualified for two months. And there was Mr Bothamley who assaulted another jockey and was disqualified for one month.

OW I ... I haven't got any knowledge of those cases.

TU Mr Cornege have you reviewed any other

PC No I haven't.

TU precedents apart from the ones that the RIU submitted?

PC No I haven't no.

TU And your position is quite clear that there should be a period of, a fine is much less restrictive than a period of disqualification.

PC That's right.

TU I guess the issue that we will need to exercise our own minds around is whether a monetary penalty is an appropriate one or whether given there are other cases within the code, and correct the circumstances of which we need to paint a picture around context of where that lies with this current form of offending, whether a period of disqualification is, is the more suitable option. And I gather that in issuing the decision to meet today that you know the committee has made it clear that at, this is an option, and this really is an opportunity for either party to make their views and submissions quite clear on that. I think Mr Cornege you have made that quite clear. The position of the RIU perhaps is a little bit more open in that I think I hear from you Mr Westerlund that, while the fine is essentially on offer, you are open to the fact that that may not necessarily be the final outcome.

OW Yes.

TU Anything further from either parties?

OW No.

[175] In applying the legal tests, we are of the view that the interventions were minimal and the production of the cases ultimately had a limited bearing on the outcome of the case, albeit we don't know exactly how much weight they were given. Having made our point we leave the matter where it lies.

The precedent cases

[176] We have carefully reviewed and considered the precedent cases. We are mindful of the fact that breaches of similar gravity and culpability should, as a general rule attract broadly similar penalties.

[177] We are not convinced that the circumstances of the precedent cases necessarily mirror the circumstances of this case and more importantly none of them relate to an assault on a female by a male.

[178] As we alluded to earlier in this decision although the level of violence in some of the precedent cases may have been greater than this matter; a significant point of difference that none of those cases related to an assault by a male on a female.

[179] The fact no two cases are the same was not lost on counsel for the Appellant and the RIU.

[180] The case of *Dwyer* was one that the Committee did not have the opportunity to consider in their deliberations. We accept there are some parallels, but equally there are points of difference. We hold a similar view in terms of *Vince*. *Cowan* was a dispute between two males that got out of hand. We view *Crozier* and *Rudkin* as a fight and of no assistance.

[181] We accept the circumstances in the *B* decision that resulted in a 6 month penalty were different in nature and gravity to this matter. We also accept that the *Thornton* assault was female on a young apprentice jockey; who like the female victim in this we categorise as being a vulnerable person.

Penalty was excessive and wrong in principle

[182] The Rules of Racing are applied to ensure that licensed persons abide by the rules and integrity in racing is beyond reproach. Judicial Committees in imposing any penalty may have regard to such matters it considers appropriate including *the need to maintain integrity and public confidence in racing (NZTR Rules, r920 (2)(d)* - Decisions of the Judicial Committee). Committees are also guided by the well established sentencing purposes (Sentencing Act purpose includes - holding the offender accountable; promoting in the offender a sense of responsibility; providing for the interests of the victim; denunciation of the offender's conduct; deterrence of both the offender and other persons; and assisting in the offender's rehabilitation and reintegration back into the community) and principles as set out in the Sentencing Act 2002. This Act does not require that any particular purpose be given greater weight than others. The purposes we believe relevant to racing include:

• the gravity of the offending

• the culpability (blameworthiness) of the offender

• the maximum penalty prescribed for the offence

• the desirability of consistency of sentences for similar offending

• the personal circumstances of the offender including personal characteristics which may make a sentence disproportionately severe upon that particular person, and

• whether any restorative justice agreements or terms have been reached

[183] During the hearing before the Judicial Committee counsel submitted *"So what the committee has to do in my submissions is not look at the label per se but actually look at what happened in the previous cases".* Similarly counsel for the Appellant during this hearing submitted that *"this appeal Committee needs to focus on what had occurred and then compare that with the circumstances of the other cases.*

[184] Reflecting on the reserved decision of the Committee, under the circumstances we believe that they did look at the previous cases and we do not believe a 6 month period of disqualification, as a starting point, was too harsh or excessive. Consistent with sentencing principles the Committee gave due consideration to the aggravating and mitigating factors. The Committee also came to their conclusions with regard to comparative cases. Taking those into account the Committee afforded the Appellant a 2 month discount that equates to a third reduction.

[185] The Committee treated as an aggravating factor, the fact that the Appellant was someone who had responsibilities as the stable foreman. We were advised the Appellant was not employed as a foreman, but rather a track rider and truck driver who on the day was the senior responsible person. Other than treating his foreman status as an aggravating factor, we do not know how much weight was

given to this when assessing the penalty (disqualification quantum).

[186] What we do know is that as the senior responsible person the Appellant became quite angry when the victim failed to follow his instructions.

[187] We have, as was suggested by counsel carefully looked at what happened in this case and measured that against other cases. We looked at the manner in which the Appellant reacted to the victim's failure to take heed of his instructions when she was loading the horses on to the float. We think his response was aggressive and disproportionate.

[188] In the *Breslin* case the Appeals Tribunal decision, in determining penalty gave very thoughtful consideration to the relationship that existed between Mr Breslin and his victim. This is what the Tribunal said at paragraphs [50] and [51]:

[50] We have carefully considered whether disqualification or suspension is the appropriate penalty. We have regard to and take considerable assistance from the Judicial Committee's reasoning noted earlier in our decision at [12]. It is persuasive. The last factor identified there is particularly significant. This is the disruptive nature of either of these penalties on a licensed trainer, and the financial consequences, which flow therefrom, whether or not that person is a senior trainer. We have decided, after not a little hesitation, that disqualification or suspension is not required to mark either the gravity of the breach or the respondent's culpability.

[51] A key factor in our determining that such a penalty is not appropriate in this case is the fact that Mr Breslin did not previously know the complainant and thus this breach of the Rules is not a breach of trust involving an industry participant. Were there a relationship between complainant and respondent that was closely connected to racing, or if the breach had the hallmarks of an employer/employee power imbalance, we would view the matter very differently. That said, we are of the view that the penalty has to both recognise and give force to the need to protect the welfare and safety of young women where there has been interaction in a racing environment, as pertained in this case.

[189] This misconduct charge arose from an assault on a young woman in her workplace and the Appellant was the senior responsible employee. As was highlighted in the *Breslin* case above the penalty has to both recognise and give force to the need to protect the welfare and safety of young women in racing.

[190] Albeit the circumstances of both cases are quite different and nature of offending easily distinguishable from one another, we agree that the penalty must reflect the need to afford young women protection in their workplace.

The Result

[191] In the final result we are not minded that the penalty imposed on the Appellant was manifestly excessive or based on a wrong principle.

[192] We confirm the penalty and dismiss the appeal.

Costs

[193] We now invite parties to make submissions as to costs.

[194] We ask that those submissions be lodged with the Executive Officer of the Judicial Control Authority by 3 pm, 7 days after the publication of this decision.

(signed)

Gavin Jones (chairman)

Appeals Tribunal

Penalty: