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

Appeal J Kriechbaumer v RIU - Written Decision of Appeals Tribunal dated 28 January 2019 - Chair, Mr T Utikere

Rules:

Repondent(s)/Other parties:

Name(s):

Decisions:

BEFORE THE APPEALS TRIBUNAL OF THE

JUDICIAL CONTROL AUTHORITY

UNDER THE RACING ACT 2003

IN THE MATTER of the Rules of Harness Racing

BETWEEN J KRIECHBAUMER

Appellant

AND THE RACING INTEGRITY UNIT

Respondent

Appeals Tribunal: Mr T Utikere (Chairman)

Mr P Williams (Member)

Appearances: Mr J Kriechbaumer (Appellant)

Mr T MacFarlane (Representing the Appellant)

Mr S Mulcay (for the RIU)

Hearing: 24 January 2019 at Cambridge Raceway

Date of Oral Decision: 24 January 2019

Date of Written Decision: 28 January 2019

DECISION OF APPEALS TRIBUNAL DATED 28 JANUARY 2019

INTRODUCTION

[1] Following the running of Race 1 (The Grass Track Racing @ Te Aroha 12th Jan Mobile Pace 2200m) at Cambridge Raceway on Friday 28 December 2018, Advanced Amateur Driver Mr Kriechbaumer was charged with a breach of Rule 868(2). The specific allegation was that he "failed to take all reasonable and permissible measures to ensure his gelding was given full opportunity to win the race or to obtain the best possible position and/or finishing place by failing to take the run that had become available in the passing lane early in the run home".

[2] Mr Kriechbaumer, after seeking advice from Senior Horseman Mr McFarlane, admitted the breach, and following a hearing as to penalty, the raceday Judicial Committee imposed a penalty of seven months period of suspension commencing from the close of racing on 4 January 2019 until the close of racing 31 July 2019.

[3] On 29 December 2018, Mr Kriechbaumer lodged an appeal against the **Finding and Penalty** imposed by the raceday Judicial Committee stating in his Notice of Appeal – *"Led to believe to be guilty by RIU...I feel I am not guilty of the charge".*

[4] The Tribunal has received a copy of Mr Kriechbaumer's Notice of Appeal, the Notice of Appointment of the Appeals Tribunal, the Raceday Decision from the Waikato Bay of Plenty Harness Meeting on 28 December 2018 and the transcript of the Raceday hearing.

[5] A pre-conference hearing with all parties was held via telephone on 7 January during which Mr McFarlane confirmed that the Appellant wished to abandon the Finding component of the Appeal, and wished to continue on basis that it was an appeal related to Penalty only. A Stay of Penalty was sought, but was declined by the Tribunal. A Minute that details all of these preliminary matters is appendiced to this Decision for completeness.

[6] An oral hearing took place prior to racing at Cambridge Raceway on Thursday 24 January. At the commencement of the hearing, Mr McFarlane confirmed that while the Appellant was seeking a reduction in the term of suspension, a combination of suspension and fine of no more than $300, could be an option. The Tribunal indicated that was at odds with what was expressed during the pre-conference hearing, but would form part of what was to be considered by the Tribunal.

ANALYSIS OF THE BREACH

[7] Using the side-on film, Mr Mulcay identified the field racing around the final turn by the 400m, with HIGHVIEW JUSTICE (Mr Kriechbaumer) four back on the pegs. Racing forward of him was CAPITAL PLAN (D Blakemore), trailing the leader was RACKETEERS BOY (K Hall), and the leader was ARMSTRONG (S Phillips).

[8] Mr Mulcay said at this point in the Race Mr Blakemore shifted out to a position one out, and Mr Kriechbaumer had then gone forward to fill that space. He had then improved onto the back of RACKETEERS BOY and raced in restricted room, picking up the wheel of ARMSTRONG late in the run home.

[9] Using the head-on film, Mr Mulcay identified Mr Blakemore shifting away from the pegs, whilst ARMSTRONG commenced to shift under pressure rounding the final turn. On reaching the entrance to the Passing Lane, ARMSTRONG was approximately one cart off the markers line and RACKETEERS BOY all but became the leading horse on the markers. Mr Mulcay stated that there was enough doubt on the night as to whether or not that horse had become the leading horse.

[10] Stewards noted that at that point, Mr Hall's obligation was to maintain a straight, uninterrupted run to the line, which he had done so. This meant the Passing Lane became available to Mr Kriechbaumer at the 180m for 30 to 40 metres. However, Mr Kriechbaumer chose not to take it and instead shifted to the outside of RACKETEERS BOY despite the fact there was no clear run available to him at that time.

[11] In order for Mr Kriechbaumer to gain a run to his outside, the RIU believed he was dependent on other factors beyond his control; such as one or more horses shifting significantly to allow him through. Mr Mulcay submitted that where Mr Kriechbaumer had sought to go, there was insufficient room to improve his horse and sulky between RACKETEERS BOY and ARMSTRONG.

[12] The back straight film identified that HIGHVIEW JUSTICE was finishing strongly and making ground on the leaders before it was taken to the outside, but was unable to improve in that position. It was the Stewards' contention that it was reasonable and permissible to expect Mr Kriechbaumer to take the Passing Lane, and he did not and on that basis the charge was preferred against the Appellant. The RIU expected a prudent driver in that circumstance to assess, recognise and take the run that became available for some 30 to 40 metres. Mr Mulcay did not believe this was a split second decision between two options that may be advantageous; instead this occurred over a prolonged period where Mr Kriechbaumer had clearly taken the lesser option.

[13] In response to a question from the Tribunal, Mr Mulcay confirmed that the fact HIGHVIEW JUSTICE had locked wheels with ARMSTRONG close to the line reinforced his assertion that there was insufficient room for Mr Kriechbaumer to improve where he did in the run home.

[14] Using the side-on film at the 400m, Mr McFarlane confirmed that Mr Kriechbaumer was four deep on the fence, and that usually a horse in that position at that stage of the race had limited options; specifically that Mr Kriechbaumer had a mindset to look for an outside run at that time. The three-back horse was still in position, so Mr Kriechbaumer was of a mindset that the trailing horse was to take the Passing Lane, hence his desire to seek an outside run.

[15] As ARMSTRONG had continued to drift out, the gap had widened to Mr Kriechbaumer's outside, and created an opening for him. Mr McFarlane pointed out that ARMSTRONG had only stopped shifting when there was a risk that it was to clip a wheel.

[16] The Passing Lane was only there for one horse, and as the gap he had seen to his outside was widening, he had made that decision at the time. He said that the Appellant was an amateur driver, but had limited driving opportunities and that it was hard to compare him with professional drivers. Mr McFarlane accepted that the Appellant was 'experienced' in terms of being an amateur driver, but for the number of drives that he has, he was far from experienced compared with other drivers. He submitted that his tally of 135 drives over 11 seasons indicated that he lacked experience.

[17] Mr MacFarlane also used the films to identify that Mr Kriechbaumer had used his whip to go where he had, and that the horse was simply not good enough, referring to the times that were run for the race, with Mr Mulcay confirming the last 800m was run in 56.8. Mr McFarlane re-emphasised that HIGHVIEW JUSTICE was going as quick as it could at the time and had a record of two wins from 40 starts, so its record was not very compelling.

[18] In response to questions from the Tribunal about the Appellant's experience, Mr McFarlane responded that while it might be an automatic reaction for a professional driver to simply move into the Passing Lane, this was not the case for an amateur; which he described, with respect, as being "inept or unskillful". He submitted that amateur drivers did what they did because of their love for the horses, racing and the adrenaline rush they got.

[19] In response, Mr Mulcay said that the Appellant may have had the mindset described at the 400m, but that he had 220m to change this. The Stewards did not believe there to be a full run to his outside at any stage, and that Mr Kriechbaumer was fully reliant on external matters beyond his control in seeking an outside run.

RESPONDENT'S VIEWS ON APPROPRIATE PENALTY

[20] Mr Mulcay confirmed that the position of the RIU was in support of the penalty imposed by the Raceday Judicial Committee. In support of this position, he referred to the reasons identified in the Committee's written decision.

[21] He believed the Committee had applied Mr Kriechbaumer's admission of the breach and his clear record under the rule in mitigation. They had accurately placed the offending in the 'mid to upper range' and described it as a "bad mistake" on the part of the driver. The Committee had considered the Appellant's experience and driving record, along with the impact upon the betting public and concerns around the integrity of the harness racing industry. Mr Mulcay believed there was a requirement for penalties to be meaningful and relevant, with a need for general and specific deterrence.

[22] He said that this was not a rule that the RIU often encountered and therefore a breach must require a meaningful sanction. He submitted that the written decision detailed the Committee's reasoning and rationale and that they had undertaken an objective analysis of the situation, alongside other penalties imposed by other judicial committees. It was also clear to him that the decision was not one that was taken lightly by the Raceday Committee.

[23] The RIU submitted that there were two overriding issues for determination. Firstly, whether the JCA Penalty Guidelines applied to Amateur Horsemen; and if so, whether the penalty imposed was manifestly excessive given the seriousness of the breach.

[24] In the absence of any evidence to the contrary, he submitted that the Penalty Guidelines applied to Open, Graduation and Junior Horseman and Amateur Drivers. He also did not believe the penalty to be manifestly excessive in these circumstances.

[25] In response to a question from the Tribunal, Mr Mulcay confirmed that he concurred with the Raceday Committee's analysis that a 7 months suspension would equate to 14 or 15 driving opportunities for the Appellant.

APPELLANT'S VIEWS ON APPROPRIATE PENALTY

[26] Mr McFarlane identified that the word "Amateur" occurred in the race headings on the HRNZ website, racebooks and throughout TABs, so the betting public would know that the Race on 28 December 2018 was an amateur drivers race; so the impact of Mr Kriechbaumer's actions upon them should not be a major consideration.

[27] The JCA Penalty Guidelines starting point of a 20 drives suspension meant it was hard to compare Amateurs with Open Horsemen. He believed the Rules were written to be applied to Open Horsemen and were not to be taken into account for amateurs.

[28] With reference to previous breaches of Rule 868(2), Mr McFarlane identified comments made by the Chief Stipendiary Steward, Mr Ydgren that indicated a different approach to penalty for Amateur horsemen. He referred to the following comments contained in written decisions for previous breaches of the rule:

"Mr Ydgren submitted that it was difficult arriving at penalty under this Rule in the case of amateur drivers who drive only twice a month at most, whereas the Penalty Guide suggests a starting point of a 20 drives' suspension. To use that starting point would result in a penalty which "far outweighs the crime" (Decision of Judicial Committee, *RIU v S Blake,* Rangiora HRC, 8 April 2018).

"The JCA Penalty Guidelines are set for drivers who drive more frequently than Mr McCormick does. Mr Ydgren said that if we apply them with rigidity we finish up with a penalty akin to "cracking a walnut with a sledgehammer" (Decision of Judicial Committee*, RIU v D McCormick,* NZ Metro TC, 16 March 2018).

[29] Mr McFarlane also referred to the Non-Raceday Inquiry Decision of *RIU v R Paynter* (Decision of Non-Raceday Judicial Committee, *RIU v R Paynter,* Dated 12 February 2018), who had less drives than amateurs and the penalty was a four months suspension along with a $350 fine. He also submitted copies of other previous decisions (Decisions of Judicial Committees for *RIU v G Cronin* (HR Waikato, 14 May 2015), *RIU v M Hallett* (NZ Metro TC, 12 December 2015) and *RIU v J McDermott* (Rangiora HRC, 8 April 2018) that he believed were relevant, with most of the penalties being in the range of an 8 to 12 weeks suspension, along with fines in some cases.

[30] He believed that these previous decisions reinforced the inference that the Penalty Guideline for the rule was targeted at Open Horsemen and that an appropriate penalty in this circumstance was not the number of drives, but the amount of time that would be served.

[31] The Appellant was prepared to pay a fine if that allowed him the opportunity to drive, and Mr McFarlane said that a fine was still going to hurt. Mr Kriechbaumer had purchased HIGHVIEW JUSTICE from the South Island, and it costs him $30 per day just to maintain the horse, so it was clear that his involvement came at a huge financial cost to him. He was like other hobby trainers and drivers who did what they did for the love of horses and racing, not for the money.

[32] Mr McFarlane submitted that Mr Kriechbaumer's breach sat at the low to mid range, not within the high range. This was because the Appellant had simply made an error of judgement, but at all times he had tried to win the race, making moves to better his position; they were just the wrong moves.

[33] In response, Mr Mulcay advised he was familiar with the cases that the Appellant had referred to, and cited that the breach was deemed to be within the low to mid range for *Blake* and *McDermott*, quite different from the current breach before the Tribunal. He was also aware of the comments attributed to Mr Ydgren, but advised that there was no set policy around that approach throughout the Stewards' panel. Mr Mulcay was also aware of previous breaches, where the penalties imposed were significantly greater than the penalty imposed on this occasion. He reiterated that the Raceday Committee had considerable difficulty in settling on an appropriate penalty, and that was understandable; but that each case turned on its own merits.

[34] Mr McFarlane confirmed that if the adopted starting point was 20 drives, then the 7 months suspension equated to a 30 percent reduction by the Raceday Committee for mitigation. On the basis of a maximum of 2 drives most months for Mr Kriechbaumer he accepted the 7 month suspension equated to between 10 and 14 drives.

[35] When invited to specify what sort of reduction in penalty the Appellant was specifically seeking, Mr McFarlane was not prepared to specify anything other than a result that would lead to a period of suspension at a lower level than that imposed by the Raceday Committee, and not more than four months.

REASONS FOR DECISION

[36] The Tribunal has considered the submissions that have been placed before it, and has had an opportunity to review the relevant films of the raceday incident. It is clear that Mr Kriechbaumer accepts that he had made an error of judgement, which we also accept. The RIU contends, and the Appellant accepts, that he should have taken the Passing Lane upon entering the home straight, but he did not. Mr McFarlane submits that his decision not to, was due to his mindset at the time.

[37] The way that Mr Kriechbaumer was thinking at the 400m, should not cloud his judgement for the rest of the race. It is clear that the Passing Lane was available, and as Mr McFarlane suggests, the Lane is only available for one horse, and in the context of this race, HIGHVIEW JUSTICE was that horse.

[38] There was plenty of room for Mr Kriechbaumer to move into the Passing Lane. We assess that the Lane was available to HIGHVIEW JUSTICE for a distance of at least 30-40 metres, and that it was not unreasonable to expect someone of Mr Kriechbaumer's experience as an Advanced Amateur Driver to take it.

[39] We do not know where HIGHVIEW JUSTICE would have finished, but it is apparent that it would have had an uninterrupted run to the line if the Passing Lane had been utilised. The side-on and back straight films clearly demonstrated that HIGHVIEW JUSTICE was making good ground from around the 400m point which refutes the suggestion from the Appellant that the horse was not doing well. The suggestion that the previous performance of the horse and the times that were run in the race the offence occurred are irrelevant to the charge before us.

[40] Much of the Appellant's argument relies on the incorrect assumption that the Rules do not apply to Amateur Licence holders to the similar extent that they should apply to Open Horsemen. That is a fallacy. In the context of this charge, the provision of this particular rule applies to all drivers, regardless of the classification of licence that is held that permits them to drive. To suggest otherwise, would call into question the integrity that the betting public expect to be apparent when they invest their monies.

[41] Mr McFarlane has suggested a combination of a period of suspension and a fine to allow the Appellant to take up driving opportunities during the latter part of the current seven month period. The discretion to impose a fine in lieu of any period of suspension, in part or in full, did rest with the Raceday Committee.

[42] It is clear that the Raceday Committee had some angst at arriving at what would be considered a meaningful penalty for someone with comparatively limited driving opportunities. While previous decisions do aid with consistency, that should not cloud the requirement for Raceday Judicial Committees to exercise their discretion based on the specific circumstances of the breach before them.

[43] Upon review of the Raceday transcript, Mr Kriechbaumer did raise this as an option, but the Chairman seemed to rule that option out, without giving him the opportunity to submit why such a sanction might be appropriate. Nonetheless, based on our review of the films, and the previous cases that both parties have referred us to, we consider the inclusion of a fine in a penalty to be inappropriate.

[44] The JCA Penalty Guidelines identifies a 20 drives starting point. We accept that a seven months suspension equates to approximately 14 drives, and this is not disputed by Mr Mulcay or Mr McFarlane. The Raceday Committee's assessment is that the seriousness of the breach fell at the mid to upper range.

[45] Our independent assessment places the breach above mid-range. That would lead us to a starting point higher than 20 drives. If we appropriately apply mitigation for the Appellant's record and admission of the breach of 25 to 30 percent, that would lead us to an end result that is higher than a seven months period of suspension.

[46] Accordingly, when we consider our own findings against the decision of the Raceday Committee, we do not consider the Committee's penalty to be manifestly excessive.

DECISION

[47] The Appeal is dismissed and the Raceday Judicial Committee's Penalty is confirmed. As no Stay of penalty is in operation, Mr Kriechbaumer's licence to drive remains suspended from the conclusion of racing on 4 January 2019 until the conclusion of racing on 31 July 2019; a period of seven months.

COSTS

[48] As the Appeal is unsuccessful, Mr Mulcay seeks costs for preparing the transcript, which was $103.50 (including GST). At the Hearing, the Tribunal advised that its decision on costs was reserved. Having reviewed the invoice information provided by Mr Mulcay, the Tribunal considers it appropriate for the Appellant to meet approximately 50 percent of what has been sought be the RIU.

[49] There is a costs order in favour of the RIU for $50.00. While costs have been incurred by the JCA, as the hearing occurred on a raceday, those costs will lie where they fall.

Signed at Palmerston North this 28th day of January 2019.

Mr Tangi Utikere

Chairman

BEFORE THE APPEALS TRIBUNAL OF THE

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UNDER THE RACING ACT 2003

IN THE MATTER of the Rules of Harness Racing

BETWEEN J KRIECHBAUMER

Appellant

AND THE RACING INTEGRITY UNIT

Respondent

Appeals Tribunal: Mr T Utikere (Chairman)

Mr P Williams (Member)

Parties: Mr J Kriechbaumer (Appellant)

Mr T MacFarlane (Representing the Appellant)

Mr S Mulcay (for the RIU)

Mr N Ydgren (RIU - Chief Stipendiary Steward)

Registrar: Ms C Hutton

MINUTE OF APPEALS TRIBUNAL DATED 7 JANUARY 2019

[1] Mr Kriechbaumer has filed a *Notice of Appeal* in relation to the 'Finding and Penalty' imposed by a Raceday Judicial Committee for a breach of Rule 868(2) at the Cambridge Harness Racing Club's Meeting on 28 December 2018.

[2] The Tribunal has received the Appellant's *Notice of Appeal* which details aspects of the grounds of appeal as "Led to believe to be guilty by RIU".

[3] It is rare for an appeal to be lodged against the 'Finding' of a Judicial Committee where the basis of the guilty finding is the entering of a guilty plea by the Appellant on a raceday.

[4] All parties participated in a teleconference, which took place this morning. The Appellant has advised the Tribunal that Mr MacFarlane is representing him. The purpose of the teleconference was three-fold:

a) To hear submissions from both parties on the appropriateness of the Tribunal to grant leave to consider the Appeal against the Raceday Committee's finding that Mr Kriechbaumer was guilty of the charge, distinct from an appeal against the penalty that was imposed.

b) To confirm other process matters, including the date and location of the Appeal Hearing.

c) To hear submissions on the Application for a Stay of the Penalty imposed by the Raceday Judicial Committee.

[5] As identified in para [3] above, Mr Kriechbaumer pleaded guilty to the charge. During the teleconference, Mr MacFarlane advised that the Appellant wished to abandon the 'Finding' aspect of his appeal. The Tribunal grants Leave for that to occur.

[6] If the Appeal was to now proceed on the basis of an *in-person* hearing, Mr Mulcay submitted a preference to have the matter heard on a raceday as relevant films and equipment would be easily available. He suggested three (3) hours prior to racing at Cambridge on 24 January as suitable; with the concurrence of the Appellant. That date is also suitable to the Tribunal.

[7] The Appellant's *Notice of Appeal* also seeks a Stay of the Penalty, on the grounds that he feels he is not guilty of the charge. Mr MacFarlane confirmed that although Mr Kriechbaumer now accepted he was guilty of the charge, he still wished to pursue a Stay so that any period of suspension could commence after the hearing on 24 January. He has also confirmed that the Appeal now related to the length of suspension, not that a suspension be replaced with a fine.

[8] The RIU have opposed the granting of a Stay, due to Mr Kriechbaumer entering a guilty plea on the night of the hearing, and the granting of a deferment to allow him to drive on 4 January. Mr Ydgren also identifies that if the Appeal is successful, then any reduction in penalty could take account of time already served under the period of suspension currently in force.

[9] The Tribunal has reviewed the Raceday Judicial Committee's Written Decision, which has also been circulated to both parties. It is clear from that Decision that the Appellant has limited driving opportunities that appear to be restricted to the Waikato/Bay of Plenty Region. Mr Kriechbaumer may refute that, but in any event as the appeal relates to the length of the term of suspension, granting a Stay until the 24 January would simply seek to provide convenience to the Appellant. In such circumstances, we are not convinced that a stay is appropriate.

[10] The following directions are made:

A. Leave is granted for the abandonment of the 'Finding' aspect identified in the Appellant's *Notice of Appeal*. As such, the Appeal will proceed on the basis of an Appeal against the 'Penalty Only' imposed by the Raceday Judicial Committee.

B. The Appeal will be heard at Cambridge Raceway on Thursday 24 January, commencing at 2.30pm. Mr Mulcay will ensure all the necessary films are available for the Hearing.

C. The RIU will arrange for the transcript of the Raceday Hearing to be transcribed. It is to be made available to the Tribunal no later than two (2) days prior to the Hearing.

D. The Appellant's Application for a Stay of Penalty is declined.

E. If there are any issues that arise in advance of the Hearing, parties are to make contact with the Tribunal via the Executive Officer of the JCA.

Signed at Palmerston North this 7th day of January 2019.

Mr Tangi Utikere

Chairman

Penalty: