

Appeal O Bosson v RIU - Reasons Decision of Appeals Tribunal dated 12 January 2021 and Decision of Appeals Tribunal dated 10 January 2021 - Chair, Mr M McKechnie

Rules:

Repondent(s)/Other parties:

Name(s):

Decisions:

BEFORE AN APPEALS TRIBUNAL

OF THE JUDICIAL CONTROL AUTHORITY

UNDER THE RACING ACT 2003

IN THE MATTER OF New Zealand Thoroughbred Racing Rules

BETWEEN OWEN PATRICK BOSSON (known as Opie Bosson)

APPELLANT

AND THE RACING INTEGRITY UNIT (RIU)

RESPONDENT

Appeals Tribunal: Mr Murray McKechnie, Chairman & Mr Noel McCutcheon

Present: Mr Bosson, Class A Jockey

Mr Paul Dale QC, Counsel for Mr Bosson

Mr David Ellis, Te Akau Racing

Mr John Oatham, Chief Stipendiary Steward

Mr Matthew Williamson, Stipendiary Steward

REASONS DECISION OF APPEALS TRIBUNAL

DATED THIS 12th DAY OF JANUARY 2021

1. INTRODUCTION

1.1 Mr Bosson is widely recognised both in New Zealand and Australia as one of the most gifted and successful Thoroughbred Jockeys.

1.2 On New Year's Day at Ellerslie Mr Bosson was twice charged with careless riding in breach of Rule 638(1)(d) of the NZTR Rules of Racing. The particulars of each charge were as follows:

- In Race 3, the Barnswood Farm Eclipse Stakes, a Group 2 Race, it was alleged that Mr Bosson, the rider of *Sword of State* permitted his mount to shift in near the 1100 metres when not clear of *Brix* which was crowded on to *Imperatrix* which was crowded and steadied.
- In Race 4 it was alleged that Mr Bosson as the rider of *Illusion of Paris* permitted his mount to shift in near the 1400 metres when not sufficiently clear of *Ezdara* which had to be steadied to avoid the runner's heels, shifting in and crowding *Sweet Anna* with *Fleetwood Maca* clipping a heel and blundering.

1.3 Mr Bosson pleaded guilty to both charges.

2. PENALTIES

2.1 In respect of Race 3 Mr Bosson's licence was suspended for a period of five days commencing after racing on 4 January 2021 and concluding after racing on 15 January 2021.

2.2 In respect of Race 4 Mr Bosson's licence was suspended for a period of six days commencing after racing on 15 January 2021 and concluding after racing on 28 January 2021.

2.3 In respect of the charge arising from Race 3 Mr Bosson was in addition to the suspension fined the sum of \$450.00. In respect of Race 4 in addition to the suspension there was a fine imposed of \$750.00.

3. APPEALS

3.1 Mr Bosson appealed the penalties in respect of both charges.

3.2 A hearing of the Appeals took place at Ellerslie on the morning of 10 January 2021 before the commencement of racing. The hearing extended over some time and there was not sufficient time to deliver a fully detailed decision. Moreover, there were a number of issues which required further consideration by the Tribunal. A decision was given on the morning of 10 January 2021. That decision should be read alongside what is set out here. The Tribunal ruled that the Appeals were to be dismissed and that the Raceday Judicial Committee decisions in respect of both races 3 and 4 were to be upheld. That decision went on to advise that this *reasons for decision* would follow promptly.

4. SUBMISSIONS FOR MR BOSSON

4.1 In written submissions filed in advance of the hearing on 10 January Mr Dale, Counsel for Mr Bosson, summarised his position as follows:

"The Appellant's position is that a just and proportionate outcome would be achieved by way of a reduced suspension period and an increased fine".

4.2 In the course of oral submissions Mr Dale went so far as to suggest that no suspension should have been imposed upon either charge and that fines would have been appropriate in each case. When questioned by the Tribunal as to whether there had ever been an instance of a case of careless riding resulting in a monetary penalty without any suspension, Mr Dale was unable to furnish any such example. For his part Mr Oatham said he knew of no such case. For its part the Tribunal Members know of no such outcome.

4.3 It became apparent during the course of the oral submissions from Mr Dale that he had not seen or read the decisions of the Raceday Judicial Committee. It follows that the submissions that he prepared which are dated 7 January 2021 were drafted without reference to what had been said by the Raceday Judicial Committee. This was a very unsatisfactory situation. The decisions of the Raceday Judicial Committee were available on the JCA website and could easily have been obtained by making contact – either by email or on the direct line – with the Executive Officer of the JCA. Mr Dale should have obtained copies of the two race day decisions, certainly before the commencement of the hearing of the Appeal on 10 January.

4.4 It was necessary to adjourn the hearing on 10 January and make copies of the Raceday Judicial decisions available to Mr Dale. Thereafter he resumed his oral submissions in support of the earlier filed written submissions.

4.5 The Tribunal has carefully considered the decisions of the Raceday Judicial Committee. These are careful and comprehensive. They are more detailed than is often the case with decisions of Raceday Committees. This clearly reflects the Committee's recognition that the consequences of whatever penalty was imposed would be significant given the upcoming racing programme in New Zealand through the immediate future. More will be said of that later in this decision.

4.6 At the forefront of Mr Dale's submissions was reference to the upcoming racing programme spoken of in the previous paragraph. These were set out as follows:

- a. Marton Cup Day at Awapuni on 9 January 2021, offering stakes of \$235,000.
- b. Ginger Nuts Salver Meeting at Ellerslie on 10 January 2021, offering stakes of \$240,000.
- c. Group One Telegraph Handicap and Levin Day at Trentham on 16 January 2021, offering stakes of \$785,000.
- d. Karaka Million Day at Ellerslie on 23 January 2021, offering stakes of \$2.34 million. That includes two of only three \$1,000,000 races on the New Zealand Racing Calendar.

It was contended that the suspensions had the potential to cause a loss of income of as much as \$80,000. This it was said would result from the possibility of earning \$55,000 in riding fees in respect of the two \$1M Karaka races. It was pointed out that Mr Bosson is likely to be riding well-fancied horses in those two races. Further, that he had been booked to ride the favourite *Brando* at Trentham in a \$200,000 race and also the favourite *Avantage* in the time honoured Telegraph Handicap. By reference to what has just been said in the submissions advanced, it was said that this might lead to what was described as "a very real risk of a substantially disproportionate penalty being incurred". It was submitted by Mr Dale that this claimed disproportionate outcome could be addressed by shorter periods of suspension and an increased fine.

4.7 Mr Dale made reference to the decisions of the Appeals Tribunal in *McDonald v RIU* 31 January 2020 and 4 February 2020. The Tribunal finds those decisions to bear little comparison with the factual circumstances that exist here. The Tribunal has no issue whatever with the reasoning in the decisions in *McDonald*: indeed, Mr McCutcheon was a member of the Appeals Tribunal in

McDonald. Mr McDonald is a Jockey based in Australia. His career began in New Zealand. The difficulty which the Appeals Tribunal faced in that case was to find an appropriate period of suspension having regard to the frequency with which Mr McDonald would be riding in Australia and how the penalty expressed in terms of the New Zealand Rules would affect his opportunities upon return to Australia. This Tribunal accepts that the fixing of penalties is not – as set out in the McDonald decisions – “a formulaic or arithmetical exercise bound by originally laid down rules”. The McDonald decisions go on to point out that the Guidelines as to penalties are simply that and that the Raceday Committee or Appeals Tribunal retains a discretion to determine a penalty that reflects many aspects which may surround the particular offence(s) and the offender.

4.8 With reference to the submission that there should be a reduction in the periods of suspension and an increase in the fines it was said, inter alia, that the risk of suspension could operate as a deterrent for senior riders to take part in minor meetings. There was also reference to the shortage of riders in New Zealand and that overseas replacements are not available given the Covid pandemic. It was said further that the loss of a rider as popular as Mr Bosson could have a negative impact on the Industry. The popularity of a Licenced Jockey is not a consideration that should be taken account of when fixing penalty. All Jockeys must be treated equally and reference to their success or previous offending is relevant, but “popularity” cannot be a relevant consideration.

4.9 Mr Dale’s submissions pointed to Mr Bosson’s outstanding record. That is acknowledged and accepted by the Tribunal: reference paragraph 1.1 above.

4.10 Further it was said that there was likely to be some difficulty in finding a replacement senior rider. The material and submissions put forward in support of that submission were unconvincing. In any event the Tribunal is of the view that the difficulty that might arise in obtaining a replacement rider is not a relevant consideration when fixing the appropriate penalty. Of relevance is the rider’s degree of culpability – that is to say the level of carelessness, his or her record and importantly consistency with other penalties imposed for similar offending in similar circumstances.

4.11 It was submitted in conclusion that Mr Bosson was not seeking special treatment but rather penalties consistent with the NZTR revised Penalty Guidelines. Those came into effect on 9 December 2020 and are conspicuously less severe than was previously the case. Further it was said that there were particular reasons in relation to the timing of the suspension and the probable losses that would occur to Mr Bosson which would be out of all proportion to the level of offending. For reasons explained above the possible loss of opportunities and income is not a significant consideration to which a Raceday Committee should have regard. Mr Bosson would have been well aware of the upcoming opportunities at meetings through the balance of January. In such circumstances it might have been appropriate to exercise a greater degree of prudence in the conduct of rides than might otherwise have been the case.

4.12 Mr David Ellis addressed the Tribunal in support of Mr Bosson’s Appeals. He is a principal of Te Akau Racing and his significant role in the Thoroughbred Industry is well known to the Tribunal. Further it is well known to the Tribunal that horses trained for Te Akau by Mr Jamie Richards are very frequently ridden by Mr Bosson. Mr Ellis spoke in impassioned terms about the effect of the Covid pandemic. He proposed that the Rules needed to be applied differently in consequence. He emphasised the difficulty there might be in obtaining replacement Jockeys and the inability to engage riders from Australia. He proposed fines rather than suspension and sought to assure the Committee that such fines would be paid by Mr Bosson personally.

4.13 With reference to Race 3 Mr Ellis provided some information to the Tribunal. Both the horse ridden by Mr Bosson, *Sword of State* and one of the horses that suffered from interference, *Imperatrix* were racing for Te Akau. *Imperatrix* was ridden by Ms Danielle Johnson. Mr Ellis explained that he had given her instructions to take the horse back. He contended that she was endeavouring to do that when the interference occurred. *Imperatrix* won the race.

4.14 Mr Ellis spoke of Mr Bosson’s outstanding record riding for Te Akau. That is well known to the Tribunal.

4.15 There was written material put before the Tribunal in support of Mr Bosson’s Appeals. This from the organisation known as “Boys Get Paid”. This spoke of Mr Bosson’s huge impact on the Karaka Million racing and how unfortunate it would be if Mr Bosson were not able to ride on that occasion. It was explained that *Boys Get Paid* would have some 850 people present on Karaka night.

4.16 The Tribunal was furnished with a letter of support addressed to the Chief Stipendiary Steward from Mr Brendon Lindsay, principal of Cambridge Stud. This spoke of the effect of Mr Bosson’s absence on Karaka Million night and what a significant event that is in the New Zealand Racing Calendar.

4.17 A letter of support for Mr Bosson was furnished by Mr Paul Wilcox, the CEO of the Auckland Racing Club.

4.18 The Tribunal has carefully considered the letters of support. With respect they do not directly bear upon the appropriateness or otherwise of the penalties imposed by the Raceday Judicial Committee. Rather they speak of Mr Bosson’s acknowledged ability and the effect that might follow from his not being able to ride on Karaka Million night. In that regard it is appropriate to point out that Mr Bosson’s inability to ride on Karaka Million night as a result of the penalties that were imposed was expressly addressed and brought to account by the Raceday Judicial Committee with reference to Race 4. The relevant passage is in the concluding paragraph on page three of the decision of the Raceday Judicial Committee.

5. POSITION OF THE RIU

5.1 Mr Oatham filed written submissions and addressed the Tribunal in support of those.

5.2 It was pointed out that both breaches had occurred in Group Two status Races, each carrying a stake of \$100,000. Importantly the RIU acknowledged that the level of carelessness was assessed as low range by the RIU and that this assessment was accepted by the Raceday Judicial Committee. Further it was said that the Committee applied the four national riding days and \$250.00 fine starting point with reference to the revised Penalty Guidelines spoken of earlier and which came into effect as recently as 9 December last.

5.3 The RIU submissions acknowledged that Mr Bosson has a good record over an extended period.

5.4 The RIU submissions sought to distinguish the decisions of the Tribunal in *RIU v McDonald*. This essentially on the grounds that set out earlier in this decision at paragraph 4.7 above. At the risk of repetition, the Tribunal does not find those judgments to bear a meaningful comparison to the circumstances here.

5.5 The RIU submissions concluded by contending that the combination of suspension and fine was in terms of the NZTR Penalty Guidelines and that nothing in the decisions of the Raceday Judicial Committee were inappropriate nor were the penalties manifestly excessive.

6. VIEWING THE FILMS

6.1 The Tribunal viewed the films of both races from all available angles. The films were commented upon by Mr Dale, Mr Bosson and Mr Ellis and also by Mr Oatham on behalf of the RIU. There was a consensus, as there had been on raceday, that it was low level carelessness in each case. Further that there were some mitigating circumstances. In Race 3 it was acknowledged by Mr Oatham that the 1200 metre start point at Ellerslie can be "tricky". It was acknowledged by the RIU that Mr Bosson was riding an inexperienced two year old. Further that the horse *Brix* had less than ideal racing manners.

6.2 With reference to Race 4 it was acknowledged by the RIU and plainly observed by the Tribunal in viewing the films that the mount of Ms Fawcett the horse *Ezdara* was racing ungenerously. That in part contributed to the consequences which arose from Mr Bosson's inward shift when having inadequate clearance from the horse on his inside. This state of affairs is expressly acknowledged in the decision of the Raceday Committee. Mr Bosson told the Tribunal with reference to Race 4 that both his horse, *Illusion of Paris* and the mount of Ms Fawcett, *Ezdara* were very green. He said further that his horse changed legs when it moved in and that in his view Ms Fawcett could have done more to alleviate the situation.

6.3 Mr Dale described the degree of carelessness in both cases as "low low level". That is not an expression which is recognised in the Penalty Guidelines nor has it been adopted by Raceday Judicial Committees or Appeal Tribunals hitherto.

6.4 The Tribunal is satisfied having carefully studied all the films and heard the submissions made in relation to them that the assessment of low range carelessness was appropriate in each case.

7. DISCUSSION

7.1 The penalties imposed by the Raceday Judicial Committee were entirely orthodox. They followed the Penalty Guide in place post 9 December 2020. As earlier remarked that Penalty Guide provides for reduced suspensions and fines compared with the earlier position.

7.2 What was proposed on behalf of Mr Bosson was a major departure from the Penalty Guide and significantly a major departure from the consistent penalties which have been applied for careless riding over an extended period of time: that is to say an appropriate period of suspension together, in most cases, with a monetary penalty.

7.3 The proposition that upcoming significant race meetings at which Mr Bosson might play a prominent role should be a reason for departing from the penalty guide and the consistent application of penalties hitherto is unconvincing. It would lead to a situation where there would be unacceptable uncertainty going forward as to the circumstances in which suspension might or might not be appropriate or where some reduction in suspension and increase in fines might or might not be appropriate. All riders must obey the same Rules and accept the same outcomes if those Rules are breached having regard of course to the individual rider's record and the circumstances of the offending. We are satisfied that the Raceday Judicial Committee approached the fixing of penalties in a manner that was entirely orthodox and appropriate. The decisions carefully explain how the penalties were arrived at and appropriate uplifts and discounts were applied. The decisions of the Raceday Judicial Committee expressly made reference to Rule 920(2). That Rule is in the following terms:

(2) On finding a breach proved the Judicial Committee may impose any penalty provided by the Rules. In imposing a penalty provided in these Rules the Judicial Committee may have regard to such matters as it considers appropriate including:

(a) The status of the Race;

(b) The stake payable in respect of the Race;

(c) Any consequential effects upon any person or horse as a result of the breach of the Rule; and/or

(d) The need to maintain integrity and public confidence in racing.

Plainly the Rule indicates that the more significant the status of the Race and the more significant the stake payable the greater the probability that some uplift may be applied to the period of suspension.

7.4 While there can be some sympathy for the predicament in which Mr Bosson now finds himself there are no grounds to overturn or alter the penalty decisions set by the Raceday Judicial Committee in respect of Races 3 and 4 at Ellerslie on New Year's Day and for all of the reasons set out here the appeals are dismissed.

8. COSTS

8.1 Any submissions on the issue of costs, whether that be sought as between the Parties or with reference to costs that might be payable as a contribution towards the expenses incurred by the JCA, are to be filed with the Executive Officer of the JCA not later than 3pm on Monday next, 18 January 2021.

DATED this 12th day of January 2021

Murray McKechnie

Chairman

(Signed pursuant to Rule 1007(5))

BEFORE AN APPEALS TRIBUNAL

OF THE JUDICIAL CONTROL AUTHORITY UNDER THE RACING ACT 2003

IN THE MATTER OF New Zealand Thoroughbred Racing Rules

BETWEEN OWEN PATRICK BOSSON (known as Opie Bosson)

APPELLANT

AND THE RACING INTEGRITY UNIT (RIU)

RESPONDENT

Appeals Tribunal: Mr Murray McKechnie, Chairman & Mr Noel McCutcheon

Present: Mr Bosson, Class A Jockey

Mr Paul Dale QC, Counsel for Mr Bosson

Mr David Ellis, Te Akau Racing

Mr John Oatham, Chief Stipendiary Steward

Mr Matthew Williamson, Stipendiary Steward

DECISION OF APPEALS TRIBUNAL

DATED THIS 10th DAY OF JANUARY 2021

At the Auckland Racing Club meeting on New Year's Day Mr Bosson was charged with careless riding following Race 3 and charged again with careless riding following Race 4. In both instances he pleaded guilty. In respect of Race 3 Mr Bosson's licence was suspended for five days commencing after racing on the 4th of January 2021 and concluding on 15 January 2021. In addition, he was fined \$450.00. In respect of Race 4 he was suspended for a period of six days commencing after racing on 15 January 2021 and concluding after racing on 28 January 2021. Further he was fined \$750.00.

There has today on 10 January 2021 and before the race meeting commenced at Ellerslie been an extended hearing before the Appeals Tribunal. Mr Bosson who was present was represented by Mr Paul Dale QC and assisted by Mr David Ellis, the Principal of Te Akau Racing. The Racing Integrity Unit were represented by the Chief Stipendiary Steward, Mr John Oatham, assisted by Stipendiary Steward, Mr Matthew Williamson.

The situation that has arisen is that a decision is required promptly in relation to these Appeals (the Appeals relate to both charges). This in order that connections of horses in significant upcoming meetings, principally at Trentham and on Karaka Night at Ellerslie on 23 January 2021 can know what the circumstances are and what arrangements they need to put in place.

A number of difficult issues have been raised today. Mr Dale has filed extensive submissions and both he and Mr Ellis have addressed the Tribunal at some length. Mr Oatham has also filed written submissions and supported those with submissions made in person today. The issues that have been raised include the proposition advanced for Mr Bosson that the periods of suspension would or might involve a disproportionate penalty if he were unable to ride at the two meetings spoken of above. The Tribunal is conscious of Mr Bosson's amazing riding record both in New Zealand and in Australia and is also conscious of his recent successes in Karaka Million

aces. There is not time today to set out in full the decision of the Appeals Tribunal. What is proposed is to announce the decision which the Tribunal has reached and then what is known in legal circles as a "reasons decision" will follow. The Tribunal will prepare that over the next few days and it will be available before the close of business on Friday 15 January 2021.

The Tribunal has carefully considered the decisions of the Raceday Judicial Committee. The Tribunal is required to approach a hearing of this kind as a re-hearing but nevertheless must have regard to what was said by the Raceday Judicial Committee. Both the decisions in respect of Races 3 and 4 are detailed and comprehensive. The Raceday Judicial Committee was clearly very conscious of the consequences of the suspensions that it imposed and the result that would mean Mr Bosson being unable to ride at the meetings spoken of at Trentham and the Karaka night at Ellerslie.

The conclusion of the Tribunal is that the Appeals must be dismissed and the decisions of the Raceday Judicial Committee in respect of both Races 3 and 4 upheld.

The detailed "reasons for decision" spoken of above will be available before the close of business on 15 January 2021. The Tribunal thanks all of those who were present today for their courtesy and co operation.

DATED this 10th day of January 2021

Murray McKechnie

Chairman

Signed pursuant to 1007(5)

Penalty: