

Appeal S J Hale v RIU - Reserved Decision dated 25 September 2018 - Chair, Prof G Hall

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 Harness Racing

BETWEEN

MR STEPHEN JOHN HALE

Licensed Trainer

Appellant

AND

RACING INTEGRITY UNIT (RIU)

Respondent

INFORMATION: A6426

COMMITTEE: Prof G Hall (Chairman)

Mr G Thompson (Member)

APPEARING: The Appellant in person, with the assistance of Mr C DeFilippi

Mrs K Williams, Racecourse Investigator, for the Respondent

RESERVED DECISION OF APPEALS TRIBUNAL

[1] Mr Hale lodged an appeal against the penalty of a fine of \$4,500 that was imposed by a Non Raceday Judicial Committee in a written decision on 15 August 2018 after he admitted a breach of r 1004(1A), (2) and (3) of the NZ Rules of Harness Racing. The horse MATAU GEM was also disqualified but Mr Hale did not appeal against this aspect of the Committee's decision.

[2] Information No A6426 alleged that:

On the 13 May 2018, Stephen John HALE, being the registered trainer of the standardbred MATAU GEM presented the horse to race in Race 3, the SOUTH FUELS BULK FUEL SPECIALISTS MOBILE PACE, at the Timaru Harness Racing Club's meeting with a prohibited substance, namely Cobalt (greater than 100 mcg/L), in its system. This is in breach of the Prohibited Substance Rule, r 1004(1A), (3) and (4).

[3] Rule 1004 of the NZ Rules of Harness Racing provides:

(1A) A horse shall be presented for a race free of prohibited substances.

(3) When a horse is presented to race in contravention of sub-rule (1A) or (2) the trainer of the horse commits a breach of these Rules

(4) A breach of sub-rule (1A), (2), (3) or (3A) is committed regardless of the circumstances in which the TCO2 level or prohibited substance came to be present in or on the horse.

[4] The appeal was heard at Addington raceway on 18 September 2018.

Summary of facts

[5] There was an agreed summary of facts

[6] MATAU GEM is a 5-year-old mare and is trained by Mr Stephen HALE. MATAU GEM is owned by Mrs M Morrison-Palmer, P B Palmer and Mrs H M Browne. MATAU GEM has raced 14 times for 3 seconds and 1 third and lifetime stakes of \$7,260 as at 24 July 2018.

[7] MATAU GEM was correctly entered and presented to race by trainer Mr Hale at the Timaru Harness Racing Club's meeting on 13 May 2018. MATAU GEM was driven in Race 3, the SOUTHFUELS BULK FUEL SPECIALISTS MOBILE PACE by Mr D Dunn, finishing in second place and winning a stake of \$1,330. This stake has not been paid out.

[8] Following the race, the Stipendiary Stewards ordered that MATAU GEM be post-race swabbed. MATAU GEM provided a urine sample at 12.20pm in the presence of the trainer and the Swabbing Steward, Ms Orr. The race was programmed to start at 12.00pm. The urine samples were recorded with the sample number 133672.

[9] On 31 May 2018 the NZ Racing Laboratory reported that swab 133672 had a Cobalt screening level in excess of 100 mcg/L. The sample was forwarded to Racing Analytical Services, Victoria, for confirmation. On 12 June 2018 Racing Analytical Services confirmed a level of 120 mcg/L. HRNZ set the level of 100 mcg/L of urine on 1 June 2017.

[10] Racecourse Investigator, Mrs Kylie Williams and Stipendiary Steward, Mr Scott Wallis advised Mr Hale of the screened result on 2 June 2018. A number of samples were taken from the property for testing and a urine sample was taken from MATAU GEM, which returned a level of 40 mcg/L.

[11] Mr Hale advised that he had been feeding a multi mineral salt block that he was unaware contained Cobalt. This mineral salt block was in the horse's feed bin with the horse eating it at will when stabled.

[12] A sample of the multi mineral salt block was taken for testing which confirmed Cobalt at a level of 60mg/kg. The packaging on the salt block clearly showed Cobalt as an ingredient at 65mg/kg.

[13] Mr Hale did not make any inquiries regarding the amount of Cobalt in the mineral mix.

[14] Dr Andrew Grierson, Chief Veterinary Advisor to HRNZ confirmed that there was enough Cobalt in a mineral salt block to return a positive and that there had been Cobalt positives in Australia from them.

[15] Mr Hale has been training since 1986/87 and has trained 31 winners.

[16] Mr Hale has not previously been charged with a breach of the prohibited substance rule.

Decision of the Judicial Committee

[17] The Committee's reasons for penalty stated that the principal mitigating factors to which the Committee had had regard in determining penalty were Mr Hale's early admission of the breach, his full cooperation and the way in which he had conducted himself throughout the inquiry. In addition, Mr Hale's record in regard to this rule was excellent with this breach being his first in over 30 years of training.

[18] Mr Hale's character was thus not in question and industry participants, including Mr C DeFilippi, had provided glowing oral and written references which the Committee took into consideration.

[19] To be balanced against those factors, the Committee said, was the ever-present need to maintain the integrity of and public confidence in harness racing by adequately punishing the breach and deterring others from offending in a similar manner in the future.

[20] Mr Hale's submissions on what happened to MATAU GEM by over indulgence of the mineral salt block, on the balance of probabilities, appeared to be the only logical explanation for the positive result.

[21] The Informant had not alleged that Mr Hale had deliberately administered the prohibited substance to MATAU GEM and the Committee found no basis for any finding that he did so. Nevertheless, the Committee found that Mr Hale was negligent to a degree in a number of respects. He had a vast knowledge of feeding and supplementation in horses as part of his employment. With this vast knowledge it was implausible that he was not more vigilant with the supplements being given to his horses. He was negligent to a degree in failing to read the ingredients on the packaging for the mineral salt block where it clearly stated that it contained among other ingredients, Cobalt. Using a mineral block that horses had literally unlimited access to with a product that includes a prohibited substance, even at low levels, was risky, to say the least. These were aggravating factors to be taken into consideration.

[22] The JCA Penalty Guide's starting point of \$8,000 was assessed as being for a mid-range breach of the rule. This case was low range with the positive reading of Cobalt being 120mcg/L, just over the limit. The Committee adopted a starting point of \$6,000. Whilst some aspects of Mr Hale's actions were to a degree negligent, an uplift for aggravating factors was not warranted. There were strong mitigating factors, being Mr Hale's early admission of the breach, his full cooperation throughout the investigation, in conjunction with his excellent record over the past 30 years and the high regard he held within the industry, as evidenced by his character references. For these factors, the Committee gave a combined discount of 25 per cent, \$1,500.

[23] The Committee was satisfied that a penalty of a fine of \$4,500 would satisfy the principal requirements of sentencing – viz, to punish the offender, to deter others in the industry, and to maintain integrity and public confidence in harness racing.

Appellant's submissions

[24] Mr Hale produced a sample of the block that had been available to MATAU GEM in its paddock. He also produced the box in which the blocks were packaged. This clearly indicated that each block contained, amongst other ingredients, Cobalt 65mg. Mr Hale explained that these blocks were obtained by being cut from a large block and that the amount of Cobalt could range from 60 to 70 mg depending on the block. It was not a completely uniform product.

[25] Mr Hale stated that the block cost \$3 and was available from any feed store. He gave one block to each of his horses. There was no warning on the product that a horse could get a high reading through consuming the block. He had purchased the blocks some 6 weeks before and MATAU GEM may have had 2 or 3 blocks in that time. He acknowledged the horse was over-indulging in that she was getting through the blocks quicker than were the other horses. When questioned by the Tribunal as to this, he said she would go through a block every 2 or 3 weeks, whereas the other horses, it would be every 2 months. He emphasised the need to feed the blocks. They were both a source of salt and something for a horse to chew on to avoid boredom, and they made them drink.

[26] Mr DeFilippi supported Mr Hale's contention in this regard. He produced a sample of the salt block he gives his horses. With respect to the mineral blocks, he said every horse is different as to how frequently they chew on them. He said there were 4 kind of blocks, 2 were especially for horses. The block Mr Hale was using was a very common one and he did not believe a trainer would remove it from the paddock the day before a horse was to race.

[27] Mr Hale also believed it was common for racehorses to chew on these blocks. He thought there would be hundreds or thousands of them out there.

[28] Mr Hale said MATAU GEM was a great big horse and would not go in the urinals at the Timaru racecourse. There was only a little sawdust and the horse had little room to move. It was in a confined space and she had only produced about 3 egg cups full of urine. The tester had said it was barely enough but it but would do. When MATAU GEM had got to the carpark she had urinated profusely.

[29] Mr Hale said Cobalt is stored in the liver and he believed the elevated level was because it was concentrated due to MATAU GEM not having urinated for some time before the test. He estimated this to be some 6 or 7 hours. A later test when MATAU GEM had urinated "normally" had produced a level of 40 mcg/L. Nothing had changed until that time; MATAU GEM still had access to the mineral block.

[30] Mr Hale said he had reimbursed the owner of MATAU GEM and emphasised he had waited 7 weeks for the result of the test. None of his horses had started in that time, although 3 were in racing trim. He had suffered a loss of fees and had had to keep feeding and working the horses. He had not charged the owner of MATAU GEM fees for 1 month before the positive test and for 7 weeks afterwards. He believed all up he had suffered a \$3000 to \$5000 loss.

[31] Mr Hale said his occupation involved his advising clients on how best to feed horses. This breach was thus especially embarrassing for him. Not everyone in the industry had been supportive, and he described one unsavoury incident.

[32] Mr Hale accepted that the label on the box indicated that the block contained Cobalt but he believed the manufacturer should have warned of the possibility of a positive should an animal over indulge.

Respondent's submissions

[33] Mrs Williams acknowledged that the Appellant had admitted the breach but emphasised it was one of absolute liability, as the Tribunal had advised at the commencement of the hearing.

[34] Mrs Williams said Mr Hale had identified the mineral block as being the cause of the high reading but it could not be said with 100 per cent certainty that this was the case.

[35] The RIU's position was that their penalty submission of \$5,000 was "more than reasonable" whether this was viewed in the light of the \$20,000 maximum penalty or the \$8,000 starting point in the Penalty Guide. This figure had taken into account the low level nature of the breach and the probable cause of the positive. She emphasised the box clearly stated that the block contained Cobalt.

[36] Mrs Williams said it was evident that the level of Cobalt an animal would return from the product would be determined by how much was consumed. She believed the level was only one factor to be considered and not too much weight should be given to it. It would reflect how much of the block the horse consumed and when. The horse's metabolism rate would be relevant too.

[37] Mrs Williams emphasised that MATAU GEM had had free access to the block, despite Mr Hale knowing it contained Cobalt. Most horses when tested would have a Cobalt level of below 20 mcg/L, whereas the level in this case was 120 mcg/L.

[38] The block in question was manufactured for numerous animals — goats, sheep, deer and horses. It would be prudent to use only a block made for horses and for it to be given in measured doses.

[39] Mrs Williams said that Mr Hale could be right when he stated that other trainers use these blocks, but it was not known whether their horses had access to them up until raceday. She believed horses did not require Cobalt and there were other substances available, such as a salt block, that could be used that did not contain Cobalt.

[40] Mrs Williams concluded by stating the penalty was “adequate”. It was well below the starting point and the maximum penalty. The product was clearly labelled and it did not state it was suitable for racehorses.

Submissions in reply

[41] Mr Hale stated that in his view Cobalt was necessary for horses. There was nothing on the packaging to state the product was unsuitable for racehorses.

[42] Mrs Williams responded that it was the trainer’s responsibility to check with a veterinarian whether a product was suitable for racehorses.

[43] Mr Hale described in some detail his personal circumstances. In the interests of his privacy, we do not recount these. However, we do note that he has had a lifetime in the industry and currently only has 3 or 4 horses in work. He said these were usually “cast offs”. He had only one paying owner.

[44] Mrs Williams responded that the RIU submission had taken into account the appellant’s financial circumstances.

[45] Mr Hale produced a letter from Mr Rennell, which addressed concerns Mr Hale had with the alleged heavy-handed nature of the RIU investigation.

[46] Mr DeFilippi referred to the *Walkinshaw* decision, which he said was a similar case, and stated that there would be no fine for Mr Hale if “the system works properly”. He said Mr Hale had not been careless and that he was not “easy azy”. Other trainers used the same block. They were aware it contained Cobalt but did not believe the quantity was such that it would return a positive. The block should not have given a positive in this instance. He could understand the fact that MATAU GEM was having more than the other horses had not been a concern to Mr Hale.

Decision of Tribunal

[47] The Committee’s starting point was \$6,000. The Committee reasoned that the \$8,000 starting point in the Penalty Guide was for a mid-range breach of the rule, whereas this was “low range”, with the level being 120 mcg/L, 20 above the threshold.

[48] In assessing the appropriate starting point regard is to be had to the gravity of the breach and the culpability of the person charged.

[49] In this regard we observe that this mineral block is commonly used with respect to feeding racehorses, although as Mrs Williams said, it is not specifically manufactured for racehorses and whether other trainers allow horses to chew on a block immediately prior to racing is not known.

[50] Despite the fact the labelling on the box clearly states that the block contains Cobalt, Mr Hale continued to allow the horse to chew on it in an unregulated manner. In particular, he did not indicate to us that he prevented MATAU GEM having access to the block prior to racing.

[51] We take into consideration the issues MATAU GEM had with urinating on the day. We are aware that Mr Hale is firmly of the view that this was the reason for the high concentration of Cobalt. We have had no scientific evidence put before us to verify this and consequently we have put that contention to one side. The level is what it is — 120 mcg/L.

[52] Mr Hale and Mr DeFilippi have referred us to the case of *Walkinshaw* and Mr DeFilippi has questioned why was Mr Hale charged and Mr Walkinshaw not. We are concerned only with Mr Hale’s appeal but we are aware that the manufacture of the feed in the *Walkinshaw* case was at a level that was 190 times that indicated on the packaging. Whereas, the amount of Cobalt in the block in Mr Hale’s case, we are told, was 5 mg less than that indicated on the box.

[53] Mr Hale, as we have noted, gave MATAU GEM unrestricted access to the block in circumstances where it should have been obvious to him that it contained Cobalt. MATAU GEM was consuming it at a greater rate than the rest of his team. His contention that the manufacturer should have given a warning that if a racehorse over indulged it could return a positive has to be viewed in the context that the block was not manufactured specifically for horses, let alone racehorses.

[54] This is evidence of negligence on Mr Hale’s part. We believe the starting point adopted by the Committee gives appropriate recognition to the circumstances of this particular breach and the need to uphold the integrity of the industry.

[55] We turn to consider personal factors. As the Committee correctly noted, there are no aggravating factors.

[56] The mitigating factors identified by the Committee were Mr Hale’s early admission of the breach, his full cooperation throughout the investigation, his excellent record over the past 30 years, and the high regard in which he is held in the industry, as evidenced by his character references. We would add the further embarrassment that he felt due to the fact that his occupation requires him to advise customers as to feeding regimes.

[57] The Committee afforded Mr Hale a discount of 25 per cent. This is at the low end of the range. It is not unusual for an admitted breach to receive a discount of 20 or 25 per cent for this fact alone. In circumstances where the breach is one of absolute liability, the

discount understandably could be a little less than this figure. Had Mr Hale not placed emphasis on further mitigating factors in his submissions to us, we would have dismissed the appeal, finding that the penalty was within the range open to the Judicial Committee.

[58] However, we have heard quite fulsome submissions from Mr Hale as to the impact of his being found to be in breach of the rule and his personal circumstances. Many of the factors raised were not before the Judicial Committee, and this is understandable, as we are told that some matters have only arisen subsequent to the first instance hearing. These include alleged acts of intimidation, both physical and via social media. We do not intend to detail these matters in this decision.

[59] In these circumstances, and because we find the discount for mitigating factors was at the lower end of the available range, we reduce the penalty to a fine of \$4,000. This is a reduction from the \$6,000 starting point for mitigating factors of one third. We recognise that in so doing we could be seen to be merely tinkering with the penalty imposed by the Committee and, as a consequence, we have hesitated to do so. However, the reduction is approximately 10 per cent and we are aware that a penalty even at this lower level will cause financial difficulties for Mr Hale.

[60] Significantly, we believe this penalty will still give effect to the important sentencing principles of the need to hold the appellant to account and to support public confidence in drug free harness racing, whilst at the same time extending an element of mercy to Mr Hale.

[61] We emphasise if guidance is sought from this case concerning penalty levels, the appropriate reference is the starting point of \$6,000 for a low level breach.

[62] The fine of \$4,500 is quashed and a fine of \$4,000 is substituted.

[63] The RIU have not sought an award of costs on this appeal.

[64] There is no award of costs in favour of the JCA.

[65] Mr Hale indicated in his notice of appeal that he challenged the Committee's award of costs to the RIU in the sum of \$77.63, being the costs of the transcript of his interview by the RIU. No oral submission was made in respect of this. Should Mr Hale wish to pursue this aspect of his appeal, he is granted leave to do so by way of a written submission within three days of the date of this decision. Mrs Williams has a further three days in which to reply.

Dated at Dunedin this 25th day of September 2018.

Geoff Hall, Chairman

Penalty: