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

Non Raceday Inquiry RIU v A J Taylor - Penalty Decision dated 8 January 2021 - Chair, Mr R G McKenzie

Rules:

Repondent(s)/Other parties:

Name(s):

Decisions:

BEFORE A JUDICIAL COMMITTEE

OF THE JUDICIAL CONTROL AUTHORITY

HELD AT CHRISTCHURCH

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

BETWEEN SIMON ANDREW IRVING, Investigator for the Racing Integrity Unit

Informant

AND AARON JAMES TAYLOR of Christchurch, Holder of Licence to Train (Class B)

Respondent

Judicial Committee: R G McKenzie (Chair)

S C Ching (Member

Hearing: On the Papers

PENALTY DECISION OF JUDICIAL COMMITTEE DATED 8 JANUARY 2021

THE CHARGE

[1] Information No. A11693 filed by Investigator, Mr S A Irving, alleges that, on 4th November 2020, at Riccarton Racecourse, the Respondent, Mr Aaron James Taylor, then Holder of a Licence to Train (Class B), wilfully failed to perform an act ordered by a Racing Investigator in that he refused to provide for a drug test, an alleged breach of Rule 801(1)(k).

[2] The Informant has produced a letter dated 6 November 2020 signed by General Manager of the Racing Integrity Unit, Mr M R Godber, authorising the filing of the Information pursuant to Rule 903(2)(d) of the New Zealand Thoroughbred Rules of Racing.

[3] The Information was served on the Respondent in person on 6 November 2020.

[4] In a teleconference held on 23 November 2020, Counsel for the Respondent, Mr J Brown, indicated that the charge was admitted by the Respondent.

[5] The charge is, accordingly, found proved pursuant to Rule 915(1)(d) and this Committee is to impose penalty pursuant to Rule 920(2) of the New Zealand Thoroughbred Rules of Racing.

[6] It has been agreed between the parties, and the Committee is satisfied, that it is appropriate for the matter to be heard “on the papers” – that is to say, solely on the basis of the documents and evidence filed by the parties without the need for an oral hearing.

THE RULE

[7] Rule 801 provides as follows:

(1) A person commits a Serious Racing Offence within the meaning of these Rules who:

(k) wilfully fails to perform an act ordered by a Tribunal, NZTR, Stipendiary Steward or Investigator to be performed by him.

[8] The penalty provision is contained in Rule 801(2) which provides:

A person who commits a Serious Racing Offence shall be liable to:

(a) be disqualified for any specific period or for life; 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 period of suspension, then the suspension shall continue to apply to the renewed Licence; and/or

(c) a fine not exceeding $50,000.

AGREED SUMMARY OF FACTS

[9] The following is an agreed summary of facts:

1. The Respondent, Aaron James Taylor, holds a Class B (Permit to Train) Licence under the Rules of New Zealand Thoroughbred Racing.

2. He is 44 years old, trains a few horses out of Riccarton Racecourse and also rides trackwork.

3. On the morning of 4 November 2020 Officials from the Racing Integrity Unit conducted routine drug testing at Riccarton Racecourse.

4. The Respondent was one of nine people selected for testing who were riding or carrying out a “Safety Sensitive Activity”.

5. At 8.52am, he was served with a Drug Testing Notification Form by a Racing Investigator after he was leading a horse near his stables.

6. The form detailed that testing would commence at 9.30am and conclude at 11.00am.

7. The Respondent became agitated upon being served the notice, refused to sign the form, advised that he would not be doing the test and stated that he believed he was being victimised.

8. Approximately five minutes later, the Respondent was spoken to by another Investigator and had the consequences of refusing to provide a sample explained to him.

9. The Respondent requested he speak to his lawyer for advice and was given that opportunity and additional time to consider his options.

10. The Respondent spoke to his lawyer, who in turn spoke to the Investigator.

11. At 11.33am the Respondent was spoken to again who stated that he was going to refuse the test.

12. The Respondent did not supply a sample in accordance with the Rule and as directed by the Investigator per Rule 656(2).

13. Mr Taylor, by not providing a sample, has wilfully failed to perform an act ordered by an Investigator.

14. NZTR records detail that Mr Taylor has held a trainer’s licence since 2008 and he has no previous JCA charges.

PENALTY SUBMISSIONS OF THE INFORMANT

[10] The following penalty submissions have been filed by the Informant:

1. Introduction

1.1 The Respondent Aaron James Taylor is a Class B (Permit to Train) Licence holder under the Rules of New Zealand Thoroughbred Racing (NZTR).

1.2 Mr Taylor is 44 years old, has held a trainer’s licence since 2008, trains a few horses out of Riccarton Racecourse and rides trackwork.

1.3 Mr Taylor has admitted a breach of the Rules in relation to refusing to present himself for drug testing at Riccarton Racecourse when directed on 4 November 2020.

1.4 New Zealand Thoroughbred Racing commenced drug testing Industry participants in 1995 and since then there has been growing awareness that there is an absolute obligation on participants to present themselves free from the influences of drugs.

1.5 All participants should be aware of the policy and the consequences should they not comply.

1.6 The testing is conducted to maintain a safe and healthy workplace and to maintain the integrity of the Industry.

1.7 Since the RIU inception in 2011, Mr Taylor has been tested on two prior occasions: 15.09.2016 (sample clear – alcohol and drugs); and 23.05.2018 (TDDA sample screened non-negative to Methamphetamine, upon evidential analysis by the ESR the sample was negative).

1.8 It is submitted that a 12 months disqualification of his licence (backdated to 4 November when Mr Taylor was “stood down”) should be imposed.

2. Offending

2.1 The details of Mr Taylor's offending are contained in the Racing Integrity Unit Summary of Facts which has been agreed.

3. Penalty Provisions

3.1 The penalty provisions for this matter are contained under Rule 801(2):

A person who commits a Serious Racing Offence shall be liable to:

(a) be disqualified for any specific period or for life; 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 $50,000.

4. Sentencing Principles

4.1 The four principles of sentencing can be summarised briefly:

• Penalties are designed to punish the offender for his / her 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 a 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 behaviour in question; and

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

4.2 All four principles apply in this matter.

5. Precedents

5.1 There has been no previous case of a NZTR Licenced Trainer refusing to provide / present for a drug sample when required.

5.2 The three most recent case involving Licenceholders who failed to provide / present for a drug test as directed by an Investigator are:

RIU v Waddell (03.12.2020) – Jockey. 22 months disqualification (five months suspended upon meeting conditions). Previous positive to Class A drug.

RIU v Harrison (14.11.2019) – Track rider. 12 months suspension (four months suspended upon meeting conditions).

RIU v Campbell (19.01.2015) – Track rider. 9 months suspension.

5.3 Recent penalties for Licenceholders positive to the Class A drug Methamphetamine range from a 10 months disqualification to an 11 months suspension:

RIU v Lammas (21.10.2020) – Jockey; 10 months disqualification

RIU v Burton (30.11.2017) – Track rider; 10 months disqualification

RIU v Janson (28.08.2017) – Track rider; 10 months disqualification

RIU v Rauhihi (02.04.2017) – Track rider; 11 months suspension

6. Aggravating Factors

6.1 It was explained to Mr Taylor on the day what the standard penalty regime for Class C and Class A drugs are, compared to the penalty for refusing. In explanation Mr Taylor commented that he did not want the stigma associated with returning a positive sample.

6.2 As a Class B Trainer, Mr Taylor has an added responsibility to be "of good character" as per the licensing conditions.

7. Mitigating Factors

7.1 Mr Taylor has admitted the breach at the earliest opportunity.

7.2 He has had no previous charges before the Committee.

8. Welfare

8.1 Mr Taylor has not engaged with the NZ Racing Drug and Alcohol counsellor, despite attempts to contact him.

9. Penalty

9.1 It is submitted that the penalty for failing to provide (or present for) a sample must exceed the penalty for providing a sample positive to a Class "A" drug, otherwise there is no incentive for Licenceholders to comply with the drug testing procedure in the

knowledge that they may test positive to a Class “A” drug.

9.2 As the RIU cannot determine categorically what drug or drugs may have been in Mr Taylor’s system, any penalty must be in excess of the more serious Class “A” drug range.

9.3 The implications of disqualification and suspension are summarised as:

Under Rule 1104(1) a person who is disqualified shall not:

(b) train any horse or ride any horse in a Race or be employed in any capacity in connection with the training or racing of horses; and/or

(c) enter or go upon any Racecourse or any Training Facility or other place owned or controlled by any Club.

Under Rule 1106(1) a person who is suspended shall not:

(b) ride any horse in any Race

Under Rule 324 only a Licenceholder may ride a horse at any Racecourse, Training Facility or Trainer’s Premises.

Under Rule 327 *a Trainer shall not employ or otherwise permit to work or to assist in any capacity in connection with the care, control or training of any horse: (b) any unlicensed person.*

9.4 In this case Mr Taylor holds a Trainer’s Licence which as per Rule 324 also implies he can ride trackwork. A suspension of his Trainer’s Licence will allow him to apply for a Miscellaneous (Trackwork or Stablehand) Licence and, if granted by NZTR, would mean he could continue to work in the Industry. A suspension would therefore have little impact as a penalty, especially given that Mr Taylor only trains a few horses.

10. Conclusion

10.1 The RIU therefore seek a 12 months disqualification of Mr Taylor’s Licence (backdated to 4 November 2020, when he was “stood down”).

10.2 No costs are sought by the RIU.

PENALTY SUBMISSIONS ON BEHALF OF THE RESPONDENT

[11] Mr Brown filed the following penalty submissions on behalf of the Respondent:

1. Background

1.1. The Respondent is an experienced horse trainer. He has an unblemished disciplinary record. During his career he has been drug tested on multiple occasions. He has on all occasions returned negative drug tests.

1.2. The Respondent was drug tested on 23 May 2018. Testing was carried out by The Drug Detection Agency (**TDDA**), a professional drug testing agency. The result of that test was “non-negative”. A non-negative test indicates that the result is unreliable and within a margin of error of equipment fault or contamination, among other things.

1.3. Upon returning the non-negative result, the nurse responsible for the testing the Respondent announced loudly and erroneously that the test was “positive”, within earshot of several other members of the Canterbury racing community waiting to be tested, who were known to the Respondent.

1.4. Despite the substantive test results confirming the test to be negative, word travelled quickly around the racing community that the Respondent had tested “positive”.

1.5. The subsequent reputational impacts for the Respondent were severe. His friends and colleagues refused to associate with him, and relationships broke down. Given his complete lack of culpability, this was significantly distressing for the Respondent.

1.6. Since that time, the Respondent has worked hard to repair his reputation.

1.7. On 4 November 2020 at approximately 8:30am, the Racing Integrity Unit (**RIU**) appeared at Riccarton Racecourse.

1.8. The Respondent was approached by Kylie Williams, a Racecourse Detective of the RIU who advised that the Respondent had been randomly selected for drug testing.

1.9. The Respondent expressed his concern with the purported ‘random’ selection. Ms Williams proffered no information to the Respondent as to the selection process. Given the impacts of his drug test in 2018 the Respondent was understandably hesitant to consent to the test. When selected for the test in 2018, the Respondent asked Ms Williams why he was the only trainer that had been selected. Ms Williams replied, *“we will go and test some other trainers then”.*

1.10. This was concerning to the Respondent as Ms Williams seemed to be able to select subjects at her will. It did not appear that a truly random selection process had been utilised.

1.11. Likewise, when selected in 2020, the Respondent asked Ms Williams who had been selected for testing. Ms Williams replied that there were *"no names on the list".*

1.12. Again, this was concerning for the Respondent and implied that selection was at the discretion of the Iinvestigators. Accordingly, he felt unjustifiably targeted.

1.13. On the basis that a genuine random selection process could not be demonstrated, the Respondent refused to undergo the test.

1.14. The Respondent spoke with Counsel. Counsel subsequently spoke with an Investigator also present at the Racecourse, Mr Irving. Counsel requested Mr Irving detail the mechanism used to select the Respondent for testing.

1.15. The Investigator advised words to the effect of *"we have the names on a list, and we select them from there."* In doing so, the Investigator confirmed that the selection process was subjective and discretionary. It provided no protections against personal biases. It was not random.

1.16. The Respondent has a right pursuant to section 21 of the New Zealand Bill of Rights Act 1990 (**BORA**) not to be subject to unreasonable search. A requirement to provide a bodily sample, and the analysis of that sample, constitutes a search.

1.17. The requirements of the New Zealand Thoroughbred Racing Incorporated Rules of Racing (**the Rules)** are subject to the BORA. Any random drug test must therefore be reasonable. The test the Respondent was asked to take was not random, and therefore in the context of the Rules, was not reasonable.

1.18. The Respondent's selection for testing was unreasonable and impeded on his right not to be unreasonably searched pursuant to s 21 BORA. The Respondent justifiably exercised his BORA right and refused to undergo the test accordingly.

2. Breach

2.1. The Respondent acknowledges in exercising his right under s 21 BORA, his refusal to undergo the test constitutes a technical breach of Rule 801(k) of the New Zealand Thoroughbred Racing Incorporated Rules of Racing (**the Rules**) on a plain interpretation of the Rules.

2.2. However, the Rules are to be interpreted and applied in a way that is consistent with BORA2. For reasons outlined below, the Respondent's selection for testing was unreasonable. The refusal was necessary to preserve the Respondent's BORA rights.

3. Penalty provisions

3.1. The applicable penalty provisions are contained at Rule 801(2) of the Rules.

3.2. Should the Judicial Committee find the Respondent liable to a penalty, pursuant to Rule 920(2) of the Rules it may have regard to such matters as it considers appropriate including:

3.2.1. *The status of the Race:*

3.2.1.1. Not applicable. The Respondent does not perform race work. He was performing track work at the time he was asked to be tested.

3.2.2. *The stake payable in respect of the Race:*

3.2.2.1. Not applicable. There was no race at hand, therefore there was no stake payable.

3.2.3. Any consequential effects upon any person or horse as a result of the breach of the Rule:

3.2.3.1. The impact on the Respondent of a penalty which deprives him of the ability to work in the Industry would be devastating.

3.2.3.2. He would be unable to support himself financially. He does not have immediate family who can provide financial support. All his experience relates to racing. He would be required to find employment in a different industry, where he has little or no experience. The job market is tight at present due to the economic impacts of COVID-19 and the Respondent believes he would struggle to find work, let alone work that pays the equivalent to his current role.

3.2.3.3. Additionally, there would be detrimental consequential impacts on the Owners of the horses trained by the Respondent, should he be unable to continue training horses as a result of a penalty. The horses trained by the Respondent would need to be transferred to other trainers, breaking continuity in training which is likely to have subsequent detrimental financial impacts on the owners of those horses.

3.2.4. *The need to maintain integrity and public confidence in racing:*

3.2.4.1. There has been no discernible detrimental impact on public confidence in racing nor integrity as a result of the Respondent's technical breach of the Rules. The breach does not involve matters of public interest. In fact, imposing a penalty against the Respondent as a result of him exercising his BORA rights is likely to undermine integrity in racing.

4. Sentencing principles

4.1. The Respondent agrees with the Investigator's summary of the four principles of sentencing contained at paragraph 4 of its submissions.

4.2. The principles do not support the imposition of a penalty.

4.3. The Respondent should not be punished for being subjected to a deficient selection process inconsistent with BORA.

4.4. Licenceholders should not be deterred from exercising BORA rights, nor should the Judicial Committee be disapproving of such behaviour.

4.5. Rehabilitation is irrelevant to this matter. By virtue of the enclosed drug test results, the Respondent has proven he is free from the influence of illicit drugs.

5. Precedent

5.1. The authorities submitted by the Investigator as precedent for the imposition of a penalty are distinguishable to the present case.

5.2. *RIU v Waddell* can be distinguished from the present case for the following reasons:

5.2.1. The Licenceholder held a class A license. He was selected for testing during a race meet in which he was riding, and in which stakes were payable.

5.2.2. The Licenceholder admitted that a drug test would have resulted in a positive result for Cannabis. Additionally, it was unclear whether a positive result for Methamphetamine would be returned.

5.2.3. The Licenceholder had *"a most unattractive record of breaching the Rules of Thoroughbred Racing".*

5.2.4. The results of the proposed test could not be discerned.

5.2.5. The Licenceholder did not raise concerns regarding procedural matters relating to selection for testing.

5.3. *Harrison* can be distinguished from the present case for the following reasons:

5.3.1. The Licenceholder refused to undergo the test because he considered he would return a positive test.

5.3.2. The results of the proposed test could not be discerned.

5.3.3. The Licenceholder did not raise concerns regarding procedural matters relating to selection for testing.

5.4. *Campbell* can be distinguished from the present case for the following reasons:

5.4.1. The Licenceholder said that there was little point doing the drug test because she smoked Cannabis the evening prior to the proposed test.

5.4.2. The results of the proposed test could not be discerned.

5.4.3. The Licenceholder did not raise concerns regarding procedural matters relating to selection for testing.

5.5. The Respondent submits that the Supreme Court decision of *Cropp v a Judicial Committee* justifies the Respondent's refusal to undergo the proposed drug test pursuant to s 21 BORA.

5.6. *Cropp* confirmed that random drug testing is lawful pursuant to the Rules and necessary to ensure safety and integrity in racing.

5.7. However, the Court noted that drug testing performed under the Rules is subject to section 21 of BORA, given a drug test constitutes a search for the purposes of that provision12. It noted:13

"the Racing Act provides for rules relating to safety at race meetings. The rules relating to random testing, which could possibly in isolation be viewed as allowing testing unrelated to safety at race meetings, must necessarily be read in this light. ***Testing must*** *be related to racing. It must be for the purpose of safety at race meetings and must* ***be carried out in a reasonable manner.*** *There is no need for the rules to spell out these implicit qualifications on the powers given to Racecourse Inspectors.* ***It is always the case that an exercise of power under delegated legislation*** *must be done for the purpose for which the power is conferred and* ***must be done in a reasonable manner.*** *A rule must be construed as if these limits were expressed in it. Like a statutory power, it is subject to such limits even if stated in unqualified terms."* (Emphasis added)

5.8. A general consent to testing, such as that contained as Rule 344 of the Rules cannot *"put the conduct of a particular search under a lawful rule outside the protection of s 21 of the Bill of Rights".*

5.9. As a body exercising a public function, the RIU is obligated to carry out drug testing in a *reasonable* manner in accordance with BORA. Therefore, for random testing, the process for selecting candidates must be random. The process for selecting the Respondent for testing was not random, and therefore was not reasonable.

5.10. Reasonableness in the sense of random selections for drug testing can be gleaned from jurisprudence in the employment jurisdiction.

5.11. In that jurisdiction a decision to drug test an employee is subject to the regulatory test contained at section 103A (2) of the Employment Relations Act 2000 (ERA), which asks:

"whether the employer's actions, and how the employer acted, were what a fair and ***reasonable*** *employer could have done in all the circumstances…".* (Emphasis added)

5.12. In a case involving selection for random drug testing the Employment Relations Authority said:

"Random testing is undertaken in circumstances where there is no suspicion of an employee and it is clearly the intention of Appendix B that the name selection be truly random. I agree

…that it is important that procedures around the selection of those to be tested are robust and transparent."

5.13. The test contained at section 103A (2) of the ERA is founded and applied largely on principles of natural justice.16 It distils these principles to simple concepts of "fairness" and "reasonableness".

5.14. In the employment jurisdiction, a decision that does not accord with principles of natural justice will seldom be "fair and reasonable" for the purposes of s 103A(2) ERA.

5.15. A consistent approach should be adopted when interpreting the word "unreasonable" in s 21 BORA. Random drug testing that defies principles of natural justice, is unreasonable.

5.16. Conversely, reasonable drug testing involves selection mechanisms (whether for reasonable cause or random) that accord with principles of natural justice. In this regard they are fair, transparent, robust, free from human interference, manipulation, and bias. All subjects to a truly random selection mechanism have an equal chance of selection, and the randomness of selection can be easily demonstrated.

5.17. In this regard the Respondent's selection for testing on 4 November 2020 was deficient. His selection lacked the elements of reasonability described above. It was unreasonable, and the Respondent justifiably refused to undergo testing accordingly.

6. Aggravating factors

6.1. Not applicable.

7. Mitigating factors

7.1. For reasons outlined above, the Respondent's refusal to undergo a drug test on 4 November 2020 was justified by s 21 BORA.

7.2. The Respondent has held various and continual roles in the Racing Industry since the age of 16. He is a well-established Trainer who has a clean disciplinary record. The Respondent's non-negative test in 2018 (ultimately returned as negative) should be given no weight. A non-negative result denotes unreliability and the potential corruption of a sample.

7.3. The Respondent strongly denies that he advised the Investigator that he *"did not want the stigma associated with returning a positive sample"*. No factual finding has been made on this point and it should bear no weight in sentencing.

7.4. The Respondent returned a negative drug test result on 18 November 2020 (which was commissioned at his own initiative and cost).

7.5 The Respondent admitted the breach at the earliest opportunity.

7.6 The Respondent has complied with all directions made by the Judicial Committee.

8. Penalty

8.1. Any penalty awarded against the Respondent in the circumstances would be unjust.

8.2. Should the Judicial Committee find the Respondent liable to a penalty/sentence, it is appropriate that any sentence should be suspended.

9. Conclusion

9.1. The Respondent seeks immediate reinstatement of his Licence and an award of costs against the RIU given the unjustifiable disadvantage he has experienced as a result of being subjected to a process inconsistent with BORA.

REASONS FOR PENALTY

[12] The Respondent has admitted a charge that he wilfully failed to perform an act ordered by an Investigator, more specifically that, at Riccarton Racecourse on 4 November 2020, after having been served with a Drug Testing Notification Form by an Investigator, he refused to supply a sample of urine as required by Rule 656(2) of the NZTR Rules of Racing. His reasons for refusal are set out in some detail in the penalty submissions presented on his behalf. It is not disputed by the Respondent that he refused to supply a sample.

[13] Counsel for the Respondent, Mr Brown, by way of mitigation, presented lengthy and detailed submissions in support of the submission that any penalty against Mr Taylor would be unjust or, alternatively, any penalty should be suspended. We do not accept that submission.

[14] We adopt the comments of the Judicial Committee in the recent case of *Waddell* when it said:

The drug testing regime in Racing is an important protection that has been in place for industry participants since 1995. The testing regime is to ensure the safety and welfare of all licence holders and horses.

A refusal under the Rules to submit to a drug test by providing a urine sample when requested is a serious breach of the Rules. When a Licence Holder refuses to provide a sample the RIU is denied the ability to find out what, if any, prohibited substance in in the Licence Holder's system.

A refusal means the drug test has not been completed and leaves it open as to what the test may have revealed in respect of any illicit drug.

The Committee went on to say that, in Mr Waddell's case, *"a fair presumption to make for the purposes of determining penalty is to presume that there would have been a positive test for a class A controlled drug".*

[15] Counsel for the Respondent has submitted, in essence, that the process for testing of Licenceholders under the Rules must be random and, if the process for selecting the Respondent for testing was not random, then it was not reasonable and, therefore, was in breach of the Bill of Rights Act.

[16] The Committee does not agree that the selection process must be random. It is misleading to compare the situation of a Licenceholder under the Rules of Racing to that of an employee under the Employment Relations Act. The context of drug testing in each of those situations is different. The obvious point of distinction is that a Licenceholder is not an "employee". In addition, and more importantly, a Licenceholder under the Rules of Racing is engaging in a "Safety Sensitive Activity".

[17] It is worth setting out the policy document of New Zealand Thoroughbred Racing:

This policy supports the Rule of Racing – Definitions which reads:

***Safety Sensitive Activity** means an activity associated with Races or racing which is the type that is specified by NZTR in a published policy to be a safety sensitive activity.*

A Safety Sensitive position is a job or position where a person holding this position has the responsibility for his/her own safety and/or other people's safety and/or the welfare and safety of all horses affected by their actions.

Safety Sensitive Positions include, but are not limited to:

• Trainers preparing and handling horses

• Licence holders preparing and handling horses

• Any other persons who are in direct control of a horse.

It would be particularly dangerous if such a trainer, licence holder or other person is using drugs or alcohol while on job or attending to racehorses. All such people have to be with clear mind and diligent while occupying such positions.

[18] Case law suggests that random testing is reasonable for safety sensitive roles, where there is a risk of serious harm as a consequence of a person's impairment as a result of drugs or alcohol. One of the leading cases is *NZ Amalgamated Engineering Printing and Manufacturing Union Inc & Ors v Air New Zealand* (2004) in which the Employment Court said:

The evidence that random testing acts as a deterrent persuades us to hold that in safety sensitive areas where the consequences can be catastrophic, the objection to the use of intrusive methods to monitor in an attempt to eliminate a recognised hazard must give way to the over-riding safety considerations. These factors take precedence over privacy concerns.

[19] Also of relevance in this regard is Rule 656(1):

A Rider who rides or presents himself to ride a horse, or any other Licenceholder who has carried out, is carrying out, or is likely to carry out, a Safety Sensitive Activity at a Racecourse, Training Facility or Trainer's Premises shall thereby be deemed to have consented to a Sample being obtained from him by or under the supervision of a Registered Medical Practitioner or by an Authorised Person if and whenever the Rider is required by a Stipendiary Steward or Investigator to permit such a Sample to be so obtained.

[20] The Committee is, therefore, satisfied that the Respondent was working in a safety sensitive role in a safety sensitive activity and, in refusing to provide a urine sample for drug testing as ordered by, Investigator, Mr Irving, whether the selection of the Respondent was random or not, the Respondent has "wilfully failed to perform an act ordered by . . . an Investigator to be performed by him".

[21] Of course, Mr Taylor has admitted the breach but the matter of the reasonableness, or otherwise, of the selection process has been advanced by his Counsel as a basis for the Committee to consider that it is appropriate that no penalty should be imposed, or

that any penalty should be suspended. We reject that submission for the reasons given above. We find it curious that Counsel for the Respondent, in his penalty submissions, makes no reference to the fact that the Respondent was engaging in a Safety Sensitive Activity.

[22] The Committee has considered the precedents referred to in the Informant's penalty submissions. The penalty range emerging from the various cases is 8-12 months. It is also relevant to consider the penalties imposed in the four cases referred to in the Informant's penalty submissions in which the penalty imposed on a jockey and two Trackwork Riders for testing positive to the Class A drug Methamphetamine was, in each case, a 10 months' disqualification. The penalty for refusing to submit to testing cannot be less than in those cases, for the reason given by the Judicial Committee in the *Waddell* case referred to in para [13].

[23] In arriving at penalty, the Committee has taken into account the sentencing principles set out in the Informant's penalty submissions, with which counsel for the Respondent has agreed, and the mitigating factors of his good record in the racing industry and his admission of the breach. However, we do not accept as a mitigating factor that the Respondent's refusal to undergo the drug test was justified by the Bill of Rights Act nor do we accept the clear drug test which he underwent with The Drug Detection Agency on 18 November 2020, which was 14 days after his refusal to submit to drug testing at the racecourse to which the present charge relates and is, therefore, of little evidential value. It is generally recognised that, for urine, the window of detectability for Class A drugs such as LSD, Heroin, Cocaine and Methamphetamine and for Class B drugs such as MDMA (Ecstasy), morphine and Opium is 3-6 days.

PENALTY

[24] Mr Taylor, who currently does not hold a Training Licence, is disqualified for a period of 12 months, backdated to 4 November 2020, such period of disqualification to expire on 3 November 2021.

COSTS

[25] No costs are sought by the Racing Integrity Unit and, since this matter was dealt with on the papers, there will be no order for costs in favour of the Judicial Control Authority.

[26] The Respondent seeks an award of costs against the Racing Integrity Unit. We make no such order.

R G McKENZIE

Chair

Penalty: