

Non Raceday Inquiry RIU v KD Townley - Reserved Decision dated 24 July 2018 - Chair, Mr D Jackson

Rules:

Repondent(s)/Other parties:

Name(s):

Decisions:

BEFORE A JUDICIAL COMMITTEE

HELD AT CHRISTCHURCH

IN THE MATTER of the New Zealand Rules of Harness Racing

IN THE MATTER of Information No. A6425

BETWEEN Racing Integrity Unit

KYLIE WILLIAMS

Informant

AND KEVIN DAVID TOWNLEY

Public Trainer

Respondent

Judicial Committee: DM Jackson (Chair), RG McKenzie (Member)

Rule Breach: 1004 (1A)(3)(4)

RESERVED DECISION OF JUDICIAL COMMITTEE DATED 24 JULY 2018

1. Mr Townley admits a charge that he breached Rules 1004(1A)(3) & (4) by presenting WELL DEFINED at the Timaru Harness Racing Club's meeting on 26 April 2018 with a prohibited substance in its system, namely Ketoprofen. Mr Townley admitted the breach at the first available opportunity and countersigned the information recording same and a penalty hearing in respect of this charge was scheduled for and heard by this Committee on 5 July 2018.

2. This is Mr Townley's third breach of this rule in less than three months. The two previous breaches involved positive swabs for Ketoprofen taken from the same horse, WELL DEFINED, on 3 February 2018 and GEENA'S GIRL on 2 March 2018. Mr Townley was fined \$7,000 by a Judicial Committee for the first breach and \$11,000 by a different Judicial Committee for the second breach. That is a total of \$18,000 in fines to date for ketoprofen breaches.

3. The rule provides:

"1004 ...

(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. Clause 5 of the Prohibited Substance Regulations provides that the therapeutic substance, Ketoprofen, is not prohibited when present at or below the mass concentration of 100mcg per litre in urine.

5. The consequences of a breach of the Rule are outlined in Rule 1004(7):

"every person who commits a breach of sub-rule (2) or (3) shall be liable to:

(a) a fine not exceeding \$20,000.00 and/or

(b) be disqualified or suspended from holding or obtaining a licence for any specific period not exceeding five years.”

6. The Rule also requires the mandatory disqualification of the horse pursuant to Rule 1004(8) and 1004D.

The facts

7. The Summary of Facts presented by Mrs Williams records that the horse WELL DEFINED is owned by Mr Townley's wife, Mrs M E Townley and is trained by Mr Townley. The horse was entered and presented to race by Mr Townley at the Timaru Harness Racing Club (at Addington) Meeting on 26 April 2018. It won the race it was entered in but the stake has not been paid out.

8. Following the race, the Stipendiary Stewards ordered that WELL DEFINED be post-race swabbed, which occurred. On 10 May 2018 the New Zealand Racing Laboratory reported Ketoprofen was detected in the sample taken.

9. Upon confirmation of the positive swab, Mrs Williams and the Manager of Stewards, Mr Nigel McIntyre, visited Mr Townley's property and spoke with him. He advised that he took WELL DEFINED to the races in his own float and that the horse was one of two horses that he had raced that day. He could not offer an explanation for the presence of Ketoprofen in the urine sample taken from WELL DEFINED and could not advise when the horse was last treated with Ketoprofen.

10. The last bottle of “key injection” containing ketoprofen on the property was taken for testing by the Racing Integrity Unit on 16 March 2018.

11. A urine sample was taken from WELL DEFINED on 11 May 2018 with the laboratory reporting that sample as negative to Ketoprofen.

12. In accordance with his rights, Mr Townley asked that the reserve sample taken during the initial testing on race day be tested, which occurred in Sydney and which test confirmed the presence of Ketoprofen in the reserve sample.

13. Mr Townley has had 14 horses swabbed since the first positive swab with WELL DEFINED on 3 February 2018. Aside from the two subsequent further breaches, all other tests have been clear.

14. Mr Townley keeps a diary in which he enters treatments that have a withholding time and all of his drugs are kept in a safe. The safe is an initiative implemented after the first positive swab. Mr Townley now primarily uses a vet for pre-race day treatments that have a withholding time, although it seems that was not the case before the return of the earlier positive swabs when he administered treatments himself.

15. The Summary of Facts records that the source of the Ketoprofen cannot be accurately determined despite considerable enquiries.

16. Mr Townley has been training since 1986-87 initially in partnership with his father Mr D J Townley and then on his own from 1994/95 on to the present day and has trained over 460 winners in that time. He has held a licence in one form or another for over 50 years.

17. The Summary of Facts was largely accepted by Mr Townley although he informed the Committee that he did give Investigators an explanation for the presence of Ketoprofen in the urine sample, which was that he could not account for it because there was no record of it in his diary, which diary he has always kept, and further, because there was no Ketoprofen on the property (having been taken away on 16 March 2018). Mr Townley confirmed to the Committee that he had not treated the horse with Ketoprofen prior to the race.

18. Mr Townley openly conceded that he had used Ketoprofen in the past and that he had had bottles of Ketoprofen in his stables during the period of his two earlier swabs. However, the third positive swab had caused him to engage a vet, at considerable expense, to not only administer pre-race treatments, but also to advise him on the keeping of his stables, the use of treatments and the possible sources of Ketoprofen contamination.

19. Mr Townley was at pains to explain to the Committee that he had removed all possible contaminants, be they ointments, be they food, anything which he thought the Ketoprofen may have come into contact with or which by some process, created or transformed into Ketoprofen. Mr Townley emphasised that since he had involved a vet and disposed of these items he has had 7 horses swabbed, all of which have tested negative. He emphasised that this was a brief and isolated incident in the history of his stable for which he could offer no real explanation.

Penalty Submissions

20. Mrs Williams presented written penalty submissions for which the Committee is grateful. Mrs Williams submitted that Mr Townley should be disqualified for a period of one (1) year or fined \$18-20,000.00 or otherwise be penalised by way of a period of disqualification and fine.

21. Mrs Williams identified that the JCA guidelines suggest a starting point of \$8,000.00 for a first offence of this kind and for a second offence a starting point of 2 years disqualification and a fine of up to \$10,000.00.

22. Mrs Williams identified by reference to Mr Townley's earlier fines of \$7,000.00 and \$11,000.00 that a fine on this occasion ought to be at least a fine of \$18,000.00 (being the total of those two earlier fines).

23. Mrs Williams submitted that an aggravating factor here was the third positive swab in a two-month period and further, Mr Townley's earlier breach in 2003 for a prohibited substance in Australia.

24. Mrs Williams referred the Committee to four decisions concerning breaches of this rule namely *RIU v TW Mitchell* (12 July 2012), *RIU v R Brosnan* (13 February 2018), *RIU v C and A Edmonds* (31 March 2016) and *RIU v B Negus* (20 March 2018). The Committee will discuss those decisions below.

25. Mrs Williams said that Mr Townley was to be given credit for the manner in which he had conducted himself during the enquiry, his admitting the breach at the first opportunity and otherwise being cooperative but the end result was that he had breached the rules for the third occasion and that that was unacceptable. Mrs Williams also sought the disqualification of WELL DEFINED under rule 1004(8) and costs of \$1,250.00 for the testing of the reserve sample.

26. Mr Townley relied upon his explanation which the Committee has recorded above, and also brought two character witnesses with him, namely Mr Dean Hunter and Mr Bruce Dawson.

27. Mr Townley's primary submission was that he ought not to be disqualified because it would be devastating to him not only because of the consequences (being at this age, the end of his training career), but also the personal pride and reputational damage which he will suffer. Mr Townley reiterated to the Committee that he was flabbergasted as to how this had occurred and could offer no explanation for the presence of the Ketoprofen in the horse's system on this third occasion.

28. Mr Townley explained that he had purchased two bottles of "Key Injection" containing Ketoprofen in July 2017 and that he had only half a bottle left by the time the second positive swab was returned, which meant of a total of 15 doses available, he had given more or less one dose per horse in his team for approximately 10 or so months.

29. He emphasised that after the second swab and the removal of the bottles by Racecourse Investigators there was no Ketoprofen on the property. The absence of Ketoprofen from the property post 16 March 2018 was not disputed before this Committee.

30. Both parties addressed the Committee on the relevant penalty principles with Mrs Williams emphasising the key principles of denunciation and deterrence, that the punishment ought not to be disproportionate to the breach, the need to rehabilitate the offender and the overall interests of racing in promoting the presentation of horses for racing which are free from prohibited substances. Mr Townley accepted that those were the relevant sentencing principles and understood that the Committee must mark its disapproval of any breach of this rule, let alone a third breach of this rule, but emphasised that there was no need to further deter him given the fines already imposed on him and the steps he has taken to address the problem after the second positive swab.

31. Mr Townley called two men to give character evidence for him. The first was a Mr Dean Hunter who was a member of the New Zealand Police for 21 years and thereafter involved in asset recovery and otherwise the holder of a licence to train for many years. He told the Committee that he had known Mr Townley for 45 years and that he found him to be honest and trustworthy, that he was a man of considerable training skill and prowess who was a great mentor to him and someone who had, in Mr Hunter's experience, always been careful around supplements and additives and was something of a stickler for compliance with the rules and in particular, the prohibited substance rule. Like Mr Townley, Mr Hunter suggested that after the second positive swab and the removal of Ketoprofen from the stables by the Racecourse Investigators the only possible source for the third positive swab was contamination.

32. Mr Hunter was at pains to emphasise Mr Townley's integrity.

33. The second man who gave character evidence to the Committee was a Mr Bruce Dawson. Mr Dawson was for many years a Justice of the Peace and sat in a judicial capacity in the District Courts of the Otago/Southland area. Mr Dawson had visited Mr Townley's stable on a number of occasions and was impressed with how clean it was and how well it was run and commented that he found Mr Townley to be "very fussy". He said that given his personal experiences of dealing with Mr Townley, he was extremely surprised that he suffered three positive swabs in quick succession and in circumstances where there was no real explanation for the third positive swab at all. Mr Dawson suggested that this third charge should be dealt with more leniently because Mr Townley had done all he could reasonably do after the second positive swab to ensure compliance with the Rules. Mr Dawson was concerned for Mr Townley's financial position noting the level of fine proposed and emphasised that disqualification would be catastrophic to Mr Townley.

34. Mr Townley concluded his penalty submissions by commenting that only a fool would continue to use or otherwise present horses to race with a prohibited substance when under investigation or otherwise charged for presenting horses with the same prohibited substance. He noted that this period of two or so months during which three positive swabs were returned, had already cost him \$18,000.00 in fines and that the Committee ought to deal with this third breach differently than the two earlier breaches where he was perhaps slow to react. Mr Townley was distressed at the prospect of disqualification.

Fixing a starting point

35. The JCA penalty guide provides suggested tariffs for a first and second breach but does not go further and suggest penalties for further or multiple breaches. That the guide does not go further is reflected in the penalties imposed in the decisions referred to by Mrs Williams, which vary both as to type and quantum or length. No two cases are alike and the Committee must start the penalty exercise by determining the level of culpability in the instant case.

36. We believe Mr Townley's culpability to be in the low to mid range on this occasion. The Committee accepts that Mr Townley made a number of changes to his stable operation following the earlier positive swabs, which have seen his horses pass a number of subsequent urine samples with clear results. Mr Townley has hired a vet to administer all pre-race treatments and otherwise to advise on the possible source of the ketoprofen in the third positive swab noting that it is not disputed by the parties that there was no ketoprofen on Mr Townley's property after the bottle of "key injection" was removed from the stables by Investigators on or after 16 March 2018.

37. In fixing culpability and accepting Mr Townley's submissions as to his reduced culpability on this third occasion, the Committee has had particular regard to the evidence of Messrs Hunter and Dawson as to Mr Townley's character. They gave credible character evidence which enables the Committee to accept that Mr Townley is at a genuine loss as to how Ketoprofen entered the horse's system and that this was neither a deliberate or negligent act on his part. Further, that he has done everything he could do since the two earlier positive swabs to root out the problem and remove it. That Mr Townley has succeeded is supported by the clear swabs since enjoyed by his team of horses. This is not a case of Mr Townley stumbling on blindly to the problem and taking no steps to address it after the second positive swab.

38. Accordingly, we fix the starting point fine for this breach in isolation but having regard to the JCA Penalty Guide at \$12,000.00.

Aggravating Factors

39. We find the sole aggravating factor to be the third breach of the Rule within a period of no more than three months. For that aggravating factor alone we increase the starting point fine by \$8,000.00 to \$20,000.00. We disregard the Australian breach as historic and no longer relevant.

Mitigating Factors

40. We find the following as mitigating factors: Mr Townley's frank and prompt admission, the changes he has made to the recording and storing of medications, the removal of a large number of old medications and treatments from his stable, his use of a vet and otherwise his good history and reputation.

41. For those factors combined we will deduct \$5,000.00 from the fine for mitigation.

42. If we approach the penalty on the basis of a fine only therefore, we would get to a fine of \$15,000.00. However, the circumstances of a third breach within a short timeframe and the nature of the two earlier breaches mean that we must consider whether a fine is the appropriate remedy or whether, as is submitted by Mrs Williams, Mr Townley ought to be disqualified.

Analysis – whether to go further and disqualify?

43. It is important at this juncture to record the primary purpose of disciplinary proceedings under the Rules of Harness Racing. Punishment is not the primary purpose. Rather, the purposes of disciplinary proceedings are set out in Clause 5, Fifth Schedule, Rules of Harness Racing and include:

- a) to ensure that racing is conducted in accordance with the code rules;
- b) to uphold and maintain the high standards expected of those participating in the sport of racing and the racing industry;
- c) to uphold and maintain the integrity of the sport of racing and the racing industry;
- d) to protect the participants in the sport of racing, the racing industry, and the public.

44. These principles originate from the Supreme Court judgment in Z v Complaints Assessment Committee [2009] 1 NZLR 1 and have been expressly adopted by the Code in the Rules. They are binding on a Judicial Committee and must be observed.

45. As already noted the decisions referred to by Mrs Williams varied significantly as to penalty and highlight that disqualification is, in fact, rare even in cases of multiple breaches. Indeed the only case of disqualification presented to the Committee was that of *Mitchell* whose original disqualification for three charges of presenting horses with elevated TC02 results of 12 months disqualification was reduced on appeal to 9 months and a fine of \$4,500.00 noting that Mr Mitchell had previously been charged with presenting a horse with an elevated TC02 and fined earlier such that on that occasion it was in effect Mr Mitchell's second, third and fourth offence across a period of several months. This case is different in kind to *Mitchell* in terms of duration, substance and culpability.

46. That this is the third breach in a short period means that the Committee ought to also consider the overall effect of the penalty on Mr Townley across the three penalties imposed on him in total. The Committee has considered Mr Townley's submission to this effect and has determined that the totality principle is relevant and applicable here.

47. At the heart of the totality principle is the need for the punishment to meet the crime and that when arriving at an appropriate penalty for several breaches, a Committee must not only assess each breach individually, but also assess the licensee's overall culpability and determine what effective penalty is appropriate for the totality of the licensee's conduct.

48. Again, this is an acknowledgement that the penalty analysis is driven by the need to match the penalty with the gravity of the overall conduct. Further, factors such as age are relevant considerations that should be taken into account when ensuring that the overall end penalty is not crushing or unfair.

49. The totality principle is not limited to assessing one penalty for multiple breaches and extends to assessing successive but proximate penalties for separate events. Here where there have been three breaches that have resulted in three penalty hearings before three different Committees, the proper approach is for this Committee to reflect on what the appropriate overall penalty would have been if Mr Townley had been sentenced on all matters at the same time, and to adjust the penalty imposed for the third breach accordingly. What is required is an assessment of the cumulative effect of the penalties in combination with earlier penalties, so that the end penalty for the overall offending is not wholly disproportionate.

50. We have done this. The Committee accepts that the effect of disqualification on Mr Townley would have a crushing effect, would see him forced into early retirement and ruin his reputation. It would be a tragic end to a notable training career. It would see his stable cease operation and horses transferred to other stables. We accept that that is too harsh a penalty and would be wholly disproportionate to Mr Townley's overall culpability.

51. This third breach is different in kind to the two earlier breaches and, stepping back, the Committee determines that denunciation and deterrence are served by a further fine on this occasion. Mr Townley confirmed to the Committee that he could afford to pay another fine.

52. We have considered totality in terms of a fine too. Adopting the end point fine outlined above and then stepping back and viewing the three fines together (\$7,000.00 plus \$11,000.00 plus \$15,000.00) means a total overall fine of \$33,000.00.

53. A fine sum of \$33,000.00 is not disproportionate to the gravity of his breaches overall, namely across the three breaches of the Rule to date.

54. That is a great deal of money. It will hurt Mr Townley but it will not break him and importantly, it will serve as a warning to all licensees of the importance of strict adherence to the prohibited substance rule.

55. Accordingly, while Mr Townley has avoided disqualification on this occasion, the fine will not be further reduced for totality purposes.

56. Mr Townley is fined \$15,000.00 for this third breach of the Rules.

57. The Committee further orders that the horse WELL DEFINED is disqualified per Rule 1004(8) from Monday, 30 July 2018.

58. Mr Townley is ordered to pay the costs of the reserve sample in the amount of \$1,250.00.

There will be no other orders for costs either of the Informant or of the Committee.

DM Jackson

Chair

Penalty: