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

Appeal B N Orange v RIU - Reserved Decision of Appeals Tribunal dated 8 March 2021 - Chair, Sir John Hansen

Rules:

Repondent(s)/Other parties:

Name(s):

Decisions:

BEFORE THE APPEALS TRIBUNAL

JUDICIAL CONTROL AUTHORITY FOR RACING

AT CHRISTCHURCH

IN THE MATTER OF the New Zealand Rules of Harness Racing

BETWEEN Blair Nathan Orange

Appellant

AND the Racing Integrity Unit

K R Williams, Investigator

Respondent

INFORMATION A13231

Counsel: JHM Eaton QC for Applicant

C J Lange for Respondent

Tribunal: Sir John Hansen, Chairman

N McCutcheon, Member

Date of hearing: 1 March 2021

Registrar: S Renault

RESERVED DECISION OF APPEALS TRIBUNAL DATED 8 MARCH 2021

1. Prior to racing at the Banks Peninsula Trotting Club meeting of 24 January 2021, RIU officials required some drivers to undergo breath alcohol testing pursuant to r 513(1) of the New Zealand Rules of Harness Racing. The Appellant was tested, initially returning a level of 199 mcg/l of breath, and 10 minutes later 190 mcg/l of breath. The permitted level is 100 mcg/l of breath. Consequentially, Mr Orange was stood down from his driving engagements for that day and an information was presented to the Raceday Judicial Committee, alleging breaches of r 513. The matter was adjourned to be heard by a Non-Raceday Committee. (That Committee also heard a similar charge against a Mr Butt). Mr Orange admitted the breach in writing at the earliest possible opportunity, and at the conclusion of the JCA hearing his driver licence was suspended from the conclusion of racing on 8 February until the close of racing on 5 April 2021 — a total period of eight weeks. He was fined $1000 and ordered to pay $750 as a contribution to JCA costs.

2. From that penalty decision, he appeals.

The Judicial Committee Decision

3. The JCA recognised that any term of suspension will exact different levels of punishment on offenders, depending on the likely future opportunities to earn income through the number of drives available. They noted that was an inevitable consequence if the privilege of participation by way of licence was breached. They also noticed the primary purpose of sanctions was regulatory and not punitive.

4. The JCA noted a previous breach in January 2016, and a misconduct-related offence within the last year where alcohol played a major part. The JCA also acknowledged the positive, proactive, rehabilitative steps taken by Mr Orange and his ready acceptance of responsibility.

5. The JCA took a starting point of six weeks' suspension to reflect the breach, the level of breath alcohol and the effect on the owners and trainers who could not use the Appellant's services on that day. It noted as aggravating features the previous offence and its level; the effect upon the gambling public; and the misconduct offence in early 2020 and applied an uplift of four weeks for the aggravating factors. The JCA then reduced it by two weeks to consider the personal mitigating factors such as family needs and the rehabilitative actions being taken. That left a suspension period of eight weeks.

Grounds of Appeal

6. The Appeal was brought on the following grounds:

i. The six-week starting point was excessive.

ii. The four-week uplift was excessive.

iii. The penalty is inconsistent with other decisions in the Judicial Penalty Guide.

iv. The JCA failed to have regard to race days and drives in determining the consequences of a suspension.

v. The credit for mitigating factors was inadequate.

vi. The fine was inappropriate.

Submissions

7. Mr Eaton referred us to the Appeal Tribunal decision in *RIU v S Lawson* as to the general purpose of disciplinary sanctions (*RIU v S Lawson*, 13 May 2019, Chair Hon JW Gendall QC).

8. Next, he submitted that the starting point of six weeks was excessive because it relied on the decision in *RIU v Gillies* (*RIU v J Gillies,* 22 September 2009). He pointed out in that case the jockey had an alcohol level of 515 mcg/l, and he compared that to the level of the Appellant. He further pointed out that Gillies was a case of breach of the relevant Rule under the Thoroughbred Racing Rules, but said it was not appropriate to use it as a starting point, given that the Thoroughbred Racing Rules have a significantly more serious maximum penalty than the Harness Racing Rules.

9. He next submitted the uplift was excessive as it was the same as was imposed on Mr Butt (*RIU v R J Butt,* 1 February 2021, Chair Hon JW Gendall QC). He pointed out that Mr Butt, whose offence occurred at the same meeting, had a prior offence within five years, and Mr Orange's previous offence was outside the five-year period. He said what occurred here was to severely re-penalise Mr Orange for his previous offence. He referred to the decisions of the Court of Appeal in *Beckham v R* and *Tiplady-Koroheke* (*Beckham v R* [2012] NZCA 290 and *Tiplady-Koroheke v R* [2012] NZCA 477).

10. He referred to the JCA Penalty Guide for JCA members which is headed 'Guide to Imposition of Harness and Thoroughbred Racing Penalties on Race Day'. He stressed that the key purpose of the Guideline was to ensure consistency, and the sanction imposed here promoted inconsistency by being out of line with similar offences.

11. He next submitted that the JCA was incorrect in imposing a penalty without taking into account the number of drives the Appellant would miss. Apparently, the Guide was not available to the Tribunal, or Counsel, at the hearing but the matter was raised about the earlier similar offence of the Appellant when Professor Hall referred to it in imposing a five-day suspension. In the decision now appealed from, the JCA expressed the view that the Guide "did not apply to misconduct offences" and said in its written decision "the Guide speaks only of driving offences". Mr Eaton stressed that this should be compared with the proper concession of the RIU that the drives to be missed because of suspension were relevant to the determination of the sanction imposed on the Appellant.

12. Mr Eaton finally submitted that the credit for mitigating factors was inadequate. He said Mr Orange had a responsible and proper attitude towards rehabilitation, and he had a number of references of good character. He advised that subsequent to the penalty being imposed, the Appellant had completed a rehabilitation course with the Salvation Army, and a letter to this effect was tendered to us. He had also voluntarily gone on the Trackside television programme on Wednesday 10 February 2021, where he accepted full responsibility for his action and was clearly remorseful.

13. Mr Lange stressed that the purpose of the Rule that was breached was to ensure that no driver competed with any level of alcohol in their blood. He submitted it was appropriate to take a similar starting point as that for Butt, who was charged on the same day, and that Butt's level of 254 was not all that much different from the Appellant's at 190.

14. He further submitted that, while consistency was important, the Penalty Guide is a Guideline and no more, and it was open to the JCA to reach the conclusion it did. He submitted that the same starting point by the identical Committee was adopted in Butt, which showed consistency, and further there was no error by the Committee in rejecting the Appellant's argument that the suspension needed to be measured against the probable number of drives or driving days rather than calendar weeks or months. He referred to the decision of the High Court in *Bosson v RIU and JCA* to support the proposition that the possible loss of opportunities in income is not a significant consideration (*Bosson v RIU and JCA* [2021] NZHC 23).

15. He further submitted that the uplift was the same as was applied by this Committee in Butt, and was based on the combination of aggravating features set out at paragraph 27, not just the previous offence.

16. He submitted the mitigating factors were properly allowed for, and a fine was appropriate in addition to the suspension.

17. Mr Lange also spent some time addressing the like Rule in the Thoroughbred Racing Rules.

Decision

18. We accept, and respectively adopt, the decision in *RIU v Lawson* where it was recognised: "A sanction must be sufficient, but no more than is necessary to achieve its purpose". In that case, it was said, the proper balancing act was to achieve proportionality between the public interest; the interests of the offending member; the interests of the professional body as a whole; the seriousness of the offending; and any aggravating and mitigating factors.

19. We also accept, even though the limit for offending is set at 100 mcg/l, that the purpose of r 513 is to ensure that no driver takes control of a horse with any level of alcohol, as Mr Lange submitted.

20. However, it is necessary to refer to the JCA's reference to *Gillies*. The maximum penalty under the Rules of Harness Racing is a 12-month suspension and/or a $10,000 fine. A driver commits a breach of these Rules who presents himself or herself within 1 hour prior to the start of the race in which he or she is engaged to drive or who drives in a race commits a breach of these Rules.

21. That must be compared with the Thoroughbred Racing Rules, where an offending jockey can be disqualified for up to two years and fined up to $50,000, in addition to a suspension of 12 months. This is clearly a much more significant maximum sentence. We presume it is to recognize the elevated danger levels in Thoroughbred Racing.

22. It can be assumed that the starting point for cases for breaches of the Thoroughbred Racing Rules consider that maximum penalty. In the same way, breaches of r 513 must take into account the maximum penalty under the Harness Racing Rules. We are satisfied it was wrong for the JCA to simply transpose a case under the Thoroughbred Racing Rules with a significantly higher maximum penalty and a very much higher alcohol level to reach a starting point that it did in this case.

23. Mr Lange is right to submit that the JCA Penalty Guide is simply that as the JCA stated. However, the Guide does stress the need for consistency, but recognises the need to retain the Judicial Committee's discretion to be exercised within readily ascertainable and transparent, parameters. In this case, in arriving at a starting point of six weeks with a 190 mcg/l level, we do not consider that the aim of consistency and equity in penalties has been fairly achieved. Despite Mr Lange's submission that there was consistency between this Committee in both this case and that of Mr Butt, that of itself does not create overall consistency. Furthermore, we think it correct, as Mr Eaton submitted, that Mr Butt's alcohol level was significantly higher. And we also accept that the actual level of blood alcohol is a significant factor in reaching a starting point. It is to be noted the level here would be within a range where it is lawful to drive a motor vehicle. That is to in no way downplay the seriousness of the offence committed by the Appellant.

24. We are satisfied by reference to the cases referred to in Mr Eaton's table and those attached to the Butt Decision that an appropriate starting point to achieve the purposes of the Rule is a sanction of four weeks' suspension.

25. Mr Eaton noted that the uplift in this case was some 66 per cent. As the Court of Appeal stated in *Beckham*:

[25] The rationale for uplifting a prisoner's sentence to take into account prior criminal history has been explained by this Court in *R v Casey* and in *R v Ward*. As Sir Michael Myers CJ explained in *Casey*, the Court must be careful to see that a sentence of a person who has been previously convicted is not increased merely by reason of those previous convictions. If this occurred, it would result in the prisoner being sentenced again for an offence which he had already expiated. This does not mean that previous convictions must be ignored, particularly if the previous convictions indicate a tendency to commit the particular type of offence for which the offender is convicted. Issues of deterrence and, in some cases, protection of the public may require an uplift for previous offending. Similarly, previous convictions may bear on the issue of character.

26. We think the JCA was in error when it referred to the decision of Professor Hall and said he wrongly applied the Guide because it did not apply to misconduct offences. In its written decision the JCA said the Guide speaks only of driving offences. We do not think that the Guide is limited in the way the JCA has suggested. The Penalty Guide does not appear to record limitations on its application in fixing penalties for Rule breaches, and the language is clear. It also clearly applies to administration offences, and to a breach of r 1001, a misconduct offence involving abusive language. We think it applies to the breach Mr Orange has admitted. In doing so, in fixing penalties it is therefore appropriate to consider one of the general principles in the Guide that states:

An overriding consideration is the need for equity in the penalties that are imposed. One method of ensuring this is for a judicial Committee to base calculations on the number of drives a Respondent would have per meeting. This avoids difficulties that arise where a driver is involved in the industry on an interest only or part-time basis. A judicial Committee must ensure that it has details of a driver's record before it, and is therefore in a position to be able to calculate the number of drives the Respondent usually has at a meeting.

27. We agree with Mr Eaton's submission that this is an entirely appropriate and realistic mechanism to ensure equity amongst the participants. In this way the process will afford all participants in Harness racing, including the betting public, a high degree of confidence in the fairness and equity of the Rules regime. In applying the Guide, it is appropriate to consider the individual consequences of the penalty imposed including the loss of drives.

28. While we accept it is only a Guide, we consider there must be clear and compelling reasons to set it to one side and to go further. We do not see such compelling considerations in this case.

29. The JCA properly considered aggravating features in considering the uplift. Mr Orange's previous offence for a breach of this Rule is only just outside the five-year period but it is a factor in the determination of the penalty. It was entirely appropriate to take into account as an aggravating feature the 2020 misconduct offence, particularly given that it was alcohol related. As Mr Lange noted in his submission, the reasons put forward by Mr Orange in this case are almost a mirror of what he put forward on 2 January 2016. This, and the fact that the 2020 misconduct charge had an alcohol component, suggests he has not learnt.

30. Mr Eaton made a submission that the uplift was 66% of the starting point. We think it unhelpful to take a mathematical approach to the uplift. Rather it requires standing back and considering the seriousness of the aggravating factors and then determining the uplift. It is also necessary to ensure there is not a "second sanction" for the 2016 offence. In this case we are satisfied the JCA approached the uplift on this basis and we do not disagree with the 4 weeks they arrived at.

31. We consider the two weeks for mitigating factors as appropriate, even with the additional information that confirms Mr Orange went on Trackside TV with a complete mea culpa, and that he has undergone satisfactory rehabilitation.

32. As we have stated we are satisfied the appropriate starting point, considering the differences in maximum penalties between the Thoroughbred Racing Rules and Harness Racing Rules, and comparable cases and blood levels, is four weeks. The uplift of four weeks takes that to eight weeks. The mitigation is appropriately set at two weeks, which leaves an end suspension period of six weeks.

33. In relation to the $1000 fine, it appears to be common ground that the RIU did not seek the imposition of any monetary penalty. That is a factor dealt with by the JCA, which simply stated:

(31) Mr Orange maintains his non race day driving work with another licensee so will have some income, and he tells us that he earned $37,000 in December and January. A fine of $1,000 is also required.

34. The JCA does not set out the reason why in addition to the suspension, with a large number of drives being missed, a fine was necessary. Accordingly, in circumstances where the RIU did not even seek the imposition of a fine, we do not think it was appropriate in this case.

35. Accordingly, the Appeal is allowed, and the suspension period reduced to six weeks, meaning the suspension is until the 22nd of March 2021. The fine of $1000 is cancelled.

Sir John Hansen

Chairman

Penalty: