

Appeal G Smith v RIU - Written Decision of Appeals Tribunal dated 6 April 2021 - 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 GAVIN SMITH

Appellant

AND RACING INTEGRITY UNIT (RIU)

Respondent

Information: A11479

Appeals Tribunal: Prof G Hall, Chairman

Mr S Ching, Member

Appearing: The Appellant in person, with the assistance of Mr K Barron

Mr Renault, for the Respondent

Date of hearing and oral decision: 31 March 2021

Date of written decision: 6 April 2021

WRITTEN DECISION OF APPEALS TRIBUNAL

[1] Mr Smith has appealed against the decision of the Non-raceday Judicial Committee where it was found that at a race meeting conducted by Ashburton Trotting Club at Timaru on Saturday, 27 February 2021, as the driver of KD HAWK in Race 1, the Woodlands Stud Trot, he was in breach of r 868(2) in that he “failed to take all reasonable and permissible measures to ensure KD HAWK was given full opportunity to win the race or to obtain the best possible placing through his lack of vigour in the home straight”.

[2] KD HAWK finished in 4th placing, a margin of 0.9L behind the winner RANDOM JUDE. The official margins for the race were a nose; 3/4L; nose.

[3] KD HAWK was having its 9th raceday start. It was the first time Mr Smith had driven the horse. KD HAWK was having its 2nd start back since being spelled after trialling in October 2020. At its first start back a week earlier at Rangiora on 20 February 2021 the horse broke when improving into the passing lane and being urged with the inside rein by Mr DeFilippi near the 200 metres.

[4] We adopt the description of the race from the Judicial Committee’s decision. Mr Smith did not dispute its accuracy.

[5] KD HAWK drew barrier 4 on the unruly. The distance of the race was 2400 metres (standing start). KD HAWK began quickly from its draw and improved three-wide around the field to be in third position as the field entered the first bend. The horse goes into a break shortly after and loses considerable ground resulting in the horse being some distance behind the body of the field after settling. (We add, that when questioned, Mr Renault told the Tribunal that the Stewards believed the ground lost by the horse was close to but not in excess of 150 metres).

[6] Near the 1100 metres KD HAWK is able to catch the field and assume a position last on the inside. From around the 900 metres the horse is shifted outwards to a two-wide position before improving three and four-wide with cover inside the final 500 metres.

[7] As the field straighten for the run home Mr Smith shifts KD HAWK to a position widest on the track and has clear running inside the final 300 metres.

[8] The video shows that Mr Smith has a firm grip on the reins and has sat motionless in the sulky until just prior to the 100 metres where his right arm makes a small movement, and he urges the horse for one stride before again sitting motionless until the end of the race. Inside the final 40 metres of the race, Mr Smith releases the firm grip he has on the horse slightly and allows the horse a little more rein until the finish of the race.

[9] At the time Mr Smith shifts ground to obtain clear running, KD HAWK is approximately 6 to 7 lengths behind the leader RANDOM JUDE as evidenced by the back straight camera angle. The horse continues to take ground off the leaders under a hold and finishes less than a length from the winner and a nose from the 3rd horse without being driven out to the finish line. The horse has made up some 5 lengths inside the final 300 metres.

Appellant's submissions

[10] The main thrust of Mr Smith's appeal was that he had been charged under the wrong Rule. While he did not believe there was any fault with his drive, he said he could accept a finding that he was in breach of r 868(3), which he believed was a lesser charge than one under r 868(2). Mr Barron supported Mr Smith's argument in this regard.

[11] Rule 868(2) provides: *"Every horseman shall take all reasonable and permissible measures at all times during the race to ensure that his horse is given full opportunity to win the race or to obtain the best possible position and/or finishing place"*.

[12] Rule 868(3) provides: *"Every horseman shall drive his horse out to the end of the race if he has any reasonable chance of running first, second, third, fourth, fifth, or sixth"*.

[13] Mr Smith was adamant that he had not breached r 868(2). He made reference to the ground the horse had lost at the start due to it going into a gallop without any warning. He said he was conscious of the possibility that the horse would gallop again for no reason and that was why he was sitting still on the horse. He said he had run the rein lightly (so it would not get a fright) across the rump of the horse fairly early in the home straight and the horse had clamped its tail which he took as the horse resenting this, and he was concerned it would break. He believed if he further encouraged KD HAWK and it broke, he could be said to be incompetent. He did not believe the horse could have run home any quicker than it had; it was giving its best. The horse had the bit in its mouth, and he was keeping it balanced.

[14] Mr Smith emphasised that the horse had somewhat of a reputation as a rogue and the 4th was the best placing the horse had achieved in 9 starts. It had broken in all but one of its previous starts. He said both the Trainer and the Connections of the horse were happy with his drive. He believed the horse had gained confidence as a result of its placing and it had won at a subsequent start.

[15] Both Mr Smith and Mr Barron drew a parallel with the decision in *RIU v Butcher* which was delivered by a different Judicial Committee but on the same day as the decision in this case. He believed the actions of Mr Butcher (more correctly the inaction) were a more serious breach of the Rules than were his. He highlighted that KD HAWK had lost considerable ground at the start, had galloped the start before when it received just one slap, and had galloped throughout its career. Mr Butcher was charged under r 868(3) not (2). Why was this, he queried.

[16] Mr Renault addressed this issue and stated that the Stewards laid the charge under r 868(2) because of the period of time in which they believed Mr Smith was in breach of the Rules (some 250 to 300 metres). Were it a matter of not driving out to the line in a close finish, Mr Renault said he would lay the charge under r 868(3). This was not the case here though. He added that he believed Mr Butcher may have been charged under the wrong Rule although arguably Mr Butcher's lack of judgement related to the final 50 metres where he mistakenly thought he had the other horse covered.

[17] We explained to Mr Smith that it was a matter of prosecutorial discretion and that Mr Renault could not be responsible for charges laid by other Stewards and in other parts of the country. He replied that he understood this, but still believed Mr Butcher's breach was worse than his.

[18] Mr Smith pointed to the "lower" penalty in the Butcher case of two days' suspension and a \$250 fine. However, he accepted when regard was had to the number of drives that he and Mr Butcher would have on a typical raceday, the penalties were in fact similar.

[19] Mr Smith reiterated the submissions that he had made to the Non-raceday Committee that the horse had not responded well when he had urged it earlier in the run home, so he did not urge it again. When we referred to his comment to the Committee that he had not "sat on" a horse in this fashion before, he explained to us that he believed that this was the best way to drive KD HAWK to achieve the best possible placing because of the way the horse felt to him. It was his first drive on the horse. He had studied videos of the horse's previous races and it was evident to him that it would gallop without warning. He had not made an error of judgement.

[20] When questioned by Mr Renault, Mr Smith said he thought it was highly likely KD HAWK had galloped too far shortly after the start, but he knew he still had to try the horse. Once the horse straightened up for the run home it was evident to him that it had something to offer. He decided to let KD HAWK trot up to speed and to give the horse its chance. It had taken time to balance the

horse as it was “going quick”.

Respondent's submissions

[21] Mr Renault submitted that had Mr Smith driven the horse out, the Stewards believed it was entirely feasible to suggest the horse had a strong chance of winning the race. The horse had continued to take ground off the leaders under a hold and finished less than a length from the winner without being driven out to the line. The horse had made up at least 5 lengths inside the final 300 metres. There was no evidence on the videos that the horse had clamped its tail; it appeared to trot evenly.

[22] Mr Renault said the lack of vigour from Mr Smith inside the final 300 metres was completely unacceptable in the circumstances. There was a clear obligation on the part of a Driver, that when circumstances permit, they must leave no doubt in the minds of the viewer of the race (whether that is the Stewards, the public or the Judicial body) that the horse is given every opportunity to finish in the best possible position. Stewards did not demand that excessive force be used upon horses; however, it was expected that a driver would display vigour that was both demonstrable and discernible, especially when they were in contention for stakes and/or dividend bearing places, as was Mr Smith. Looking at the replays, Mr Renault submitted the horse had made up so much ground in the final 300 metres under no pressure that it was “entirely realistic to think that KD HAWK had a reasonable chance of winning the race.” Some vigour or urging was required from Mr Smith. If he had driven the horse out at all, the horse would have run 3rd.

[23] Mr Renault drew the Tribunal's attention to a quote from the Hon Justice Mr W R Haylen, who stated in a decision on 20 May 2009: “Perhaps to throw my own interpretation into the mix I might view it this way – that the sort of culpable action that is required to amount to a breach of this Rule might be such that in normal circumstances a reasonable and knowledgeable Harness Racing spectator might be expected to exclaim with words to the effect “What on earth is he doing” or “My goodness, look at that” or some such exclamation. Mr Renault submitted that this statement demonstrated how r 868(2) should be applied and represented a common-sense application of the Rule.

[24] Mr Renault concluded his submission by stating there was no impediment to Mr Smith driving the horse out in the run home. There was no anomaly or discernible change apparent with the horse's gait. The horse had trotted fluently in the home straight. A Driver could take into account the known characteristics of a horse, just as a Driver could act on instructions from an Owner or Trainer, but Mr Renault emphasised he or she could only do so to the extent that the provisions of r 868(2) were not breached. He believed that Mr Smith had “overdone his thoughts re the manners of the horse”.

[25] In reply, Mr Smith stated that the side-on video was not a true angle; it made it appear that the outside horse was finishing much quicker than the horses on its inner when it was not. He believed that KD HAWK had come to the end of its run at the winning post. This was demonstrated by the fact that the horse had not raced past the other horses after the line which it would have done, had it been finishing so much faster. He did not agree with Mr Renault that the horse had any realistic chance of winning the race. He added he did know the Rules and was doing the best by the horse having regard to how it felt at the time.

Decision as to breach

[26] We believe Mr Renault's description of Mr Smith having a firm grip on the reins of KD HAWK and that he has sat motionless in the sulky until just prior to the 100 metres when he made a small movement with his right arm and urged the horse for one stride before again sitting motionless until the end of the race is accurate. Inside the final 40 to 50 metres of the race Mr Smith released slightly the firm grip he had on the horse and allowed KD HAWK a little more rein until the finish of the race.

[27] We adopt the passage from the decision in *RIU v H* 2005 where the Committee said: “A breach of this particular Rule (the Rule Mr Smith has been charged under) is one that invariably jeopardises the integrity of Harness Racing for reasons which are self-evident. Harness races are based on the requirement that all contestants in a race are given every opportunity by their drivers and that, when the race has been run, all contestants have been fully tested and been asked to do the best that they can do. This has to be the case in order that the betting public, so important to the Industry, can have confidence that they have had a run for their money when they have invested their money on contestants in a Harness race. Any suggestion that a horse has not been given every possible opportunity and has not been asked to do the best that it can, for whatever reason, will result in loss of public confidence in Harness Racing.”

[28] We understand Mr Smith's perception of his actions in the race. In his mind he was trying to get the best result for KD HAWK. But the horse was not urged or called upon by him, other than a very light and cursory pull of the rein across the rump early in the final straight. More than this was required to keep his actions within the Rules.

[29] This was not a trial or a workout. It was raceday and naturally there was money invested on the horse. Mr Vince's comment to the Judicial Committee to the effect that those persons who had invested on KD HAWK in the 1st 4 should buy Mr Smith a beer, is telling. Those persons who had backed the horse each way or in trifectas were also entitled to believe that the horse would be truly tried. The “Justice Haylen test” is pertinent. We are of the view that those persons who had placed money on KD HAWK would exclaim, “What on earth is Mr Smith doing?” They could rightly say that with the lack of vigour demonstrated by the Respondent the whole way up the straight that this was not the case, ie that they would think that the horse had not been truly tried.

[30] We do not accept that the reasons advanced by Mr Smith justify his lack of action in not driving KD HAWK to give it the best possible finishing position in the race. The horse is finishing off the race well and, significantly, continues to make up ground on the leaders when given more rein in the final 50 metres by Mr Smith, until it is only a nose away from 3rd placing at the line.

[31] We are satisfied that Mr Smith believed in his own mind, that he was doing the right thing by driving the horse quietly, but the Rule requires that he take, and be seen to take, "all reasonable and permissible measures to obtain the best possible position and/or finishing place."

[32] Thus, we agree with the conclusion of the Judicial Committee at [22] that Mr Smith "made a serious error of judgement on this occasion and, quite simply, has not done enough to discharge his obligations under the Rule. Had he urged the horse at all, it may well have broken but, then again, it may not have. If the horse did break, then sobeit, but at least it will have been tried which it was Mr Smith's obligation to do."

[33] The Appeal against the finding that Mr Smith was in breach of r 868(2) is dismissed.

Penalty

[34] Mr Smith did not make any detailed penalty submissions stating that if we found the charge under the "more serious" breach of the Rules was proved, then he could not argue that the penalty was not appropriate.

[35] Conversely, Mr Renault sought an increased penalty. He believed the Non-raceday decision placed too little emphasis on the integrity of the Harness Racing Industry. Mr Renault also raised the possibility of there being various other factors that might be considered when imposing penalty under r 868(2) in addition to those that were considered by the Committee.

[36] We did not hear full submissions and Mr Smith did not respond directly to these. In these circumstances, we do not take the matter any further other than to state we see some merit in the factors Mr Renault has identified.

[37] In the circumstances of this particular case, we believe the penalty imposed by the Judicial Committee to be a measured and an appropriate response to the breach. It is not manifestly excessive or inadequate.

[38] The Appeals against penalty are dismissed.

[39] There was no request by the RIU for costs and as the matter was heard before another Non-raceday matter on the day of a race meeting, we do not order costs in favour of the RIU.

[40] We understand the Appellant has not paid a filing fee. In these circumstances and in lieu of payment of the fee, there is an order of costs in favour of the JCA in the sum of \$250.

Dated at Wellington this 6th day of April 2021.

Geoff Hall, Chairman

Penalty: