30 May 2024

**DECISION**

**HARNESS RACING VICTORIA**

**and**

**EMMA STEWART**

**Date of hearings:** 8 December 2023, 29 January 2024

**Date of decision:** 22 May 2024

**Panel:** Judge John Bowman (Chairperson)

**Appearances:** Mr Christoper Winneke KC and Mr Adrian Anderson, instructed by Mr Andrew Cusumano, appeared on behalf of the Stewards.

Mr Damian Sheales represented Ms Emma Stewart.

**Charge:** Australian Harness Racing Rule (“AHRR”) 196B(1) states:

(1) A person shall not without the permission of the Stewards within one (1) clear day of the commencement of a race administer, attempt to administer or cause to be administered an injection to a horse nominated for that race.

**Particulars: Charge 1 AHRR 196B(1)**

That as the licensed trainer of SHOW ME HEAVEN engaged in Race 3 at the Maryborough Harness Racing meeting on Sunday 17 September 2023, that on Saturday 16 September 2023, within one (1) clear day of the commencement of that race, you attempted to administer an injection to that horse, by way of an intravenous drip.

**Charge 2 AHRR 196B(1)**

That as the licensed trainer of ACT NOW engaged in Race 7 at the Maryborough Harness Racing meeting on Sunday 17 September 2023, that on Saturday 16 September 2023, within one (1) clear day of the commencement of that race, you administered an injection to that horse, by way of an intravenous drip.

**Charge 3 AHRR 190B(1)**

That as a licensed trainer between the calendar year of 2022 and 21 September 2023, you failed to thoroughly maintain a logbook, listing and recording all details of treatments administered to horses in your care.

**Plea:** Guilty

**DECISION**

The factual background could be summarised as follows.

A dispute which largely involves a question or questions of law has arisen in this matter.

Ms Emma Stewart is a licensed harness racing trainer. Her partner, Mr Clayton Tonkin, is also a licensed harness racing trainer. Following a Stewards’ inspection at Ms Stewart’s stables on 16 September 2023, she was disqualified for each of two concurrent periods of six months for breaches of AHRR 190B(1). It was alleged that the Stewards arrived at her stables the day before the two relevant horses were to run at Maryborough. She was in the process of administering a drip to each.

Ms Stewart sought a Stay in relation to the imposition and operation of the disqualifications. On 8 December 2023, I heard the contested application of Ms Stewart for a Stay of the operation of the disqualification penalties.

I shall not go into greater detail. I would refer generally to my decision of 8 December 2023 in which a Stay was granted in respect of the operation of the two concurrent periods of disqualification. As can be seen from the Ruling, the introduction of a new factor by the Stewards played a role of some significance in the Stay Order which I made. No conditions were attached to the Stay Order made.

The appeal was otherwise adjourned to a date to be fixed and a Directions Hearing on 29 January 2024.

By letter on 9 January 2024, the solicitors for Ms Stewart advised the Registrar of the following. On 8 December 2023, presumably immediately after the granting of the Stay, Ms Stewart lodged stable returns with Harness Racing Victoria (“HRV”) seeking to transfer 20 horses trained by her to Mr Tonkin as proposed trainer. She sought to transfer a further horse on the following day.

On 14 December 2023, Mr Rhys Harrison, General Manager Integrity at HRV, wrote to Ms Stewart effectively seeking submissions as to why the Stewards should not exercise their powers pursuant to AHRR 25(4) and reject the transfer of the 21 horses. In short, the Stewards were concerned that the proposed transfer would circumvent the effect of any potential penalty resulting from the Charges.

On 19 December 2023, Mr Harrison informed Ms Stewart that the 21 proposed transfers had been rejected.

On 20 December 2023, and in response to a suggestion by those representing Ms Stewart that what was proposed was in essence a contempt of this Tribunal, Mr Harrison wrote that the Stewards had determined to reject the proposed transfer.

A lengthy letter of 9 January 2024 to Mr Harrison from Ms Stewart’s solicitors included the assertion that, in rejecting the proposed transfers, what the Stewards had done was prima facie a breach of the Stay order.

On 29 January 2024, a Directions Hearing was conducted and a timetable was set out for written submissions in relation to the following issue:

“That the Harness Racing Victoria decision to reject the stable returns was compliant with the orders of the Stay decision on 8 December 2023”.

Written submissions were received from Mr Christopher Winneke KC with Mr Adrian Anderson of Counsel on behalf of Stewards and from Mr Damian Sheales of Counsel on behalf of Ms Stewart. I thank all concerned for those very helpful submissions. A matter of interest is that no submission received referred directly to any relevant decision made in relation to the operation of Stays in disciplinary matters such as this. That is no criticism. I have not been unable to find any, but, as shall be pointed out, I did locate a relevant comment in a paper from a conference. I shall return to that.

The essential argument raised on behalf of the Stewards is that the decision to reject the stable returns was made because of concern that they were designed to circumvent a penalty that this Tribunal may or might impose and not because of the disqualification imposed by HRV on 8 December 2023. Reference was made to AHRR 25(4), in addition to AHRR 120.

As was stated in the Stewards’ submissions of 12 February 2024:

“The Stewards are legitimately concerned to ensure that Ms Stewart cannot sidestep the consequences of any ultimate suspension or disqualification by transferring horses to Mr Tonkin prior to the ultimate determination of Ms Stewart’s penalty. The Stewards decision to reject the stable returns was made for this purpose…”

Much the same approach was evident in the written submissions of 8 April 2024 of Mr Winneke and Mr Anderson. In those submissions, it was stated as follows:

“The Stewards’ decision to reject the stable returns was made because of a concern that they were designed to circumvent the effect of a penalty that the VRT may impose and not because of the disqualification imposed by HRV on 5 December 2023”.

The submissions of Mr Sheales on behalf of Ms Stewart are directed to the proposition that the effect of the Stay ordered by the Tribunal is to stay the effect of the disqualification in its entirety, the last three words being underlined. Any discretion conferred by AHRR 120 only arises for exercise after a trainer has been disqualified or a licence suspended or cancelled.

It is further submitted that HRV has no power to invoke a consideration of the provisions of AHRR 120 at any time prior to the imposition of the penalty. In the present case, it is argued that the penalty has been stayed. Section 50A of the *Racing Act* 1958 and the definitions contained therein prohibit such a consideration whilst the stay is operative.

In my opinion, the effect of a Stay such as that ordered on 8 December 2023 is essentially one of maintaining the status quo that existed prior to the commencement of operation of the penalty imposed and which is the subject of the appeal. To state the obvious, the operation of the period of disqualification imposed by the Stewards has been stayed. Thereafter, and for the time being, it is as if the penalty of disqualification had never been imposed. If that be so, there is no relevant inhibition on how Ms Stewart deals with or disposes of the horses which she trains. As of 8 December 2023, no such inhibition exists for the time being.

Whilst I was not directed to any authority precisely on this point and particularly in relation to disciplinary tribunals, I would refer to the following.

The matter is perhaps most neatly summarised by barrister Mr Matt Black in his article “Staying an initial disciplinary sanction”, a paper delivered for the Queensland Law Society at a Seminar on Disciplinary Law on 8 September 2015.

That neat summary is as follows:

“Plainly enough, if a Tribunal orders that the imposition of such a sanction be stayed, then the effect is that the status quo should prevail pending the resolution of the proceedings”.

The words “such a sanction” take one back to the previous paragraph and refer to cancellation of some form of registration or authority to practice and/or the imposition of conditions on a person’s practice.

I appreciate that Mr Black is a barrister, not a judge, and accordingly the extract is from a paper at a seminar, not from a judgment.

Nevertheless, it seems to me to be a pithy, helpful and accurate summation of the law applicable to the present situation and to like situations. The operation of the relevant sanction is frozen for the time being. In a sense, it is as if the sanction never existed. As stated by Mr Black, the status quo prevails. That is so until the Stay is otherwise removed – for example, by the resolution of the relevant proceedings.

Whilst there is no need for me to go into this in detail, it also seems to me that there is merit in the argument advanced by Mr Sheales. The Order of the Tribunal of 8 December 2023 is simple. The Stay Application was granted and the appeal adjourned to a date to be fixed. There were no conditions, reservations or qualifications. It could be described as an absolute Stay. The Stay applied to the penalty of the two concurrent periods of disqualification imposed by the Stewards. If they are not operative, no barrier exists to Mr Stewart carrying out all aspects or matters of training permitted by the licence. To use the words of Mr Black’s article, the status quo should prevail pending the resolution of the proceedings.

That is the conclusion at which I have arrived.

Mark Howard

Registrar, Victorian Racing Tribunal