

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT:

BRAYDEN GAERTH

APPLICATION NO:

A30/08/800

PANEL:

**D MOSSENSON (CHAIRPERSON)
MS K FARLEY SC (MEMBER)
MR W CHESNUTT (MEMBER)**

DATE OF HEARING:

5 OCTOBER 2017

DATE OF DETERMINATION:

23 FEBRUARY 2018

IN THE MATTER OF an appeal by BRAYDEN GAERTH against the severity of the penalty of three years disqualification imposed by the Racing and Wagering Western Australia (RWWA) Stewards of Thoroughbred Racing on 19 June 2017 for breach of Australian Rule 81A(1)(a) of Thoroughbred Racing.

Mr T F Percy QC with Ms J Byrne of Equitas Lawyers represented Mr Gaerth.

Mr R J Davies QC represented the RWWA Stewards of Thoroughbred Racing.

By unanimous decision of this Tribunal, the appeal against penalty under AR81A(1)(a) is upheld and the period of disqualification is reduced from three years to two years.



DAN MOSSENSON, CHAIRMAN



RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR DETERMINATION OF MR W CHESNUTT

APPELLANT:

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Mr T F Percy QC with Ms J Byrne of Equitas Lawyers represented Mr Gaerth.

Mr R J Davies QC represented the RWWA Stewards of Thoroughbred Racing.

1. This appeal against penalty was heard before us on 5 October 2017. Mr. Percy QC appeared for the appellant and Mr. Davies QC appeared for the Stewards.

2. Mr Gaerth had pleaded guilty at a Stewards hearing on 9 June 2017 to having a banned substance present in a urine sample provided by him following trackwork on 5 May 2017 (AR 81A(1)).
3. At the hearing, the appellant applied to amend his grounds of appeal pursuant to a document that had been lodged with the registrar on 26 September 2017, and he was permitted to do so by the Chairman.
4. The amended grounds of appeal were as follows:
 - 4.1 The Stewards erred by applying the wrong onus of proof in relation to the mitigating circumstances put forward by the Appellant.
 - 4.2 The Stewards erred by dealing with the question of penalty on the basis that the prohibited substance was capable of having an active effect on the Appellant at the time in question.
 - 4.3 The Stewards erred in fact by proceeding on the basis that the Appellant's position was that he could not recall ingesting the prohibited substance when his position was that he denied knowingly ingesting it.
 - 4.4 The Stewards erred by failing to identify which previous cases they relied on in their assessment of penalty.
 - 4.5 The Stewards erred by failing to articulate what discount they applied for the plea of guilty.
 - 4.6 The penalty imposed was excessive in all the circumstances of the case.
5. The background to this matter is as follows. On Friday, 5 May 2017 a urine sample was taken from Mr. Gaerth, who was a licensed track rider and aged 19 at the time. It was taken at the offices of Perth Racing after Mr. Gaerth had ridden track work at Ascot Racecourse. The sample was found to contain MDMA, commonly known as Ecstasy, and its metabolite MDA. The evidence suggested that the drug may have been taken the previous Wednesday evening when Mr. Gaerth had been out socialising with some friends at the Raffles Hotel, but that was never conclusively determined.
6. Mr. Gaerth had a record of testing positive to prohibited substances. He had previously been found to have cocaine in his system in August 2014, when he was a licensed person, and he was then disqualified for nine months; which was made concurrent with

a term of twelve months disqualification he also received at that time for attempting to substitute a urine sample. As a result of these offences he was required to undertake counseling and to provide a number of clear samples before the Stewards would consider allowing him to return to the industry as a Stable hand. Unfortunately for him, a sample he gave on 30 March 2015 was found to contain amphetamines.

7. He was allowed to re-enter the industry in this State on 29 December 2016 when he was granted a track work riders licence. In April 2017 he attended an interview with the Deputy Chief Steward, Mr. Taylor, and the Training Manager, Mr. Fleming, and made application to resume his career as an Apprentice Jockey. The Stewards, quite naturally, were hesitant and placed a number of conditions on Mr. Gaerth before further consideration would be given to his application. One of these was the requirement to submit to regular and random drug testing.
8. Following the discovery of ecstasy in the sample of 5 May 2017, the Stewards conducted an inquiry on 9 June 2017 into Mr. Gaerth's latest encounter with a prohibited drug. He pleaded guilty in the course of that inquiry to a breach of AR 81A (1) (a).
9. On 19 June 2017, the Stewards published their reasons for imposing the penalty that they arrived at. That penalty was a disqualification of three years; however pursuant to AR 81D a remission of the three year penalty might apply should certain conditions be met.
10. Those conditions, briefly stated, were that following a period of two years and clean drug test samples, together with assessment by a sports psychologist and the RWWA medical adviser, Mr. Gaerth would be permitted to obtain a stable employee licence. Following a further twelve month period with clean samples, consideration would be given to allowing him to obtain a trackwork riders licence.
11. The Stewards in their reasons correctly recognised that they had to endeavor to protect the racing industry, as well as seek to prevent the Appellant from continuing down a path that may ultimately lead not just to the end of his racing career, but also to other significant and detrimental consequences for him in his life. They are to be commended for the wise and humane way that they tried to go about this. Ultimately, however, I am driven to accept the argument of Mr. Percy QC that the period of disqualification that they imposed was simply too severe.

12. Before dealing with ground 6, however, I will deal briefly with Mr. Percy QC's other grounds of appeal. Given that I would uphold the appeal on ground 6, it is not necessary to discuss the other grounds in detail, save that ground 4 is worthy of some short comment.
13. Grounds 1 and 3 seem to arise from an assertion by the appellant that he may have consumed the ecstasy inadvertently whilst at the Raffles Hotel with his friends on the Wednesday night. He claimed not to remember taking it. The suggestion was that somebody may have slipped it to him without his knowing about it. In my opinion the Stewards were justified in treating this suggestion with healthy skepticism even before looking at Mr. Gaerth's record. However, given this young man's record of consuming illicit substances, the suggestion that he did not knowingly consume the drug on this occasion had an air of unreality about it. It was open to the Stewards to reject the Appellant's contention. In my view, these grounds are without merit. I shall say no more about them.
14. Ground 2 is also without merit. It was never conclusively established when the Appellant ingested the ecstasy, albeit Wednesday evening was certainly likely. The question of when it would or might have stopped having an effect on him was not something that the Stewards should have to delve into. The fact of the drug being in his system leads to the probability or at least the possibility that it was having some effect on him. In any event, the rule prohibits the presence of the banned substance in the system, and does not rely upon any possible effect the presence of that substance has on a person.
15. Ground 4 does have some merit, in my opinion. The Stewards stated in paragraph 8 of their reasons for penalty that they had considered a number of similar cases from the past which established a range of penalties going from suspensions at the bottom end, up to a period of three years disqualification. They did not there identify which cases they were referring to, although some of them were canvassed before us in argument at the hearing of the appeal. In my view, if the Stewards claim to be able to identify a range of penalties for an offence then they ought to identify the previous case or cases, or at least the main cases, which establish that range, and also identify what features of the matter then before them cause it to take its particular place within the range.
16. This does not need to involve a lengthy analysis of every previous case, it could in most instances be done within a few simple and short paragraphs. But a licensed person receiving a penalty involving the exercise of an element of discretion is entitled to know

what factors led the Stewards to exercise their discretion in the way that they did. That is particularly so when they are removing his livelihood from him.

17. In this case, the Stewards identified a range, without explaining where it came from, and then proceeded to give the appellant a disqualification at the very top of that range, without really explaining why they did so. It is not to the point that they sought to ameliorate that penalty in the way that they did.
18. Ground 5 is without merit. It would be highly undesirable, in my opinion, for this Tribunal to lay down any sort of requirement for the Stewards to articulate a percentage amount by which they discount a penalty for a breach of the rules of racing when there is a plea of guilty to that breach. A plea of guilty is one of a number of factors which they weigh when arriving at a penalty. In racing, a plea of guilty almost invariably occurs during the course of a Stewards inquiry, either before or after the stage of the inquiry that involves laying a charge. The evidence, in the main, has all been called by then. The factors involving a plea of guilty which apply in criminal matters simply do not have any, or at least not very much, relevance in racing matters. Remorse is the only one which springs readily to mind, and there did not seem to be very much of that present in this case.
19. Ground 6 has substance to it. As stated above, the Stewards imposed upon Mr Gaerth a three year disqualification, which was at the very top of the range that they had identified. It was a second offence, although there was of course the sample whilst he was disqualified which tested positive for amphetamines.
20. The Stewards had before them a young man who had a worrying history of taking illicit substances. But he was only 19. Youth is a time when the young make mistakes in their lifestyle choices and their behavior generally. The criminal law recognises this and treats the young with a significant degree of leniency- youth is always a mitigatory factor. It is, too, when it comes to depriving a man of his employment in his chosen calling. It seems to me that the Stewards erred in not giving enough weight to the Appellant's youth when they arrived at a penalty at the very top of the range which they had identified. Although they stated in paragraph 9 of their reasons that they were conscious of his young age, they do not appear to have given any or enough weight to this. If there was some particular factor which properly led them to disregard the significant mitigation to be given to his young age, they failed to articulate it. That was an error on their part which enlivens the jurisdiction in this Tribunal to revisit the question of penalty.

21. In re-exercising the discretion, I believe a period of two years disqualification is adequate to achieve the aims of general and specific deterrence which the Stewards identified in their reasons. This can be achieved by reducing the overall period of disqualification from three years to two years. I agree with the approach of the Stewards in applying Rule 81D, and the Appellant should be permitted to apply for a Stable hands licence after a period of one year, instead of two years. I would not otherwise interfere with what the Stewards have done.
22. The only concluding remark I wish to make is that Mr. Gaerth is now fast approaching the age when he will no longer be able to claim the mitigation which his youth affords him. He does not seem to have shown any sign of growing up or shaking off his flirtation with illicit drugs so far. He has now been given all the tolerance which he could reasonably expect to be afforded. No doubt his legal advisers and his mentor Mr Fred Kersley, will emphasise this fact to him.



WILLIAM CHESNUTT, MEMBER



RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR D MOSSENSON
(CHAIRPERSON)

APPELLANT:

BRAYDEN GAERTH

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Mr R J Davies QC represented the RWWA Stewards of Thoroughbred Racing.

I have read the draft reasons of Mr W Chesnutt, Member.

I agree with those reasons and conclusions and have nothing further to add.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON



RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MS K FARLEY SC (MEMBER)

APPELLANT: BRAYDEN GAERTH

APPLICATION NO: A30/08/800

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MS K FARLEY SC (MEMBER)
MR W CHESNUTT (MEMBER)

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I have read the draft reasons of Mr W Chesnutt, Member.

I agree with those reasons and conclusions and have nothing further to add.



KAREN FARLEY SC, MEMBER

