APPEAL NO. 816

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: **KIM NEVILLE PRENTICE**

APPLICATION NO:

PANEL: **MS KAREN FARLEY SC (CHAIRPERSON)**
MR ROBERT NASH (MEMBER
MS EMMA POWER (MEMBER)

DATE OF HEARING: **1 AUGUST 2018**

DATE OF DETERMINATION: **20 SEPTEMBER 2018**

IN THE MATTER OF an appeal by KIM NEVILLE PRENTICE against a determination made by Racing and Wagering Western Australia Stewards of Harness Racing imposing a 12 months disqualification for breach of Rule 190 of the RWWA Rules of Harness Racing

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Mr Gary Hall Sr appeared, with the leave of the Tribunal, for Mr Prentice

Mr Ron Davies QC represented the Racing and Wagering Western Australia Stewards of Harness Racing.

Summary

1. In my opinion, for the reasons which follow, the Applicant's appeal against penalty for breach of Harness Rule of Racing 190 of the RWWA Rules of Harness Racing ("Rules") should be allowed and the penalty disqualifying the Applicant as a trainer until 7 January 2019 ought be substituted with a penalty of disqualification which expires on 7 October 2018.

Reasons

2. Kim Neville Prentice ("Mr Prentice" or "the Applicant") is a RWWA Licensed Trainer in the WA Harness Racing Industry.

3. Mr Prentice has appealed against the penalty imposed by the RWWA Stewards on 10 May 2018 in which they imposed a disqualification of his harness training and driving licences until 7 January 2019 having found Mr Prentice guilty of breaching Rule 190 of the Rules by, as the trainer of the horse EXTRADITE NZ ("the Horse"), presenting the Horse to race in Race 5 at Northam on 25 November 2017 not free of a prohibited substance in that the Horse had a concentration of cobalt in excess of 100 mcg per litre in its urine.

4. Mr Prentice, by his Notice of Appeal dated 18 May 2018, contends that the penalty imposed by the Stewards was too severe given his unblemished record in the industry and failed to take account penalties imposed in comparable cases.

5. On 8 January 2018, the Stewards notified Mr Prentice of the positive cobalt test result, and initially suspended his trainer's licence allowing him to continue to participate as a licensed driver, which partial suspension was made a full suspension of both his trainer's and driver's licences on 1 February 2018 until the disqualification penalty was imposed on 10 May 2018.

Background

6. Mr Prentice has been a licensed harness trainer and driver for about 30 years.

7. He was the trainer of EXTRADITE NZ which won Race 5 at Northam on 25 November 2017.

8. A post-race urine sample was taken from the Horse and tested by the Chem Centre at Perth. The Chem Centre certified the urine sample to have a concentration of cobalt in excess of 100 micrograms per litre, namely 150 micrograms per litre. The Chem Centre test was confirmed by the testing of a confirmatory sample by RASL (Victoria) which certified the cobalt concentration in the Horse's urine sample to be 163 micrograms per litre. The effect of the two laboratory certifications is that they constitute conclusive proof under the Rules of the Horse having a cobalt level exceeding 100 micrograms per litre in its post-race urine sample: Rule 191(1) and (2).

9. Rule 190 of the Rules provides:

> '*(1) A horse shall be presented for a race free of prohibited substances.*
> *(2) If a horse is presented for a race otherwise than in accordance with sub rule (1) the trainer of the horse is guilty of an offence.*
> *(3)...*

(4) An offence under sub rule (2) or sub rule (3) is committed regardless of the circumstances in which the prohibited substance came to be present in or on the horse.'

10. Rule 188A of the Rules contains the following provisions:

'(1) The following are prohibited substances:

(a) Substances capable at any time of causing either directly or indirectly an action or effect, or both action and effect, within one or more of the following mammalian body systems

.....

the blood system

(b) Substances falling within, but not limited to, the following categories

...

haematopoietic agents

(2) The following substances when present at or below the levels set out are excepted from the provisions of sub rule (1) ...

....

(k) Cobalt at a concentration of 100 micrograms per litre of urine....'

11. Cobalt is a naturally occurring substance and is normally present in horses at very low levels as a result of ingestion of foodstuffs which contain trace amounts. Cobalt is considered an essential mineral in the production of red blood cells. By having high levels of cobalt in their blood, horses can produce higher than normal red blood cells which enhances the oxygen carrying capacity of the blood, and hence the performance of the horse. Horses ordinarily have a cobalt concentration of less than 10 micrograms in their urine, with the average (according to population study of horses undertaken in 2014) of 4.3 micrograms. Cobalt is considered to be a haematopoietic agent [*Dr Judith Medd, Inquiry Transcript pp19 to 21].*

12. Senior Investigative RWWA Steward, Mr Criddle, after becoming aware of the Horse's positive cobalt test, attended Mr Prentice's property at Lot 1241 Anderson Road, Oldbury on 20 December 2017. He attended with Dr Medd, RWWA Veterinarian. Mr Prentice was interviewed and spoke of having a regime of administering the product VAM to his horses by injections. VAM, which is a registered product, is known contained cobalt. Its use can lead to elevated Cobalt levels. There is nothing wrong or improper with injecting a horse with VAM per se, although a trainer needs to be mindful that it contains Cobalt and therefore it should not be

administered to a horse close to race day (i.e. within 48 hours of racing) or in excessive amounts.

13. Mr Prentice told Mr Criddle and Dr Medd that he had been using VAM for about three to four months. He said his practice was to administer it on Mondays and Thursdays, although if a horse was racing on a Friday, it would not be injected with VAM on the Thursday. He said that the product had been recommended to him by a Mr Percy Johnson and he had not sought advice from a Veterinarian. He stated that the Horse had been administered with VAM on Monday 20 November 2017, being five days prior to the race at Northam on 25 November 2017, although he conceded the possibility that it could have received an injection on Thursday 23 November 2017 (which concession he repeated at the subsequent Stewards inquiry). He said he was not aware that VAM contained cobalt but had believed it contained only iron, and that he had never knowingly used cobalt.

14. By letter dated 8 January 2018, the Stewards notified Mr Prentice of the results of the urine sample tests and, pursuant to Rule 183, suspended his training licence forthwith pending the outcome of the Stewards inquiry into the matter. Accordingly, from that date Mr Prentice was not permitted to nominate or present any horse in a race at any time or undertake any activities in relation to training of horses being nominated or presented to race. The suspension of Mr Prentice's training licence did not operate to suspend him from driving in harness races until 10 February 2018, when the suspension was extended to include driving.

15. The Stewards inquiry began on 24 January 2018. Dr Medd gave evidence of a study which had shown that ordinarily after the being administered with VAM a horse's cobalt level will exceed 100 micrograms per litre initially and will usually fall below that level within 12 to 15 hours. The substance, according to Dr Medd, is quite quickly excreted from the body. Dr Medd was of the view that it was unlikely the level of cobalt found in the Horse's urine after the race in Northam on 25 November 2017 could be attributable to an injection of VAM on Monday 20 November 2017.

16. During the inquiry, apart from the use of VAM, Mr Prentice could offer no other compelling reason for the Horse having an elevated cobalt level. He acknowledged that even if he had administered the Horse with VAM on Thursday 23 November 2017, that would have been more than 48 hours prior to the race at Northam and within the period of time that Dr Medd considered would be a safe amount of time for a horse to largely excrete it and have its levels fall well within the threshold of 100 micrograms.

17. At the inquiry, Mr Prentice did not challenge the correctness of the cobalt level found in the Horse's urine sample.

18. In an endeavour to explain what could have caused the cobalt level to be so high, Mr Prentice turned to Dr Alan McGregor, a veterinarian, who gave extensive evidence about potential explanations for the Horse's elevated cobalt level. However, the reason the Horse had an elevated cobalt level was never satisfactorily established albeit there was much conjecture and hypothesis as to the potential causes for the elevated levels.

19. After considering the evidence that had been adduced, the Stewards charged Mr Prentice with the breach of Rule 190. He pleaded not guilty, although in doing so he admitted that the Horse was presented not free of a prohibited substance. Mr Prentice's plea was articulated at *T6-7, 12 April 2018,* where he agreed the Horse was presented not free of the substance Cobalt but said:

> *'Well, by the swab he wasn't free of it. But as far as I'm concerned I've done everything I thought so he would be free.'*

20. A presentation offence is committed regardless of how a prohibited substance comes to be present in a horse: *Rule 190(4).* It would seem, initially at least, that Mr Prentice was claiming he had an honest and reasonable but mistaken belief that the Horse was presented free of a prohibited substance. Such a defence is not available under the Rules: *Harper v Racing Penalties Appeal Tribunal (1995) 12 WAR 337.*

21. The Stewards endeavoured to explain to Mr Prentice that it mattered not how the excessive cobalt level came to be in the Horse's urine when it came to the question of his guilt of the charge under Rule 190. Despite that, Mr Prentice was permitted to adduce further evidence from Dr McGregor to provide a potential explanation.

22. Dr McGregor offered a number of potential explanations for the high reading in the Horse's urine sample, including the specific gravity (or concentration) of the urine sample which he said can have a significant impact on the recorded level of cobalt. He also spoke of the potential for cobalt to store up and become irreversibly trapped in a horse's red blood cells over time (where there has been an extended regime of administrations of cobalt over time), and then following a stressful event (such as participating in a race) be discharged from damaged red blood cells and then be 'dumped' or 'explosively secreted' (*T46, 12 April 2018)* into the horse's urine.

23. Dr McGregor also gave evidence that challenged the proposition that cobalt satisfied the definition of a prohibited substance contending that it did not fall within the category of either a haematopoietic agent or hypoxia inducible factor stabiliser. This evidence was carefully considered by the Stewards and was rejected. No complaint is made in this appeal against that finding or aspect of the matter and it is unnecessary for this Tribunal to further consider it.

24. Other factors put forward by Mr Prentice were that the Horse's light weight and possible dehydration may have been factors in the high cobalt level found in the Horse's urine sample.

25. The Stewards ultimately found Mr Prentice guilty of the charge and pointed out that much of the evidence that had been led from Dr McGregor was irrelevant to the presentation offence. The Stewards noted that very little was in dispute in terms of the particulars of the charge and made the observation that Mr Prentice had failed to appreciate the 'strict liability' nature of presentation offence and observed that most of the evidence led in support of the plea of not guilty was more properly relevant to the question of penalty.

26. By letter dated 10 May 2018, the Stewards notified Mr Prentice of the penalty imposed and attached to that letter their written reasons.

27. The Stewards determined that the appropriate penalty was a disqualification of twelve (12) months. They reduced that by the time Mr Prentice had been suspended in part and full pending the outcome of the inquiry and reduced the period of disqualification imposed so as to expire on 7 January 2019. Further, the Horse was disqualified from Race 5 at Northam on 25 November 2017 and Mr Prentice was required to return the stake money that had been paid to him after the Horse had won.

28. In considering the question of penalty, the Stewards:

    a. noted Mr Prentice had cooperated professionally and conducted himself respectfully through every aspect of the matter despite his plea of not guilty;

    b. recognised Mr Prentice was a trainer of long standing (30 years) with considerable success in the industry and with an unblemished record;

    c. recognised that Mr Prentice relied on his licence as a trainer and driver for his livelihood;

    d. observed that given the time Mr Prentice had been in the industry, it would be difficult for him to gain other employment from which he could earn a commensurate income to that he had earned from training and driving in the harness industry;

e. acknowledged that a significance consequence of the disqualification for Mr Prentice had been the opportunity he had lost in being the trainer of the high calibre horse, SOHO TRIBECA;

f. noted that Mr Prentice was experiencing a number of personal issues in his life including going through separation and a property settlement;

g. expressed the view that Mr Prentice had failed to exercise the necessary awareness and maintain the required working knowledge expected of a trainer in using a product such as VAM;

h. stated they were not satisfied that the administration of VAM on the Monday prior to the Race, and possibly also on the Thursday, were plausible explanations for the high level of Cobalt found in the Horse's post-race urine test;

i. stated that if they had accepted Mr Prentice's reported regime of administering VAM was the cause of the report post-race Cobalt level in the Horse, they would have placed his case in a similar light to that of the trainer, Bradly Sims in South Australia, where he received an 8 months disqualification;

j. referred to the welfare risks to horses posed by high levels of cobalt administration;

k. observed that in all decided cases in Western Australia concerning cobalt administrations, the penalty range was 9 to 12 months disqualification;

l. after referring to a number of authorities, observed that disqualification was the usual mode of penalty, which is appropriate given that the industry relies on the confidence of the betting public that it operates on a level playing field; and

m. said that it would emasculate the intent of the Rules if penalties imposed did not accurately reflect the seriousness of the situation and serve the necessary general and specific deterrence.

29. Mr Gary Hall Sr, representing Mr Prentice before the Tribunal, contended that the penalty of 12 months was not in line with similar cases, and argued that most penalties for such offences were 9 months disqualification. He specifically referred to the case of *McPherson* as analogous to the circumstances of Mr Prentice's case *[see reference below]*. Mr Hall submitted to the Tribunal that people in the industry should get the benefit of a long standing good record, particularly a person like Mr Prentice who was of high standing and reputation in the industry. Mr Hall argued the penalty imposed by the Stewards on Mr Prentice did not adequately or at all recognise his standing and reputation in the industry. Mr Hall pointed out that Chris Lewis,

renowned champion reinsman, was also present at the Tribunal hearing to support Mr Prentice, and was prepared to attest to his standing and good character in the industry.

30. Mr Hall argued that people should get the benefit of their good record in the industry when it comes to the imposition of penalties. Mr Hall contended that the penalty imposed on Mr Prentice did not demonstrably and materially reflect a proper recognition by the Stewards of his long standing impeccable record, high regard, and good character in the harness racing industry.

31. Mr Hall also emphasised that although there was a short period between 8 January 2018 and 1 February 2018 in which Mr Prentice was only suspended from training (and could still drive in races) he still suffered the loss of two outstanding horses he had under training at that time. He further pointed out that the suspension from 1 February 2018 onwards, for all intents and purposes, effectively put Mr Prentice out of the industry and led to him suffering the same level of financial hardship as that arising from a disqualification.

32. Mr Hall submitted that those like him, being leaders in the industry, did not think that the general public wanted to see people of the high level of integrity that Mr Prentice had, treated in the way the Stewards had treated Mr Prentice.

33. The Stewards took the unusual step of briefing Mr Davies QC to represent them before the Tribunal. It was unusual because Mr Davies usually only appears before the Tribunal when the Applicant is represented by experienced counsel. Mr Davies advised the Tribunal that he appeared because of the high importance the Stewards placed on the precedent of this case.

34. Mr Davies pointed out that on the surface the penalty imposed on Mr Prentice may appear harsh. He referred to the anguish the Stewards went through in imposing such a penalty on a trainer of Mr Prentice's record and standing. He pointed out that the Stewards, despite their empathy and respect for Mr Prentice, had to impose a penalty which reflected the paramountcy of the preservation of the integrity of racing and was demonstrative of their control over the industry.

35. In referring to the importance of the presentation concept created by the offence under Rule 190, Mr Davies reminded the Tribunal what was said by Sir Thomas Bingham MR in the Agha Khan Case [*R v Disciplinary Committee of Jockey Club; Ex Parte Aga Khan [1993] 1 WLR 909*] which was referred to with approval by the lead judgment of Anderson and Owen JJ in *Harper v Racing Penalties Appeal Tribunal of Western Australia & Anor (1995) 12 WAR 337* (in which a five (5) member bench of the Full Court sat). At 857-858, Bingham MR said:

'The powers which the Jockey Club exercised in the present case .. are among those assumed by the Jockey Club to safeguard the integrity of ... racing. Under its rules of racing, the finding of a prohibited substance obliges the Jockey Club to fine the trainer... and to disqualify the horse for the race in question. The applicant has not criticised the stringency of these rules. There is no ground for doing so. For a variety of reasons including the large sums of money which stand to be won or lost on the outcome of a single race, horse racing is an activity peculiarly prone to criminality, cheating and chicanery of many kinds. Experience no doubt shows that strong measures of control and close vigilance are necessary preconditions of fair and honest competition.'

36. As noted by the Court in *Harper,* a significant policy consideration for the rules of racing is the requirement that races be won by honest means so that public support of the industry is maintained. The level of public support for the industry affects the livelihood of all licensed persons. It is for that reason that the Court in *Harper* rejected implying into the rules of racing, to which all licensed persons are contractually bound, a defence of honest and reasonable but mistaken belief when it comes to presentation cases.

37. Mr Davies made further submissions that:

a. the alternative to the presentation rule was chaos for the industry;

b. if there is a proven administration then that is an even more serious offence;

c. there needs to be a hard and fast approach to the enforcement of the presentation rule;

d. the Stewards could have disqualified Mr Prentice for 5 years if they had wanted to;

e. penalties imposed in WA and the approach to enforcement by the local industry was different to other states and New Zealand;

f. all factors put in mitigation by Mr Prentice had been accepted by the Stewards and they had accepted it was a very sad situation;

g. the Stewards had facilitated and drawn out of Mr Prentice at the hearing all the mitigating factors so as to ensure they were known to them and taken into account;

h. the penalty imposed by the Stewards was not only fair, but was entirely within the proper exercise of their discretion;

i. there was no error demonstrated in the manner in which the Stewards determined the penalty in this case;

j. the betterment of the industry must come ahead of the trauma and hardship that Mr Prentice may feel as a result of the penalty;

k. emphasised the comments made by the then Chairperson of the Tribunal, Mr Mossenson, in the case of *Larkin Appeal 809* (in which he sat as a single member tribunal), to the effect that:

i. the Stewards were the best placed and in a far better position to make the adjudication of penalty; and

ii. the Tribunal's role is not to substitute its own opinion of the appropriate penalty for that of the Stewards unless the Tribunal is satisfied that there has been an error on the part of the Stewards in reaching their decision as to penalty.

38. The Tribunal received written references as to Mr Prentice's good character and standing in the racing industry from the Hon. John Castrilli OAM, and John Hunt, Principal Commentator, Gloucester Park. The Tribunal was also aware that Mr Chris Lewis attended the Tribunal hearing offering to speak to Mr Prentice's character, reputation and standing in the industry. It is apparent from the position taken by the Stewards at the inquiry, and at the hearing before the Tribunal, that Mr Prentice's standing and reputation in the industry was not in question.

Consideration of the Issues

39. In the context of presentation cases, it is well-established and accepted that:

> *'[to maintain] the integrity of racing and ... public confidence in its integrity, there is a need to impose very stringent controls and that those who wish to participate in racing for rich rewards will have to accept that the privilege of doing so may well be taken away from them if for any reason, even without fault on their part, they present a horse [which is not free of a prohibited substance]' Harper at p. 349.*

40. The Tribunal was provided with a number of past decisions of the Stewards where penalties for excess cobalt levels have been imposed for a breach of Rule 190 of the Rules:

(a) *Matter of Bruce Stanley (2016):* Mr Stanley pleaded not guilty to two charges of a presenting a horse with cobalt levels in excess of 200mg/litre in urine (which was then the applicable accepted threshold limit under the Rules), namely 450 micrograms/ litre and 260 micrograms per litre. He was also charged for failing to keep and maintain a log book of administrations. He had a previous presentation offence in 2013 for a therapeutic substance. Otherwise he was regarded as a person of good character and reputation in

the industry. He received a 12 month disqualification for each of the presentation offences which were ordered to be served concurrently to the extent of 6 months. It is noteworthy that the Stewards observed that the levels of 430mg/l and 260 mg/l were "*not considered to be extreme*".

(b) *Matter of Sharon Taylor (2015)*: Ms Taylor was charged with two presentation offences of presenting a horse with cobalt levels in excess of 200mg/litre in urine, with one of the offences showing a level of 310 micrograms per litre and the other not being specified. She was a trainer of long standing with an unblemished record, and pleaded guilty at an early stage. The Stewards considered she was not able to provide the Stewards with a plausible explanation for her horse having the level it had. She received a 12 month disqualification for each of the presentation offences which were ordered to be served concurrently to the extent of 6 months.

(c) *Matter of Ben Abercrombie (2018)*: Greyhound presented with caffeine. Level was classified as high. It was a stimulant. There was no acceptable explanation given. Mr Abercrombie strongly denied any knowledge as to the reasons for its detection. 9 months disqualification was imposed.

(d) *Matter of Barry McPherson (2018):* Cobalt presentation offence in excess of 100 mg/litre. Plea of not guilty. The levels were stated to be high but were not stated in the extract of the reasons. After considering Mr McPherson's extensive involvement in the industry, the unexplained reasons for its presence, the fact it was his first prohibited substance offence, and his personal circumstances, a penalty of 9 months disqualification was imposed back dated to the date of his initial suspension.

(e) *Matter of Jack Cockell (2018):* Cobalt presentation offence in excess of 100 mg/litre. Plea of guilty. One prior conviction under the same rule in 2014. Disqualified for 9 months backdated to the date he was first stood down.

(f) *Matter of Wayne Brown (2018):* Cobalt administration and presentation offences in excess of 100 mg/litre. Level was 150 mg/l/. Full and frank admission that he had administered VAM on the race day for which the Stewards considered he deserved credit. Unblemished record. Good reputation. 9 months disqualification for each offence to be served concurrently back dated to the date he was stood down.

41. A review of the various decisions of the Stewards set out in the paragraph above, suggests that the range of penalties that has been adopted by the Stewards in this jurisdiction has

ordinarily been between 9 and 12 months disqualification for a cobalt presentation offence with the disqualifications usually being back dated to the date that the trainer was first suspended. The three cases decided since the introduction of the lower cobalt threshold of 100mg/l, have had penalties of 9 months imposed.

42. At the inquiry hearing, the Stewards noted the decision of *Mr Peter Moody*, which was an administration offence relating to cobalt, in which the Victorian Racing and Disciplinary Board imposed a penalty of 12 months suspension with 6 months of that suspension being suspended for a period of 12 months provided that no other offences were committed. The Stewards considered the *Moody* decision to be an exceptional case where the particular factual circumstances were noted to have resulted in a penalty which was significantly lighter than that ordinarily imposed.

43. The Stewards referred to a previous decision of this Tribunal in *GW O'Donnell (Appeals 263 and 264)* where observations were made to the effect that little reliance can be placed on previous decisions unless all the surrounding facts and circumstances of those cases are known and the factual differences taken into account.

44. The penalty outcome of any given case will be primarily informed by the facts and circumstances of the particular case and of the personal circumstances and antecedents offender, although there is no doubt that consistency in the imposition of penalties is also important.

45. It is certainly important that within this jurisdiction there be a degree of consistency in the penalties being imposed for similar offences. Sometimes there are differing approaches taken by the authorities in other states and countries. That may be due to differences in the applicable rules and/or different attitudes based on prevailing local conditions. It is important not to allow what may be more lax approaches in some other jurisdictions to fetter or detract from the right of the local authority, namely the RWWA Stewards, to exercise their judgment as to what is necessary for the control the local industry by setting the standards they consider are appropriate for the regulation and control of the local industry.

46. The goal of attainment of consistency cannot, however, subjugate the importance of having proper regard to the particular facts and circumstances of the case at hand, and to deal with each matter by reference to its own unique circumstances.

47. A significant factor emphasised by the Stewards in this case was that they felt there was no adequate explanation proffered for the cobalt level in the Horse's urine. Mr Prentice went to

considerable lengths in calling expert evidence, namely from Dr MacGregor, a veterinarian, in an attempt to explain how the cobalt level may have reached the level recorded.

48. In considering this aspect of the case, the Stewards needed to consider and assess Mr Prentice's explanations and the genuineness of them, in the context of his long standing good record and reputation in the industry, and taking account of the high regard in which he was held by his peers and by leading participants in the WA harness industry.

49. It was not insignificant, in my view, that leading and respected members of the local harness industry (namely Mr Gary Hall Sr and Mr Chris Lewis) came out in support of Mr Prentice to, in effect, protest the severity of the penalty that had been imposed on him.

50. The Stewards concluded that they could not be satisfied that Mr Prentice's reported use of VAM provided a satisfactory explanation for the elevated level of cobalt in the Horse (even if, as he had conceded was possible, the Horse received its last administration on the Thursday before the race). The Stewards' non-satisfaction was a factor that they considered was relevant to the penalty as is evident from the comments they made in relation to the case of *Bradly Sims* at [para 25] and by expressly referring again at [para 32]. It was used as a basis to impose a penalty different to that which they would have imposed had there been, in their view, a plausible explanation offered by Mr Prentice for the elevated cobalt level.

51. In the case of *Wayne Brown* referred to above, which was not just a case of a presentation, but also of an admitted pre-race administration (which as Mr Davies in his submissions noted was a more serious offence than a presentation offence), the trainer was given a total penalty of 9 months disqualification for a similar cobalt reading to that found in the Horse in this case. The Stewards said that Mr Brown's frankness about giving his horse a pre-race administration of VAM justified the leniency given.

52. It is understandable that the Stewards may consider frank admissions made by a trainer about making administrations prior to a race, and thus providing a plausible explanation for an elevated cobalt level, are mitigatory. However, the mere fact that a trainer has been unable to provide what the Stewards consider to be a satisfactory explanation ought not as a matter of course result in less mitigation being afforded. Such an approach has the potential to create perverse outcomes where someone who deliberately administers a substance such as cobalt immediately before a race (hoping the recorded level will remain under the threshold) is better off than someone who genuinely cannot explain how their horse came to have an elevated level. I cannot see how being frank about the former case justifies a better penalty outcome than for someone who simply cannot explain an elevated level, provided the Stewards have

no basis to consider the person in the latter case is not genuine. For example, if someone is a repeat offender or is found to be an unsatisfactory witness during the inquiry, then that may provide a basis for not accepting their genuineness.

53. The Stewards in this case did not make a finding that Mr Prentice had not been honest or forthcoming in his evidence. Rather, the Stewards praised Mr Prentice for his cooperation and professional dealing in respect of every aspect of the inquiry and of the investigation.

54. Mr Prentice's long standing record in the industry and his good character, combined with his fulsome and respectful cooperation with the inquiry, entitled him to the presumption that he was a witness of truth. There was no aspect about the manner in which he conducted himself through the inquiry, or during the prior investigation, that would justify an inference that he was not endeavouring to faithfully assist the Stewards in trying to find an explanation for the elevated cobalt level.

55. Evidence of his prior good character and reputation was relevant to both the assessment of his credibility and to his propensity to have deliberately conducted himself in a manner likely to lead to a breach of the Rules: *Attwood v The Queen [1960] HCA 15.*

56. The Stewards at [para 23] referred to their earlier decision in the matter of *Sharon Taylor* as a decision where they had also not been satisfied with the explanation proffered for the horse's elevated cobalt level. The quoted extract of that decision [at page 11] refers to the Stewards not being satisfied to the *Briginshaw* standard with the trainer's offered explanation for the elevated cobalt level. It seems that the approach of the Stewards is that even if explanations are sought to be put forward to explain an elevated level, unless they are satisfied to the Briginshaw standard, then their conclusion is that no satisfactory explanation has been offered and accordingly the degree of mitigation that would otherwise be given for a satisfactory explanation is not afforded to the trainer.

57. The above approach is not, in my view, a correct application of the Briginshaw test and raises a concern that the Stewards are placing an unjustified and heavy onus on trainers to come up with explanations about matters which they may just simply and in all good faith be unable to provide.

58. The approach that this Tribunal is to take in reviewing discretionary judgments of the Stewards was the subject of analysis by Murray J in *Danagher v Racing Penalties Appeals Tribunal (1995) 13 WAR 531 at 554.* In that case, Murray J said that the Tribunal should approach the matter in the same way as an appellate court would review a discretionary judgment of a lower

court where the appeal is by way of rehearing. In this respect he referred to the decision in *Australian Coal and Shale Employees Federation v Commonwealth (1953) 94 CLR 612 at 627,* where Kitto J said:

> *'the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.'*

59. The Tribunal will not substitute its own opinion for that of the Stewards simply because it may disagree with the Stewards' opinion as to what the appropriate penalty ought to be. The Stewards' deep understanding of the industry and how actions of its participants impact the industry and perceptions of the industry, are matters which are accorded considerable weight by this Tribunal. However, if it is demonstrated that a penalty imposed by the Stewards is manifestly excessive, or if the Stewards have misdirected themselves in some material way, or their decision has been the product of taking into account an irrelevant consideration or of a failure to take into account relevant consideration, then it is open for this Tribunal to reconsider the Stewards' determination of the penalty imposed. That is consistent with the approach that appeal courts take in reviewing criminal sentences on appeals: *Dinsdale v R [2000] HCA 54 at 57 to 58,* and reflects what has been said in numerous previous decisions of this Tribunal.

60. In considering this appeal, I have been mindful that the guiding thesis of the Rules is the maintenance of the integrity of racing in this jurisdiction. The interpretation and enforcement of the Rules by the Stewards and this Tribunal must be undertaken with that guiding thesis at the front of mind.

61. I recognise that this Tribunal should not interfere with penalties imposed by the Stewards unless it considers there has been a material error of approach which is more than simply having a different opinion as to the fair outcome of the matter.

62. I acknowledge the Stewards' aim is to impose penalties that provide both specific and general deterrence with a view to the maintenance of the integrity of the harness racing industry in Western Australia. It is also the case, in my experience, that the Stewards recognise that the interests of the maintenance of integrity in harness racing are enhanced, not detracted from, by giving material and substantive recognition to a trainer's:

    a. long standing good record and reputation in the industry; and

    b. respect and cooperation during the course of any investigation or inquiry into a breach of the Rules,

    when it comes to determining the penalty to be imposed for a breach of the Rules.

63. In my opinion there has, however, been a discernible and material error on the Stewards' part in their determination of the penalty in this particular case. In my view, they have erred by reducing the level of mitigation that they would otherwise have accorded Mr Prentice by reason of his failure to offer them an explanation for the cobalt level that they considered satisfactory, despite having found him to be a cooperative witness throughout the process and despite his long standing good record in the industry and his unquestioned good character.

64. In my view the penalty should, accordingly, have been 9 months disqualification back dated to the commencement of Mr Prentice's suspension from training. That is consistent with the approach adopted by the Stewards in the three cases since the 100mcg/l level came into force and particular with the approach in the McPherson case.

65. Accordingly, I would allow the appeal against the penalty disqualifying the Applicant as a trainer until 7 January 2019 and substitute it with a penalty of disqualification which expires on 7 October 2018.

ROBERT NASH, MEMBER

APPEAL NO. 816

RACING PENALTIES APPEAL TRIBUNAL
REASONS OF DETERMINATION OF MS KAREN FARLEY SC (CHAIRPERSON)

APPELLANT:	**KIM NEVILLE PRENTICE**
APPLICATION NO:	**A30/08/816**
PANEL:	**MS KAREN FARLEY SC (CHAIRPERSON)** **MR R NASH (MEMBER)** **MS EMMA POWER (MEMBER)**
DATE OF HEARING:	**1 AUGUST 2018**
DATE OF DETERMINATION:	**20 SEPTEMBER 2018**

IN THE MATTER OF an appeal by KIM NEVILLE PRENTICE against a determination made by Racing and Wagering Western Australia Stewards of Harness Racing imposing a 12 months disqualification for breach of Rule 190 of the RWWA Rules of Harness Racing

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Mr Gary Hall Sr appeared, with the leave of the Tribunal, for Mr Prentice

Mr Ron Davies QC represented the Racing and Wagering Western Australia Stewards of Harness Racing.

I have read the draft reasons of Mr R Nash, Member.

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

KAREN FARLEY SC, CHAIRPERSON

APPEAL NO. 816

RACING PENALTIES APPEAL TRIBUNAL
REASONS OF DETERMINATION OF MS EMMA POWER (MEMBER)

APPELLANT:	**KIM NEVILLE PRENTICE**
APPLICATION NO:	**A30/08/816**
PANEL:	**MS KAREN FARLEY SC (CHAIRPERSON)** **MR R NASH (MEMBER)** **MS EMMA POWER (MEMBER)**
DATE OF HEARING:	**1 AUGUST 2018**
DATE OF DETERMINATION:	**20 SEPTEMBER 2018**

IN THE MATTER OF an appeal by KIM NEVILLE PRENTICE against a determination made by Racing and Wagering Western Australia Stewards of Harness Racing imposing a 12 months disqualification for breach of Rule 190 of the RWWA Rules of Harness Racing

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Mr Gary Hall Sr appeared, with the leave of the Tribunal, for Mr Prentice

Mr Ron Davies QC represented the Racing and Wagering Western Australia Stewards of Harness Racing.

I have read the draft reasons of Mr R Nash, Member.

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

EMMA POWER, MEMBER

Seal of the Racing Penalties Appeal Tribunal of WA