

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: CLINT JOHNSTON-PORTER

APPLICATION NO: 20/4938

PANEL: MS K FARLEY SC (CHAIRPERSON)

DATE OF HEARING: 5 OCTOBER 2020

DATE OF DETERMINATION: 26 OCTOBER 2020

IN THE MATTER OF an appeal by Clint Johnston-Porter against the decision made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing to suspend him for 10 days for breach of Rule AR131(a) of the Australian Rules of Thoroughbred Racing.

Mr T Percy QC and Mr J Young appeared for the Appellant.

Mr R Davies QC and Mr D Borovica appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

Background

1. Following the running of Race 1 at Belmont Park on Saturday 12 September 2020, Stewards held an inquiry as to the cause of two horses “bumping” at the 150-metre mark in the straight.
2. One horse was AT WAR, ridden by jockey Clint Johnston-Porter. The other was HARIASA, ridden by jockey Patrick Carbery.
3. Footage played at the inquiry and at the Tribunal hearing shows that around the 150 metre mark, Mr Johnston-Porter attempts an inside run but is prevented from doing so by apprentice jockey L Romaly’s mount CAN’T HELP MYSELF, who drifts inside towards the rail, effectively cutting off Mr Johnston-Porter’s potential run.
4. Mr Johnston-Porter thereafter rides his horse between Mr Romaly’s and Mr Carbery’s horses. At this point he makes contact with HARIASA who was put off balance.
5. Having considered the evidence, the Stewards found that there had not been sufficient room for the run taken by the appellant with AT WAR and that, as a result, contact had been made with HARIASA. A slight shift by CAN’T HELP MYSELF may have contributed but the main cause of the interference was Mr Johnston-Porter’s decision to attempt a run between

HARIASA and CAN'T HELP MYSELF, when there was insufficient space available to make that run.

6. Mr Johnston-Porter initially pleaded guilty to the charge, admitting that he had made an error of judgement in concluding, as he had, that there was sufficient room for him to make his run without bumping and unbalancing HARIASA. He said this several times during the inquiry.
7. Stewards agreed that Mr Johnston-Porter had "*a good record*". He had 300 rides since his last suspension. He had been forthright in the inquiry. He had booked rides for later that week.
8. Before the penalty could be further considered, the inquiry was adjourned to enable Mr Johnston-Porter to ride in a further race.
9. On resumption, the Chairman of Stewards advised that the Panel had decided a suspension should apply. He stated (TS p.7) "*we considered a reprimand, but we feel the incident doesn't qualify for a reprimand*". No explanation was given as to why the incident did not so qualify.
10. At that point, Mr Johnston-Porter requested to change his plea to not guilty, having thought more about it. He explained (TS p.8) that he believed he was "*not guilty to a certain degree*" because his initial run was prevented. He acknowledged that the run was "*going to be tight. I'm not saying I'm going to make contact with him (Mr Carbery's mount) but it will definitely be tight.*"
11. Following further discussion on a review of the footage, Stewards found Mr Johnston-Porter guilty on the basis that there was insufficient room for Mr Johnston-Porter's run, which caused contact with Mr Carbery's hind quarter. Stewards acknowledged Mr Romaly's shift, and the contact of that rider's whip to AT WAR's nose, but despite these matters, concluded that contact still occurred as a result of Mr Johnston-Porter putting himself in restricted room and causing the contact.
12. Mr Johnston-Porter initially appealed against this finding but did not pursue that ground at the hearing of the appeal. As such, that decision, and the reasons given by the Stewards for it, stand as the basis upon which a penalty was imposed.
13. Following the finding of guilt, Mr Johnston-Porter confirmed that he had some "*good forthcoming rides*" and that he "*believed the incident should attract a reprimand*".
14. Following a short adjournment, the Stewards proceeded to impose a penalty as follows:

"CHAIRMAN Mr Johnston-Porter. So, in terms of penalty the Stewards have considered a reprimand.

J-PORTER Yes, Sir.

CHAIRMAN But we say that there was going to be contact. It was the degree of the contact, we felt that you, going in there, you haven't given yourself sufficient clearance not to make contact to Mr Carbery.

J-PORTER Yes, Sir.

*CHAIRMAN So we say that the degree of carelessness is towards the lower end of the scale. The bump to Mr Carbery's quite a hefty one. It turns him and he's unbalanced so we see that low to mid-level type of interference. The consequences of your actions are that one horse has been bumped heavily. You've put yourself into restricted room, so you've caused yourself some impediment to your own horse. Your record's a good one and **we felt that for all those reasons a reprimand couldn't be applied** but we felt a suspension should apply for 10 days. So that would start on the 19th, so you ride right through til Saturday. We'd allow you to ride Saturday" (emphasis added).*

It is clear, although not precisely put, that Stewards meant by this statement that they were of the view that the conduct of Mr Johnston-Porter was too serious to attract a reprimand, and as such suspension for a period of 10 days was the appropriate penalty.

The Hearing

15. At the hearing of this matter, Senior Counsel for the Appellant submitted that the penalty imposed was not proportionate to the findings of fact of the Stewards and that as such implied error had been demonstrated. It was submitted that although fines were not usually imposed in matters involving careless riding, they were available. In the circumstances, Senior Counsel submitted that the penalty imposed upon the Appellant was excessive inter alia, because, as a leading rider in WA, a 10-day suspension would result in a substantial loss of race earnings and potential earnings.
16. Senior Counsel for the Stewards submitted that the assessment of seriousness was a matter for the Stewards and that an argument that the penalty imposed was outside of a range of sound discretion was an *"untenable proposition"*. Stewards provided a schedule of suspensions imposed for careless riding imposed between 2019 and 2020. There were some 84 incidents captured.
17. In the course of submissions, it became apparent that although the parties agreed that fines were rarely, if ever, imposed for offences under AR131(a), reprimands were often (the Appellant's position) or very rarely imposed and only then in extremely minor cases or in relation to inexperienced or apprentice riders (the Stewards position).
18. Senior Counsel for the Stewards suggested that reprimands were imposed where no finding as to guilt has been made. In fact, reprimands appear to follow findings or acceptances of guilt as would be apparent on a reading of AR131(a) and AR283.
19. In the circumstances, I gave Stewards leave to provide me with information regarding reprimands issued for careless driving offences.
20. In further submissions received by the Tribunal on Friday, 9 October 2020, Stewards advised, inter alia, that since October 2018 110 reprimands were issued, 27 to apprentices and 83 to jockeys, no details of the offences leading to those reprimands were provided. I note that Mr Johnston-Porter's "record" by way of a Personal Incident Search (Exhibit 1 in the proceedings), discloses both reprimand and suspension penalties, as perhaps would be expected if the two penalties are both regularly handed down.

21. As the Stewards however correctly point out, the fact that both penalties are regularly imposed begs the fundamental question in this appeal, which is that this Tribunal may interfere only if it can be demonstrated that the Stewards acted on a wrong principle or misunderstood or wrongly assessed some part of the evidence bearing on the question of penalty. In this regard, I repeat the comments of Dixon, Evatt and McTiernan JJ in *House v R* (1936) HCA 40; 55 LLR 499 at paragraph 2:

“The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.”

22. Certainly, if the Stewards are correct in their conclusion that the circumstances of Mr Johnston-Porter’s riding on this occasion were such that a reprimand “*couldn’t be applied*” the suspension penalty of 10 days could not be seen as being outside the usual range of suspension penalties usually imposed.
23. I have given considerable thought to ground 1 of this appeal, which I describe as the “Fine” argument.
24. The Appellant claims that the Stewards erred by failing to consider the option of a fine as a penalty.
25. It should be noted from the outset that Mr Johnston-Porter did not, during the course of the inquiry, suggest that a fine would be appropriate. He did not suggest, except in the most general terms, that Stewards consider the financial impact of imposing a suspension upon him.
26. At the hearing, Senior Counsel for the Appellant tendered a letter from Mr Johnston-Porter’s bookkeeper (his mother) suggesting a substantial loss to him should the 10-day suspension be upheld.
27. In *Purdon v RWWA Stewards of Harness Racing* (Appeal 807), Presiding Member Mr P Hogan said in relation to harness racing (at paras 8 & 9):

“Whenever the stewards are called upon to consider a penalty, the stewards are engaged in an exercise pursuant to rule 256 of the Rules of Harness Racing. The Rules are made by RWWA. RWWA is given power to make rules under the Act and in rule 256(2) there is a list (a) to (j) of the different kinds of dispositions, to use a neutral word, that can be imposed. They include the two things spoken about mostly in this appeal, namely a fine, and they include a suspension and the dispositions go down so far as a reprimand or a severe reprimand.

Those penalties therefore – because they are in the Rules – must be considered in every particular case. On the facts, sometimes some of those penalties might not even arise for consideration, might not even merit speaking about by a person before the stewards or the stewards, but they all have to be considered.”

28. However, these comments must be considered in light of previous comments of this Tribunal in relation to the exigencies of the need to decide matters efficiently and in a timely manner.
29. Both parties agreed that fines are rarely, if ever, imposed as a penalty following a finding of guilt in relation to careless riding. Certainly, neither party was able to direct me to an instance where a fine was imposed, notwithstanding that a monetary penalty is available pursuant to AR283.
30. The imposition of fines may well overcome the Appellant’s concern that the financial impact upon him of a suspension is greater than that of an “amateur” jockey, or one that is not so highly regarded or sought after. It is true that jockeys in high demand, such as Mr Johnston-Porter, will suffer a greater detriment by suspension penalty in these matters, and that this is a separate issue from the imposition of a period of suspension which is on its face toward the lower end of the range of suspensions imposed.
31. It may well be that in future matters of a similar nature (if such occur), persons charged under the rule may well urge Stewards to consider the imposition of a fine. That did not occur in this matter.
32. None of the appeal grounds have been made out in this matter. I am unable to substitute any view I may have for that of the Stewards as to why a reprimand, whilst worthy of consideration, was not appropriate in the circumstances. It is clear that Stewards were of the view that the level of carelessness was simply too serious to warrant a reprimand.
33. The suspension imposed was clearly within the range of those usually imposed for similar matters and cannot be said to be manifestly excessive.
34. Stewards are under no obligation to make inquiry into the financial implications of penalty of any person. Should a person believe such financial implications to be relevant to penalty it is incumbent upon them to raise it for consideration. Should it be raised as a circumstance, in appropriate circumstances Stewards may well consider the possibility of a fine as an appropriate penalty in light of the comments by Mr Hogan in Purdon (above).
35. In any event it was clear in this case that Stewards were in fact aware that the Appellant was a leading rider with many engagements.
36. The appeal must be dismissed.

Karen Farley

KAREN FARLEY SC, CHAIRPERSON

