APPEAL NO. 856

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT:	**MR DARREN ROBERT LEE TAYLOR**
APPLICATION NO:	**22/4637**
PANEL:	**MR ROBERT NASH (CHAIRPERSON)** **MR ANDREW E MONISSE (MEMBER)** **MS NATALIE SINTON (MEMBER)**
DATE OF HEARING:	**11 NOVEMBER 2022**
DATE OF DETERMINATION:	**3 FEBRURY 2023**

IN THE MATTER OF an appeal by DARREN ROBERT LEE TAYLOR against a determination made by Racing and Wagering Western Australia Stewards of Thoroughbred Racing to impose a disqualification period of two years for two breaches of Rule AR 233(c) of the Rules of Thoroughbred Racing

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Messrs Tom Percy KC and Jack Young represented Mr Taylor.

Messrs Ron Davies KC and Denis Borovica represented the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

Background

1. The Appellant is a licensed Racing and Wagering Western Australia (RWWA) trainer. On 15 August 2022, following an inquiry by RWWA Stewards held on 22 July 2022 and 15 August 2022, the Appellant pleaded guilty to two charges of sexual harassment of a person employed, engaged in, or participating in the racing industry contrary to the Rules of Thoroughbred Racing (the Rules) AR 233(c).

2. On 25 August 2022, the Stewards imposed a total effective disqualification of 2 years for those charges, consisting of 18 months for charge 1, and 12 months for charge 2, to be served cumulatively but reduced by 6 months to give effect to the totality principle.

3. The Appellant appeals the total disqualification imposed on three grounds, the first alleging express error in the Stewards' characterisation of the seriousness of his offending, the second and third alleging implied error in the imposition of a penalty that was manifestly excessive.

4. In order to succeed, the Appellant must establish that the Stewards expressly or impliedly made a material error of fact or law: *House v The King* (1936) 55 CLR 499 at [505].

5. The appeal cannot be allowed simply because, had this Tribunal been in the place of the Stewards on 25 August 2022, it would have imposed a different penalty.

6. For the reasons that follow, I am satisfied that the penalty imposed was manifestly excessive, and I would allow the appeal and reduce the disqualification imposed on charge 1 to 8 months, and the disqualification imposed on charge 2 to 6 months, with both disqualifications to be served concurrently. The total disqualification period is therefore 8 months, commencing 25 August 2022.

The facts

7. The facts of the Appellant's offending conduct are not in dispute.

8. The Appellant is 37 years of age. He has been involved in the racing industry for many years, and for the past five years has held a trainer's licence.

9. In that capacity, the Appellant employed the two victims, namely CBM and CLD, on a trial basis, at separate times, the intention being that if their trials went well, they would be apprenticed as jockeys with the Appellant as their trainer.

10. In relation to charge 1, CBM was employed by the Appellant from March to May 2022. She was 17 years of age. The Stewards found, at the conclusion of their inquiry, that the Appellant engaged in sexual harassment of CBM by sending a series of text messages and videos that were of a sexual nature, specifically:

    a. 'Come spoon'.

    b. Photo of a ham roll imaging a vagina.

    c. 'Can we cuddle, it's cold'.

    d. 'Send me a lack of boob pic'.

    e. 'Send nudes'.

    f. Picture of a male and female with the caption 'Hi I'm the electrician...I'm here to remove your shorts and check your box.'

    g. 'Cuddles?'

    h. 'BJ?'

    i. Article titled 'For the love of Anambra'.

    j. Message with a love heart and 'Ascot!'

       Him: fancy going for a coffee today?

       Me: 'shave vagina just in case'

    k. Four videos of sexual content.

11. In relation to charge 2, CLD was employed by the Appellant from May to July 2021. She was 21 years of age. The Stewards found, at the conclusion of their inquiry, that the Appellant engaged in sexual harassment of CLD by sending a series of text messages and videos which were of a sexual nature, specifically:

    a. 'Hope it's the same when you are sucking my dick'.

    b. 'A boner for you'.

    c. 'I'll rub some cream on you'.

    d. 'G not coming home.'

       'You have to take one for the team'.

    e. 'I love you'.

    f. 'Kiss me'.

    g. 'Can I feel you then'.

    h. 'Can we kiss'.

    i. 'I could do anything internal to you'.

The Appellant's personal circumstances

12. The Appellant was at the time the Stewards imposed their penalty 37 years of age. He was in good health and had recently become a father.

13. He has been involved in the racing industry for a number or years, with about the last five of them as a licensed trainer. He was reliant on training and associated equine industries for his income, with the Stewards in their reasons noting that he can earn a living from educating and training equestrian and pleasure horses outside thoroughbred racing. His partner was on maternity leave, with a limited income as a result.

The Stewards' reasons for penalty

14. The Stewards provided the Appellant with comprehensive written reasons for penalty.

15. In those reasons, the Stewards note that the racing industry has been historically male dominated, and that the increasing number of women entering the industry should be able to do so confident that they will not be subjected to sexual harassment. Nothing in these reasons should be interpreted as suggesting that the Stewards were wrong on this point.

16. The Stewards noted that the Appellant's conduct was ongoing, and not a singular case of sending an inappropriate text message. They further noted that CBM, at 17 years of age, was a minor at common law and the Appellant, as her employer, was in a position of trust.

17. The Stewards confirmed receipt of four references vouching for the Appellant's character and describing his conduct as out of character – a description the Stewards found difficult to reconcile with the persistence of the Appellant's conduct.

18. In the Appellant's favour, the Stewards noted that he pleaded guilty, acknowledged fault and had cooperated with RWWA investigators. He had expressed remorse and had no prior breaches of the Rules in relation to matters of this kind.

19. It was also noted that the Appellant had provided the Stewards with confirmation that he had been attending counselling with a psychologist.

Ground 1 – mischaracterisation of the seriousness of the Appellant's conduct

20. The Appellant's first ground of appeal alleges express error in that the Stewards categorised the offending as being 'in the most serious category under the rule'.

21. The ground contains six particulars, which it is not necessary to repeat.

22. AR 233 provides that a person must not:

    a. breach a policy, regulation or code of practice published by Racing Australia or a PRA;

    b. engage in workplace harassment or bullying of a person while the person is acting in the course of his or her duties while employed, engaged in, or participating in the racing industry;

    c. engage in sexual harassment of a person employed, engaged in, or participating in the racing industry.

23. 'Sexual harassment' is defined in AR 2 as:

    a. subjecting a person to an unsolicited act of physical intimacy; or

    b. making an unsolicited demand or request (whether directly or by implication) for sexual favours from a person; or

    c. making a remark with sexual connotations relating to a person; or

    d. engaging in any other unwelcome conduct of a sexual nature in relation to a person, where the person engaging in the conduct described in paragraphs (a), (b), (c) or (d) does so:

        i. with the intention of offending, humiliating or intimidating the other person; or

        ii. in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.

24. AR 2 also provides that the conduct described in paragraphs (b), (c) and (d) includes, without limitation, conduct involving the internet, social media, a mobile phone, or any other mode of electronic communication.

25. It is apparent from this definition that sexual harassment can cover a wide range of conduct, from making unwanted physical contact intending to offend, humiliate or intimidate, to making a remark with sexual connotations where there is no such intention, but where a reasonable person would have anticipated that the remark might cause offence.

26. The Appellant's conduct was clearly serious. It involved repeated and persistent offending against two young and vulnerable victims in circumstances where there was a significant age and power disparity between the victims and the 37 year old Appellant. One of victims was 17 and therefore not an adult and the other only 21. In relation to both victims, the Appellant, as their employer, was in a position of authority.

27. The Appellant's conduct, while serious, cannot be properly described as 'in the most serious category under the rule'. Had the Stewards so categorised the Appellant's offending, this would have been an error.

28. The Stewards did not, however, do so.

29. In their reasons for penalty, the Stewards made the following relevant statements.

    a. *'An offence under AR 233 of sexual harassment is undoubtedly a very serious breach of the Rules of Racing'*: at [8].

    b. *'A clear message needs to be sent to the racing industry that there is no place for such conduct and will [sic] be treated as a most serious breach of the rules. There needs to be in cases such as these a clear message to both the offender and the wider industry, that harassment of this nature and type will not be tolerated and that there is no place for it within the industry'*: at [25].

30. Both statements, in their proper context, refer to offences of sexual harassment generally and not to the Appellant's specific offending.

31. Further, while it may seem to be a fine distinction, the Stewards in their reasons refer to such conduct as 'a' most serious breach, not 'the' most serious breach.

32. 'The most serious breach' means exactly that – there is no breach more serious. 'A most serious breach' is merely another way of saying 'very serious'.

33. I would therefore dismiss the Appellant's first ground of appeal.

Grounds 2 and 3 – manifestly excessive penalty

34. Grounds 2 and 3 each allege the imposition of a manifestly excessive penalty.

35. Ground 2 makes reference to the circumstances of the case and matters personal to the Appellant, whereas ground 3 makes reference to penalties imposed in similar cases both within Western Australia and in other jurisdictions.

36. While the grounds are particularised differently, they allege the same error and may conveniently be dealt with together.

37. A ground of appeal that alleges a penalty is manifestly excessive alleges the existence of an implied error. A penalty will only be manifestly excessive if it is shown to be plainly unreasonable or unjust. The range of penalties customarily imposed is of significance although each case turns on its own facts and circumstances. Sentencing ranges provide a general guide only and is merely one of the factors to be taken into account. The discretion conferred on the primary decision maker is of fundamental importance and this Tribunal will not substitute its own opinion merely because it would have exercised the discretion differently: *Houghton v The State of Western Australia* [No 2] [2022] WASCA 7 at [224] to [228].

Penalties provided by the Rules

38. AR 233 does not provide for either a maximum or a minimum penalty.

39. The penalties available under the Rules are set out in AR 283, and are:

    a. a disqualification;

    b. a suspension;

    c. a reprimand; or

    d. a fine not exceeding $100,000.

40. There is no maximum period of disqualification or suspension provided by the Rules.

41. Disqualification or suspension may be supplemented by a fine: AR 283(2).

42. A penalty other than a disqualification or warning off can be suspended for up to 2 years: AR 283(5)

43. A disqualification is a more serious penalty than a suspension. This is apparent from the effects of disqualification on a disqualified person, as set out in AR 263, which states that a person disqualified under the Rules must not, during the period of that disqualification:

    a. enter upon a racecourse or training track owned, operated or controlled by a PRA or Club or on any land used in connection with those properties;

    b. enter upon any training premises, complex or establishment of a PRA, Club or licensed person;

    c. be an office holder, official, member or employee of any PRA or Club or participate in the business of any PRA, Club, or any other racing disciplinary body;

    d. be employed by, or otherwise engaged to provide any service in any capacity to any thoroughbred racing stable;

    e. ride any horse in any race, official trial, jump-out or test;

    f. enter or nominate a horse for a race or official trial, whether acting as agent or principal or in any other capacity;

    g. subscribe to any sweepstakes;

    h. race or have trained any horse, whether as owner, lessee or in any other capacity;

    i. share in the winnings of any horse;

    j. participate in any way in the preparation for racing or training of any horse;

    k. open a betting account, operate an existing betting account, transact a bet or have a bet transacted on his or her behalf, have any interest in or share in any bet, and/or receive a benefit from any bet placed with a licensed wagering operator in connection with any thoroughbred race meeting held in Australia;

    l. conduct or assist with thoroughbred breeding in Australia;

    m. attend or participate in thoroughbred horse sales or related events;

n. permit or authorise any other person to conduct any activity associated with thoroughbred racing, thoroughbred horse sales and/or breeding for or on behalf of the disqualified person; and/or

o. receive any direct or indirect financial or other benefit derived from thoroughbred racing and/or breeding in Australia.

The range of penalties previously imposed

44. The Appellant, in his written submissions, referred the Tribunal to a small number of matters, both Western Australian and from interstate, which may be informative as to penalties previously imposed for similar conduct.

45. Before examining the interstate decisions to which the Tribunal was referred, I note that in *Shane Andrew Beard v RWWA Stewards of Greyhound Racing* (Appeal No 536), Tribunal Member Patrick Hogan stated:

> *'whilst I accept that consistency in penalty Australia wide might be a desirable object, I am not persuaded that it is necessarily so. Further, even if it were, I am the opinion that nothing has been demonstrated to indicate that the Western Australia approach is not the one to be followed.'*

46. However, as was said by Chairperson Farley SC in *Pateman v RWWA Stewards of Thoroughbred Racing* (Appeal No 848), where – as in this case:

> *'...there are few if any WA precedents in relation to penalty for similar breaches, it is sometimes useful to have regard to penalties imposed in other jurisdictions when considering whether a penalty imposed is so far out of the range of penalties to be expected as to manifest error.'*

47. There being, as yet, no Western Australian approach to follow when it comes to sentencing for breaches of AR 233(c), I am of the view that regard can be properly had to decisions of other Australian jurisdictions.

48. The first matter referred to by the Appellant in his written submissions was that of Anthony Bolden.

49. The Tribunal has been provided with two media releases relating to Mr Bolden. Both were exhibits at the Stewards' inquiry into the Appellant's conduct.

50. The first media release, dated 19 July 2013, states that Mr Bolden was stable hand who pleaded guilty to one charge under AR 175(q) (AR 175 being the misconduct offence provision before the introduction of AR 233).

51. The first media release states that Mr Bolden sent a series of inappropriate text messages to a RWWA licensed track rider between 3 and 5 April 2013. Mr Bolden was fined $1,500 and suspended for 3 months, that suspension being suspended for 3 months.

52. The second media release, dated 17 March 2017, states that Mr Bolden was found guilty of a charge under AR 175(y) of sexual harassment towards a licensed person through social media. A 9-month disqualification was imposed.

53. Neither media release provides detail as to the nature or seriousness of Mr Bolden's conduct, what if any age or power disparity existed between him and his victim/s, or his personal circumstances. I consider the media releases to be of no real assistance in determining whether the penalty imposed on the present Appellant was manifestly excessive.

54. The second matter referred to by the Appellant in his written submissions was that of Brett Rosen. The Tribunal was provided with a copy of a Stewards Report dated 13 July 2010. The report was an exhibit at the Stewards' inquiry into the Appellant's conduct.

55. Mr Rosen was found guilty of three charges of improper conduct under AR 175(q), relating to two victims who were employed by him.

56. His conduct consisted of sexually harassing a 15 year old by inappropriate touching and/or physical contact in his car whilst travelling to and returning from a racecourse on 1 February 2009.

57. Around eight days later, he sent the same victim an uninvited and inappropriate text message.

58. Around a month later, he sexually harassed a 19 year old by inappropriate touching and/or physical contact in his car whilst travelling to and returning from a racecourse.

59. Very limited information is provided as to the facts of Rosen's offending conduct. However, what is apparent is that his offending involved physical touching of two separate victims in his employ, both young, one a 15 year old child, over a six week period.

60. It also appears that Rosen was found guilty rather than pleading guilty, with a plea of guilty being a mitigating factor in the Appellant's case.

61. Mr Rosen was disqualified for a total of 12 months, comprised of 12 months for the first offence, 1 month for the second and 6 months for the third, all to be served concurrently.

62. Assuming the total penalty of 12 months' disqualification imposed on Mr Rosen to have been within an appropriate range, it does in my view provide support for the Appellant's contention that the 2 year disqualification imposed on him was manifestly excessive, given the charges to which he pleaded guilty did not allege any physical contact.

63. The third matter referred to by the Appellant in his written submissions was *Randall v Racing New South Wales* [2021] Appeal Panel of Racing NSW.

64. Mr Randall was charged with four offences, one of which was an offence of sexual harassment contrary to AR 233(c), to which he pleaded not guilty. The alleged facts of that offence were that the Appellant would routinely, over a period of around two and a half months, without the underage victim's consent, touch her on the leg while driving her to and from work. The Appellant denied this, and his appeal against a finding of guilt was upheld.

65. Mr Randall had been disqualified for 6 months for his offending contrary to AR 233, cumulative on a disqualification of 2 years and 3 months for possession of a cattle prod.

66. Assuming the above 6 month penalty imposed on Mr Randall to have been within an appropriate range, as was effectively submitted by the Appellant, it does in my view provide support for his contention that the penalty he received was manifestly excessive in circumstances where his offending behaviour did not involve any physical contact.

Was the penalty manifestly excessive

67. Sexual harassment is, as was noted by the Stewards in their reasons for penalty, a most serious breach of the Rules. Further, the Appellant's offending involved two young and vulnerable victims who were not in a position to complain or protest given their desire to secure an apprenticeship with the Appellant at the end of their three month trial period. It also involved offensive and degrading conduct that persisted throughout the period of their employment.

68. While disqualification is undoubtedly a severe penalty, the Appellant's conduct was sufficiently serious to warrant it. Further, the need for both general and specific deterrence is such that disqualification was the appropriate penalty in this matter. That conclusion is supported by the authorities of Rosen and Randall referred to by the Appellant in his written submissions.

69. However, a further conclusion supported by the above factors and authorities is that, having regard to the facts of the Appellant's offending conduct and his personal circumstances, disqualification for 2 years was so far outside the range of what was open as to be plainly unreasonable or unjust.

70. As such, I am satisfied that taking into account all the factors in mitigation the penalty that was imposed was of a length that was disproportionate to the Appellant's offending conduct. Accordingly, I would allow the appeal.

Additional evidence

71. At the hearing of the appeal, the Appellant was granted leave to file, pursuant to section 11(3)(c) of the *Racing Penalties (Appeals) Act 1990*, evidence that the victims had each returned to work in the racing industry.

72. This was not put forward by the Appellant as a factor mitigating his conduct, but to counter any suggestion that that conduct was aggravated by having driven the two victims out of the industry.

73. The material provided to the Tribunal by email dated 18 November 2022, in the form of a statutory declaration from the Appellant's partner setting out information largely obtained in conversation with third parties, can only, by virtue of that circumstance, be given limited weight.

74. CBM's evidence at the Stewards' inquiry was to the effect that she wanted a break from racing because she had been working very long hours for the Appellant, and the whole situation had affected her mental state. She had ridden for other trainers since leaving the Appellant's employ but had decided to go down a different career path for the time being, with the hope of returning to racing in the future.

75. CLD's evidence at the Stewards' inquiry was to the effect that she had suffered an injury in August 2021 which was the subject of a workers compensation claim but that she had been able to return to working 'as I see fit except riding work'.

76. There can be no doubt, based on the evidence the victims gave at the Stewards' inquiry, that they were negatively affected by the Appellant's conduct. This must and will be reflected in the penalty imposed on the Appellant.

77. However, to the extent that it is suggested that their having been driven from the industry aggravates the Appellant's offending, this fact is disputed and, as a fact adverse to the Appellant, should only be taken into account in imposing penalty if it has been properly established: *North v The State of Western Australia* [2020] WASCA 6 at [34].

78. The Appellant's conduct has not therefore been treated as having been aggravated by having driven the victims from the racing industry.

The appropriate disposition

79. As has been made clear, the Appellant's offending conduct was serious. As the victims' employer, he was in a position of authority over them both, which put them in a difficult position in terms of objecting to his behaviour.

80. He was significantly older than each of them.

81. His conduct was persistent, though absent the aggravating factor of having been asked to stop and continuing. As noted above the two young and vulnerable victims were not in a position to complain or protest about it.

82. The content of his messages to the victims was offensive and degrading and entirely inappropriate, though absent the aggravating factor of an intention to offend, humiliate or intimidate them.

83. The Appellant has substantial mitigation. He fully cooperated with the Stewards' investigation and inquiry, pleaded guilty and evidenced genuine remorse by his express statements in the inquiry that he was very embarrassed and ashamed of his actions, for which he apologised.

84. He was in the process of obtaining psychological counselling to address his behaviour.

85. The Appellant was also of prior good character and has no record of any other breaches of the Rules.

86. Taking into account all the circumstances a period of disqualification is the appropriate penalty for this matter. In my view, disqualification for a total period of 8 months is necessary to reflect the seriousness of the Appellant's conduct, the need for general and specific deterrence and to take into account the mitigation in this matter.

87. I would achieve this result by reducing the disqualification imposed on charge 1 to 8 months, and the disqualification imposed on charge 2 to 6 months, to be served concurrently to give effect to the totality principle.

88. This new period of disqualification would take effect from 25 August 2022, being the date when the Appellant's initial penalty imposed by the Stewards commenced.

NATALIE SINTON

APPEAL NO. 856

RACING PENALTIES APPEAL TRIBUNAL
REASONS FOR THE DETERMINATION OF
MR ROBERT NASH (CHAIRPERSON)

APPELLANT:	**MR DARREN ROBERT LEE TAYLOR**
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Background

1. I have read the draft reasons of Member, Ms Sinton.

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

ROBERT NASH, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of W.A.

APPEAL NO. 856

RACING PENALTIES APPEAL TRIBUNAL
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