

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE NO. Z843/2023

CATCHWORDS

Review and Regulation List – review of decisions by Victorian Racing Tribunal as to penalties, rule 173 of *Australian Harness Racing Rules* – a driver shall not bet in a race in which the driver participates – appropriate penalties – section 83 of the *Racing Act 1958*.

APPLICANT	John Nicholson
RESPONDENT	Harness Racing Victoria
WHERE HELD	Melbourne
BEFORE	E de Zilwa
HEARING TYPE	Hearing
DATE OF HEARING	1 August 2024
DATE OF ORDER & WRITTEN REASONS	11 October 2024
CITATION	Nicholson v Harness Racing Victoria (Review & Regulation) [2024] VCAT 979

ORDERS

- 1 The decision under review is affirmed.
- 2 The above decision comes into effect on 11 November 2024 in part lifting the Tribunal's stay of the decision under review.

E de Zilwa
Member

APPEARANCES:

For the Applicant: In person, assisted by Mr R Jones

For the Respondent: Mr A Cusumano, solicitor



REASONS

Introduction

- 1 Mr John Nicholson seeks a review of a decision as to penalty by the Victorian Racing Tribunal ('VRT') dated 6 September 2023. In those proceedings Mr Nicholson faced four charges laid against him by Harness Racing Victoria ('HRV'). The charges were brought under the Australian Harness Racing Rules ('AHRR').
- 2 VCAT has jurisdiction in this matter under section 83 of the *Racing Act 1958* (Vic) ('Racing Act') which relevantly says that a person whose interests are affected by a decision made by the VRT may apply to VCAT for review of that decision in relation to a penalty imposed on the person by the VRT.¹
- 3 Mr Nicholson pleaded guilty to all four charges at the hearing before the VRT on 6 September 2023. In relation to the first three charges, Mr Nicholson was suspended on each charge for 18 months, with six months of that penalty suspended for 24 months. The three periods of suspension were to be served concurrently. Mr Nicholson was also fined \$800 on the fourth charge.
- 4 In December 2023, VCAT stayed the above penalty decision until Mr Nicholson's application to VCAT was decided.
- 5 On 1 August 2024, I heard Mr Nicholson's application. Mr Rick Jones represented Mr Nicholson at VCAT. He is not a lawyer. HRV was represented by a solicitor, Mr Cusumano. I reserved my decision.
- 6 The decision under review is now affirmed, with effect from 11 November 2024.

The charges

- 7 The VRT laid three charges under rule 173(1) of the AHRR which reads 'A driver shall not bet in a race in which the driver participates.'
- 8 The particulars of charge one are:
 1. Mr Nicholson was at all relevant times a licensed trainer and driver and a person bound by the AHRR.
 2. Between 27 August 2020 and 14 October 2020, he placed on his TAB account:
 - (a) Four (4) win bets; and
 - (b) Six (6) each way betson horses that he drove in races.
- 9 The particulars of charge two are:

¹ See *Harness Racing Victoria v Phillips* [2023] VCAT 1071 from [10].



1. At all relevant times Mr Nicholson was a licensed trainer and driver with HRV, and a person bound by the AHRR.
 2. Between 13 August 2020 and 27 March 2021 he placed 42 multi-bets on his TAB account that included races in which he participated in as a driver, consisting of:
 - (a) 37 multi-bets where the offending leg or legs were bets only on horses that he drove in races; and
 - (b) five multi-bets where at least one of the offending legs was a bet on a horse other than the horse that he drove in a race.
- 10 The particulars of charge three are:
1. At all relevant times Mr Nicholson was a licensed trainer and driver with HRV, and a person bound by the AHRR.
 2. Between 9 August 2020 and 19 January 2021, he placed 36 exotic bets on his TAB account in races in which he participated in as a driver consisting of:
 - (a) 29 triffecta bets; and
 - (b) seven 'First Four' bets.
- 11 Quite detailed particulars of Mr Nicholson's betting in relation to each of these charges (Win and Place Bets, Multi Bets and Exotic Bets - Triffectas and First Fours) were contained in tables labelled Tables 1, 2 and 3 which corresponded to the first three charges. These tables each showed Bet Date and Time, Race Date, Track Location, Race Number, Horse Driven, Bet Selection, Bet Type, Market, Stake and Payout.
- 12 At the beginning of the hearing Mr Cusumano advised of some amendments to Table 2. Both parties agreed those amendments had no bearing on this proceeding.
- 13 The fourth charge was laid under rule 173(4) of the AHRR which reads 'A licensed person shall not authorise, enable, permit or allow another person to place a bet on a betting account of the licensed person.'
- 14 The particulars of charge four are:
1. At all relevant times Mr Nicolson was a licensed trainer and driver with HRV, and a person bound by the AHRR.
 2. On 13 December 2021 and 9 November 2022, he was interviewed by HRV stewards regarding the wagering activity on his TAB betting account.
 3. During these interviews he provided evidence to the effect that he allowed another person to place bets on his TAB betting account on or around 30 April 2021.
 4. As a licensed person on or about 30 April 2021, he allowed another person to place bets on his TAB betting account.



- 15 The first three charges are regarded as ‘serious offences’ for the purposes of s 50C(d)(iv) of the Racing Act.

The VRT hearing

- 16 The VRT accepted a submission from the Stewards that of the first three charges, charge three was the most serious and should be treated as the ‘lead charge’.
- 17 The VRT observed that several of the bets placed by Mr Nicholson, particularly the exotic bets involved in charge three, occurred when Mr Nicholson was the trainer of two horses in a race and he drove one horse while his son-in-law drove the other. His son-in-law is also a licensed person. In one bet Mr Nicholson selected the horse driven by the other person to finish first. In 15 of his bets Mr Nicholson selected another horse to win in addition to including the horse he was driving as a potential winner.
- 18 The VRT accepted that Mr Nicholson had not kept up with the development of the rules concerning wagering. It found there is no suggestion that he tried to alter the outcome of any race the subject of the charges, or that any horse trained or driven by him, was not allowed to compete on its merits. The VRT found there was no suggestion of Mr Nicholson in any way attempting illegally to affect the finishing order in any race.
- 19 The VRT was satisfied that Mr Nicholson was not ‘unaware of some of the restrictions imposed by the Rule’ prohibiting betting by licensed persons. (rule 173(1)). It based this finding on an answer by Mr Nicholson to a question asked of him by the Stewards at page 17 of the transcript of the interview held on 13 December 2021. The VRT noted that Mr Nicholson’s record in relation to this offence is without blemish. It also noted the alleged breaches are reasonably flagrant.
- 20 The VRT observed that all the offences have the potential to do considerable damage to the appearance and reputation of the industry. They also observed that the appearance of what occurred in relation to betting has the capacity to damage the public’s impression of the honesty of harness racing.

Submissions for Mr Nicholson

- 21 It was submitted by Mr Jones that the penalties imposed on Mr Nicholson by the VRT were excessive given:
- the first three charges relate to a single series of offending;
 - Mr Nicholson did not understand he was not supposed to bet;
 - He had done this for 45 years;
 - He had been naïve;
 - His conduct was not malicious; and



- He was quite open and transparent making no attempt to conceal his betting, did not attempt to avoid detection and had not been deceptive.
- 22 Mr Jones submitted that HRV had not been sufficiently proactive; HRV should have picked up Mr Nicholson’s behaviour earlier.
- 23 He invited VCAT to consider the material which he had prepared and filed on the stay application from December 2023 (the ‘Stay Submission’):
- It is apparent from the record of interview that Mr Nicholson does not recognise and comprehend the damage his betting can cause, both internally within the industry and externally with the betting public.²
- 24 The Tribunal Book contains two transcripts of interviews of Mr Nicholson. The first was dated 13 December 2021 and the second was dated 9 November 2022. The Stay Submission does not specifically refer to which transcript of interview Mr Jones is referring.
- 25 The Stay Submission makes the point that Mr Nicholson was naïve because in the transcript of interview he says there was no harm in having a few bets and he believed he was not cheating anyone.³
- 26 The Stay Submission lists several reasons why the penalties imposed by the VRT were excessive. These include that:
- There was no deliberate attempt to corrupt a race or betting outcome.
 - Mr Nicholson’s age (He was then 71 years old).
 - He had participated in the industry for over 50 years.
 - His previous good character and record.
 - As a result of his suspension Mr Nicholson cannot handle a horse and any other employment opportunities are bleak.
 - The penalty imposed on Mr Nicholson was too severe.⁴
- 27 The Stay Submission also made the point that Mr Nicholson primarily derives an income from working at stables run by family members, doing track work and preparing horses to race. He has no other experience or skillsets. It would be difficult for him to find other work during the 12 month period of suspension.⁵
- 28 At the hearing, Mr Nicholson was described as a man who was a mentor in the industry. All his family was involved in the industry. It was said he had never committed serious offences.
- 29 The penalties were described as excessive because not enough weight had been given to Mr Nicholson’s good character.

² R Jones, Stay Submission, 4 December 2023 [4].

³ Ibid [5].

⁴ Ibid [8].

⁵ Ibid [11].



- 30 Mr Jones referred to two decisions of the VRT. These were *HRV v Jayden Brewin*⁶ (*'Brewin's case'*) and *HRV v Kyal Costello*⁷ (*'Costello's case'*). He submitted that the cases of *Brewin* and *Costello* did not give good guidance to imposing penalties on someone like Mr Nicholson.
- 31 He told the Tribunal that Mr Nicholson's offending was less serious than that of both *Brewin* and *Costello*, and that the penalties imposed by the VRT on Mr Nicholson were 'too similar' to the penalties in the cases of *Brewin* and *Costello*.
- 32 Mr Jones estimated that this proceeding has cost Mr Nicholson \$1,200. He said the financial penalty of \$800 was too excessive.
- 33 He said the effective period of suspension by the VRT of Mr Nicholson was too much for a first serious offence. He said that the maximum penalty should be the three months of effective suspension that Mr Nicholson had already served. Alternatively, an effective penalty of six months suspension should be imposed.

Submission for HRV

- 34 Mr Cusumano, on behalf of HRV, referred to and relied on *Brewin's case* and *Costello's case*.
- 35 In *Brewin's case*, Mr Brewin pleaded guilty to eight charges, seven of which were described by the VRT as being 'betting offences'. Three of those were breaches of rule 173(1). The VRT imposed a total penalty of two years immediate suspension with 12 months suspended for two years and a fine of \$1,500. In relation to the three charges under rule 173(1) the VRT imposed an effective penalty of two years and six months suspension, 12 months suspended for two years and 18 months to be served immediately.
- 36 In *Costello's case*, Mr Costello pleaded guilty to 25 charges, 24 of which were breaches of rule 173(1). Fifteen of those charges involved betting on horses which Mr Costello did not drive. The VRT imposed a penalty of 24 months suspension on each of those charges but 14 of those penalties were made concurrent with the first penalty of two years suspension. The remaining nine of the betting charges involved horses which were driven by Mr Costello. The VRT imposed a suspension of six months on each of these charges but made these penalties concurrent with the two year suspensions imposed on the other betting charges.
- 37 On behalf of HRV, Mr Cusumano said that the penalties imposed by the VRT should be affirmed.

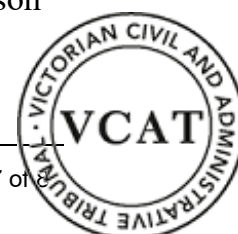
⁶ VRT Decision 25 July 2023.

⁷ VRT Decision 18 August 2022.



Decision

- 38 Clause 66N of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('VCAT Act') means that VCAT is bound by findings of fact which have been made by the VRT.
- 39 Relevantly in each case, there were breaches of rule 173(1). The penalties in *Costello's case* were greater than the penalty imposed on Mr Nicholson. The penalty in *Brewin's case* in relation to breaches of rule 173(1) was similar to Mr Nicholson's penalty.
- 40 There are, however, obvious differences between Mr Nicholson and the cases of *Brewin* and *Costello*. Mr Nicholson is much older than either Mr Brewin or Mr Costello. Consequently, Mr Nicholson has had decades more experience in the industry than either Mr Brewin or Mr Costello. Their personal circumstances are quite different from each other. But a common thread drawn through all three cases by the VRT involves the need to preserve the integrity of the sport, and the public perception of the image of the industry.
- 41 Mr Nicholson is now 72 years of age. He is a licensed driver and trainer. His family is heavily involved in the sport and is supportive of his work. He has survived very serious health problems. He has spent many decades in the harness racing industry. This is the first time he has been charged with committing serious offences.
- 42 The Tribunal was given three written character references for Mr Nicholson. They spoke, among other things, of his amiable nature, his warm personality, his passion for harness racing and his knowledge of the industry. Unfortunately, they did not directly address the charges Mr Nicholson faced, but I have considered them.
- 43 Mr Nicholson should be given credit for pleading guilty to all charges. He freely admitted a lack of awareness of the rules. The VRT Decision notes the apparent contradiction between his lack of awareness of the rules as they apply to betting, and his statement to the investigating stewards on 13 December 2021 that 'I probably thought that you wouldn't have caught me.'
- 44 The Tribunal accepts, as did the VRT, that despite the pattern of betting he engaged in, there is no suggestion that Mr Nicholson tried to alter the outcome of any race, or that any horse trained or driven by Mr Nicholson was not allowed to compete on its merits. The Tribunal also accepts that Mr Nicholson in no way attempted to illegally affect the finishing order in any race.
- 45 As did the VRT, the Tribunal considers that the charges relating to betting in breach of rule 173(1) appear to be flagrant breaches of the rules.
- 46 Similarly, the charge of breaching rules 173(4) by allowing another person to use his TAB account to place a bet is a matter of concern.



- 47 All the charges under rule 173(1) require a period of suspension. The periods of suspension argued for on behalf of Mr Nicholson are not sufficient to express the condemnation of his conduct which the VRT identified as necessary. The fine imposed for a breach of rule 173(4) should stand. The penalties imposed by the VRT are appropriate.
- 48 The decision under review is affirmed, with that decision to come into effect on 11 November 2024. The short time will allow Mr Nicholson to make any required arrangements.

E de Zilwa
Member

