QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Ahrens v Queensland Racing Integrity Commission* [2020] QCAT
PARTIES:	**BENJAMIN CARL AHRENS** (applicant) **v** **QUEENSLAND RACING INTEGRITY COMMISSION** (respondent)
APPLICATION NO/S:	OCR337-19
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	8 September 2020
HEARING DATE:	14 July 2020
HEARD AT:	Brisbane
DECISION OF:	Member Fitzpatrick
ORDERS:	**1. The decision of the Queensland Racing Integrity Commission is set aside as to penalty.** **2. In substitution:** **(a) Benjamin Carl Ahrens is suspended from holding a trainer's licence for nine (9) months, wholly suspended for 12 months, commencing from the date of this order.** **(b) If Benjamin Carl Ahrens engages in any conduct which results in a contravention of Australian Rule of Racing 178 for which a penalty is imposed, during the period of suspension, the period of suspension will immediately be re-activated and the suspension will be served in full. The matters which are the subject of any new charge will be treated and dealt with as a separate proceeding.** **(c) Benjamin Carl Ahrens is fined $3,000.00 for a breach of Australian Rule of Racing 178 to be paid by 7 October 2020.**
CATCHWORDS:	PROFESSIONS AND TRADES – LICENSING OR REGULATION OF OTHER PROFESSIONS, TRADES OR CALLINGS – Thoroughbred trainer – presentation of

a horse to race when a urine sample found the prohibited substance cobalt above the threshold – plea of guilty to charge of breach of Australian Rule of Racing 178 – question of appropriate penalty

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 20
Racing Integrity Act 2016 (Qld) s 3, s 246

Graham v Queensland Racing Integrity Commission [2019] QCAT 198
Harness Racing Victoria v Chisholm [2017] VCAT 1620
Kavanagh v Racing New South Wales [2019] NSWSC 40
Queensland All Codes Racing Industry Board v Thomas [2016] QCATA 82
Queensland Racing Integrity Commission v Lancaster (Internal Review Decision), 16 May 2019)
Queensland Racing Integrity Commission v Scott [2019] QCATA 121
Queensland Racing Integrity Commission Stewards' Report: Mr George Clegg 23 June 2020
Racing Integrity Unit v L O'Sullivan and A Scott (New Zealand) 22 March 2016
Racing New South Wales Stewards' Report: Ron Quinton 5 October 2017
Wallace v Queensland Racing [2007] QDC 168
Waterhouse v Racing New South Wales Appeal Panel (2 September 2005)

APPEARANCES & REPRESENTATION:	
Applicant:	J E Murdoch QC instructed by M O'Connor, Solicitor, O'Connor Ruddy & Garrett Solicitors
Respondent:	R Anderson QC instructed by W Kelly, in house solicitor for the respondent.

REASONS FOR DECISION

[1] This is an external review under s 246 of the *Racing Integrity Act* 2016 (Qld).

[2] The review only relates to penalty, as a result of a breach of Australian Rule of Racing 178. The Rule provides:

> Subject to AR 178G when any horse that has been brought to a racecourse for the purpose of engaging in a race and a prohibited substance is detected in any sample taken from it prior to or following its running in any race, the trainer and any other person who was in charge of such horse at any relevant time may be penalised.

[3] Upon an internal review of the original Stewards' decision of 5 September 2019, the penalty was amended to nine months' suspension, with three months wholly

suspended for a period of two years. The internal review decision was made on 3 October 2019.

[4] A stay of imposition of the penalty was granted by this Tribunal on 11 October 2019.

[5] By s 20 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act), the purpose of this review is to produce the correct and preferable decision. The Tribunal must hear and decide the review by way of a fresh hearing on the merits.

[6] Mr Ahrens gave evidence at the hearing on 14 July 2020. His evidence in chief is set out in his affidavit filed in the Tribunal on 17 June 2020.[1] Mr Ahrens also tendered two character references, to which I have had regard.[2]

[7] I have also had regard to the documents filed by the respondent pursuant to s 21(2) of the QCAT Act.[3]

Facts

[8] I find in accordance with the uncontested facts that:

(a) Mr Ahrens, trainer of King Luther (NZ) presented the horse to a race on 4 November 2018 at the Sunshine Turf Club. When a pre-race urine sample was taken from King Luther it was found, upon analysis, to contain the prohibited substance cobalt above the regulatory threshold;

(b) Australian Rule of Racing 178C (1) provides that the regulatory threshold of cobalt is 100 micrograms per litre in urine (mcg/L). The detected level of cobalt in King Luther's urine was 292 mcg/L.[4]

(c) Mr Ahrens pleaded guilty to the charge made pursuant to Australian Rule of Racing 178.

(d) Upon veterinary advice Mr Ahrens injects the horses he is training with a commercial vitamin mixture known as Hemoplex.

(e) Cobalt is a naturally occurring trace element. It is associated with vitamin B. Cobalt was present in Hemoplex.

(f) The explanation for the elevated cobalt reading in King Luther's urine sample is that Mr Ahrens administered Hemoplex to King Luther on 2 November 2018 – 48 hours prior to his next race day. Such treatment is not in breach of the Rules of Racing. However, prior to racing on 4 November 2018 King Luther was inadvertently injected with a further dose of the vitamin mixture.

(g) The cause of the inadvertence was mistaking King Luther for another horse, Maquereau, which is similar in appearance. Mr Ahrens assumed he was injecting Maquereau after he requested it be brought to him with other horses due to race some days later. A new stable hand instead brought King Luther to be injected and the mistake was not discovered until later.

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1 Exhibit 1.

2 Exhibit 2 reference from Ross Howard, undated; Exhibit 3 reference from John Wilson, dated 7 June 2020.

3 Exhibit 4.

4 Documents numbered 7 (Exhibit 5 Certificate of Analysis for the sample. Sample number 440619) and 16 (Exhibit 14 confirmatory Certificate of Analysis for sample. Sample number 440619) in documents provided pursuant to s 21(2) QCAT Act.

(h) Mr Ahrens did not intend to inject King Luther with Hemoplex on 4 November 2018.

[9] Mr Ahrens was cross examined at the hearing in relation to his knowledge of cobalt. He confirmed that on 4 November 2018 he knew that cobalt was a prohibited substance at levels in excess of 100mcg/l and that there was a need to be cautious in relation to the substance.

[10] When asked if Mr Ahrens knew that Hemoplex contains cobalt, Mr Ahrens said that he knew it may contain cobalt, but not at a significant level. His evidence is that he knew there was an insignificant amount of cobalt in Hemoplex, but because Hemoplex is a commonly used supplement, he did not think he was breaching a Rule by using it. I accept that evidence and find that Mr Ahrens knew that there was a small amount of cobalt in the Hemoplex that he was administering to his horses.

[11] Because of the mix up between King Luther and Maquereau I find that injection of King Luther with Hemoplex on 4 November 2018 was an inadvertent administration of the prohibited substance. I note the Stewards accepted Mr Ahrens' explanation of inadvertent administration.

[12] Mr Ahrens' evidence is that he has been a trainer since 2003. In 2010 thoroughbred horse training became his full-time occupation. He has never been charged with a breach of presentation rule throughout his training career, until this incident.

[13] Mr Ahrens has up to 70 horses either in training or agisted at his facility Epsom Lodge. Mr Ahrens employs a full-time trainer, a full-time foreman, four full-time stable hands, two full-time track work riders/stable hands and one part-time administration manager.

[14] Mr Ahrens' evidence is that if he were to be suspended in accordance with the decision, he will not be able to service his home mortgage, he would need to close his training facility and that would impact the employment of his staff. His horses would have to be dispersed to other trainers. Although qualified as a physiotherapist Mr Ahrens has not practised for 15 years. He would have to re-train and has no idea of his ability to return to that work if he had to.

[15] I accept Mr Ahrens' evidence and find that the imposition of a suspension on his right to train will have very significant consequences for him, his staff and business if he is unable to continue to train horses for a period.

Submissions of the applicant

[16] The applicant relies on the following principles.

(a) Determination of penalty for a breach of the rules pertaining to presentation of a racing animal with a prohibited substance in its system is to be determined by an assessment of the blameworthiness of the trainer.[5]

(b) A lack of blameworthiness is a mitigating circumstance which may justify more leniency than a second category of case where there is no explanation for an elevated reading and therefore no indication of the trainer's blameworthiness.

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5 *Wallace v Queensland Racing* [2007] QDC 168, [57].

A third category of case is where there is some explanation which did show moral blameworthiness which would justify a more severe penalty.[6]

(c) A respondent is not liable to a penalty if an overall assessment of the evidence rebuts the fault inferred from a positive test and reasonably supports a finding that he or she acted under an honest and reasonable mistake that the horse being presented was drug free or alternatively they had done all they could to stop the horse from testing positive for a banned substance.[7]

(d) Considerations irrelevant to liability, such as good character, lack of knowledge, accident or carelessness and even unexcluded possibilities may mitigate, if not sufficient to excuse or support a forensic finding consistent with innocence.[8]

(e) The decision to punish in a presentation case under ARR 178 is discretionary. The finding is mandatory, but the penalty is discretionary.[9]

[17] It is submitted that in this case all the evidence points to circumstances in which Mr Ahrens had no reason to depart from his belief that the horse was being presented to race free of prohibited substances. It is said that is a strong mitigating factor.

[18] In relation to penalty precedents it is submitted that:

(a) the penalty imposed on Mr Ahrens is in excess of those imposed in relation to cases not involving cobalt under AR178 or the counterpart "presentation" rules in the harness racing or greyhound codes, which are most frequently a fine of $3,000.00 or lower; or $5,000.00 in relation to a trainer with a history of prior breaches.

(b) The earlier cobalt infringements have attracted higher penalties than for other prohibited substances because of higher cobalt readings and no mitigating circumstances.

(c) This is a "presentation" not "administration" charge and on the cases, the penalty is significantly lower.

(d) There are cases involving cobalt in which mitigating circumstances have been taken into account in the assessment of blameworthiness with the result that trainers have not been penalised with a suspension or disqualification.[10]

(e) A case involving a mix up of horses is *Queensland Racing Integrity Commission v Lancaster*.[11]The trainer negligently presented the wrong horse to race. The trainer was fined $1,000.00 It is acknowledged that these facts relate to a different rule, but relative to the consequences of the mistake, the mistake of Ms Lancaster was no greater than that of Mr Ahrens.

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6 Ibid [69].

7 *Queensland All Codes Racing Industry Board v Thomas* [2016] QCATA 82, [77].

8 Ibid [105].

9 *Waterhouse v Racing New South Wales Appeal Panel* (2 September 2005).

10 *Racing New South Wales Stewards' Report: Ron Quinton* 5 October 2017; *Queensland Racing Integrity Commission Stewards' Report: George Clegg* 23 June 2020; *Kavanagh v Racing Victoria Limited No 2* [2018]; *Racing Integrity Unit v L O'Sullivan and A Scott* (New Zealand) 22 March 2016.

11 (Internal Review Decision)16 May 2019.

(f) The tables of penalties[12] demonstrates that for substances other than cobalt, fines are the penalty. First offender: $2,000 to $3,000. Second offender: $5,000.

[19] It is submitted that this case should be treated as one of inadvertent administration and that the appropriate outcome of the review should be no penalty with a reprimand or caution. Alternatively, a fine in the order of $3,000.00 should be imposed.

[20] Mr Ahrens submits that there is no justification for the assertion that the presence of cobalt in a horse should necessarily result in disqualification or suspension of a trainer. In relation to most other substances, deterrence is achieved through a fine.

[21] It is said that there is no evidence in this case that the level of cobalt was harmful or that it was performance enhancing. It is noted that King Luther finished sixth. As to the level of cobalt it is submitted that level was only present because of the freakish circumstances at play on the day in question. It is not the case that the horse was on a feeding regime to build up the level of cobalt or that in breach of the Rules cobalt was deliberately administered on race day. The level is linked only to the circumstances of administration to the wrong horse.

[22] Finally, it is submitted that the level of blameworthiness in this case is very low. There has never been a similar mix up in all Mr Ahrens' years of operating. The risk of this occurring was not foreseeable.

[23] It is submitted that the consequences of Mr Ahrens not being able to train are severe and that when one considers the root cause of the mistake was inadvertence a suspension or disqualification is a disproportionate punishment.

Submissions of the respondent and the applicant's reply

[24] The respondent presses for the imposition of a period of suspension as the appropriate penalty and says that the Stewards' decision should be confirmed. The respondent acknowledges that this is not an appropriate case for disqualification. It is submitted that the facts of this case are not capable of being categorised at the lower end of the scale of innocence.

[25] The point is made that if a person wishes to administer substances that are banned beyond a certain threshold, he or she must accept responsibility for failing to take necessary steps to ensure strict compliance with the rules is maintained. The respondent says that the circumstances called for caution, but the required caution was not exercised.

[26] The respondent stresses the need for deterrence and the seriousness with which cobalt offences are treated. It is said that all Queensland cases related to cobalt include a period of suspension. No Queensland authority supports no suspension.

[27] The respondent asserts that two recent decisions are more determinative on a comparability basis than those referred to by the applicant.

[28] In particular:

(a) *Queensland Racing Integrity Commission v Scott*[13] involved a finding of moderate carelessness in the feeding and supplement regime which, over time,

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12 Attachments "A", "B" and "C" to the Outline of submissions of the applicant filed 24 June 2020.

13 [2019] QCATA 121.

built up levels of cobalt above the threshold. A suspension of nine months and a fine of $6,000 was imposed.

(b) *Graham v Queensland Racing Integrity Commission*[14] involved a considerable degree of carelessness in the intravenous administration of a supplement containing cobalt at three times the recommended dose the day before the race. A suspension of 12 months was imposed.

[29] The respondent acknowledged at the hearing that even a wholly suspended suspension is relevant to deterrence. It was also submitted that if I impose a fine instead of suspension then a fine in the range of $6,000 to $12,000 is appropriate.

[30] In reply, Mr Ahrens distinguished the *Scott* and *Graham* cases, on the basis that those cases involved conscious dealing with the horses in question. In this case Mr Ahrens had no intention to treat King Luther on the day. Further, in the *Scott* and *Graham* cases, no finding of mere inadvertence was made.

[31] Finally, Mr Ahrens submits that although it is said against him that he should have taken reasonable precautions to prevent injecting the wrong horse, no reasonable step is advanced by the respondent. Mr Ahrens says that by reference to the steps in *Wallace's* case, there is no moral blameworthiness on his part which would put him into the category which justifies a more severe penalty. Mr Ahrens says that inadvertence is not moral blameworthiness. It is not for example recklessness. On this basis it is submitted that Mr Ahrens' conduct falls within the first category on the *Wallace* analysis, or alternatively a low level of the second category.

Discussion

[32] The presence of cobalt in a horse is a serious matter and is treated seriously by the racing industry.

[33] I find that the mix up of horses could have been avoided by greater attention on the part of Mr Ahrens. The mix up was not inevitable. It was brought about by a lack of care as to which horse was being injected. That is particularly the case where a new stable hand was on the job and the two horses were practically identical in appearance. The inadvertence or lack of care which resulted in King Luther being mistakenly injected with Hemoplex on race day brings with it personal blameworthiness[15] for what has occurred.

[34] I accept that Mr Ahrens acted under an honest and reasonable mistake that King Luther was being presented to race drug-free. However, I do not accept that Mr Ahrens did all he could to stop the horse from testing positive for a banned substance. As a matter of common sense merely asking the name of the horse before administering an injection would have avoided the error.

[35] Where there is some personal blameworthiness on the part of a trainer for the presence of cobalt in a horse, it is appropriate that a penalty should follow. The cases attempt to grade the personal or moral blameworthiness of the person accused of a breach of ARR 178. For example, findings of moderate carelessness and a considerable degree of carelessness, respectively, have been made in the *Scott* and *Graham* cases. Obviously, some conduct is more culpable than other conduct. It follows that the

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14 [2019] QCAT 198. This decision is currently subject to appeal.

15 *Wallace v Queensland Racing* [2007] QDC 168, [69].

more culpable the conduct, the more severe the penalty should be, from both a general and specific deterrence point of view.

[36] The presence of cobalt in King Luther was caused by inadvertence on the part of Mr Ahrens, not recklessness or some higher level of culpability.

[37] It is a mitigating circumstance that Mr Ahrens did not intend to inject King Luther with Hemoplex on race day. Rather he intended to inject a similar looking horse – Maquereau, who was not racing on that day. On this basis, I am able to find that Mr Ahrens believed he was presenting King Luther to race free of prohibited substances. I accept that is a mitigating circumstance.

[38] Other mitigating circumstances are that there is no evidence of harm to the horse or enhancement of its performance. Further, Mr Ahrens has no relevant disciplinary history. He is a man of good character.

[39] I agree with the submissions made by Mr Ahrens that his case can be distinguished from *Scott's* and *Graham's* cases and other cases where a known horse was consciously given a product containing cobalt resulting in a level above the regulated level.[16]

[40] It is trite to say that each case must be determined on its merits. This case brings with it a peculiar set of facts, different to all those which have preceded it in relation to the presence of cobalt in a horse.

[41] The facts of this case are closer to those of *Lancaster's* case because of the mix up of horses, that being the inadvertent act which caused the presence of cobalt in King Luther in excess of the regulated threshold. Of course, a different rule is involved in the consideration of penalty in that case. For that reason, I think that the case is of limited assistance in determining penalty.

[42] Any penalty imposed on Mr Ahrens should reflect the protective purpose of the *Racing Integrity Act* 2016 (Qld) which is to maintain public confidence in the racing of animals in Queensland for which betting is lawful; to ensure the integrity of all persons involved with racing or betting under the Act or the *Racing Act* and to safeguard the welfare of all animals involved in racing under the Act or the *Racing Act.*[17]

[43] On the facts of this case none of the objectives of the Act have been seriously threatened. A penalty should be no more than is necessary to achieve the objective of the legislation.[18]

[44] As to deterrence, I accept that there is a need to emphasise more generally the importance of horses not being presented with a prohibited substance such as cobalt. However, specific deterrence with respect to Mr Ahrens can have little relevance where it has been found that his breach is inadvertent and is never likely to be repeated given the peculiar facts of the matter.[19]

[45] In acknowledgement of the need for general deterrence and because there is blameworthiness attached to Mr Ahrens' inadvertence, I consider that a period of

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16 See the discussion of comparative cases in *Graham v Queensland Racing Integrity Commission* [2019] QCAT 198.

17 *Racing Integrity Act* 2016 (Qld), s 3.

18 *Harness Racing Victoria v Chisholm* [2017] VCAT 1620, [24].

19 *Kavanagh v Racing New South Wales* [2019] NSWSC 40, [67].

suspension is warranted. That is consistent with other cases involving the presence of cobalt.

[46] Balanced against that are Mr Ahrens' own circumstances. I consider being forced to close his business, terminate his staff and disperse his horses to other trainers is a very harsh penalty and disproportionate for a single act of inadvertence. I also take into account the mitigating factors set out earlier.

[47] For these reasons I consider that a period of nine months' suspension, wholly suspended for a period of 12 months is appropriate. I also consider that a fine in an amount of $3,000.00 should be imposed.

Orders

[48] The orders of the Tribunal are that the decision of the Queensland Racing Integrity Commission is set aside as to penalty and in substitution:

(a) Benjamin Carl Ahrens is suspended from holding a trainer's licence for nine (9) months, wholly suspended for 12 months, commencing from the date of this order.

(b) If Benjamin Carl Ahrens engages in any conduct which results in a contravention of Australian Rule of Racing 178 and the imposition of a penalty during the period of suspension, the period of suspension will immediately be re-activated and the suspension will be served in full. The matters which are the subject of any new charge will be treated and dealt with as a separate proceeding.

(c) Benjamin Carl Ahrens is fined $3,000.00 for a breach of Australian Rule of Racing 178 to be paid by 7 October 2020.