IN THE RACING APPEALS TRIBUNAL

DARREN EGAN
Appellant

v

RACING NEW SOUTH WALES
Respondent

REASONS FOR DETERMINATION

Date of hearing: **1 October 2024**

Date of determination: **28 October 2024**

Appearances: **Mr J Bryant for the Appellant**

Mr M Cleaver for the Respondent

ORDERS

1. **The appeal is dismissed.**
2. **Any appeal deposit is to be refunded.**

INTRODUCTION

1. In 2023, Darren Egan (the Appellant) was charged by Racing New South Wales (the Respondent) with 5 offences of engaging in sexual harassment contrary to cl 233(c) of the Australian Rules of Racing (the Rules). Generally speaking, the Appellant's offending arose from text and similar messages sent to a total of 5 Complainants.

2. Before the Stewards, the Appellant pleaded not guilty to two of those offences, but guilty to the remaining three. He was found guilty of all five charges, and the following penalties were imposed:

    (i) Charge 1 – a disqualification for 4 months;
    (ii) Charge 2 – a disqualification for 3 months (reduced from 4 months on account of the plea of guilty);
    (iii) Charge 3 – a disqualification of 3 months (reduced from 4 months on account of the plea of guilty);
    (iv) Charge 4 – a disqualification of 12 months; and
    (v) Charge 5 – a disqualification of 12 months.

3. Having regard to principles of totality, a disqualification of 2 years was imposed.

4. The Appellant lodged an appeal against that determination to the Racing New South Wales Appeal Panel (the Panel). On 16 April 2024, the Panel found charges 1, 4 and 5 (being those to which the Appellant had previously pleaded not guilty) established. In reasons published on 3 June 2024, the Panel dismissed the Appellant's appeal in respect of the severity of the entirety of the penalties imposed at first instance, and confirmed the disqualification of 2 years.[1]

5. The Appellant now appeals against the Panel's determination. The hearing of the appeal took place on 1 October 2024, following which my judgment was reserved.

[1] At [103].

It should be noted that the appeal proceeded on the basis that the sole issue was that of penalty.

6. I am indebted to the parties for providing me with an agreed Statement of Facts setting out, amongst other things, the terms of the charges against the Appellant. I would encourage all parties who have matters before the Tribunal to follow that course. Quite apart from any other consideration, it helpfully limits the amount of material which needs to be provided to the Tribunal for making its determination, thereby reducing both time and costs.

THE RELEVANT PROVISIONS OF THE RULES

7. Rule 233 of the Rules is in the following terms:

> ***233 Other misconduct offences***
>
> *A person must not:*
>
> *,,,*
>
> *(c) engage in sexual harassment of a person employed, engaged in, or participating in the racing industry.*

8. Rule 2 of the Rules defines sexual harassment in the following terms:

> ***Sexual harassment means:***
> *(a) subjecting a person to an unsolicited act of physical intimacy; or*
>
> *(b) making an unsolicited demand or request (whether by demand or 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;*
> *(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;*

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.

THE AGREED FACTS

9. The agreed facts are as follows, noting further that there is no dispute that the Appellant:

    (i) was, at all material times, a licenced trainer with the Respondent, and required to comply with all relevant rules; and

    (ii) takes no issue with the fact that the conduct in each case amounted to sexual harassment; and

    (iii) accepts that he sent messages to the various Complainants which were:

        (a) unprompted;
        (b) unwelcomed; and
        (c) of a sexual nature, such that a reasonable person sending them would have anticipated the possibility of offence or humiliation being felt by the recipients.

10. The messages are reproduced below in the same terms in which they were sent.

Complainant 1

11. At the material time, Complainant 1 was a 24 year old apprentice jockey who had previously ridden one race for the Appellant**.** She described their relationship as one of *"strictly work",* and she did not view it as being *"friends".* She accepted that they were polite with one another and that they had seen, and socialised with, each other on one occasion with a group of people, but said that she would not have socialised with the Appellant alone.

12. Between 15 October 2023 and 12 November 2023, the following exchange took place between the Appellant and Complainant 1 via text message:

Appellant:	*Come back to RSL* *Fuck, I won't go hugg* *Uourighynow* *Nothing sexual, just friends* *That was go red some one Elsy* *....* *Hi, I hope you don't think that I'm trying to fuck you or something by asking you out for a drink or asking you around for a drink, if I was single I would, for sure, I think your beautiful, I'm happy to stay friends and hang out and catch up for drinks and stuff. Although I was thinking about making sure you got into bed safely last night.*
Complainant	*Happy to have a drink as mates.*
Appellant:	*Sweet, when you hadn't replied earlier, I thought you might have thought I was trying to fuck you or something.*
Complainant:	*Nah nah, all good, we're sweet.*
Appellant:	*Good, I won't send you any cock pics then.*

13. Complainant 1 interpreted the messages to be an invitation for her to entertain a sexual advance by the Appellant. She viewed them as "*a little bit inappropriate*", and described them as being "*humiliating"* and making her feel "*uncomfortable"*. She explained that "*we're all just doing our best to get rides and ride trackwork and hopefully get rides in doing that and, yeah, it just makes it harder, especially being a female I think"*.

Complainant 2

14. At the material time, Complainant 2 was a 19 year old licenced jockey, and a track rider for the Appellant.

15. At about 8.58 pm on 12 September 2022, the Appellant sent the following message to Complainant 2:

Appellant:	*Hey, I just shit myselfbb* *Sorry, that wasn't for you, but I thought I accidentally sent you a naughty photo of something*

16. About 9.12 pm on 28 September 2022, the Appellant sent the following message to Complainant 2:

> *Appellant:* *Fuck I could get myself in trouble looking at your photos on FB, if I was young again I would comment on how good you look and I would ask you out for drinks*

17. Between 7.48 pm and 8.06 pm on 9 November 2022, the following exchange took place between the Appellant and Complainant 2:

> *Complainant:* *go with 5 tomorrow.*
> *Appellant:* *Sweet*
> *Hey, I forgot to ask, did you get hurt in the gates??*
>
> *Complainant:* *no no I'm all good thanks.*
> *Appellant:* *Good*
> *If you had of got hurt, I was going to ask you round for a spa*
>
> *...*
>
> *Hey, I'm really sorry about that message. I really didn't mean anything by it, I should have added that I was only joking, nothing serious.*

18. Complainant 2 described the messages as making her feel *"uncomfortable"*. She interpreted them as having what she described as a "s*exual connotation"*. In respect of the message referring to "*photos on FB",* Complainant 2 said that she was "*offended"*.

19. The messages to Complainant 2 ceased after her partner confronted the Appellant.

Complainant 3

20. At the material time, Complainant 3 was a 21 year old licensed jockey/stable foreperson. Prior to 4 November 2023, she had only interacted once with the Appellant, such interaction having occurred via Facebook regarding riding horses. On 4 November 2023, they met in person at Dubbo Racecourse.

21. Between 4 November 2023 and 9 November 2023, the Appellant sent the following messages to Complainant 3 via Facebook:

> *Appellant:* *Hi, I have to say that you looked absolutely stunning today at Dubbo, not sure if your seeing anyone, if you are, he's one lucky bloke.*
>
> ...
>
> *Hi, I wasn't coming on to you with my comments, I was just saying that you where looking beautiful.. If I was coming on, I'd send you a few cock pics.*

22. The first of those messages was sent on 4 November, and the second on 9 November. The second was accompanied by a series of "laughing" emojis.

23. Complainant 3 described the messages as making her "f*eel a bit uncomfortable"*, particularly because she perceived that the Appellant viewed her (in circumstances where she was a young person) in a sexual way, rather than as just another person in the racing industry. She described the second message as *"offensive"*.

Complainant 4

24. At the material time, Complainant 4 was a 28 year old apprentice jockey. Prior to the offending, she had ridden the Appellant's horses in trials. She described their relationship as friends.

25. Between 18 April 2022 and 19 April 2023, the following exchanges occurred between the Appellant and Complainant 4 via Facebook:

> *Appellant:* *Hey, I like your Tinder pic*
> *Complainant:* *What are you doing on Tinder?*
>
> *Appellant:* *Looking for you, want to go on a Tinder hook up lol*
> *Complainant:* *I think I'm getting rid of it though I can't be bothered with any of it haha*
>
> *Appellant:* *You don't need it, we can secretly hook up whenever you want lol*

...

Appellant: *Hey, I need to explain myself, I don't do Tinder, a friend made up an account a couple of years ago and every now and then I get a like and it comes up, so I click on it, when I did last night, you came up, I think I clicked like, I'm not real sure, coz I don't use it, so don't tell Kylie about this ...*
By hey, if all you want is a fuck buddy, I'm always free, no strings attached, very discreet ...

Complainant: *It's all good, I wont tell about it*

...

Appellant: *Hey, I'm sorry, I should ask you to be a sex buddy, even though I'd love to fuck you*

...

Appellant: *Hey, I'm sorry, I shouldn't be saying anything about wanting to fuck you, where are friends and I'd like to stay friends.*

...

Appellant: *Unless you want to fuck me.*

Complainant: *Darren stop. We are friends ok I'll just pretend I didn't read all of that ok haha*

Appellant: *I will, I'm sorry.*

26. At about 8.11 pm on 4 February 2023, the Appellant sent a message to Complainant 4 saying:

Is it wrong to say I want toi pleasure you xx.

27. Attached to that message was a photograph of the Appellant's genitalia.

28. The following further text exchange took place between the Appellant and Complainant 4 on 10 February 2023:

Appellant: *Hello beautiful, I didn't realise I sent you a cock pic,*
I'm sure it was for someone else. I am so fucking sorry, unless you want to see more lol.
I'm trialling Unrestricted again next Wednesday if you available xx

Complainant: *Hi Darren it was really inappropriate to send to me but I can*

forgive and forget, you can't send me those things, especially being an apprentice. I am happy to trial unrestricted again if it works out not sure what else I have yet at this stage but put my name down anyway.

29. Between 22 June 2023 and 28 October 2023, the following further text exchanges occurred between the Appellant and Complainant 4:

Complainant: *Thanks gonna get back to Scone and ride my horse before it gets too cold again lol*
Appellant: *All good …*
I don't want you to think I would try anything, just friends being friends

Complainant: *I know I just wanna get home and get everything done early before I crash as pretty tired atm*

Appellant: *Although friends with benefits (only joking)*
Complainant: *Don't start or I'll block you like Tracey did lol*

….

Appellant: *Don't know about you, but I'm glad to be home in trackies*
Complainant: *Lol I'm in my trackies too*

Appellant: *Haha, please don't read this the wrong way, I'm really enjoying spending time with you.*
Complainant: *Thanks for being there for me.*

Appellant: *Anytime, if you ever need anything (even friends with benefits moment) only joking, only good friends, I'm always here.*

…

Appellant: *Have fun at work, I hope you don't think that I'm trying to get you alone to try and seduce you, we are friends, I'll never try to fuck you, not saying that I wouldn't love to slide my cock into you, sorry, I shouldn't be saying that, we are friends, so I wouldn't try and instigate anything.*

…

Appellant: *OK, I no I shouldn't. have sent that message, call in and I'll buy you a drink*
Complainant: *No Darren you shouldn't have you were lucky I was asleep. I'll stop in after work.*

30. Complainant 4 said that the messages made her feel "*uncomfortable",* and that the photograph of the Appellant's genitalia was "o*ffensive* and *gross"*. She viewed the Appellant's conduct as a betrayal of their friendship, and expressed her deep disappointment at his attempts to transgress its boundaries. She described herself as having been put in a position where she had to continually rebuff the Appellant, all the while trying to further her career and continue to ride. Notwithstanding her exhortations to him to stop sending messages to her, the Appellant continued to do so, which caused her to be upset because of a perception that any interest he had in her was not a professional one, and had "n*othing to do with [her] riding ability"*.

Complainant 5

31. At the material time, Complainant 5 was a 23 year old licensed approved rider/stable foreperson. Prior to the offending, she had known the Appellant for approximately eight years and said they were "*close friends"*.

32. Between 9 May 2022 and 5 April 2023, the following exchange occurred between the Appellant and Complainant 5 via Facebook:

Appellant:	*Hi, I hope I haven't crossed the line by saying I'll have a spa ready for you after track work, if I do ever go to far, pull me up on it, sometimes I can go far without realising it.*
	Don't want to hurt the friendship.
Complainant:	*Oh no it's okay. I know you didn't mean anything like that by it.*
	Well I think anyway haha.
Appellant:	*Haha, no, unless you want me to jump in the spa with you, only joking lol*
	...
Appellant:	*Call in for a coffee when you finish if you want.*
Complainant:	*Just finished. Still around for a coffee.*
	...
Appellant:	*Fuck it's nice and warm in bed.*
Complainant:	*You suck.*
Appellant:	*Haha, I could be rude and say, it would be nice if you could join*

	me, but I'm behaving myself and I shouldn't say that, because we are friends and it would be awkward with Kylie here aswell lol
Complainant:	*God I'm so cold now I've stopped. I'm going home to warm up and then have to come back this afternoon to work my breaker.*
	…
Appellant:	*I'm tipping your back in bed, it's still fucking freezing outside.*
	…
Appellant:	*Hey, thanx heaps for coming down and riding mine, I really appreciate it, I know your under the pump atm*
Complainant:	*No, that's all good. I don't mind, I know what it's like trying to find riders.*
Appellant:	*Thanx, I owe you heaps, I might even give you a massage one day if you want one*
	…
Appellant:	*Hey, I don't know why I said I'll massage you, I've just woken up and read what I sent you, I shouldn't be saying that stuff, sorry. I feel bad because I wish you could ride all mine*
Complainant:	*Don't feel bad, it's all good.*
Appellant:	*I do, because I'd prefer you*
	…
Appellant:	*How far away are you?*
	…
Appellant:	*Haha, no pills for me, been playing for 15 to 20 and still no cum. Can't show you a photo of this one and I know we are friends and I know you probably don't want here about me pulling my cock, so I apologise if it offends you.*
	My heart was racing but after today, a dick pic might cheer you up (I won't send you one unless you want one, jokes)
	…
Complainant:	*Hey, what are times were those stallion parades this weekend:*
Appellant:	*3-3.30 Saturday Kia Ora and Vinery at 8.30 am on Sunday*
	…
Appellant:	*Give me something good to watch on Netflix please, I'm running out of shows to watch.*
Complainant:	*I'm about to start watching the new game of thrones but that's no on Netflix.*

...

Appellant:	*Hey, I forgot to say something earlier (I love you) nah nah, only joking, as a friend I do.* *Nah, I was just going to tell you that I was going to kiss you the other when my horse won, but I stopped myself because Sarah was right there and she would of freaked out thinking something was happening.* *It was only going to be a kiss on the cheek although I would have gone for the lips first lol*
	...
Complainant:	*Hey give me a call when you're awake*
Appellant:	*Hey I'm glad I spoke to you, because I was about to send you a text, that might have been a little sexual, nothing like a dick pic, just something about pleasuring you on my birthday, I'll leave it up to your imagination, you where I live if you want to act on it.*
Complainant:	*Behave yourself.*
Appellant:	*Always behaving, I'm just playing, I would never send you a dick pic or do anything to ruin our friendship, you know that.*
Complainant:	*I do know that.*

33. At about 8.57 pm on 2 January 2023, the Appellant sent Complainant 5 approximately six photographs of his genitalia via the messaging application Snapchat.

34. Between 1 March 2023 and 5 April 2023, the Appellant sent Complainant 5 the following further messages:

Appellant:	*Oh shit, I'm sorry, I should have sent that snapchat. Sorry Sorry*
	....
	Fucking cat just work me up with half a fat one, and I didn't send you a snatchat of it, now it's rock hard and I'm being well behaved, no photos. I love our friendship and won't fuck i5 up with cock pics.
	...
	I'll send you Meg's number, I told her that you will be in contact with her, she has a bloke, hopefully not a boyfriend, only joking, I'm behaving myself .. He rides as well.

35. Between 25 August 2023 and 9 September 2023, the following text message exchange occurred between the Appellant and Complainant 5:

Appellant:	*I feel like eating pussy.*
Complainant:	*Excuse you.*
Appellant:	*I'm lying in bed alone and bored, I woke up with a hard one and thought I'd make your trip entertaining.*
Complainant:	*You're hopeless. I fell off one this morning.*
Appellant:	*Hope you didn't get hurt.*
Complainant:	*No, it was a really embarrassing fall. Off literally one of the quietest horses I've ever sat on. I'll tell you about it later.*
Appellant:	*OK and I am not hopeless. I'm really good and I love eating pussy.*
Complainant:	*Stop it!*
Appellant:	*OK I'll stop it.*
Complainant:	*The horse Steve fell off this morning was one of my breakers I did this year. He said it was only its first day out on the track thought and he only rode it once in the round yard the day before. I felt like saying well wtf do you expect when it's not been lunged or put on the walker or anything like that. No doubt Pat will carry on saying its my bad breaking job.*
Appellant:	*Yep, I bet he does, if he say's anything to me in the morning I'll tell him he's a dickhead for not lunging it first.*
	...
Complainant:	*And to top off my day, I'm going to Dubbo, leaving the stables at 8am and I am also 100% sick and coming down with something.*
Appellant:	*Fuck that, you're sick and you can't go. Because I'm a good friend I could make you feel better by letting me eat you out, then I'd have your cold and feel sick. Only joking.*
Complainant:	*Darren.*
	Behave.
Appellant:	*I said I'm only joking, but it would be nice. ok. no more. I'm behaving.*
	...
Appellant:	*I'm sorry, I shouldn't have wrote something so silly, I won't do it again.*

36. Complainant 5 described the messages as being *"uninvited"*, and said that they offended her. She described the pictures sent to her of the Appellant's

genitalia as "o*ffensive"* and "*gross"*.

THE APPELLANT'S INTERVIEW WITH INVESTIGATORS ON 17 NOVEMBER 2023

37. The material before me includes the transcript of a lengthy interview between the Appellant and the Respondent's investigators on 17 November 2023, which appears to have been around the time that the messages were first discovered. Whilst I obviously do not propose to recount the entirety of what the Appellant said in answer to the questions put to him, some of his responses are noteworthy.

38. First, when it was put to the Appellant that in engaging with Complainant 1 he had followed a pattern of sending a message, claiming it was a joke, and then waiting for a reply that would assist him in *"doing whatever he wanted to do",* the Appellant said:[2]

> *No. Yeah, but – yeah, but I – yeah.*

39. Secondly, when the Appellant's attention was drawn to messages sent to Complainant 2 in which he had made reference to the fact that he may have *"accidentally sent [her] a naughty photo of something",* and had commented upon *"how good [she] looked"* whilst inviting her for a drink, the Appellant said:[3]

> *... I had no intent. It was just a remark, you know, that I said and there was no – I said there was no intentions of actually getting her over .... I sent her a message, what you've just read out, that says there was nothing serious. I was only joking ... It was just like a remark you know ....*

40. Thirdly, when the Appellant's attention was drawn to messages he had sent to Complainant 3 in which he made reference to sending her a *"few cock pics",* he conceded[4] that he had only met the Complainant "*a few times"* but again

[2] Interview at p. 46.
[3] At p. 7 of the Interview.
[4] At p. 40 of the Interview.

described his conduct as a *"joke."*[5] Having then appeared to accept[6] that his conduct was *"certainly not appropriate",* the Appellant then said:[7]

> *I can see it should be more offensive if I actually sent her cock pics.*

41. Fourthly, when the Appellant's attention was drawn to messages he had sent to Complainant 4 in which he:

    (i) made references to *"Tinder"*;

    (ii) asked the Complainant whether she wanted a *"fuck buddy"*; and

    (iii) said to the Complainant *"I'd love to fuck you",*

    the Appellant said:[8]

> *Oh yeah, but that's just all at the time thinking it was just in fun, you now, so there was no – she knows. We muck around all the time.*

42. Further, when asked about another message he had sent Complainant 4 when he had said:

> *"I'll never try to fuck you, not saying that I wouldn't love to go down on you and slide my cock into you, sorry, I shouldn't be saying that ....*

the Appellant told investigators:[9]

> *Oh, that's one I probably shouldn't have made, but like I say, like there was always – there's never been any intent whatsoever. Like, okay, that might – that one might sound bad. I agree with that. I'm not disagreeing it sounds bad .... It's probably not appropriate, no, but she's not a teenager, she's 27.*

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[5] At p. 41 of the interview.
[6] At p. 42 of the Interview.
[7] At p. 43 of the Interview.
[8] Interview at p. 10.
[9] Interview at p. 16.

43. Fifthly, when the Appellant's attention was drawn to messages he had sent to Complainant 5 in which he made reference to *"jumping in the spa"* with her, he said:[10]

> *I'm not disagreeing that I've said that, but again there's no, actually no intent whatsoever like.*

44. The Appellant described[11] other messages sent to Complainant 5 as *"just a bit of fun"*.

SUBMISSIONS OF THE PARTIES

Submissions of the Appellant

45. In written submissions, the fundamental proposition advanced by Mr Bryant on behalf of the Appellant was that the penalty imposed was manifestly excessive.[12] In support of that submission, he referred me to previous determinations in matters of this nature which I have discussed below.

46. At the hearing, Mr Bryant made a number of further submissions which may be summarised as follows:

    (i) sexual harassment of the kind which is the subject of the present charges was of less objective gravity than sexual assault;[13]

    (ii) the offending involved no sexual touching of, or threats to, any of the Complainants;[14]

    (iii) the offending did not occur in person;[15]

    (iv) at least some (and perhaps the majority) of the offending occurred after hours, and none of it occurred in the workplace;[16]

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[10] Interview at p. 25.
[11] Interview at p. 29.
[12] Written submissions at [6].
[13] Transcript 2.65 – 3.120.
[14] Transcript 4.188.
[15] Transcript 4.188.
[16] Transcript 3.125.

(v) none of the Complainants were placed in any immediate danger as a consequence of what the Appellant did;[17]

(vi) whilst the subjective effect of the Appellant's conduct on the 5 Complainants was obviously relevant to an assessment of objective seriousness, so too was the Appellant's underlying mindset, which was not nefarious;[18]

(vii) the Appellant pleaded guilty to the majority of charges at the first available opportunity;[19]

(viii) although the number and frequency of the messages, along with their content, might otherwise have placed the offending into the mid-range of objective seriousness, a proper assessment placed it at the lower end, particularly bearing in mind the close friendships between the Appellant and at least some of the Complainants.[20]

47. In terms of the Appellant's subjective case, Mr Bryant pointed out that the Appellant:[21]

(i) is now 52 years of age;

(ii) has a blemish-free disciplinary history;

(iii) completed an on-line course concentrating on the unacceptability of sexual harassment; and

(iv) has played no role in the racing industry since 21 November 2023.

48. Mr Bryant further submitted that the Appellant was *"happy to provide apologies to the victims",* and that his pleas of guilty were evidence of his remorse and contrition.[22]

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[17] Transcript 3.130 – 3.140.
[18] Transcript 4.145 – 4.150
[19] Transcript 4.155 – 4.156.
[20] Transcript 4.160 – 5.193.
[21] Commencing at Transcript 6.240.
[22] Transcript 11.511 – 11.516,

Submissions of the Respondent

49. In written submissions, Mr Cleaver highlighted that:[23]

    (i) the conduct of the Appellant was unsolicited;

    (ii) the Complainants were all young industry participants who were professionally linked to the Appellant;

    (iii) the Appellant's conduct was not isolated, and involved sending multiple messages and photographs over a long period of time;

    (iv) the only available inference was that the Appellant had acted as he did, either to express his willingness to engage in sexual activity with the Complainants, or to explore the possibility of doing so, in circumstances where none of the Complainants had ever invited his advances, or indeed had given the vaguest indication of being interested in them (or in him); and

    (v) there was a clear power imbalance between the Appellant and each complainant.

50. Mr Cleaver undertook an individual analysis of each of the charges[24] by reference to factors such as:

    (i) the terms of the messages;

    (ii) the period over which they were sent;

    (iii) the effect on the individual Complainant; and

    (iv) the disparity in age between the Appellant and the respective Complainant in each case.

51. By reference to such factors, he submitted that the objective seriousness of charges 1, 2 and 3 fell within the mid-range, but that the objective seriousness of

[23] At [11].
[24] Commencing at [12].

charges 4 and 5 was higher.[25] Mr Cleaver also made submissions by reference to previous determinations in matters of this nature.[26]

52. In oral submissions, Mr Cleaver took particular issue with the Appellant's assessment of the objective seriousness of the offending. In particular, he submitted[27] that the relationship which existed between the Appellant and each Complainant was an aggravating, rather than a mitigating, factor. Whilst accepting that none of the Complainants were placed in any physical danger as a consequence of the Appellant's conduct, Mr Cleaver submitted that there was nevertheless evidence of the Complainants (perhaps to varying degrees) having their mental health jeopardised[28], and that in any event, conduct of this kind, in any form, was simply unacceptable, particularly when it was sustained over a long period of time.

53. In terms of the Appellant's subjective case, Mr Cleaver submitted that the Appellant's undertaking of an on-line remedial course was deserving of little weight, and amounted to the *"bare minimum"* of what a person in the Appellant's position might have been expected to undertake.[29] He accepted that the Appellant was entitled to a discount in respect of those pleas of guilty which were entered at an early stage, but submitted that no further discount should be applied on account of the fact that the present appeal had proceeded solely by reference to the question of penalty.[30]

THE APPELLANT'S SUBJECTIVE CASE

54. I acknowledge the Appellant's pleas of guilty, and the fact that the present appeal has proceeded solely on the basis of penalty. Those matters are reflective of some degree of remorse and contrition, as is the fact that the Appellant has undergone

[25] Submissions at [16].
[26] Commencing at [17].
[27] Transcript 6.271 – 7.325.
[28] Transcript 7.235 – 7.331.
[29] Transcript 9.398 – 9.430.
[30] Transcript 9.434 – 9.440.

some rehabilitation of his own accord. I also acknowledge the Appellant's good disciplinary history, which I have taken into account.

CONSIDERATION

The objective seriousness of the offending

55. In considering the question of penalty, it is appropriate to commence by addressing the objective seriousness of the offending. That, in turn, requires reference to the definition of sexual harassment, the terms of the charges, and the conduct itself.

56. Both parties approached the assessment of objective seriousness by reference to what was said to be the point at which the offending fell on a notional scale. Whilst that approach is not necessarily wrong, it remains the case that objective seriousness falls to be determined by reference to, and through an assessment of, the facts, matters and circumstances surrounding what an offender actually did.

57. Each of the charges against the Appellant alleged that his conduct amounted to sexual harassment because he:

> *(a) made an unsolicited request for sexual favours; and/or*
> *(b) made remarks with sexual connotations; and/or*
> *(c) engaged in conduct of a sexual nature which was unwelcomed*
>
> *in circumstances where a reasonable person would have anticipated the possibility that the Complainant n would be offended, humiliated or intimidated by the messages and/or photographs which were sent*.

58. Whilst r 2 addresses more than one form of sexual harassment, It is important to bear in mind that, by its very nature, *any* form of such behaviour is serious. It is fundamentally at odds with acceptable social norms of any civilised society.

59. In the present case, the first matter to be noted is that the offending involved messages being sent to a total of 5 Complainants, over a period commencing on 12 September 2022 and ending on 28 September 2023. It follows that in both of

those respects, the offending was far from isolated. Further, and notwithstanding that the fundamentally vile nature of the Appellant's conduct tends to speak for itself, there are some aspects of it which warrant particular reference.

60. First, in an overall sense, the Appellant's behaviour was inherently manipulative. For example, he would often repeat the fact that he and a particular Complainant were *"friends",* only to immediately act in a way which amounted to a complete betrayal of any friendship, be it by sending further inappropriate messages[31] or, worse still, by sending photographs of genitalia.[32]

61. Secondly, a fundamental aspect of the Appellant's modus operandi was to acknowledge the impropriety of certain conduct, only to immediately engage in it.[33] That is an unequivocal reflection of the fact that the Appellant was entirely cognisant of the wrongfulness of what he was doing, but nevertheless chose to continue it. It also tends entirely against his repeated assertion to investigators that he had *"no intent"* in acting as he did. It should also be noted that the facts set out above, which are agreed, include an express acknowledgement by the Appellant that a reasonable person sending the messages (i.e. the Appellant himself) would have anticipated the possibility of offence or humiliation being felt by the Complainants. Notwithstanding that, he persevered over a significant period of time.

62. Thirdly, to categorise certain aspects of his conduct as amounting to nothing more than being a *"bad friend"*[34] is entirely artificial and understates the seriousness of the offending. On the basis of the agreed facts, it is open to conclude that to the extent that the Appellant did have a previous friendship with any of the Complainants, he abused and manipulated it in the worst possible way.

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[31] See for example the exchange of messages with Complainant 4 between 18 April 2022 and 19 April 2023.
[32] See for example the message sent to Complainant 4 on 4 February 2023.
[33] See for example the latter exchange of messages with Complainant 4.
[34] Transcript 5.199.

63. Fourthly, the Appellant was prone to engaging in a pattern of sending an entirely inappropriate message, embedded in which was a reference to *"joking",* and/or the use of "*laughing emojis*". No amount of references of that kind can mask the reality of the fact that the Appellant consistently engaged in intentional and calculated sexualised behaviour for his own gratification. Conduct of that kind could not possibly be regarded as a joke by any rational-thinking person.

64. Fifthly, the Appellant's conducted included sending multiple pictures of male genitalia. Any further comment about the unacceptability of that conduct would be superfluous.

65. I accept the submission advanced on behalf of the Respondent regarding the disparity in age between the Appellant and the Complainants, whose ages at the time of the offending ranged from 19 to 28. In that respect, it is significant that when being questioned by investigators, the Appellant (in reference to Complainant 4) sought to excuse, or at least minimise, his conduct on the basis that *"she's 27"*. It needs to be stressed that whilst conduct of this kind is particularly egregious when directed towards young adults (such as Complainant 2 who was only 19 years of age), it remains fundamentally unacceptable, irrespective of the age of the person to whom it is directed.

66. I am not persuaded that the objective seriousness of the offending is reduced on account of the fact that it occurred out of working hours, and/or that it occurred in a written form as opposed to occurring in person. As to the first matter, the fact remains that the offending stemmed from working relationships between the Appellant and the various Complainants. Any attempted distinction between those circumstances, and the same offending within the confines of an actual workplace is, at least in the present context, a distinction without a difference. That is particularly evident in the case of Complainant 1, who described her relationship with the Appellant as *"strictly work"*[35], as well as in the case of

[35] Agreed Facts at [3].

Complainant 3 who, at the time of the offending, had engaged with the Appellant on only two occasions, both through work.[36] Further, and quite apart from the disparity in age, there was a significant power imbalance between the Appellant and each of the Complainants. As to the second matter, the effect on the Complainants of the Appellant's conduct was not rendered any the less by the fact that he chose to communicate in writing. Clearly, each and every one of the Complainants was directly and adversely affected by what the Appellant did. They variously described his conduct as *"humiliating",*[37] *"uncomfortable",*[38] *"offensive",*[39] *"offensive and gross",*[40] and *"uninvited, offensive and gross".*[41] Those effects cannot be ignored.

67. Finally, whilst I accept that the Appellant's offending did not involve any *physical* touching of any Complainant that does not, as was effectively submitted on the Appellant's behalf, automatically lead to a conclusion that it was less serious. It remains a question of degree. In testing the submission which was put, the absence of any physical touching must be balanced against all of the characteristics of the Appellant's offending to which I have referred. Depending upon the nature and circumstances of the conduct in question, the adverse effect, on victims, of sustained offending of the kind in which the Appellant engaged has the clear capacity to be substantially more serious than that which might be brought about by an isolated instance of physical touching (serious though such an act might be). When a balancing exercise is undertaken in the context of the present case, any difference in overall objective seriousness between the two circumstances is marginal at best. Indeed on one view, the Appellant's offending is arguably substantially worse than an isolated instance of physical touching.

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[36] Agreed Facts at [15].
[37] Complainant 1, Agreed Facts at [5].
[38] Complainant 2, Agreed Facts at [12].
[39] Complainant 3, Agreed Facts at [17].
[40] Complainant 4, Agreed Facts at [25].
[41] Complainant 5, Agreed Facts at [33].

68. In light of all of these factors a conclusion that the Appellant's offending is of the utmost seriousness is inescapable. Forced to place it at a point on a notional scale, the factors discussed above would see it fall at least at, if not above, the mid-range.

69. General deterrence has a substantial role to play in determining any penalty. It is necessary that a clear message be sent to all industry participants that offending of this kind is simply unacceptable and, if proven, will result in the imposition of a substantial penalty which is likely to include a period of disqualification. To take any other approach would be to ignore the inherent gravity of the conduct, the necessity to protect industry participants who find themselves subjected to it, and the accompanying necessity to protect the integrity of the industry as a whole.

70. Personal deterrence also has a substantial role to play in the present case, a circumstance which stems largely from the Appellant's statements to investigators, some of which are set out above. Whilst I accept that the Appellant has now had time to reflect on his conduct, some of his responses to the allegations when they were first put to him by investigators are a matter of concern. The proposition that conduct of this kind can be viewed, from any perspective, as a *"joke", "fun", "mucking around"* or *"just a remark"* (as the Appellant would variously have it) reflects a complete lack of insight, as does the proposition that his conduct should be viewed simply on the basis that it might have *"sounded bad"*.

PREVIOUS DETERMINATIONS

71. I was referred to previous determinations in matters of this nature, which I was asked to consider for what were described as *"parity"* purposes. In that regard, it is necessary to repeat what I have said on a number of occasions regarding the use of such material, namely that I whilst I am grateful for any assistance which previous determinations might provide, it remains the position that no two cases are ever factually identical, and that what must be achieved in determining

penalty is the consistent application of principle, as opposed to numerical equivalence.

72. The first determination to which I was referred was that of this Tribunal (differently constituted) in a matter of *O'Neile*.[42] The Appellant in that case had been charged with one offence contrary to AR 228, and one offence contrary to AR 233(c), both arising out of the same event. The facts are set out in the Tribunal's determination[43] and there is no need to repeat them. It is sufficient for present purposes to note that the offending revolved around a single remark, and accompanying sexual gesture, by the Appellant to a female apprentice jockey at the commencement of a race. A disqualification of 4 months was imposed.

73. I do not regard the decision in *O'Neile* as providing any real assistance in the determination of the present appeal. Quite apart from any other consideration, an isolated instance of offending is markedly different from the sustained conduct of the Appellant.

74. I was also referred to a decision of the Panel in *Dwyer*.[44] The Appellant in that case was charged with various offences contrary to AR 233(b) and AR 233(c). The allegations against the Appellant included:

    (i) disparaging comments made to female stable staff about their weight;
    (ii) putting his arm around the waist of a female stable hand without her consent; and
    (iii) physically touching a female staff member without her consent.

75. The Appellant had pleaded guilty to some offences but not others. The Panel imposed a suspension of 4 months.

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[42] 21 April 2023.
[43] At [3].
[44] 18 August 2023.

76. Leaving aside that this Tribunal is not bound by a decision of the Panel, the submission which was advanced on the Appellant's behalf by reference to the decision in *Dwyer* was that *"the objective seriousness of touching a young lady … in a workplace on the backside must be higher than sending inappropriate text messages to close personal friends".*[45] Whilst I have already addressed (and essentially rejected) that general proposition, two further observations should be made about it.

77. The first, is that if comparative exercises are to be undertaken, it is necessary that they be undertaken by reference to the entirety of the respective offending. As to that, and as I have observed, the Appellant's conduct extended over a significant period of time. It was not an isolated act.

78. The second is that in any event, the Appellant's offending was not limited to offending towards close personal friends. Complainant 1 described her relationship with the Appellant as one of *"strictly work".* Complainant 2 was a track work rider for the Appellant. Complainant 3 was a track work rider for the Appellant, whose second contact with him was the receipt of an inappropriate message. Moreover, to the extent that the Appellant was friends with Complainants 4 and 5, he manipulated and betrayed those friendships to suit his own ends.

79. For all of these reasons, the determination in *Dwyer* is of little assistance for the purposes of determining penalty in the present case.

CONCLUSION AND ORDERS

80. For the reasons I have given, I consider that the penalties imposed on the Appellant are entirely appropriate. It follows that the appeal must be dismissed.

[45] Transcript at 5.219 – 5.224.

81. It was submitted on behalf of the Appellant that he had not participated in the industry since 21 November 2023 and that any disqualification should commence on 22 November 2023. I left it open to the parties to file further evidence in relation to this issue, although it does not appear that anything was provided. In those circumstances, I consider that the disqualification should commence from the date proposed by Mr Bryant. That said, if there is any issue about that, it is a matter which is capable of being varied if there is a proper basis upon which to do so. I will leave that issue with the parties.

82. I make the following orders:

    1. The Appeal is dismissed.
    2. Any appeal deposit is to be refunded.

THE HONOURABLE G J BELLEW SC

28 October 2024