

APPEAL PANEL OF RACING NEW SOUTH WALES

IN THE MATTER OF THE APPEAL OF APPRENTICE JOCKEY HOLLY DURMAN

Heard at Racing NSW Offices

Appeal Panel: **L Gyles SC - Convenor, Ms J Foley, Ms S Skeggs**

Representatives: **Racing NSW – Mr M Cleaver – Operations Manager - Integrity**
Appellant – Mr W Pasterfield - Solicitor

Date of Hearing: **2 December 2024**

Date of Reasons and Orders: **4 December 2024**

REASONS FOR DECISION

1. This Appeal arises from three charges brought by the Stewards against an Apprentice Jockey, Ms Holly Durnan (“the Appellant”).
2. The charges were as follows:
 - 1) A breach of AR 233(b) being for Workplace Harassment;
 - 2) A breach of AR 218(4)(b) arising from the Appellant having her mobile phone in the jockey’s room during race meetings; and
 - 3) A breach of AR 218(4)(c) arising from the Appellant’s use of her mobile phone in the jockey’s room during race meetings.
3. On 3 October 2024 the Appellant pleaded guilty to charges 2 and 3. In respect of charge 2, the Stewards imposed a fine of \$1,000 but suspended \$500 of that so that it would only become payable if the Appellant committed a further breach of the rule over the following 18 months. In respect of charge 3, the Stewards imposed a suspension of two weeks.
4. There is no appeal in respect of charges 2 and 3. The Appellant had pleaded guilty to those charges and does not now challenge the penalties imposed.

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5. By contrast, a plea of not guilty was entered in respect of charge 1 when the matter was before the Stewards. The Stewards at the conclusion of their hearing found the Appellant guilty of the charge and imposed a suspension of three months, but on the basis that if the Appellant completed a Workplace Harassment course the suspension would be reduced by one month.
6. In the Appeal before this Panel, the Appellant does not contest the finding of guilt in respect of charge 1, but rather challenges the reasonableness of the sanction imposed by the Stewards.
7. The only matter before the Panel is therefore the sanction which should be imposed in respect of charge 1.
8. Whilst the Panel will have regard to the sanction imposed by the Stewards, the Stewards carry the onus of satisfying the Panel that the sanction proposed by them is necessary and reasonable in the circumstances. The Panel thereby approaches the matter anew having regard to the well versed principles of sentencing, including that the sanction is not intended to penalise the person involved but rather is directed to upholding the standing, integrity and reputation of racing including by imposing penalties which will sufficiently deter the Appellant from engaging in similar conduct, and will also send an appropriate message to industry participants by way of general deterrence. The Panel will also in accordance with such principles have regard to the particular circumstances of the case, for example any contrition shown by the Appellant and any guilty plea.

9. The circumstances giving rise to the charge against the Appellant are unusual and have not been the subject of any prior determination by this Panel. It raises an important issue given that the use of mobile phones, and related harassment and bullying by way of social media, have become commonplace in Society, with sometimes tragic outcomes for those involved. The Racing industry it would seem is not immune from this conduct.
10. The substance of the charge was that on 16 September 2024, whilst in the jockey's room at Corowa Race Club prior to the first race, the Appellant took a photo of another apprentice female jockey without her permission or knowledge and sent it to a male jockey. The photograph showed the female apprentice wearing her silks and a sports bra and contained an acronym "OMFG". The male recipient of the photograph subsequently passed it on to the apprentice jockey in the photograph. Upon receipt of the photograph she responded, "*What the actual fuck?*". She made complaint to the Stewards about 12 days later which was the genesis of the Stewards' investigation which gave rise to the charges being laid.
11. The apprentice jockey in question was interviewed by a Racing NSW investigator who confirmed that the photograph was taken without her knowledge or consent and confirmed that when she saw the photo she felt humiliated and said that she *didn't expect somebody to take a photo when she was getting changed*, and that *it wasn't nice to know that someone has got that photo of her*. She said that she and the Appellant had been friends *but she had done a few things along the way like this which she wouldn't think a true friend would do* so they had drifted apart since then.

12. The Appellant's position before the Stewards was that it was common both for her and the other jockey to have their phones in the jockey's room to take photos of each other and send them to Mr Downey, who was a mutual friend. She says that she thought at the time that the other jockey knew that the photo was being taken. She said that she thought the photo was funny and that there was no malice involved in sending it, and that she didn't think at the time that it was inappropriate to send the photo of her in a sports bra.
13. For present purposes we accept and shall proceed on the basis that the other apprentice did feel genuinely humiliated by the incident and did not take it as a joke. Her complaint is consistent with her feeling genuinely aggrieved.
14. Despite her belief at the time, and probably by a greater understanding gained by recently completing a workplace harassment course, the appellant now recognises that what she did was inappropriate. We also recognise and accept, by the Appellant no longer contesting the charge and by the submissions of her lawyer, and by her own statements, that she is genuinely contrite and has learned from the incident, and is unlikely to re-offend.
15. Mr Cleaver who appeared for the Stewards maintains that the original sanction was reasonable and justified in the circumstances and drew attention particularly to the following matters:
 - a. The impact on the other apprentice from the conduct;
 - b. The initial downplaying of the seriousness of the conduct by the Appellant;
 - c. The fact that the photograph had gone beyond the two of them which exacerbated the potential humiliation;

- d. The fact that the charge involved use of a mobile phone which the Appellant should not have had in the jockey's room anyway;
 - e. The fact that the incident took place in the female jockey's room which should be a safe place for all female jockeys and there should not be a risk of them being photographed in the way that she was.
16. Mr Cleaver for those and other reasons submits that the circumstances are objectively serious and require a suspension to be imposed, both by way of individual and general deterrence, and that a fine alone would not sufficiently meet this objective.
17. Mr Pasterfield on behalf of the Appellant submitted that a fine was the appropriate sanction, or alternatively submitted that if a suspension was to be imposed that it should be reduced from the three months imposed by the Stewards. In that respect he submitted that the Appellant received \$260 for each race day ride, leaving aside any additional amount if she won or placed in a race, and that she would generally expect to have about 10 rides per week. He said on that basis, that each week of any suspension would cost her \$2,600 and that hence the financial impact of a two-month suspension on the Appellant would be in the order of \$20,000 plus prize money.
18. He otherwise relied upon the following matters:
- a. The fact that the Appellant wasn't contesting the charge before us;
 - b. The fact that it was her first offence;
 - c. That she was a young woman with time to rehabilitate;
 - d. The relatively minor seriousness of the conduct;
 - e. The fact that the apprentice did not complain to the Stewards for in the order of two weeks after the photograph was taken and did not say

anything to the Appellant by way of complaint although they had seen each other a few times over that period; and

f. The fact that the Appellant had completed the Workplace Harassment course.

19. Mr Pasterfield told the Panel that the Appellant lived at home and received \$700 per week for her general labouring work around the stable, and had to pay \$1,200 per month by way of a vehicle loan.

Determination

20. The Panel rejects Mr Pasterfield's submission that the conduct could be properly described as relatively minor, and accepts the submission of Mr Cleaver that the conduct was objectively serious. The Panel does this principally for three reasons.

21. First, because it involved taking a photograph without the knowledge or consent of the person, in a sports bra, and sending it to another person who it would be appreciated had the capacity to take a screenshot of it and distribute it more widely. The conduct was also, we find, intended to make fun of, or ridicule, the "friend" and was a form of harassment or bullying. This sort of conduct is not a joke and is not trivial and can have far reaching and unintended consequences.

22. Second, the conduct took place in the sanctity of the female jockey's room which by any way of thinking should be a place where any jockey can be, particularly when getting changed as is a necessary part of the job, without fear of being photographed. It is a clear breach of trust for this to occur, particularly when the two were friends.

23. Third, the incident took place at the apprentice jockey's place of work, where she is entitled to proper protections and to go about her role without

harassment, and worse where the photo was sent to an industry participant who she would be expected to interact with. This was not a social gathering.

24. We therefore accept the submission of Mr Cleaver that a fine would be insufficient to reflect the seriousness of the conduct and would not send a strong enough message to others that such conduct will not be tolerated. We note the Panel's decision referred to us by Mr Pasterfield in the *Appeal of Licensed Trainer Michael Dwyer* (RAP 18 August 2023) in which at paragraph 21 the Panel in reference to two of the charges found that a fine and not a suspension would be appropriate. However, whilst those two charges did relate to workplace harassment, the conduct itself was of a far less serious character than the present and with far less capacity to do mischief and detrimentally impact the target of the conduct. We therefore do not believe that an imposition of a suspension in the present case is inconsistent with that decision.
25. We do however have regard to the mitigating factors put forward by Mr Pasterfield, including as to the Appellant promptly attending a workplace harassment course prior to this hearing, and have come to the conclusion that a suspension of four weeks is appropriate in all of the circumstances. There was no contest that the commencement of the suspension can be deferred for seven days from the date of the giving of our determination. We are also content for the two week suspension in respect of charge 3 to be served concurrently with the 4 week suspension in respect of charge 1.
26. The orders of the Panel are:
 - a. The appeal against the severity of the penalty in respect of charge 1 is upheld.

- b. In lieu of the three-month suspension, the Appellant's licence is suspended for one month, which is to be deferred under AR 283(7) for seven days from the date of these reasons.
- c. We lift the prior stay of the Stewards orders in respect of Charges 2 and 3, and note that the suspension in respect of charge 3 can be served concurrently with the above suspension;
- d. We order that half of the Appeal deposit be returned.

