

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Wehlow v Queensland Racing Integrity Unit* [2021] QCAT 86

PARTIES: **JARED WEHLOW**  
(applicant)  
v  
**QUEENSLAND RACING INTEGRITY UNIT**  
(respondent)

APPLICATION NO/S: OCR015-20

MATTER TYPE: Other civil dispute matters

DELIVERED ON: 12 March 2021

HEARING DATE: 1 December 2020

HEARD AT: Brisbane

DECISION OF: Member Gardiner

ORDERS: **1. The decision of Mr Kane Ashby of 6 January 2020 to confirm on internal review the original Stewards' decision of 27 November 2019 is set aside.**  
**In substitution:**  
**2. Jared Wehlow is found not guilty.**

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 a prohibited substance – plea of not guilty to charge of breach of Australian Rule of Racing 178 – question of appropriate chain of custody  
*Queensland Civil and Administrative Tribunal Act 2009 Qld s 20*  
*Racing Integrity Act 2016 Qld, s 246*  
*Briginshaw v Briginshaw* (1938) 60 CLR 336  
*Re Day* [2017] HCA 2; (2017) 91 ALJR 262

APPEARANCES & REPRESENTATION:

Applicant: P Boyce, Solicitor, Butler McDermott Lawyers

Respondent: S. McLeod Q.C. instructed by the Queensland Racing Integrity Unit

## REASONS FOR DECISION

- [1] Jared Wehlow is the trainer of the thoroughbred Mishnah. Mr Wehlow presented Mishnah to race at Rockhampton on 31 January 2019 and again on 14 February 2019. Post-race urine samples were taken from the horse which were allegedly found on later analysis to contain a prohibitive substance, dexamethasone.
- [2] Mr Wehlow was charged with two breaches pursuant to rule 178 of the Australian Rules of Racing, namely, Mishnah's urine samples were found to contain a prohibited substance.
- [3] An inquiry was conducted before QRIC Stewards on 27 November 2019. Mr Wehlow pleaded not guilty to each charge concerning the prohibited substance. At the first instance, the Stewards found Mr Wehlow guilty on each charge and imposed a fine on each charge of \$3,000.00, a total of \$6,000.00.
- [4] An internal review of that decision was sought by Mr Wehlow and on 6 January 2020 this review decision confirmed the original decision. The finding of guilt and the penalties remained the same.
- [5] This is an external review under s 246 of the *Racing Integrity Act 2016* (Qld). 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.<sup>1</sup>
- [6] Section 24 of the QCAT Act sets out the functions of this Tribunal on review. The Tribunal may confirm or amend the decision, set aside the decision and substitute its own, or set aside the decision and return the matter for reconsideration to the decision maker with directions if appropriate.
- [7] Mr Wehlow does not challenge the finding of dexamethasone in the urine sample. The issue he brings to the Tribunal for determination is whether I can be reasonably satisfied that the samples that were tested showing dexamethasone were the same samples that were taken from the thoroughbred Mishnah on 31 January 2019 and again on 14 February 2019. In essence this is an examination of the chain of custody of these samples from the horse to the analysis.
- [8] Mr Wehlow makes several submissions based on the evidence to show the procedure adopted in this chain of custody was flawed. I will address each of these submissions and the submissions in response from the Queensland Racing Integrity Unit ("QRIU") in chronological order of the event.

### **The taking of the sample**

- [9] The first event is the taking of the sample itself. This occurs directly after the finish of the race. This process is governed by an internal QRIU document called a "Standard Operating Procedure". This document is not publicly available. It apparently (I say apparently as I did not see this document during the hearing) contains a form that is signed by the taker of the sample and the holder of the horse -

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<sup>1</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 20.

often a strapper - at the time of taking the sample.<sup>2</sup> A copy of the form is not provided to the holder of the horse at the time the sample is taken.

- [10] This document was called for on behalf of Mr Wehlow at the hearing, but an objection was raised by the QRIU on the basis that it is an internal document, not publicly available. It was also not made available during the hearing.
- [11] During the hearing I expressed some surprise that when the sample was taken, the form (or a copy of it) that is signed by the sample taker and the holder of the horse was not provided to the trainer or the strapper as a record of the fact that the sample was taken from that particular horse at a particular time and date and given a particular sample number.<sup>3</sup> This seems a logical step in the chain of custody.
- [12] Mr Wehlow submits the QRIU should be interested in ensuring that a standard procedure was followed and is open to scrutiny and comment.
- [13] What is recorded each race day is a running document titled “Record of Sample Custody and Dispatch” completed by the Stewards of samples received, secured and sealed in a security bag with a blue zipper seal tag. These security bags contain either six or 12 samples and the record charts the progress of the samples from collection through to consignment for delivery to the Racing Science Centre.<sup>4</sup> Each collected sample is given an identifying number on that document.
- [14] Mr Wehlow submits, referring to the two Records of Sample Custody and Dispatch, that each document refers to several sample numbers. He submits the evidence before this Tribunal does not establish which sample was taken from Mishnah on either 31 January 2019 or 14 February 2019. He submits the sample collection kit numbers are meaningless without the individual collection kit number being provided as the identification remarks on this form do not specifically identify the horse or the race.
- [15] I will return to this issue later in these reasons.

### **The processing of the samples**

- [16] In each case, the samples arrived at the Racing Science Centre shortly after each race day. They were split into Sample A and Sample B using normal practices and then frozen. The undisputed evidence was that because of backlogs in the Racing Science Centre, the A samples were not thawed for analysis until 13 May 2019 when, because of human error, the samples were destroyed.
- [17] On 15 May 2019, the B samples in each case were then thawed and split to form a new A and B sample and re-numbered. This splitting process was undertaken by the Principal Veterinary Officer of the QRIU and witnessed by another officer.<sup>5</sup> The process was filmed, and this film process forms part of the evidence in this hearing.<sup>6</sup>

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<sup>2</sup> Transcript page 56 at line 32 and continuing to page 57 at line 44.

<sup>3</sup> Ibid.

<sup>4</sup> Exhibit 2 pages 19 and 34.

<sup>5</sup> Exhibit 6.

<sup>6</sup> Exhibit 5.

- [18] Underlying this splitting was a QRIU Quality Procedure document for Portion B procedures.<sup>7</sup> This set out the procedure for the later splitting of a Portion B to create a new Portion A and B. This procedure has a number of steps. The evidence of some of these steps was not before me. The evidence that was before me was the actual film of the physical splitting of the B samples and their renumbering.
- [19] What was not before me was evidence of the requirements of three photographs of the Portion B pouches, and copies of written directions from the Stewards as to re-allocation of the original samples.
- [20] These omissions were explained by the Principal Veterinary Officer. She said she was the author of the Procedure document.<sup>8</sup> She said her statements were given to document the splitting of the B sample. She clearly stated the other photographs were taken and Stewards' directions were obtained. I was satisfied with the Principal Veterinary Officer's explanation and did not doubt the veracity of her evidence. I am comfortably satisfied that the procedure set out in the Quality Procedure document was followed by the Principal Veterinary Officer and, although not before me, documentation of these steps is held in the QRIU records.
- [21] I was able to observe for myself the actual splitting of the B sample into two portions in each case and the renumbering of those samples.<sup>9</sup>
- [22] Despite the misadventure of the A sample, I am satisfied that the B sample was split following the proper processes and that the renumbering identifies sufficiently the source of the sample as it arrived at the Racing Science Centre.
- [23] The question remains however - is it referable to the thoroughbred Mishnah?

### **Returning to the taking of the sample**

- [24] What is before me is a running document titled "Record of Sample Custody and Dispatch" completed by the Stewards of samples received, secured and sealed in a security bag for delivery to the Racing Science Centre. Each collected sample has an identifying number. This record shows columns recording the Collection Kit number, the sample type (urine or blood) and the sex of the animal. The relevant Stewards' names and signatures are recorded. The heading of the form records the place and date of the meeting and boxes to show the racing code (although on one of the forms, this is not ticked).
- [25] The bottom of the form identifies dates and times of collection and transportation events – such as storage and delivery.
- [26] What it does not do is individually relate the kit numbers to particular horses.
- [27] This connection is not specifically made, without the form completed when the sample was taken on site – presumably that had the identifying number recorded on it. I have no evidence before me of the connection between the urine sample taken from Mishnah and one of the identifying numbers on either of the documents titled

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<sup>7</sup> Annexure to Exhibit 6.

<sup>8</sup> Exhibit 7 paragraph 4.

<sup>9</sup> Exhibit 5.

“Record of Sample Custody and Dispatch” completed on either day that Mishnah ran in Rockhampton.

- [28] The QRIU denies this is fatal. It submits the when the totality of the evidence is examined there is no warrant to accept this contention. It says the evidence clearly demonstrates that the two charges are substantiated and that the testing processes and results reveal that a prohibited substance, dexamethasone, was detected in the urine samples taken post-race from Mishnah, on 31 January and 14 February 2019 respectively.
- [29] While I accept that on the evidence before me the testing processes and results reveal that a prohibited substance, dexamethasone, was detected in the urine samples taken from horses on 31 January and 14 February 2019 respectively, the standard of proof on the *Briginshaw*<sup>10</sup> principle may rise when consideration is given to the seriousness of the matter or the gravity of the consequences that flow from a particular finding.
- [30] The observations of Gordon J in *Re Day*<sup>11</sup> assist the understanding of this principle:
- [T]he seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether an issue has been proved to the reasonable satisfaction of the tribunal. Where, as here, fraud is alleged, ‘reasonable satisfaction’ is not produced by inexact proofs, indefinite testimony, or indirect inferences. This does not mean that the standard of persuasion is any higher than the balance of probabilities. It does mean that the nature of the issue necessarily affects the process by which the reasonable satisfaction is reached.<sup>12</sup>
- [31] The finding of guilt and the imposition of a fine are serious matters for a trainer in this industry and affect Mr Wehlow’s reputation and potentially his ongoing work arrangements.
- [32] I remain perplexed as to why a very obvious step – linking the sample taken to the sample number identifier - is even an issue, but an issue it is, and one that is not resolved to my satisfaction on the evidence presented to me in this review.
- [33] I am not satisfied that there is sufficient identification in the chain of custody of the urine samples taken on 31 January and 14 February 2019 respectively to properly identify which sample that was produced to the Racing Science Centre directly relates to the thoroughbred Mishnah.
- [34] The decision of Mr Kane Ashby of 6 January 2020 to confirm, on internal review, the original Stewards’ decision of 27 November 2019 is set aside and a finding of not guilty is substituted.

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<sup>10</sup> (1938) 60 CLR 336.

<sup>11</sup> [2017] HCA 2; (2017) 91 ALJR 262.

<sup>12</sup> *Ibid*, [15].