

DECISION

Racing Integrity Act 2016, section 252AB

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| Review application number | RAP-34 | |
| Name | Sariah Champkin | |
| Panel | Ms Dianne Condon (Acting Chairperson) Mr Edwin Wilkinson (Panel Member) Mr Juanita Maiden (Panel Member) | |
| Code | Thoroughbred | |
| Rule | Australian Rules of Racing 228(b) A person must not engage in: (b) misconduct, improper conduct or unseemly behaviour | |
| Penalty Notice number | PN-008523 | |
| Appearances & Representation | Applicant | Self represented |
| | Respondent | Clayton Warren |
| Hearing Date | 1 August 2023 | |
| Decision Date | 3 August 2023 | |
| Decision | The racing decision the subject of this application is varied. | |
| Panel Penalty | \$1,500 fine and a 13 day suspension, commencing on Sunday 6 August 2023. | |
| Case References | Baker v QRIC RAP-18 Hooper v Queensland Racing Integrity Commission [2017] QCAT 236 Russell v Queensland Racing Integrity Commission [2020] QCAT 329 El-Issa v Racing Queensland Limited [2011] QCATA 280 | |

Schmetzer & Whitfield v Racing New South Wales (Racing New South
Wale Appeal Panel) (2 March 2022)

Ms Haruka Nakamura v Retail Staff Pty Ltd [2021] FWC 1396

Beriman v QRIC RAP-10

Reasons for Decision

- [1] The applicant in this matter, Ms Sariah Champkin, is an apprentice jockey for thoroughbreds.
- [2] On the 20 July 2023, stewards conducted an inquiry into an incident at Toowoomba Turf Club on 1 July 2023 where the applicant was conducting trackwork.
- [3] Following that hearing, the applicant was charged with a misconduct offence under Australian Rules of Racing for Thoroughbreds Rule 228(b) which provide:

228 Conduct detrimental to the interests of racing

A person must not engage in:

(b) misconduct, improper conduct or unseemly behaviour:."

- [4] The particulars of charge to which the applicant entered a plea of guilty are as follows: -
"On the morning of 1 July 2023, at Toowoomba Turf Club trackwork, you did misconduct yourself by engaging in an altercation with Mr. Bradley Appo whereby you made forceful physical conduct with Mr Appo in the vicinity of his face or head by way of an open palm strike."
- [5] A penalty of two weeks suspension was imposed effective immediately from the decision of the stewards, being 26 July 2023 to end on 9 August 2023.
- [6] Ms Champkin was also fined \$1,500, being a suspended sentence enlivened from a finding of guilt by the stewards made on 17 April 2023 concerning a Rule 228(e) breach. On that occasion, \$1,500 of a \$3,000 fine was suspended on the condition the applicant did not re-offend against Rule 228 or a similar Rule within a period of 2 years.¹
- [7] Those penalties are presently stayed until the matter is decided, by virtue of an order of this panel made on 28 July 2023.
- [8] Pursuant to section 252AB of the *Racing Integrity Act 2016* by way of application lodged on 26 July 2023, the applicant now seeks a review in relation to the penalty imposed.
- [9] In her application material the applicant frames the grounds of her appeal on penalty as follows:
"Unfair decision based off evidence given during the inquiry, past issues with Mr Appo and disqualification of my license to ride in races effective immediately even though I have rides booked for this weekend and the next."
- [10] Before the panel, the applicant qualified her grounds of appeal in that she accepted the fine and suspension imposed by the stewards and that she did not contest those, however was seeking the suspension not to commence until Sunday 6 August 2023 due to nine rides she has booked on Saturday 5 August 2023.

¹ Exhibit 1 before the Panel – Steward's report of 17 April 2023

[11] In other words, in the circumstances of her mitigating factors and financial circumstances, the commencement of any suspension before 6 August 2023 would be an excessive penalty.

[12] Accordingly, it's necessary to assess the appropriate penalties in this case.

[13] Before this Panel, the whole of the materials provided to the stewards' Inquiry were admitted into evidence and considered by the Panel.

Penalty Framework

[14] The respondent's Racing Penalty Guidelines for Thoroughbreds 2023 state that the purpose of a penalty under the rules is to maintain standards of integrity and animal care through the enforcement of the rules of racing, to provide general deterrence to the industry by ensuring that any penalty imposed is sufficient to discourage other participants from breaching the particular rule, and, finally, to provide specific deterrence to the individual.²

[15] The Guidelines set out a number of factors which may be taken into account in imposing penalty. In accordance with the Guidelines, imposing a penalty involves a balance between the severity of the offence, the need for deterrence, both for the individual and the industry generally and any mitigating factors. All situations need to be assessed according to their individual merits. Considerations listed include the circumstances of the offence itself, the degree of culpability involved in the offending, whether there has been an early plea of guilty, the disciplinary record person involved and also the race status.³

[16] Whilst the Panel is not bound by the Guidelines, they enunciate well-established sentencing principles as to mitigation and aggravation relevant for the panel to consider and they seek to provide for consistency in the imposition in penalties under the Rules.

Events of 1 July 2023

[17] As being particularly relevant to considering matters of specific and general deterrence, it's necessary to consider in depth the whole circumstances of 1 July 2023 at Toowoomba Turf Club involving the applicant and Mr Bradley Appo, particularly as to weigh the applicant's culpability or blameworthiness for her offending conduct.

[18] It is for the Panel to consider matters afresh and the panel is not bound by the Steward's conclusions.

[19] A number of witnesses gave evidence before the stewards about the events of 1 July 2023 involving the applicant and Mr Appo. Whilst none of the respondent's witnesses were made available for cross-examination, the audio of that inquiry before the panel provides a thorough account of the varying testimonies.

[20] There are two distinct incidents relevant to the events of 1 July 2023, one being an incident which in the applicant's evidence prompted her approach to Mr Appo which resulted in the conduct of which she was found guilty. These circumstances are all relevant to considering the applicant's culpability in this matter and accordingly each needs to be considered in some detail. Both were subject of evidence before the stewards.

² *Baker v QRIC* RAP-18 at [13]

³ *Baker v QRIC* RAP-18 at [13] – [14]

Trackwork incident

- [21] The first was an incident on the track involving Mr Appo, the applicant and Ms Bree Wiblen who were all doing trackwork. All gave evidence before the stewards. Four trackwork riders who were also present and witnessed this incident gave evidence. They were Matthew Goodwin, Kieran Kirwan, Isabella Rabjones and Cameron Creevey.
- [22] The evidence of the applicant and Ms Wiblen was that they were riding "babies" together around the track at mid pace when Mr Appo came right up behind them, pushing his horse between them and into the heels of Ms Wiblen's mount.
- [23] Ms Wiblen's evidence was that Mr Appo was digging his horse up and driving his horse right onto their heels. She said this caused her mount to bolt and sustain a cut to its leg. She stated that he was trying to push the applicant out of the gap and that Ms Wiblen pushed her horse so he couldn't get between them. Ms Wiblen said whilst not normally scared whilst riding, she was very scared by the incident and that her mount may come down on her.
- [24] The applicant's evidence before the stewards was that she had been keeping an eye on Mr Appo on his mount who was 100 metres behind them and he was not struggling with his horse nor galloping. She said they "*made room for him*". The applicant said then "*in the blink of an eye he was right on us*" and that she not aware he was there until Ms Wiblen was yelling and he was on their heels driving. She stated that she pulled on her reigns to control her mount and that Mr Appo never called out to say he was in trouble.
- [25] The applicant's further evidence before the stewards regarding the trackwork incident was that she felt scared and that Mr Appo was driving his horse with intent and that she felt targeted. She stated she was worried about their safety and that they were put in a situation that any rider or trainer would not want anyone in. The applicant accounted that she has had multiple issues in the past with Mr Appo on the track.
- [26] The applicant also gave evidence before this panel. Regarding the trackwork incident she gave a consistent account to as her evidence before the stewards. Before the panel the applicant confirmed that after sitting back 100 metres behind them, Mr Appo was driving and race-riding his mount towards her and Ms Wiblen. She recounted that after the incident the two went around for about another 50 metres and then took the horses in and unsaddled.
- [27] It was then the applicant said she reported the incident to her master Mr Tony Sears straight away. She gave evidence that she asked Mr Sears if she could approach Mr Appo about it and Mr Sears gave her permission on the proviso she recorded it on her phone, was measured in her language and didn't touch Mr Appo. The applicant said she was also encouraged by Ms Wiblen to record the conversation, but that Ms Wiblen could not go with her to speak to Mr Appo as she had to leave the track.
- [28] Regarding Mr Appo's handling of his horse, consistent with the applicant's evidence, Mr Goodwin and Mr Creevey's evidence before the stewards each was that Mr Appo's mount was not hard to handle and Mr Kirwan's evidence was that it was "*not playing up*".
- [29] Mr Goodwin stated that whilst his view was side on, he saw Mr Appo then "*galloping down the hill and ran up their arse*". Mr Creevey, who said he had a good view of the incident from 60 metres away, stated to the stewards that Mr Appo came up behind them and was driving his horse and that he then heard shoes hitting and that he saw Ms Wiblen's horse stumbled.

- [30] Mr Kirwan who was riding on the track at the time said that Mr Appo passed him at the 600 metre mark, at which time Mr Kirwan dropped off and Mr Appo was between him and the applicant and Ms Wiblen on their mounts. Mr Kirwan then stated that he heard the commotion of bones and hooves and that Mr Appo was skating on the heels of Ms Wiblen's mount. Mr Kirwan's evidence before the stewards was that what Mr Appo did was "*unnecessary*", that there was plenty of opportunity for him to pass the applicant and Ms Wiblen. He stated that there was no need for him to be there or "*do that*" and that the incident could have been avoided.
- [31] Ms Rabjones' evidence before the stewards was that she was waiting at the gap and she could see the applicant and Ms Wiblen on babies and that Mr Appo was behind them up the hill at a "*leisurely*" pace. She stated none of the horses were playing up at that stage, they were all in a canter. She stated that Mr Appo then was "*getting into his horse*" driving his mount with a whip, slapping it on the shoulder and sending it down-hill. Ms Rabjones evidence was that Mr Appo made no effort to go inside the ladies at the gap and that he went straight up the middle of the applicant and Ms Wiblen. Her evidence was that their horses were very frightened and scattered and that Ms Wiblen's mount went for the fence.
- [32] Ms Rabjones stated before the stewards that she was shocked and that she considered the actions of Mr Appo to be dangerous. She said that the applicant and Ms Wiblen were doing the right thing, giving "*full credit to the girls*" for how they handled the situation.
- [33] The applicant, Ms Wiblen and Ms Rabjones all gave evidence that Mr Appo was using a whip on his mount.
- [34] Mr Appo gave evidence before the stewards concerning the incident. He stated he was on a highly strung big horse he'd been riding for two weeks. He said it "*did something stupid out of the blue*" whilst he was on the inside of the applicant and Ms Wiblen. He stated that he didn't know what happened and that his mount had "*always been a bit funny at the gap*". Mr Appo said his mount started taking hold and the "*next minute I was on their heels*". He said there was no gap between the applicant and Ms Wiblen. Mr Appo denied he was driving the horse or carrying a whip and stated he was taking hold before the winning post.
- [35] When challenged by the stewards that he has targeted the applicant and/or Ms Wiblen, Mr Appo gave evidence that he rarely targets people because that's when people get hurt. He said he's out there "*to look after younger people*". He denied an allegation put to him by the stewards that he had said to another apprentice that he "*tests out all new apprentices we have*".
- [36] In giving evidence to the panel, the trainer of Mr Appo's mount Mr Joseph Gleeson told the stewards that Mr Appo had said to him of the incident that the horse had charged through the gap but that Mr Appo did not mention it bolting. Mr Gleeson said the horse was green but had never bolted on him prior to the incident.

Tie-up incident

- [37] It was undisputed before the stewards and before the panel that the applicant approached Mr Appo at the Hursley Road tie-ups following the trackwork incident, where an altercation took place which resulted in the strike to the face for which the applicant pleaded guilty.
- [38] Both the applicant and Mr Appo gave evidence to the stewards regarding this, as did Mr Gleeson who was a witness. Before the panel and of assistance was a recording the applicant took on her mobile phone of the interaction ('the recording').

- [39] Mr Appo stated before the stewards that the applicant came around the corner half rushing at him and screaming, although he had no idea what she was saying. He said she was waving her fingers and throwing punches at him, about 20 punches. He said he was trying to block her with his arms and repeatedly said "go away". He said that in trying to protect himself he made contact with the applicant's arm. Mr Appo said only one punch connected which got him on the nose and during the altercation he was trying to get away.
- [40] When challenged by the stewards that the applicant could not possibly have had 20 swings at him in the 20 seconds indicated by the recording, Mr Appo said he "*wasn't counting she was just swinging*".
- [41] Before the stewards the applicant gave evidence that she asked her master permission to approach Mr Appo about the trackwork incident and that permission was given on the condition she recorded the conversation on her phone. In approaching Mr Appo the applicant said that she said to Mr Appo "*what were you doing?*" regarding what occurred on the track and that he "*had put people's lives in danger*". She said she twice told him not to touch her and that he had told her to go away.
- [42] The applicant made forthright admissions that she made contact above Mr Appo's eyebrow with an open hand and this was immediately in response to him grabbing her left arm and pushing it into her. Her evidence was that he made contact first and she acted in self-defence and that this was instinct and a reaction to him grabbing her.
- [43] The applicant denied she hit Mr Appo multiple times, as he had stated to the stewards. The applicant gave evidence that she was scared of Mr Appo who was a man twice her size and she felt intimidated in the encounter.
- [44] Before the panel, the applicant gave evidence that when she went to confront Mr Appo, she stopped and that he walked towards her from 5 metres away which is when he grabbed her arm. She stated to the panel this was sufficient to make her take a step back and confirmed she didn't feel pain nor sustain any bruising.
- [45] The applicant confirmed before the panel that she struck Mr Appo with an open palm as an act of self-defence and that she approached him with no intention to strike him or to be disrespectful or rude, which is why she recorded it on her phone. She stated that the whole sequence of events from the incident on the track to the end of her interaction with him was no more than 20 minutes. The applicant's further evidence was that she then reported the incident to Mr Sears and later the steward and police. She further stated that she had previous instances with Mr Appo on the track where he had cut her off.
- [46] Mr Gleeson gave evidence that he could see the applicant and Mr Appo were having an argument and there was a lot of finger pointing, handwaving and raised voices. He stated he could not hear what was said apart from the applicant saying "*there are lives on the line*". Mr Gleeson described the applicant as the aggressor. He further stated that Mr Appo was putting his hands up defensively and that the applicant reported to him that Mr Appo touched her, but that he couldn't see that from where he was standing.
- [47] Mr Gleeson confirmed before the stewards that the applicant struck Mr Appo with an open hand and that she made no attempts to punch him before then.
- [48] In the recording of the incident the applicant is heard to say: "*Bradley, what are you doing on the track (repeated) - there's rules (repeated) Don't touch me, don't fucken touch me! do not touch me you touched me first. Why did you do that? you can't do that . I'm on record anyway. Fuck'n Learn how to*

ride (repeated) ... There's rules ... There are people's lives you can't cut people off at the gap... You are ridiculous you pick on women and (indistinct) is writing a report" .⁴ The applicant then walked away swearing at him. Her tone was elevated during the interaction particularly when she was repeating "don't touch me".

[49] In the recording Mr Appo says "*settle down, don't mouth (twice) I know there's rules. (indistinct) See that? See that guys? Go away you just assaulted me....*"⁵ He is heard to say "go away" 20 times during the recording.⁶

Discussion

[50] In relation to the trackwork incident, the weight of the evidence points to a conclusion that Mr Appo drove his horse in a manner such as to nearly cause a serious incident with Ms Wiblen, the applicant and their young mounts. Ms Wiblen's horse was injured.

[51] Mr Appo's explanation of the events immediately prior to his mount running into the back of Ms Wiblen's mount, in that his horse did something out of the blue and that he was not driving it, are not consistent with the accounts of the applicant, Ms Wiblen, Mr Goodwin, Mr Creevey and Ms Rabjones who witnessed the events. Mr Kirwan described Mr Appo's conduct as unnecessary and the collision which transpired as avoidable. Indeed, the evidence of Ms Rabjones suggests that the applicant and Ms Wiblen handled their mounts so well such that the outcome was not more serious.

[52] The panel accepts both the applicant and Ms Wiblen's evidence that they were scared by this, that it caused them to take action to recover their mounts and that they were concerned for their safety and that of their mounts. In the context of the applicant's evidence that she has had other incidents on the track with Mr Appo, the panel accepts the evidence of the applicant that she felt targeted by his actions on the track.

[53] Accordingly, It is reasonable to conclude that Mr Appo created a potentially dangerous situation that such would leave the applicant shaken and fearful as was her evidence.⁷

[54] The panel also accepts that the applicant's ensuing conduct in confronting Mr Appo at the tie-ups was a direct response to this incident.

[55] In relation to the incident at the tie-ups, Mr Appo was not before the panel to be cross-examined. Having regard to his account before the steward's that the applicant was punching him up to 20 times before connecting with his nose by way of a punch, is not consistent with the evidence of the applicant and Mr Gleeson, who witnessed the altercation.

[56] The panel accepts the applicant's evidence that she struck Mr Appo above the eyebrow with an open-palm and that she made no attempts to strike him before then. This is supported by the evidence of Mr Gleeson.

[57] The panel accepts the applicant's evidence that this was in direct response to Mr Appo grabbing her left arm and pushing it into her and that striking him was instinct and an automatic reaction to his action. Mr Appo admitted before the stewards that he did make contact with the applicant's arm. The panel accepts that this was with sufficient force to make the applicant take a step back as she accounted. The recording of the incident would tend to support the applicant's version in these

⁴ Applicant's audio recording of 1 July 2023

⁵ Ibid

⁶ Ibid

⁷ The respondent submits that this incident has been subject of separate disciplinary action.

respects, where her voice became quite elevated when she is heard to say “*Don’t touch me, don’t fucken touch me! do not touch me you touched me first.*”

- [58] The recording of the incident is instructive in other respects supplementary to the respective evidence of the applicant, Mr Appo and Mr Gleeson on what transpired. Based on the recording, the panel is satisfied that the applicant approached Mr Appo with an elevated tone and that Mr Appo clearly did not wish to engage with the applicant about the issue, evidenced by his repeated requests for her to “*go away*”. In the face of this, the applicant persisted to verbally engage him on the issue and the matter escalated quickly resulting in she striking him.
- [59] The panel accepts that in recording the incident on her phone the applicant was seeking to speak in a reasonable manner with Mr Appo about why he did that on the track; also that she had no intention of engaging in a physical altercation with Mr Appo. Intention is relevant to determining penalty.⁸
- [60] The respondent submits that having given repeated evidence before the stewards that the applicant was scared of Mr Appo and felt targeted by him, the applicant notwithstanding (and after feeling frightened following the first incident) approached Mr Appo alone with the intention of confronting him about the track incident.⁹ The respondent doesn’t take this submission further, however it is understood the panel is invited to draw an inference this was unreasonable and/or inconsistent behaviour.
- [61] There are other circumstances relevant however militating against such a conclusion. The panel accepts the applicant’s evidence was that she was nervous and intimidated in approaching Mr Appo about the matter because as she stated in her evidence he was a senior male licensed person of twice her size; also on the background of her evidence that she had had previous track incidents with him, in addition to the one which had just transpired.
- [62] Relevant also to the applicant approaching Mr Appo on her own is:
- (a) upon her request, the applicant was authorised by her master to approach Mr Appo regarding the incident on certain conditions; and
 - (b) the immediacy in confronting Mr Appo after the track incident, rather than affording time for passions to cool.
- [63] As a young apprentice jockey and in the circumstances of what transpired on the track, arguably the applicant would have benefited from advice from her master upon reporting the incident to him, that an approach to Mr Appo was not the preferable course. Rather, the matter be immediately referred to the stewards to investigate as being the appropriate course.¹⁰
- [64] The respondent further submits that the defence of provocation or in the alternate, the defence of self-defence cannot amount to a defence in a charge such as this, relying on *Russell v Queensland Racing Integrity Commission*.¹¹ Given the legal position and being that guilt is not in contest accordingly it’s not necessary or appropriate for the panel to consider those defences or make findings.¹²

⁸ *Hooper v Queensland Racing Integrity Commission* [2017] QCAT 236 at [7]

⁹ Respondent submissions dated 31 July 2023 at paragraph [40]

¹⁰ Exhibit 6 Steward’s decision dated 26 July 2023 at [9]

¹¹ [2020] QCAT 329. Respondent submissions dated 31 July 2023 at paragraphs [37]-[38]

¹² Respondent submissions dated 31 July 2023 at paragraph [49]

[65] Notwithstanding, respectfully the panel considers the steward's characterisation of the applicant as being 'the aggressor' in the incident to be not an accurate conclusion when all the circumstances of the matter are taken into account.

[66] Whilst her persistence in seeking to engage Mr Appo at the tie-ups regarding the track incident, when he was clearly seeking to avoid engaging with the applicant about the matter is a factor, the panel's findings above in relation to the circumstances of 1 July 2023 enunciate some significant mitigating factors favouring the applicant.

Mitigating circumstances

[67] Some pertinent mitigating factors the panel takes into account with respect to the applicant are:

- (a) She is a 23 year old apprentice jockey of two years' experience;
- (b) She was engaged in trackwork at the relevant time on 1 July 2023 wherein the related events involved a senior male licenced person;
- (c) Her financial circumstances, which are considered in more detail below; and
- (d) She made forthright admissions to the stewards and pleaded guilty at the earliest opportunity. In the inquiry proceedings the Stewards commented on her honesty before them.¹³

[68] Outlined in detail above under 'Discussion' are the panel's findings concerning the applicant's conduct on 1 July 2023, which in the panel's view, amount to some significant mitigating factors in her favour. These relate principally to the applicant's actions being in response firstly, to Mr Appo's conduct on the track and the resultant impact on the applicant; and more immediately, he making physical contact with her first during the ensuing altercation and prior to her striking him. Also in her favour, the applicant's noted lack of intention to engage in an altercation with Mr Appo in deciding to approach him.

[69] Before this panel Mr Warren for the respondent advised that all related facts and circumstances were taken into account in imposing penalty, including the mitigating circumstances.

Aggravating circumstances

[70] The respondent submits in aggravation regarding the applicant's recent breach of Rule 228(e) on 17 April 2023. This is the offence to which the present suspended fine relates.

[71] On a background of an otherwise modest disciplinary record, re-offending under the same Rule within a period of three months and with respect to the same person in the panel's view is a significant factor in aggravation. The imposition of a fine on that occasion clearly did not deter the applicant from engaging in similar conduct. Accordingly the panel accepts the respondent's submission that a fine is inadequate in the interests of achieving specific deterrence, in particular, namely that a suspension is appropriate.

Serious offence

[72] A charge of misconduct under the Rules is a serious one. Any conduct concerning violence is a serious matter¹⁴ and goes to the heart of the section 3 purposes of the *Racing Integrity Act*, including the integrity of all persons involved in racing and maintaining public confidence in the industry.

¹³ Audio of Stewards Inquiry 20/07/2023 recording #2

¹⁴ *El-Issa v Racing Queensland Limited* [2011] QCATA 280 at [28]

[73] The respondent refers in their submissions to a number of authorities relating to important deterrence principles associated with such breaches, including the damage violent conduct can have on the image of racing¹⁵ and that persons should be entitled to come to work and feel safe and not subject to violence.¹⁶

Comparatives

[74] The Penalty Guidelines provide for “starting points” for penalties with respect to particular identified breaches of the Rules. No such guidance is provided on the imposition of penalties for a breach of Rule 228(b).

[75] The Respondent has submitted three cases which are said to be comparative penalties and which the stewards had regard to in imposing penalty on the applicant.¹⁷ They relate to incidents of striking another licenced person a single time in breach of various Racing Rules and in their decision notice, the stewards contend all involve provocation in some form.¹⁸ It is instructive to consider each case.

[76] In *Racing Victoria v Rob Kirkpatrick*¹⁹ the Victorian Racing Tribunal considered an application where Mr Kirkpatrick was found guilty in breach of AR 227(a)²⁰ following an altercation with another male trainer at trackwork where Mr Kirkpatrick (a jockey) punched the trainer in the face after being kicked in the chest by the trainer. This resulted in the trainer falling to the ground and hitting his head requiring medical treatment. Having regard to matters of provocation, the applicant’s financial circumstances, his remorse and the exceptional testimonials in his favour, the Tribunal varied a six week suspension imposed on the applicant by the stewards to a three week suspension.

[77] In *QRIC v Ronald Finch*²¹, a trainer pleaded guilty to an improper conduct charge in breach of Rule 228(b) and received an 8 month suspension with two months suspended on the condition that Mr Finch provide proof of participating in anger management counselling. The steward’s report disclosed no details of the offending conduct.

[78] In *Racing NSW v Troy McCarney*²² a trainer pleaded guilty to an improper conduct charge in breach of Rule 228(b) and received a six month suspension, with three months suspended on the condition that he does not breach the Rules for 12 months. The only facts disclosed concern an altercation with another male where Mr McCarney struck the victim in the vicinity of the face.

[79] Before the panel the applicant submitted that the three comparatives were not similar to her situation, in seriousness including that one involved a “king hit”. She submitted that considering her case, there was a significant difference in force and intent between an open slap and the instances disclosed by the comparatives.

[80] Certainly, there are distinguishing features of these matters to the present case. Foremost they are altercations between two males, generally far more experienced licenced persons and disclose far more violent encounters, particularly in the cases of *Kirkpatrick* and *McCarney*. The other party in *Kirkpatrick* required medical treatment.

¹⁵ *Schmetzer & Whitfield v Racing New South Wales* (Racing New South Wales Appeal Panel) (2 March 2022) at [35]

¹⁶ *Ms Haruka Nakamura v Retail Staff Pty Ltd* [2021] FWC 1396 (15 March 2021) at [219]

¹⁷ Exhibit 6 at paragraph 12; Respondent submissions dated 31 July 2023 at paragraph [42]

¹⁸ Exhibit 6 at paragraph 13; Respondent submissions dated 31 July 2023 at paragraph [42]

¹⁹ 29 April 2020

²⁰ ‘commits any breach of the Rules, or engages in conduct or negligence which has led or could have led to a breach of the Rules’

²¹ 19 June 2023

²² 2 August 2021

[81] It would be a fair assessment that there are no true comparative penalties to the present matter before the panel. The applicant submits that penalties for breaches of Rule 228(b) vary considerably depending on the circumstances of the case²³ and this is certainly demonstrated in the comparatives presented.

Financial circumstances

[82] The applicant gave evidence before the Panel in support of her argument that any suspension should not commence before 6 August 2023 in terms of her financial circumstances. She stated that she has nine confirmed rides booked for Saturday 5 August 2023 – being seven in Toowoomba and two in Nanango with another two possible rides. The applicant confirmed that each ride would attract a \$250 ride fee and that she has no rides booked after that date. She stated in terms of her present financial circumstances, she is very dependant on this weekend's rides.

[83] In terms of her general financial circumstances, the applicant stated that being an apprentice jockey was her only job (part-time) which earns her \$330 to \$370 a week on a \$12 per hour rate. She stated that she is very reliant on race rides on top of that income to cover her living expenses, particularly Saturday rides of which she would, on average, have five rides. The applicant stated her living expenses to include rent, car insurance as well as a loan of \$6,000-\$7,000 and a repayment plan to QRIC for the \$1,500 fine imposed in April 2023.

[84] The prospective rides for Saturday 5 August 2023 would attract up to \$2,250 income for the applicant. This is a significant figure in her circumstances, being the equivalent of at least six week's salary on a very modest apprentice jockey's salary. Further, being that her evidence is that her income is very reliant on Saturday rides, missing Saturday rides has a significant impact on her ability to make a living and indeed to pay any fine.

[85] Before this Panel in *Beriman v QRIC* it has been determined:

*Although there are many factors to be considered in determining penalty and a wide range of matters that need to be taken into account, the mere fact that a suspension may have the consequence that a jockey may miss the opportunity to ride in a particular race or at a particular race meeting should not of itself or as a matter of course constitute a ground for mitigating a penalty otherwise objectively appropriate and merited by the breaching conduct.*²⁴

[86] This is relevant to the basis of the applicant's submission that, assuming the penalty is as that imposed by the stewards, to miss the nine confirmed rides she has booked on Saturday 5 August 2023 would be an unduly harsh penalty in terms of its impact on her income, ability to make a living and to pay her fines.

[87] The panel accepts this submission. The impact of any particular penalty will have on a party in their personal circumstances is relevant to considering the appropriate penalty, particularly so if that impact leads to disproportionate hardship. The panel considers that a suspension which would deprive her of the rides on 5 August 2023, where she stands to make good income relative to her modest weekly income as an apprentice, would be unduly oppressive and therefore not an objectively appropriate penalty.

²³ Exhibit 6 at paragraph 16

²⁴ RAP-10 at paragraph [11]

[88] In this sense the present case is distinguishable from *Beriman*. The panel considers that not having the opportunity to ride on 5 August 2023 is not a sole mitigating factor and exists in a broader determination in the case as to mitigation.

[89] The penalty imposed should reflect the seriousness of the breach and that it is the applicant's second recent offending against Rule 228 with respect to the same person. The panel is of the view that the significant mitigating factors in the case weigh against those factors in aggravation such as to apportion some small reduction in the term of suspension to that imposed by the stewards.

[90] Accordingly, it is the panel's view that the following penalties achieve specific and general deterrence in all the circumstances of the case:

(a) imposition of a \$1,500 fine for re-offending under Rule 228, being the suspended portion of the penalty imposed on 17 April 2023; and

(b) a suspension in the order of that imposed by the stewards is appropriate, discounted by one day in recognition of the significant mitigating factors outlined herein including the financial position of the applicant.

Orders

[91] The decision of the panel is to vary the racing decision made on 26 July 2023, imposing a \$1,500 fine and a 13 day suspension of the applicants licence, commencing on Sunday 6 August 2023 and ending on Friday 18 August 2023.