

REASONS FOR DECISION

MOTORCYCLING QUEENSLAND TRIBUNAL

KALEB BARHAM

[Heard on 17 November 2018]

1. This decision is in respect of an appeal instituted by Kaleb Barham against a decision of the Steward, Mark Franzmann, made on or about 28 July 2018. Mr Franzmann's decision as Steward was in response to a protest brought by Bailey Malkiewicz against a decision by the Clerk of the Course, John Gierke.

DECISION

2. The appeal is allowed. Each of Bailey Malkiewicz, Zac Small, Joel Evans and Jayce Cosford are relegated three places. The appeal fee should be returned.

REASONS FOR DECISION

3. By letter of appeal dated 9 August 2018, Mr Barham appealed the Steward's decision and the placings in the second round of the Motocross Queensland Titles. The placings were in respect of the Pro MX2 Class race 1.
4. That letter sets out the background to the decision appealed from in a way which was uncontroversial. The underlying incident occurred between flag points 2 and 3. Four riders, Bailey Malkiewicz, Zac Small, Joel Evans and Jayce Cosford all passed Mitchell Alexander who was a lap down and who had slowed significantly in response to a waved yellow flag.
5. GCR11.16.1.4 states that a waved yellow flag will be waved in motocross events to indicate immediate danger. The rule goes on to provide that when yellow flags are waved, competitors must not overtake other competitors from the point displaying the

yellow flag. The penalties are relegation of three places and up to a \$500 fine for a first offence and subsequent offences in the same year exclusion and a \$500 fine. Appendix B to the GCR's provides in relation to a waved yellow flag in motocross that it signifies great danger and that competitors should prepare to stop. There is to be no overtaking. A significant reduction in speed must be observed, therefore, jumps should not be attempted.

6. It was also uncontroversial that due to the competitors' general failure to comply with the waved yellow flag and medical flag, the race had to be red flagged. John Gierke penalised Bailey Malkiewicz three positions and also warned Joel Evans. He did that because he had only seen Bailey Malkiewicz, however, he had also been informed that Joel Evans had also passed under the yellow flag. Having said that, he did not actually observe Joel Evans passing under the waved yellow flag. Bailey Malkiewicz protested against Jayce Cosford, Zac Small and Joel Evans on the basis that each of those riders had also passed under the yellow flag.
7. Early on the Sunday morning, a meeting was held with the five riders involved in the incident relevant to the protest. All four admitted to passing Mitchell Alexander. The effect of the Steward's decision was that none of the four riders were penalised. We will address shortly the reasons for that. It should also be noted that there was a medical flag out because of a crash which had occurred between flag point 3 and flag point 4 on lap 6. Mr Barham points in the appeal letter to the fact that Bailey, Joel and Zac all managed to record their fastest lap with both these flags being waved. Soon after the race was red flagged. The Tribunal had the benefit of a map of the course which indicated that the proportion of the track that was under flags was not insignificant and further that it was a particularly fast part of the track. It is difficult to understand how, if the three riders had significantly slowed in that fast section, they could have posted their fastest lap time.

The Tribunal was not in a position to make any finding about that, but merely notes the oddity. It is also observed that it is of serious concern that the race had to be red flagged because, as we understand it, competitors were not slowing to the extent they should have in the circumstances.

8. The thrust of Mr Barham's appeal is that the effect of the four riders who passed under yellow flags not being penalised is that he was penalised in terms of the outcome of the race because he did do the right thing and significantly slowed. He also points to the fact that the riders involved all ride nationally and soon after this event they attended a national event and the rule in question was enforced at that event.
9. It should be observed firstly, that all the officials that attend these events are volunteers, each seeking to do the best they can in the circumstances. The fact that a Tribunal might ultimately disagree with a particular decision which is made is not intended as any criticism of the official in question but, rather, it is hoped that decisions such as this will be considered by those who officiate at events in the future.
10. Something should also be said about what could be described as a procedural oddity in terms of the hearing of the appeal. Each of Bailey, Zac, Joel and Jayce were informed as to when the appeal was to be held and were advised that if they could not attend in person, they could call in. Only Bailey took the opportunity of doing so. Jayce and Zac each communicated via email with MQ regarding the appeal. The Tribunal was informed that Joel would provide a statement but he did not do so. Zac's communication was limited, it seems, to complaining about how long it was going to take to hear the appeal and suggesting that the matter had been appropriately dealt with between the riders at the event. He raised nothing as to the substantive issues.
11. Jayce stated that he passed the lapped rider well before the flag point and accordingly followed the rules and was not in breach. Unfortunately Jayce did not attend the appeal.

Otherwise the evidence was not only that each of the riders in question had passed under a yellow flag, but also that they all admitted to doing so as part of the protest. Given Jayce did not attend the appeal, the Tribunal did not have the benefit of hearing any further detail from him. Otherwise, however, the Tribunal did hear from the Steward and his evidence was that he spoke to each of the riders individually and all of them admitted passing under a yellow flag. The Tribunal proceeds on the basis that each of them did pass under the yellow flag.

12. It would certainly be preferable in terms of future appeal hearings that those who stood to be potentially affected by the outcome make the effort to attend. Having said that, it does seem that they were each given an opportunity to attend, whether in person or by telephone and have chosen not to. Ultimately, that is a matter for them to decide.
13. During the protest Zac explained to the Steward that Mitchell Alexander had been lapped and he had slowed considerably (nearly to a stop) and moved over to the side of the track so that the faster riders could overtake. The riders affected said that they all knew that the accident was after flag point 3 and not in the section they passed in and that they could not see anyone down on the track, and that if a rider slowed to the extent that Mitchell had and moved to the side of the track it was appropriate to pass.
14. The riders were advised by the Steward that they had technically broken the rules, but the situation was not quite as straight forward and simple as the written rule because of the actions of the lapped rider. The Steward took the view that it was in the best interests of the sport and fair competition for the protest to be dismissed and the determination of the Clerk of the Course to penalise Bailey overturned, thereby allowing all the riders who had passed under a yellow flag to keep their points as they finished in the race prior to any relegation.

15. The terms of GCR11.16.1.4 are clear. Competitors are not to overtake under a yellow flag. The Tribunal can, of course, understand that an oddity arises in circumstances where a rider has slowed more than might perhaps be necessary or, as here, has waved faster riders by. There was no suggestion that the riders passed him recklessly or that they had any particular intention to breach the rule in doing so. However, the terms of the rule are clear. Not only that, the riders were specifically reminded at the Riders Briefing of the rule and that any yellow flag was to be treated as a waved yellow flag at the event. They were also reminded that if they breach the rule they would be relegated three places for the first infringement.
16. While the Tribunal well understood the Steward's good intentions in dealing with the matter in the way he did, we are concerned that the effect of such a decision is to allow, or to encourage, the riders to determine for themselves whether it is safe to overtake under a waved yellow flag. In the Tribunal's view, that is clearly not the intention of the rule. No exception is made in terms of the rule for circumstances where the rider being overtaken is riding particularly slowly.
17. The effect of the rules is to allow for the officials rather than the riders to determine when it is safe to overtake. Where an express instruction is given that all yellow flags are to be treated as waved flags at a Riders Briefing, that instruction is clear. It means, if there is a yellow flag out at all, the instruction is that no overtaking should occur. The officials need to be able to have control over the conduct of the races.
18. Whilst, in some respects, the decision to penalise the four riders involved may seem harsh, that ignores a number of factors. First, it ignores that some riders did not choose to overtake other riders. Second, it should not be seen as harsh in circumstances where the rule is clear, the need for control by the officials is clear, and all the riders were clearly warned. Also, although the Tribunal cannot make any finding about it, it seems

that it is possible that the extent to which the riders in question slowed was really not sufficient. Finally and most importantly, it will often be the case that where a rider passes under a waved yellow flag, all the officials in question will be able to determine is the fact that the passing occurred. It will be very hard for any determination to be made as to whether or not in the particular circumstance that was appropriate. Here for example, there is at least the suggestion that the riders in question, or perhaps three of them, posted their fastest lap after the flags had come out. That does not appear to be something of which the Steward was aware at the time of the determination. So much is clear from the Steward's report.

19. Ultimately, and not without some hesitation, the Tribunal determined that it was appropriate that the result dictated by the relevant rule be applied. The reasons that is considered to be the preferable outcome will be apparent from the factors addressed in the previous paragraph.
20. Given the outcome of the appeal, it is appropriate in the Tribunal's view that the appeal fee be returned to Mr Barham.