IN THE RACING APPEALS TRIBUNAL

SARAH FELLOWES
Appellant

v

GREYHOUND WELFARE AND INTEGRITY COMMISSION
Respondent

REASONS FOR DETERMINATION OF AN APPLICATION BY FOR AN ORDER PURSUANT TO CLAUSE 20 OF THE RACING APPEALS TRIBUNAL REGULATION 2024

Date of determination: 2 September 2024

ORDERS:

1. **Pursuant to clause 20 of the *Racing Appeal Tribunal Regulation 2024* (NSW), and until further order, the determinations of the Respondent imposing:**
   - **(i) a total period of disqualification of 55 months for breaches of r 159 of the *Greyhound Racing Rules*; and**
   - **(ii) fines totalling $1,650.00 for breaches of cl 10(3)(c) of the *Greyhound Racing Regulation 2013 (NSW)***

   are not to be carried into effect.

2. **The parties are to provide to the Appeals Secretary, by 5.00 pm on 9 September 2024, draft orders for the timely prosecution of the appeal.**

INTRODUCTION

1. On 31 May 2024, Sarah Fellowes (the Appellant) was charged by the Greyhound Welfare and Integrity Commission (the Respondent) with:

    (i) 14 breaches of r 156(f) of the *Greyhound Racing Rules* (the Rules), to which I will refer as charges 2 – 15, to which the Appellant pleaded not guilty;
    (ii) 2 further breaches of r 156(f), to which I will refer as charges 16 – 17, to which the Appellant pleaded not guilty;
    (iii) 6 breaches of cl 10(3)(c) of the *Greyhound Racing Regulation 2019,* to which I will refer as charges 18 – 23, to which the Appellant pleaded guilty.

2. The Appellant was found guilty of charges 2 – 15, and charges 16 – 17. The following penalties were imposed:

    (i) charges 2 – 15: disqualification for a period of 40 months;
    (ii) charges 16 – 17: disqualification for a period of 15 months, cumulative on the disqualification in (i), thus giving rise to a total disqualification of 55 months;
    (iii) charges 18 – 23: a fine of $150.00 in respect of charge 18, and fines of $300.00 in respect of each of charges 19 – 23, making a total of $1,650.00.

3. On 8 August 2024, the Appellant filed a Notice of Appeal in respect of those determinations, which was accompanied by an application for a stay. These reasons deal with that application, which is to be determined according to the provisions of cl 20 of the *Racing Appeals Tribunal Regulation 2024* which came into force on 1 September 2024.

4. In prosecuting her appeal, the Appellant will challenge the findings of guilt in respect of charges 2 – 15, and charges 16 – 17, as well as the entirety of the

penalties imposed for all of the breaches. However, for the purposes of the present application, the focus is upon charges 2 – 15, and charges 16 – 17.

5. The application is opposed by the Respondent. I have been provided with a large amount of documentary material by the parties, along with written submissions.

THE RELEVANT PROVISION OF THE RULES

6. Each charges 2 – 15, and 16 – 17, alleged a breach of r 156(f) of the Rules, which is in the following terms:

> ***156 General offences***
> *An offence is committed if a person (including an official):*
> ...
> *(f) has, in relation to a greyhound or greyhound racing, done something, or omitted to do something, which, in the opinion of the Controlling Body or the Stewards:*
> *(i) is corrupt, fraudulent or dishonest;*
> *(ii) constitutes misconduct or is negligent or improper.*

THE CHARGES AGAINST THE APPELLANT

7. It is not necessary for me to set out the entirety of the terms of every charge which was brought against the Appellant, for the simple reason that each one of them was (within its individual group) pleaded in identical terms.

8. Each of charges 2 – 15 alleged that:
   (i) the Appellant was, at all relevant times, registered with the Respondent as an Owner, Trainer and Breeder;
   (ii) the Appellant had done something which, in the opinion of the Respondent, was dishonest and improper, in that:
      (a) between specified dates the Appellant had held herself out to be the trainer of a named greyhound;
      (b) between those same dates, a Mr Wayne Vanderburg (Vanderburg) had undertaken activities associated with the training of the greyhound;

(c) the Appellant improperly allowed Vanderburg to undertake those activities; and

(d) in doing so the Appellant was aware, or ought to have been aware, that Vanderburg did not hold a registration permitting him to train the greyhound in question.

9. Each of charges 16 – 17 alleged that:

(i) the Appellant was, at all relevant times, registered with the Respondent as an Owner, Trainer and Breeder;

(ii) the Appellant had done something which, in the opinion of the Respondent, was dishonest and improper, in that:

(a) between specified dates the Appellant had held herself out as the trainer of a named greyhound;

(b) the greyhound was nominated to compete in a particular event;

(c) on a specified date, Vanderburg obtained a Veterinary Certificate in respect of the greyhound from a Dr Fergus Hay, without the greyhound being presented to Dr Hay;

(d) the greyhound was subsequently scratched;

(e) by holding out to Stewards that the greyhound had been examined by a Veterinarian when it had not, the Appellant had acted dishonestly and improperly.

THE APPELLANT'S REQUEST FOR PARTICULARS

10. The primary basis of the present application is that the Appellant was denied procedural fairness as a consequence of the Respondent not properly particularising its case in respect of charges 2 – 15, to the point where the case against the Appellant was not made clear. It is therefore necessary to trace the history of that complaint.

11. On 29 May 2024, following the Appellant being advised of the charges, her Solicitor wrote to the Respondent in respect of charges 2 – 15. Having cited part of the terms of the charges, the Appellant's Solicitor said:

> *Our client requires the following further and better particulars in order to understand the Charge against her, and to respond ….*
>
> 1. *Particulars of the "activities" alleged referred to in the first dot point in the Notice, including:*
>   a. *the type of activity;*
>   b. *the date that the activity is alleged to have been undertaken by [Vanderburg].*

12. On 31 May 2024, the Respondent replied, setting out the charges in the form that I have outlined above, and stating:

> *We advise that the below additional charges and particulars provide, in the Commission's view, the further and better particulars sought by your client in respect of the matter the subject of the interim suspension.*

13. On 3 June 2024, the Appellant's solicitor responded, saying:

> *The Updated Notice ….. does not, however, provide any particulars of the type of activity or the date that the activity is alleged to have been undertaken by [Vanderburg]. Accordingly, the Commissions [sic] stated view that the Updated Notice answers the Request for particulars is incorrect.*

14. On the same day, the Respondent replied, saying:

> *The Commission relies on the definition of "train" as outlined in r 9 of the Greyhound Racing Rules.*
>
> *The Commission does not intend to issue further particulars in respect of the training the Commission alleges that [Vanderburg] is engaged in. The Commission relies on the material contained in the brief of evidence including the content obtained from [Vanderburg's] phone records, as evidence of [Vanderburg's] training activities for greyhounds recorded in [the Appellant's] traineeship.*
>
> *Further, the charges outlined … already identify date ranges for the alleged offences.*

15. Two matters should be noted at this point.

16. The first, is that I have not been provided with the Brief of Evidence which, according to the submissions of the Respondent, extends to more than 500 pages.

17. The second, is that each of charges 2 – 15 was based, at least in part, on an assertion that Vanderburg undertook unparticularised "*activities"* which were said to have been *"associated with"* the training of the greyhound in question. There is arguably something of a displacement between that position, and the terms of the Respondent's correspondence of 14 May. In particular, the Respondent's references in that correspondence to the definition of the term *"train"* in cl 9, and the reference to *"training activities",* seem to amount to an allegation that Vanderburg engaged in unspecified activities which amounted to the *actual training* of the greyhound, as opposed to engaging in unspecified activities which were said to have been *"associated with"* such training. To actually engage in an activity is one thing. To do something associated with such activity is quite another.

THE HEARING OF 19 JUNE 2024

18. The Appellant appeared, with her Solicitor Ms Crnkovic, at a disciplinary hearing on 19 June 2024. A transcript of that hearing has been provided to me. At the time the hearing, the position in relation to the particulars of the charges remained as I have outlined it above. That prompted Ms Crnkovic to raise the issue at the commencement of the hearing, in the course of which she made reference to what she described as the Respondent's refusal to provide particulars of charges 2 – 15.[1] That prompted the following exchange between Ms Crnkovic and Mr Birch:[2]

Birch:	*What's deficient in the particulars in respect of what you say?*
Crnkovic:	*It's not clear what activities the Commission is referring to.*
Birch:	*Well, training is defined in the rules. It means the preparation, education and exercise of a greyhound, including to race or trial.*
Crnkovic:	*What does that mean and why can't we be given particulars of that if it such a clear-cut answer?*

[1] Transcript 6.21 – 6.35.
[2] Transcript 6.45 – 7.16

Birch:	*Yeah.*
Crnkovic:	*It's difficult because it also – it could be different activities relative to the different greyhounds. Thes charges concern different dogs in question.*
Birch:	*Right. So Ms Fellowes accepts that Mr Vanderburg communicates with the owners, educates greyhounds, breaks greyhounds in under her care and nominates and prepares greyhounds for particular races?*
Crnkovic:	*He does everything that's required of him as an attendant. He's been an attendant for a significant period of time.*

19. A number of observations should be made about that exchange.

20. The first, is that Mr Birch's reference to the various components of the definition of the word "train' posed more questions than it answered, and further obfuscated the case against the Appellant. Whether the Respondent alleged that Vanderburg had engaged in *actual training* in the form of preparation and/or education and/or exercise of the Appellant's greyhounds on the one hand, or had (in accordance with the terms in which the charges had been pleaded) engaged in conduct *"associated with"* one or more of those activities on the other, was unclear. If it was the former (which seems to have been the case) it was at odds with the charges.

21. Secondly, Mr Birch's non-responsive answer to Ms Crnkovic's query as to why, if the matter was so easily defined, particulars could not be provided, is telling. It simply highlights the ease with which the issue could have been resolved.

22. Thirdly, nothing said by Ms Crnkovic in the course of that exchange amounted to an concession that the Appellant accepted that Vanderburg had engaged in *any* of the activities cited by Mr Birch. The apparent attempt by Mr Birch to attribute an admission to the Appellant was quite unfair.

23. Fourthly, as the hearing proceeded, the case against the Appellant in respect of charges 2 – 17 descended further into uncertainty. For example, Mr Birch made

reference[3] to activities of informing owners, nominating greyhounds and breaking greyhounds in. It remains entirely unclear whether these allegations were relied upon by the Respondent in support of the charges. It is also unclear whether it was alleged that Vanderburg had engaged in those activities, or engaged in conduct associated with them. Far from clarifying matters, the case against the Appellant became progressively less clear as the hearing proceeded.

24. The hearing then turned to charges 16 – 17.[4] It is evident from what was put by Ms Crnkovic in respect of those charges[5] that one of the principal issues in relation to them was whether the Appellant had acted dishonestly. That brings me to a further issue on which the Appellant does not specifically rely, but in respect of which I find myself compelled to comment from the point of view of the issue of procedural fairness.

25. Rule 156, which I have previously set out, is directed towards acts or omissions which:

    (i) are corrupt;
    (ii) are fraudulent;
    (iii) are dishonest;
    (iv) constitute misconduct;
    (v) are negligent;
    (vi) are improper.

26. The matters in (i), (ii) and (iii) are all within r 156(f)(i). It would be fair to say that those levels of culpability are more serious than those in (iv), (v) and (vi) which are all within r 156(f)(ii). Each of r 156(f)(i) and (ii) uses the word "or". That suggests, without more, that each category of culpability is to be regarded as an alternative. In other words, the word "or" is to be construed disjunctively.

[3] Transcript 7.33 – 7.36.
[4] Commencing at Transcript 11.35.
[5] Transcript 11.43 – 11.46.

27. In the present case, each of charges 2 – 15, as well as charges 16 – 17, alleged that the Appellant had acted in a way which was "*dishonest and improper*". Dishonestly and impropriety are two completely different concepts. A person may act in a way which is improper without exhibiting dishonesty. In my view, consistent with what I consider to be the proper construction of r 156(f), it is at least arguable that the charges in the form in which they were pleaded were duplicitous, and that the Respondent was required to elect whether it alleged that the conduct of the Appellant was dishonest on the one hand, or improper on the other.

THE APPLICABLE PRINCIPLES

28. The principles which apply to a determination of this kind were set out at length in *Marshall v Greyhound Welfare and Integrity Commission*.[6] I do not propose to repeat those principles. Put simply, they require the Appellant to establish that:

    (i) there is a serious question to be tried; and
    (ii) the balance of convenience favours a stay.

SUBMISSIONS OF THE PARTIES

Submissions of the Appellant

29. The Appellant's submissions in support of a stay encapsulated three fundamental propositions, namely that:

    (i) she had been denied procedural fairness;
    (ii) the charges were "novel";
    (iii) absent a stay, there was a possibility that any appeal would be rendered nugatory.

30. As to the first of those matters, the Appellant submitted that there had been a failure on the part of the Respondent to properly particularise its case, in circumstances where the charges were legally complex. The effect of the

[6] A decision of 21 December 2023 at [16] and following.

submissions of the Appellant was that in all of the circumstances, it remained unclear what case she was required to meet, such that fundamental rules of procedural fairness had been breached. These matters, it was submitted, were rendered of even more significance by the fact that the charges were "novel".

31. As to the third matter, the Appellant submitted that any penalty was unlikely to warrant a suspension of greater than three months, which the Appellant had already effectively served.

32. As to the balance of convenience, it was submitted that in circumstances where the Appellant would otherwise have 30 dogs in her care, the economic consequences of a stay not being granted were significant, notwithstanding that she had an alternative source of income. It was further submitted that in circumstances were this was the first occasion on which charges of this kind had been brought against an industry participant, it could not be said that the conduct alleged against the Appellant was in any way prevalent, or would otherwise give rise to concerns which would bear upon the integrity of, or public confidence in, the greyhound racing industry.

Submissions of the Respondent

33. The Respondent took issue with the suggestion that the Appellant had been denied procedural fairness. It was submitted, in particular, that the Respondent had discharged its obligations in this regard by:
    (i) providing notice of the charges;
    (ii) providing the Appellant with the evidence against her;
    (iii) particularising the charges;
    (iv) providing the Appellant with an opportunity to appear and be heard;
    (v) providing reasons for the decision.

34. I would note in passing that it could not be suggested that the Respondent did not, generally speaking, discharge its responsibilities in respect of the matters in (i),

(ii), (iv) and (v) above. Given what I have outlined, any procedural fairness issue arises in the context of (iii), and matters stemming from it.

35. The Respondent also cited evidence of, and made lengthy references to, Vanderburg's alleged conduct. In doing so, it was submitted that Vanderburg *"was the actual trainer of the greyhounds"*. I would simply note that if that is the Appellant's case, it does not, for the reasons I have already set out, specifically accord with the terms in which the charges were pleaded.

36. The Respondent further submitted that there was nothing novel or complex in the allegations made against the Appellant, and that the Appellant had engaged in "*repeated acts of dishonesty*". It was submitted that in all of these circumstances, there was no serious question to be tried, and that the balance of convenience weighed against a stay.

Submissions of the Appellant in reply

37. The Appellant's submissions in reply made reference to the evidence before the decision makers. Given that the majority of that evidence is not before me, there is an obviously difficulty in evaluating those submissions. The balance of the submissions in reply, generally speaking, highlighted the difficulties in which the Appellant had been placed in knowing the case which was brought against her.

CONSIDERATION

Is there a serious question to be tried?

38. I should state at the outset that I am not persuaded that the fact (if it be the fact) that the charges are "novel" supports a stay. Moreover, the proposition that the appeal will be rendered nugatory if a stay is not granted is based on the proposition that the Appellant will have served any penalty which is likely to be imposed before any appeal is heard. That is a determination I am not able to make, given that I have not been provided with all of the evidence.

39. The issue of whether there is a serious question to be tried arises principally from an asserted failure on the part of the Respondent to afford the Appellant

procedural fairness. On the Appellant's case, that failure stems primarily from the Respondent's failure to provide proper particulars of at least some of the charges, although it will be evident from some of my earlier observations that the issue may extend beyond that.

40. It is not possible to reduce the duty to afford procedural fairness to a set of fixed rules.[7] The duty has no fixed content, and reflects the notion of a flexible obligation to adopt fair procedures which, importantly, recognise the entitlement of a person affected by an administrative decision to know the case against them.[8] In this context, fairness is not an abstract concept. The concern of the law is to avoid practical injustice.[9]

41. In the present case, and whilst (as I have acknowledged) the majority of the procedures employed by the Respondent were in accordance with principle, there are other factors which, in my view, raise a serious question as to whether the Appellant was afforded procedural fairness.

42. First, it is arguable that the charges were, for the reasons I have outlined, duplicitous. Specifically in my view, it is arguable that on a proper construction of r 156, the Respondent was required to elect whether it alleged that the Appellant's conduct in each case was dishonest on the one hand, or improper on the other. The two states of mind are quite different. The importance of electing one or the other is reflected in the potentially different impact of each on the issue of penalty.

43. Secondly, each of charges 2 – 15 alleged that Vanderburg had undertaken "*activities*". In the circumstances of this case, it is arguable that the Appellant was entitled to know what those "*activities"* were in advance of the hearing in order to know the case she was required to meet.

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[7] See *Wiseman v Borneman* [1971] AC 297 per Lord Morris at 309.
[8] See *Kioa v West* (1985) 159 CLR 550 at 584 - 585 per Mason J
[9] See *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1 per Gleeson CJ at [37].

44. Thirdly, I am mindful of the fact that the Appellant was provided with a large volume of evidence. The provision of that material is relied upon by the Respondent as discharging the obligation of appraising the Appellant of the case against her. In some cases, providing such material might well discharge that obligation. In the present case however, it is arguable that it did not, for the simple reason that the Respondent's case appears to have oscillated between an allegation that Vanderburg undertook unspecified activities "*associated with*" the training of greyhounds, and an allegation that he was the actual trainer. The latter appears to be the Respondent's present position, in light of the submissions made on this application. For the reasons I have pointed out, such a position does not sit entirely comfortably with the terms in which charges 2 – 15 were pleaded. It was not the responsibility of the Appellant to attempt to work out what the case against her was by reference to material provided to her, and which apparently extended to 500 pages or more. Arguably, the Respondent's case could, and should, have been made clearer.

45. Fourthly, on a fair reading of the transcript of the disciplinary hearing, it is arguable that the proceedings descended to the point where the Appellant was being told of the case against her, as it were, *"on the run"*. Whilst the Appellant was afforded a hearing, it is arguable that it was one which did not meet the requirements of procedural fairness. As I have observed, the case against the Appellant seemed to become less clear as the hearing proceeded. Ms Crnkovic was faced with dealing with issues which arguably should have been made clearer before the hearing commenced.

46. There are, of course, cases in which a failure to afford a party procedural fairness at first instance can be overcome by the mere fact that the Appellant has the right to an appeal which operates as a hearing *de novo*. However in my view, the present case does not fall into that category. For the reasons I have outlined it is arguable, on more than one basis, that a significant penalty was imposed on the Appellant at the conclusion of a procedurally unfair process, in circumstances

where the unfairness went to the root of the charges against her. For all of those reasons I am satisfied that there is a serious question to be tried.

Where does the balance of convenience lie?

47. For essentially the same reasons, and taking into account the additional hardship which would be visited upon the Appellant, I am satisfied that the balance of convenience weighs in favour of a stay.

CONCLUSION AND ORDERS

48. How the matter is to be approached from this point, having regard to the observations I have made, and having regard to the fact that the appeal will proceed *de novo,* will of course be a matter for the parties. To facilitate the progress of the matter, I make the following orders:

1. Pursuant to clause 20 of the *Racing Appeal Tribunal Regulation 2024* (NSW), and until further order, the determinations of the Respondent imposing:
   (iii) a total period of disqualification of 55 months for breaches of r 159 of the *Greyhound Racing Rules*; and
   (iv) fines totalling $1,650.00 for breaches of cl 10(3)(c) of the *Greyhound Racing Regulation 2013 (NSW)*

are not to be carried into effect.

2. The parties are to provide to the Appeals Secretary, by 5.00 pm on 9 September 2024, draft orders for the timely prosecution of the appeal.

THE HONOURABLE G J BELLEW SC

2 September 2024