IN THE RACING APPEALS TRIBUNAL

ASHLEY MARSHALL
Appellant

v

GREYHOUND WELFARE AND INTEGRITY COMMISSION
Respondent

REASONS FOR DETERMINATION

Date of hearing: **12 August 2024**

Date of Determination: **30 August 2024**

APPEARANCES: **Mr D Cleverley for the Appellant**

Mr M Tutt for the Respondent

ORDERS

1. **The appeal in respect of the offence contrary to r 141(1)(a) of the *Greyhound Racing Rules* is dismissed.**

2. **The disqualification of 2 years imposed for the offence in order [1] is confirmed.**

3. **The appeal in respect of the offence contrary to r 151(2) of the *Greyhound Racing Rules* is upheld.**

4. **The fine of $400.00 imposed in respect of the offence in order [3] is set aside, and a fine of $200.00 is imposed in lieu thereof.**

5. **The appeal deposit is to be refunded.**

INTRODUCTION

1. By a Notice of Appeal dated 26 February 2024,[1] Ashley Marshall (the Appellant) has appealed against a determination of the Greyhound Welfare and Integrity Commission (the Respondent) made on 19 February 2024, to impose:

    (i) a disqualification for a period of 2 years for a breach of r 141(1)(a) of the *Greyhound Racing Rules* (the first offence); and

    (ii) a fine of $400.00 for a breach of r 151(2) of the *Greyhound Racing Rules* (the second offence).

2. In each case, the sole issue for the purposes of the appeal is that of penalty.

3. The hearing of the appeal took place on 12 August 2024, and judgment was reserved. The parties provided a Tribunal Book (TB) containing all relevant documentary material.

THE RELEVANT PROVISIONS OF THE GREYHOUND RACING RULES

4. In terms of the first offence, r 141 of the *Greyhound Racing Rules* (the Rules) is in the following terms:

> *(1) The owner, trainer or other person in charge of a greyhound:*
> *(a) nominated to compete in an event;*
> *...*
> *must present the greyhound free of any prohibited substance.*
>
> *(2) ...*
>
> *(3) The owner, trainer or person in charge of a greyhound presented contrary to subrule (1) of this rule shall be guilty of an offence.*

5. In terms of the second offence, r 151 of the Rules is in (inter alia) the following terms:

[1] TB 1 and following.

(1) The person in charge of a greyhound must keep and retain written records detailing all vaccinations, antiparasitics and treatments administered to the greyhound:

(a) from the time the greyhound enters their car until the time the greyhound leaves their care; and
(b) for a minimum of two years.

(2) If requested by the Controlling Body, a Steward, or an authorised person, the record/s of treatment referred to in subrule (1) of this rule must be produced for inspection.
...

THE CASE AGAINST THE APPELLANT

The Appellant's position as an industry participant

6. At the time of the offending, the Appellant was registered with the Respondent as a Public Owner and Trainer. In that capacity, she was the Trainer of *Zipping Osman* (the greyhound).

The first offence

7. On 2 July 2023, the greyhound competed in a race at Richmond, and placed first. A urine sample taken from the greyhound following the race was found to contain recombinant human erythropoietin, to which I will refer as rhEPO.

8. An Affidavit of the Appellant forms part of the evidence before me, in which she has stated:[2]

> *I did not do anything or act to lead to the detection of a prohibited substance in the dog at any time nor do I know who did.*

9. Given that the Appellant has not been charged with *administering* rhEPO, and also given that she was not cross-examined on her Affidavit, I accept what she has said in this respect.

[2] TB 121 at [4].

10. The evidence before me includes a statement of Dr Steven Karamatic, the Chief Veterinarian of Greyhound Racing Victoria.[3] Although the Appellant's solicitor originally indicated that he wished to cross-examine Dr Karamatic, and whilst Dr Karamatic was made available for that purpose, the proposed cross-examination was abandoned at the commencement of the hearing.[4]

11. In his report, Dr Karamatic explained the nature of rhEPO in the following terms:[5]

> *rhEPO is a Prescription Only Medicine as defined in Schedule 4 of the Commonwealth Standard for the Uniform Scheduling of Medicines and Poisons. It could be prescribed off-label (prescription for an unapproved indication, dose or form of administration) by a registered veterinarian to an animal under their care after establishing a therapeutic need for that substance, but prescription to a greyhound would be a breach of the Rules.*

12. Dr Karamatic further stated:[6]

> *EPO is an endogenous glycoprotein cytokine produced mostly by the kidneys, and in lesser amounts the liver, in response to cellular hypoxia (low oxygen levels), which triggers erythropoiesis in bone marrow resulting in increased production and longevity of red blood cells. Red blood cells contain haemoglobin which is responsible for carrying oxygen around the body. Red blood cells released into the bloodstream following parenteral administration (i.e. by injection), will have effects that last much longer than the detection time of any EPO administered, which will vary depending on the type of ESA given.*
>
> *Canine erythropoietin, the endogenous form in dogs, is clearly distinguishable from human recombinant erythropoietin. Exogenous forms of EPO are manufactured mostly from Chinese hamster ovary cells for a wide variety of human diseases including nonspecific anemias, anemias resulting from chronic kidney disease, neoplastic anemias, anemias resulting from chemotherapy and radiation therapy, Chron's disease and ulcerative colitis.*
>
> *There are potentially negative animal welfare outcomes from administering rhEPO with the most commonly observed side effect in horses being the development of a refractory and potentially life threating anemia secondary to antibody development against EPO from recognising the presence of the human foreign protein. i.e. the body attacks its own EPO thinking it to be foreign.*
>
> *In my opinion there is no reason to administer EPO to a racing greyhound other than to improve its condition or performance.*

[3] Commencing at TB 99.
[4] Transcript 2.13 – 2.17.
[5] TB 101 at [13].
[6] TB 102 at [20] – [23].

The second offence

13. On 24 August 2023, the Appellant was spoken to by Inspector Turner at which time the following conversation took place:[7]

Turner:	*Have you got the treatment records for that dog?*
Appellant:	*[no audible response]*
Turner:	*I'm sorry?*
Appellant:	*I don't know where they are.*
Turner:	*You don't know where they are?*
Appellant:	*I'm not well.*
Turner:	*OK. Do you have treatment records for the dog?*
Appellant:	*I have treatment records, I just don't know where I've put them.*
Turner:	*OK. Can you please present them to me? What? Can you, can you get, go get them for me?*
Appellant:	*I don't know where they are, I just told you that.*
Turner:	*Okay. So you're unable to produce them?*
Appellant:	*Yeah, I guess so.*
Turner:	*OK.*
....	
Turner:	*Ashley, have you got the treatment records for the dog? Ashley, stop there. Ashley, stop. Let us, wait up. Ashley, stop there. Ashley, can you just stop?*
Appellant:	*I haven't touched anything, so don't tell me to stop.*
Turner:	*Okay, okay. Can you just ---*
Appellant:	*Hence, it's still my vehicle.*
Turner:	*--- no worries. Can you just jump back and let me search. Have you got treat ---*
Appellant:	*Like I trust you to search this.*
Turner:	*Have you got treatment records for the, uh, for that dog.* *[no audible response]*
...	
Turner:	*You do not have treatment records for this dog?*

[7] Extracted from the Respondent's submissions at TB 20 – 22 at [46], and drawn from footage taken from body worn camera at TB Index 25 and 26.

Appellant: *I have 'em, but I just, I, I move 'em around … I sometimes drive the ute too … It depends on what I need for the day. So if I'm not trialling, sometimes he will take that to work.*

THE APPELLANT'S SUBJECTIVE CASE

14. The Appellant's subjective case is essentially set out in her Affidavit.[8] Aside from the exculpatory statement to which I previously referred,[9] and which I accept, I am satisfied, on the basis of her Affidavit, that the Appellant:

    (i) is a single parent with three children, whose sole income is presently derived from Centrelink payments;[10]

    (ii) has been forced to move from her premises;[11]

    (iii) has been engaged with greyhounds all of her life, having been introduced to them by her father who recently passed away;[12]

    (iv) has not committed any previous offence involving the deliberate administration of a prohibited substance;[13] and

    (v) intends to return to the industry as soon as she is able to do so.[14]

15. The Appellant's disciplinary history as a participant in the greyhound racing industry is also before me.[15] She was registered as an Owner Trainer in 2015, and as a Public Trainer in 2017. She has a multiplicity of breaches in her history, although in fairness, a number of them were dealt with by way of small fines or reprimands, which tends to indicate that those matters, at least, were of a relatively minor nature. However, there are two matters of greater significance which can be summarised as follows:

[8] TB 121 and following
[9] At [8] above.
[10] At [6].
[11] At [7].
[12] At [15] – [21].
[13] At [27] – [28].
[14] At [29].
[15] Commencing at TB 106. The history is summarised in a document at TB 112 – 113.

(i) in November 2018, the Appellant was suspended for a period of 15 weeks for a breach of (then) r 83(2)(a), stemming from the detection of Cobalt in a greyhound, the Cobalt being in excess of the prescribed threshold;

(ii) in January 2023, the Appellant was suspended for a period of 2 months for a breach of r 141(1)(a) in respect of the detection of Diclofenac in a greyhound.

SUBMISSIONS OF THE PARTIES

Submissions of the Appellant

16. The initial written submissions of the Appellant[16] raised various issues of procedural fairness stemming from the original determination, including what was said to be a lack of adequate reasons for the penalties which were imposed. As to those submissions, I need only observe that even if they have substance (an issue about which I make no determination) any shortcomings stemming from the decision at first instance are overcome by the fact that this appeal operates as a hearing *de novo*.

17. As to the first offence, the further written submissions of the Appellant[17] appeared to advance a proposition,[18] which was said to be based *"on the matter of S Bilal",* that the Respondent was under an obligation to adduce evidence of some act on the part of the Appellant which led to rhEPO being introduced into the greyhound's system. The submissions then conceded that the Appellant was not in a position to advance any hypothesis as to how the presence of rhEPO in the greyhound had come about. It was further submitted that the Appellant had not come under notice for an offence involving this particular substance, and that her previous breaches had been met with a "*mild penalty"* in each case.[19] Given the details of

[16] Commencing at TB 4.
[17] Commencing at TB 8.
[18] Commencing at [4].
[19] At [8].

the Appellant's history which I have set out above,[20] that submission is somewhat tenuous.

18. As to the second offence, it was submitted that although the records where not in the Appellant's possession at the material time, they were nevertheless available for inspection.[21]

19. Significant weight was placed on the Appellant's subjective case,[22] the essence of which I have summarised above. Reliance was also placed on her pleas of guilty which, it was submitted, should attract a discount of 25%. It was submitted that in all of the circumstances, a disqualification of "*a year or less"* would fairly reflect the entirety of the circumstances of the offending, and the Appellant's subjective case.[23]

20. The Appellant also filed written submissions in reply[24] which were expanded upon in oral submissions at the hearing, and which encapsulated the following propositions:

    (i) special circumstances had been established;[25]

    (ii) the Appellant's personal circumstances were deserving of significant weight, and included the recent death of her father;[26]

    (iii) the majority of the Appellant's previous breaches were relatively minor;[27] and

    (iv) she complied with all of the previous penalties which were imposed on her.[28]

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[20] At [15].
[21] At [19].
[22] Commencing at [22].
[23] At [33].
[24] Commencing at TB 24.
[25] Transcript 3.19.
[26] Transcript 3.19 – 3.38.
[27] Transcript 3.40 – 4.44.
[28] Transcript 4.41 – 4.44.

Submissions of the Respondent

21. In written submissions,[29] and in terms of the first offence, the Respondent emphasised[30] the opinions of Dr Karamatic which I have set out above.[31] Reliance was also placed on the Penalty Guidelines (the Guidelines), in the context of which it was submitted that offences involving the detection of rhEPO, whilst comparatively rare, remained a matter of considerable concern which warranted the imposition of a significant penalty.[32]

22. In advancing these submissions, the Respondent relied on a number of previous determinations in cases of this nature, by reference to which it was submitted that the appropriate starting point was a disqualification of 3 years. The Respondent invited me to adopt that starting point and affirm the penalty imposed at first instance [33] which, it was submitted, was a proper reflection of both the objective seriousness of the offending, and the Appellant's subjective case.[34]

23. In terms of the second offence, the Respondent took issue[35] with any suggestion that the Appellant had not been provided with a reasonable opportunity to produce the relevant records. It was submitted that the fact that she was provided with such opportunity was supported by the terms of her conversation with Inspector Turner, extracts of which are set out above.[36] It was submitted that in all of the circumstances, the penalty imposed was appropriate. In support of its position in respect of the second offence, the Respondent also relied upon a number of previous determinations.[37]

24. In oral submissions made in the course of the hearing of the appeal, it was submitted on behalf of the Respondent that the special circumstances referred to

[29] Commencing at TB 13.
[30] Commencing at [19].
[31] At [11] – [12].
[32] Commencing at [22].
[33] At [40].
[34] At [43].
[35] At [45].
[36] At [13].
[37] At [53] – [58].

in the Guidelines had no direct application to the present case. However, it was accepted that matters which might fall into the category of special circumstances could nevertheless be treated as part of the Appellant's subjective case.[38]

25. Specifically, in terms of the first offence, the oral submissions made on behalf of the Respondent reiterated, by reference to Dr Karamatic's report, what was described as the *"egregious nature"* of rhEPO.[39] It was also submitted that, properly analysed, the Appellant's history included two previous matters of significance, the most recent of which had occurred in April 2023.[40]

26. As to the level of the Appellant's culpability in respect of the first offence, it was submitted that her position was not dissimilar to that experienced by the majority of participants charged with presentation offences, namely that she was unable to point to any circumstances which might explain how the substance came to be in the animal's system.[41]

27. It was further submitted that general deterrence remained an issue[42] and that in assessing an appropriate penalty for the first offence, I would derive particular assistance from the previous decision of this Tribunal in *Finn*.[43]

CONSIDERATION

28. Before dealing with the substance of the submissions of the parties, there are three preliminary matters which should be addressed, the first of which stems from the Guidelines.

29. I have observed on a number of previous occasions that the Guidelines are not fixed and, in any event, are not binding on me. In terms of my function they are, at

[38] Transcript 5.41.
[39] Transcript 6.44 – 6.46.
[40] Transcript 8.8 – 8.24.
[41] Transcript 8.38 – 10.46.
[42] Commencing at Transcript 17.5.
[43] Commencing at Transcript 14.4.

best, indicative in nature, just as they act as a guide for decision makers at first instance. Bearing in mind the submission made on behalf of the Appellant that she has established *"special circumstances",* the Guidelines provide as follows:

> *The term 'special circumstances' is a broad one, and an exhaustive statement of what constitutes special circumstances cannot be made. It describes circumstances that are out of the ordinary, unusual or uncommon. Special circumstances may include one single special matter, a combination of special factors or a combination of ordinary factors when, taken together, can be seen as special.*
>
> *Special circumstances do not include subjective factors such as:*
>
> - *A very lengthy contribution to the industry;*
> - *Good character; or*
> - *A good disciplinary history.*

30. As I read the terms of the Guidelines, and leaving aside the definition, special circumstances are referred to in the context of a starting point for assessing the penalty to be imposed for some offences, but not others.[44] Importantly, special circumstances are not specifically referred to in the context of Category 1 prohibited substances such as rhEPO, which would suggest that they have no role to play at all in determining the penalty for the first offence. If that is correct, then the submissions made on behalf of the Appellant that she has established special circumstances are, at least in that context, irrelevant. Moreover, as I have noted, the Guidelines are not binding on me in any event. The factors relied upon by the Appellant as constituting special circumstances are nevertheless relevant as part of her subjective case. I have taken them into account in that way.

31. The second matter stems from the submission made on behalf of the Appellant regarding the absence of any explanation for the presence of rhEPO in the greyhound. I have summarised that submission above[45] but for present purposes it should be reproduced in full:[46]

[44] See for example TB 171 – 175.
[45] At [17].
[46] TB 8 and [4] – [6].

> *Where the matter of S Bilal is taken to mean that the Commission must provide evidence of some act or conduct by the participant in relation to the detection, it is most respectfully submitted that they present no evidence that the Appellant had any role to play.*
>
> *What [the Appellant] is unable to do is to present an alternative hypothesis or engage in speculation as to the source of the contamination as the possibilities are technically infinite.*
>
> *She does, however, accept that she had the responsibility in her capacity as charged.*

32. I make a number of observations as to that submission.

33. First, the reference to "*the matter of S Bilal"* is, to say the least, opaque. No other reference to that decision was cited, and no copy of it was provided. As far as I am aware, the only published decision of this Tribunal which might answer that description is that of *Sophie Bilal v Greyhound Welfare and Integrity Commission.*[47] That decision related to a determination of the Respondent regarding the Appellant's fitness and propriety. It did not concern a presentation offence. It says nothing whatsoever about any requirement or onus on the part of the Respondent to adduce evidence in relation to the detection of a prohibited substance. To the extent that it addresses the issue of onus at all, it does so in the specific context of fitness and propriety. Moreover, that issue has since been revisited in the decision of *Fitzpatrick v Harness Racing New South Wales*.[48]

34. Secondly, the fact that the Respondent has adduced *"no evidence that the Appellant had any role to play"* is explained by the fact that the Appellant is not charged with administering rhEPO. The Appellant is charged with what is colloquially known as a presentation offence. It is no part of the Respondent's case that the Appellant had any role to play in the administration of the substance. That is why the Respondent has not adduced any evidence in support of such a proposition.

[47] A decision of 22 February 2024.
[48] A decision of 15 June 2024.

35. Thirdly, and generally speaking, presentation cases of this kind fall into one of three categories, namely:

    1. where there is evidence of positive culpability on the part of the participant, for example, where there is evidence of the participant knowingly and intentionally administering the prohibited substance;
    2. where the participant provides no explanation for the presence of the prohibited substance, or where such explanation which is proffered is rejected, such that the Tribunal is left in a position of having no real idea as to how the substance came to be in the animal's system;
    3. where the participant provides an explanation for the presence of the prohibited substance which the Tribunal accepts, and which supports a conclusion that there is no culpability at all.

36. The present case falls squarely into Category 2.[49] Any onus to provide an explanation of the kind to which reference is made is on the Appellant, not the Respondent.

37. The third matter stems from a submission advanced on behalf of the Appellant in reply that she is *"vicariously liable because of her registration status"*. Vicarious liability arises when an individual is held liable for the unlawful actions of another. The Appellant's liability for the first offence is not vicarious at all. It is personal. It arises, not because of the actions of any other person, but because the *Appellant herself*, as the owner, trainer or other person in charge of the greyhound, presented the greyhound for competition when it was not free of a prohibited substance. Any suggestion that the Appellant's liability is vicarious, such that her level of culpability should be reduced, is untenable.

38. Those matters having been addressed, I turn to the question of penalty.

[49] See *McDonough* [2008] VRAT 6.

39. In considering the objective seriousness of the first offence, the opinion of Dr Karamatic, which is entirely unchallenged, is of considerable importance. Based upon that opinion, I am satisfied that:

    (i) rhEPO is a prescription only medication;
    (ii) prescription of rhEPO to a greyhound is a breach of the Rules;
    (iii) there are potentially negative animal welfare outcomes which stem from the use of rhEPO;
    (iv) such outcomes (albeit outcomes produced in other animals) include life-threatening anemia secondary to antibody development;
    (v) there is no reason to administer EPO to a racing greyhound, other than to improve its condition or performance.

40. Given the observation in (v) above, it is not without significance that the greyhound won the race in question.

41. I am mindful of the fact that the Appellant is not charged with administering rhEPO. At the same time, the opinion of Dr Karamatic, particularly that in (v) above, supports the conclusion that the presence of that substance in any greyhound presented for participation in a race strikes at the very heart of the integrity of, and the maintenance of public confidence in, the greyhound racing industry. An important component of integrity and public confidence is the maintenance of a level playing field. It follows that general deterrence is of paramount importance in the determination of any penalty for the first offence.

42. As to the second offence, the relevant rule imposes an obligation on a participant to produce records on request. Clearly, the Appellant did not do so. The proposition advanced on the Appellant's behalf, namely that the records were available for inspection, is unsupported by any evidence. If the records were available, that begs the obvious question: Why were they not produced? That question is not answered by reference to the Appellant's affidavit, which makes

no reference to the second offence at all, nor is it addressed by the remaining evidence. Put simply, if the records were available, then they could, and should, have been produced. The fact that they were not is the gravamen of the offending. Whilst perhaps not the most serious of breaches, the importance of the necessity to maintain proper treatment records, and to produce them on request so that the regulator can confirm (inter alia) that animal welfare obligations are being discharged, should not be underestimated.

43. The Appellant pleaded guilty to the offences and there is no dispute that she is entitled to a discount of 25% to reflect those pleas. Her general subjective circumstances have been set out and I have taken them into account. I accept, in particular, that the Appellant is a person of limited means, for whom any period of disqualification (in respect of the first offence) and any fine (in respect of the second offence) will have significant financial consequences.

44. The Appellant's disciplinary history contains a number of entries for comparatively minor breaches of the rules. At the same time, there are two previous matters of more significance. The first offence represents a significant escalation in the seriousness of the Appellant's offending. All of these factors lead to the conclusion that personal deterrence is a factor which is relevant to the determination of penalty.

45. I have had regard to the previous decisions to which I was referred. The decision of this Tribunal in *Finn*[50] is instructive for a number of reasons. To begin with, in terms of the nature of rhEPO, the Tribunal in *Finn* cited[51] expert evidence before it which included the following:

> *The administration of rhEPO significantly alters parameters that are closely associated with enhanced athletic performance in people, horses and greyhounds. It does this by increasing the oxygen-carrying capacity of blood. By extension rhEPO is likely to be capable of enhancing performance in greyhounds.*

[50] 20 February 2017.
[51] At [20] and following.

> *… There are no registered veterinary medicines that contain synthetic rhEPO for use in animals*.

46. These observations are entirely consistent with those of Dr Karamatic, and highlight the objective seriousness of the first offence.

47. The Appellant in *Finn* was charged with 4 presentation offences, each of which involved rhEPO. Her history of participation in the industry extended over 27 years,[52] far longer than the Appellant. Her disciplinary history was also better, containing as it did a single breach in respect of the detection of a prohibited substance 22 years previously.[53] The Appellant in *Finn* was also able to rely upon a significant history of volunteer work in the industry which, in the opinion of the Tribunal, she was entitled to have taken into account.[54] That is not a subjective factor on which the Appellant in this case is able to rely.

48. At first instance, a disqualification of 12 years was imposed on the Appellant in *Finn*. The Tribunal concluded that such a penalty, from the point of view of the Appellant, gave rise to a justifiable sense of grievance.[55] *"Driven by the objective seriousness"* of the offending,[56] the Tribunal concluded that a disqualification of 2 years and 6 months for each offence was appropriate.[57] The structure of the accumulation which was adopted[58] resulted in an effective period of disqualification of 3 years and 3 months.

49. As I have said on a number of occasions, the assessment of penalty is not a comparative (or for that matter, mathematical) exercise, for the simple reason that no two cases are the same. In terms of the determination in *Finn,* what can be said is that objectively, the matter was of greater seriousness because of the

[52] At [28].
[53] At [29].
[54] At [33].
[55] At [46].
[56] At [50].
[57] At [52].
[58] At [55].

multiplicity of offending. Conversely, the subjective circumstances which the Tribunal was able to take into account in favour of the Appellant in that case were far stronger than those of the present Appellant. Common to both cases is the fact that the offending involved the same substance which, for the reasons I have given, poses a threat to the integrity of the greyhound racing industry.

50. Taking all of those factors into account, I am of the view that in the present case, a disqualification of 2 years for the first offence reflects all relevant factors. It is also an outcome which is entirely consistent with that reached in *Finn*.

51. In terms of the second offence, I am mindful of the Appellant's parlous financial circumstances set out in her Affidavit which obviously affect her capacity to pay a fine. Recognising that the offence warrants some penalty being imposed, I consider a fine of $200.00 to be appropriate in light of the entirety of the evidence which is before me.

52. As the Appellant has had some partial success, the appeal deposit should be refunded.

ORDERS

53. I make the following orders;

1. The appeal in respect of the offence contrary to r 141(1)(a) of the *Greyhound Racing Rules* is dismissed.

2. The disqualification of 2 years imposed for the offence in order [1] is confirmed.

3. The appeal in respect of the offence contrary to r 151(2) of the *Greyhound Racing Rules* is upheld.

4. The fine of $400.00 imposed in respect of the offence in order [3] is set aside, and a fine of $200.00 is imposed in lieu thereof.

5. The appeal deposit is to be refunded.

THE HONOURABLE G J BELLEW SC
30 August 2024