

IN THE RACING APPEALS TRIBUNAL

MICHAEL PHILLIPS
Appellant

v

GREYHOUND WELFARE AND INTEGRITY COMMISSION
Respondent

DETERMINATION AS TO THE JURISDICTION OF THE RACING APPEALS TRIBUNAL
TO DETERMINE AN APPEAL

Date of determination: 10 December 2024

Determination: The Tribunal has no jurisdiction, given that the Notice of Appeal was filed out of time and the Appellant does not rely on special or exceptional circumstances in support of an extension.

INTRODUCTION

1. By a Notice of appeal dated 20 November 2024, which was filed with the Appeals Secretary on 21 November 2024, Michael Phillips (the Appellant) seeks to appeal against a determination of the Greyhound Welfare and Integrity Commission (the Respondent) imposing a fine of \$200.00 for a breach of r 156(f)(ii) of the *Greyhound Racing Rules* (the Rules). That fine was the subject of a *Notice of Disciplinary Action* dated 8 September 2023 (the September Notice).
2. It is the Appellant's case that he did not receive the September Notice at or about the date it bears. It is the Respondent's case that he was given the September Notice at that time. In light of these competing positions, and given that the Notice of Appeal was not filed until 21 November 2024, an issue of jurisdiction arises in light of the provisions of cl 10(1)(a) of the *Racing Appeals Tribunal Regulation 2024* (NSW) (the Regulation) which is in the following terms:

10 Lodgement of Notice of Appeal

- (1) *For the Act, s 18(1)(a), a person may appeal against a decision specified in the Act, section 15A by lodging a notice of appeal with the Secretary within-*
 - (a) *7 days after being notified of the appellable decision, or*
 - (b) *a longer period granted by the Tribunal on the application of the person.*
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- (5) *An application for an extension of time for lodging a notice of appeal made under subsection (1)(b) must be-*
 - (a) *in the approved form; and*
 - (b) *given to the Secretary.*
- (6) *The Tribunal may only grant an extension of time for lodging a notice of appeal under this section if satisfied it is appropriate to do so because special or exceptional circumstances exist.*

3. The Appellant's position is that the fact of the imposition of any fine first came to his notice on or about 13 November 2024 when he received correspondence from the Respondent enquiring why it was that the fine had not been paid. Accordingly,

the Appellant asserts that the Notice of Appeal was lodged within the time limit prescribed by cl 10(1)(a) of the Regulation. If I were to determine that this was not the case, the provisions of cl 10(6) might be engaged. However, the Appellant has made it clear that if I conclude that the Notice of Appeal has been lodged out of time, there is nothing in the way of special or exceptional circumstances to which he can point in support of an extension of time under cl 10(6) of the Regulation.¹ It follows that if I am against the Appellant in terms of the date on which he was notified of the penalty, this Tribunal would have no jurisdiction to hear and determine the appeal.

FACTUAL BACKGROUND

4. On 8 September 2023, the Appellant attended a race meeting at the Gardens Greyhound Club. He acted as the handler of *Dam Slithery* (the greyhound) which competed in race 4. The greyhound was trained by Joseph Mcfadyen.

5. Rule 105(5) of the Rules is in the following terms:

105 Starting procedures

(5) *After greyhounds engaged in an event are placed in the starter's hands, the starter must order that any nose straps, head checks, leads, collars, parade rugs or gear other than that which the greyhound is approved to compete in, be removed.*

6. There is apparently no issue that the starter made such an order before the greyhound competed in race 4. The greyhound competed without its collar having been removed.

7. At the conclusion of the race, Senior Steward Kevin Adams conducted an Inquiry into why it was that the greyhound had raced without its collar. At the conclusion of that Inquiry, Mr Adams determined that the Appellant be charged with an offence of negligent conduct contrary to r 156(f)(ii) of the Rules.

¹ Submissions at [8](b) and [16].

8. The Stewards Report forms part of the evidence before me and contains the following:

Dam Slithery

Started a short-priced favourite. Received significant interference in the back straight which impacted on its overall finishing position.

*Stewards spoke with trainer Joseph Mcfadyen and handler Michael Phillips as to the reason why the greyhound raced with its collar still attached. After considering all available evidence Stewards charged Michael Phillips for negligence under Rule 156(f)(11) (sic) **for which he pleaded guilty and was fined \$200** (emphasis added).*

9. The evidence before me includes a document headed *Notice of Disciplinary Action* dated 8 September 2023 (the September Notice). It records, amongst other things, the charge brought against the Appellant, and the fine imposed. It is signed by Mr Adams. For reasons which are not explained, the September Notice omits a considerable deal of relevant information, including:

- (i) the nature of the Appellant's registration;
- (ii) the name of the greyhound;
- (iii) the ID of the greyhound; and
- (iv) the time and date of the offence.

10. The submissions of the Respondent² make reference to the procedure adopted in issuing a Notices of this kind. That procedure is relied upon, in part, to establish that the Appellant was notified of the fine on 8 September 2023 by being handed a copy of the Notice. Even allowing for the fact that cl 17 of the Regulation provides that the Tribunal is not bound by the rules of evidence, I have not taken these submissions of the Respondent into account. In fairness to the Appellant, there is a distinction to be drawn between a submission on the one hand, and the evidence to support it on the other. Where particular matters are relied upon to establish a fact, it is preferable that there be some evidence to support them.

² At [11] and following.

11. In his Notice of Appeal, the Appellant has stated the following:

*On the night of greyhound meeting of 8/9/2023 I was severly (sic) ill, before and after the race and it wasn't until I arrived home in the early hours of 9/9/2023 that is (sic) was self diagnosed that I was possibly suffering from possible food poisoning. Medical certificate and blood pathology referral attached. It was later advised that I in fact had suffered severe food poisoning from eating the only meal that I had on that day at The Gardens racetrack Bistro. **There is no doubt that my ability to focus clearly was impacted due to a medical episode** (my emphasis). He asserts that in these circumstances, the appeal has been lodged within*

12. The Appellant provided medical evidence to corroborate his statement.

13. The Appellant also relies on a Statutory Declaration of Mr Mcfadyen which is partly in the following terms:

At the conclusion of the event and after completing post race procedures with [the Appellant], sometime after we were both spoken to by GWIC Senior Steward Mr Kevin Adams in the stewards room.

Michael and I entered the stewards room together and we remained together until the inquiry finished. We both left the stewards room together.

I do not recall Michael receiving any documentation from Mr Adams.

THE ISSUE

14. The issue for my determination is when it was that the Appellant was notified of the imposition of the fine. In short, the Appellant asserts that he was:

- (i) not given the September Notice on or about the date it bears;³
- (ii) unaware of the imposition of the fine until he received correspondence from the Respondent on 13 November 2024 seeking payment of it;⁴
- (iii) was thus “*notified*”, within the meaning of cl 10(1)(a) of the Regulation, on 13 November 2024.

³ Submissions at [5].

⁴ Submissions at [6].

15. If that were accepted, it would follow that the Notice of Appeal was lodged with the Appeals Secretary within time, and the appeal could proceed.

16. The Respondent's position is that I should conclude on the whole of the evidence that the Appellant was given the September Notice, and was thus notified within the meaning of cl 10(1)(a) of the Regulation, on 8 September 2023. If that conclusion is reached, the appeal is out of time. As I have noted, the Appellant accepts⁵ that in that event, he cannot point to any special or exceptional circumstances which might justify an extension of time.

SUBMISSIONS OF THE PARTIES

Submissions of the Appellant

17. The Appellant submitted that the Respondent had not adduced any evidence in support of a conclusion that he had been given a copy of the September Notice,⁶ and relied on the evidence of Mr Mcfadyen to support his position in this respect.

18. He also submitted that Stewards were not "*impervious to making mistakes*"⁷. In this regard, he submitted that I should conclude that it would have been unlikely for Mr Adams to issue a Notice in what is a clearly incomplete form.⁸

Submissions of the Respondent

19. In the absence of any direct evidence being adduced, the Respondent effectively submitted that I should draw an inference that the Appellant was handed the Notice on 8 September 2023, and was thus notified of the imposition of the fine on that day. The facts on which the Respondent relies to sustain that inference are considered below.

⁵ Submissions at [8](b).

⁶ Submissions at [11].

⁷ Submissions at [17].

⁸ Submissions at [20]; [22]-[23].

CONSIDERATION

20. Clause 10(1)(a) of the Regulation speaks of an Appellant being “*notified*” of the appealable decision. Notification can, of course, be effected in different ways. Being issued with a document in the form of the September Notice is one way of being notified of a penalty, although it is obviously not the only way. That said, this case has proceeded on the basis that any notification to the Appellant of the fine was constituted by his being given the September Notice. It is not suggested that he was informed in any other way.
21. In determining whether I can be satisfied that the Appellant was so notified, there is certainly no *direct* evidence that the Appellant was given the September Notice by Mr Adams. The absence of any statement from Mr Adams in that regard is somewhat surprising. The September Notice is also clearly incomplete. Whilst that might be somewhat inconsistent with best practice, it has limited probative value in terms of the issue I am required to determine.
22. All of that said, the absence of direct evidence, be it in the form of a statement from Mr Adams or otherwise, that the Appellant was given the September Notice does not mean that there is no evidence from which an inference can be drawn that this is the case. In my view, there are a number of established facts which support such an inference.
23. First, it is evident from the Stewards Report that there was an Inquiry into the fact that the greyhound’s collar had not been removed. Whilst it is not entirely clear what form that Inquiry took, it appears to have had some degree of formality. Mr Mcfadyen refers to accompanying the Appellant to the Stewards Room.
24. Secondly, the Appellant participated in that Inquiry by virtue of his attendance. The conclusion to be drawn from the Stewards Report is that the failure to remove the greyhound’s collar was, as one would expect, discussed during the Inquiry.

25. Thirdly, at the conclusion of the Inquiry, the Appellant was charged by Stewards with an offence contrary to r 156(f)(ii) of the Rules.
26. Fourthly, the Appellant entered a plea of guilty to the charge.
27. Fifthly, the nature of the Inquiry was such that it would be expected to have been completed on the day.
28. Sixthly, it is clear that the September Notice was issued by Mr Adams, in the sense that it was completed (at least partially) by him.
29. Seventhly, the September Notice bears a date of 8 September 2023.
30. Eighthly, it is apparent from the Stewards Report that the Inquiry was concluded on 8 September 2023.
31. Ninthly, the Stewards Report makes reference to the Appellant being fined.
32. In my view it would be surprising, to say the least, if in all of these circumstances, the September Notice was not given to the Appellant at the conclusion of the Inquiry.
33. Two further matters should be noted.
34. The first, is that whilst the Appellant asserts that he was not given the Notice, he has expressly conceded that his ability to focus was impaired at the time by virtue of the illness he was suffering. This must have some effect on his recollection of the events on the day.
35. The second, is that whilst I have taken into account the Statutory Declaration of Mr Mcfadyen, it is relevant to note that it was made on 30 November 2024, more than 14 months after the event. Moreover, at its highest, Mr Mcfadyen does not

recall the Appellant receiving any documentation from Mr Adams. That is, importantly, different from a positive assertion that the Appellant did *not* receive such documentation.

36. For all of these reasons I am satisfied on the balance of probabilities that the Appellant was notified of the penalty on 8 September 2023 by being given a copy of the September Notice. That being the case, the Notice of Appeal was lodged outside the 7 day period stipulated in cl 10 of the Regulation and, as I have noted, the Appellant concedes that he is unable to point to any special or exceptional circumstance(s) in support of an application for an extension of time.

37. It follows that the Tribunal has no jurisdiction to hear and determine the appeal.

SPECIAL OR EXCEPTIONAL CIRCUMSTANCES

38. In the circumstances I have outlined, I am not required to consider the issue of special or exceptional circumstances by reference to cl 10(6) of the Regulation. However, it is appropriate that I draw attention to the observations I made in respect of that issue in *Callaghan v Harness Racing New South Wales*.⁹ Whilst such observations are not necessarily exhaustive, they should be regarded as encapsulating the general principles which will be applied by the Tribunal in determining whether special or exceptional circumstances are made out in cases where that issue arises:

[44] I was provided by both parties with references to previous determinations of this Tribunal (differently constituted) in which consideration had been given to the meaning of the term “special or exceptional circumstances.” Generally speaking, I agree with the approach previously taken by the Tribunal. However, it is convenient to gather, in the one determination, the principles which can be extracted from the various authorities in which the meaning of the term has received judicial consideration. That approach will hopefully be of assistance in the event that the same issue arises in the future.

⁹ A decision of 30 July 2024 commencing at [44].

[45] The term “special or exceptional circumstances” is one which is used from time to time in statutes and regulatory provisions to place limits upon the exercise of a power.¹⁰ The Macquarie Dictionary defines the term “special” as:

...relating or peculiar to a particular person, thing, instance; having a particular function, purpose, of a distinct or particular character; being a particular one; extraordinary or exceptional.

[46] It defines the term “exceptional” as:

... forming an exception or unusual instance; unusual; extraordinary; exceptionally good, as of a performance or product; exceptionally skilled, talented or clever.

[47] With these matters in mind, the following general principles may be distilled from the authorities:

1. the use of the word “or” in the term “special or exceptional circumstances” may be indicative of a deliberate differentiation between “special” on the one hand, and “exceptional” on the other;¹¹
2. that said, and in light of the above definitions, the distinction between “special” and “exceptional” may be more illusory than substantial;¹²
3. the words “special” and “exceptional” are ordinary English words describing a circumstance which forms an exception which is out of the ordinary course, unusual, special or uncommon;¹³
4. whilst the words “special” or “exceptional” do not mean “unprecedented or very rare”, in order to be special or exceptional, the circumstances relied upon must fall outside what is usual or ordinary;¹⁴
5. special or exceptional circumstances may be established by the coincidence or combination of a number of factors;¹⁵

¹⁰ *R v Young* [2006] NSWSC 1499 at [19].

¹¹ *R Brown* [2013] NSWCCA 178 at [22] per the Court (Rothman, Fullerton and Beech-Jones JJ).

¹² *R v Wright* (Supreme Court of NSW, Rothman J), 7 June 2005 unreported) cited in *Brown* at [23].

¹³ *Harvey v Attorney-General Queensland* (2011) 229 A Crim R 186 at [24]; *R v Kelly* (2000) 1 QB 198 at 208; *R v Celeski* [2016] ACTSC 140 at [41].

¹⁴ *R v Watson* [2017] ACTSC 311 at [42]; *Harvey* at [42]; *Groth v Secretary, Department of Social Security* (1995) 40 ALD 541 at 545; *Celeski* at [42].

¹⁵ *Young* (supra) at [20]; *Brown* at [27]; *Grant v R* [2024] NSWCCA 30 at [30]; see also *Watson* at [16] and the authorities cited therein.

6. *the approach to determinising whether special or exceptional circumstances are made out must be a flexible one, and a conclusion reached by reference to the individual circumstances of the case;*¹⁶
7. *delay is a relevant factor in determining whether circumstances are special or exceptional;*¹⁷
8. *special or exceptional circumstances may include events which would render compliance with the relevant period (in this case, 7 days) unfair or inappropriate,*¹⁸ *and may also include events which are outside reasonable anticipation or expectation;*¹⁹
9. *although it will enable a decision maker to understand why a time limitation was not complied with, merely explaining a delay, or a failure to comply with a limitation period, will not, at least of itself, constitute a special circumstance justifying an extension of time.*²⁰

CONCLUSION

39. In circumstances where the Notice of Appeal has been lodged out of time, the Tribunal has no jurisdiction to proceed with the appeal or to make any other order. That includes any order in relation to the appeal deposit, which will be a matter for the parties to resolve by agreement

THE HONOURABLE G J BELLEW SC

10 December 2024

¹⁶ *R v Medich* [2010] NSWSC 1488; *R v Pirini* Supreme Court of New South Wales (McClellan CJ at CL), 8 September 2009 unreported; *R v Chehab* (Court of Criminal Appeal New South Wales (Latham, Fullerton, Adamson JJ) unreported; *Grant* at [30] citing *R v Khayat (No. 11)* [2019] NSWSC 1320 at [14].

¹⁷ *Beadle v D-G of Social Security* (1985) 60 ALR 225; [1985] FCA 234 at 674.

¹⁸ *Beadle* at 674.

¹⁹ *R v Steggall* [2005] VSCA 278 at [27], cited with approval in *Burlock v Wellington Street Investments Pty Limited* [2009] VSC 565.

²⁰ *Connelly v MMI Workers Compensation (Vic) Limited and ors.* [2002] VSC 247.