IN THE RACING APPEALS TRIBUNAL

RAYMOND LEE
Appellant

v

GREYHOUND WELFARE AND INTEGRITY COMMISSION
Respondent

REASONS FOR DETERMINATION

Date of hearing: 13 November 2024

Date of determination: 23 December 2024

APPEARANCES

Mr J Bryant for the Appellant

Ms K Mohan for the Respondent

ORDERS

1. **The order made on 28 May 2024 pursuant to cl 14(1)(a) of the *Racing Tribunal Regulation 2015* (NSW) is vacated.**
2. **The charge against the Appellant contrary to r 141(1)(a) of the *Greyhound Racing Rules* is established and the Appellant is found guilty of that charge.**
3. **The appeal against penalty is allowed.**
4. **The penalty imposed at first instance in quashed.**
5. **In lieu thereof, a suspension of 6 months is imposed, to date from 1 January 2025.**
6. **The suspension in order [5] is wholly suspended conditional upon the Appellant not committing any further offences during that period.**
7. **Pursuant to cl 19(2)(b) of the *Racing Appeals Tribunal Regulation 2015* (NSW) the Respondent is to pay the Appellant's costs in the sum of $2,895.00.**
8. **The appeal deposit is to be refunded.**

INTRODUCTION

1. By a Notice of Appeal filed on 22 May 2024, Raymond Lee (the Appellant) has appealed against a determination of the Greyhound Welfare and Integrity Commission (the Respondent) to impose a suspension of 9 months for a breach of r 141(1)(a) of the *Greyhound Racing Rules* (the Rules). It is noted that with the consent of the Respondent, I previously made an order granting a stay of that suspension pending the outcome of this appeal.[1]

2. The hearing of the appeal first came before me on 14 August 2024. Shortly put, the Appellant had pleaded guilty to a charge contrary to r 141(1)(a) of the Rules which is in the following terms:

> ***141***
> *(1) The owner, trainer of other person in charge of a greyhound:*
> *(a) nominated to compete in an event*
> *...*
> *must present the greyhound free of any prohibited substance.*
> *...*
> *(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.*

3. The particulars of the charge to which the Appellant pleaded guilty were as follows:[2]

> 1. *That [the Appellant], as a registered Public Trainer and Breeder, while in charge of the greyhound Kinloch Babe ("**Greyhound**"), presented the Greyhound for the purpose of competing in race 9 at the Gardens meeting on 26 January 2024 ("**Event**") in circumstances where the Greyhound was not free of any prohibited substance.*
>
> 2. *The prohibited substances [sic] detected in the sample of urine taken from the Greyhound following the Event was Meloxicam; and*
>
> 3. *Meloxicam is a prohibited substances under Rule 137 of the Rules.*

[1] See orders of 23 May 2024.
[2] TB 52

4. At the commencement of the hearing of the appeal on 14 August 2024, Ms Summerson, who then appeared for the Respondent, conceded that the reference to *Meloxicam* in each of paragraphs [2] and [3] of the particulars was an error, and was replicated in a number of associated documents.[3] She foreshadowed an application to amend the charge, so as to aver that the substance which was detected in the greyhound was, in fact, *Metformin*. The foreshadowed application to amend was opposed by the Appellant.

5. In a determination made on 6 September 2024, I granted the Respondent leave pursuant to cl 18(1) of the *Racing Appeals Tribunal Regulation 2015* (NSW), to amend the particulars to allege that the prohibited substance was *Metformin* as opposed to *Meloxicam*. The question of costs was reserved. An application for costs has now been made by the Appellant and is addressed in this determination.

THE APPEAL

6. When the hearing of the appeal resumed before me on 13 November 2024, Mr Bryant, who appeared for the Appellant, indicated that he wished to raise an issue concerning the chain of custody of the relevant sample. In those circumstances, I proceeded on the basis that the Appellant was entering a plea of not guilty.[4] In doing so, I noted that such plea was entered by reference to the limited issue of continuity of the sample, and that the Appellant did not contest any of the other matters relied upon by the Respondent to support the charge.[5] In these circumstances, I indicated that it was my preliminary view that if the Appellant was ultimately unsuccessful in his challenge to the chain of custody and was found guilty, he should nevertheless be given the benefit of the full discount of 25% which he would otherwise have been given had he entered a plea of guilty.[6] The Respondent made no submission against that approach, which I have adopted.

[3] Submissions at [2] and [3].
[4] Transcript at 2.43.
[5] Transcript at 2.45 – 2.46.
[6] Transcript at 3.1 – 3.2.

7. The parties provided me with an updated Tribunal Book (TB) containing all relevant documentary material.

THE FACTS

General background

8. The Appellant has been a registered participant in the greyhound racing industry since April 1960, more than 64 years ago.[7]

9. He attended a race meeting at The Gardens on 26 January 2024 for the purposes of racing two greyhounds, one of which was *Kinloch Babe* (the greyhound). The greyhound participated in race 9.[8]

The taking of the sample and the chain of custody up to analysis

10. A urine sample was taken from the greyhound at 10.46 pm on 26 January 2024.[9] It was ascribed sample number V815007[10] which was then separated into two urine samples and one control sample[11] and given seal numbers 938147, 939818 and 939851.[12]

11. An Operations Sheet and Chain of Custody Document (the Custody document), which was completed (at least partially) by the Respondent's Senior Steward Mr Adams, states that the sample was posted to the Respondent from the Chittaway Bay Post Office. Despite the fact that Section 2 of that document makes provision for the inclusion of additional information, such as the date on which the sample was sent and the tracking number of the package, those details were not completed by Mr Adams. However, the Custody document does state that the samples were received by the Respondent on 30 January 2024.

[7] TB 49
[8] TB 33.
[9] TB 24.
[10] TB 28.
[11] TB 32.
[12] TB 31.

12. A statement was obtained from Mr Adams regarding his completion of the Custody document in which he said:[13]

> *Upon reviewing that document, I now realise that I failed to include the postal tracking details. I also failed to list the date that I sent the samples from the Gardens to Bathurst Head Office.*

13. Mr Adams offered no explanation for his failure to properly complete the Custody document. Annexure A to his statement[14] establishes that the sample was sent to the Respondent from Chittaway Bay Post Office on 29 January 2024 at 12.21 pm.

14. I pause at this point to make two observations.

15. The first, is that there is no evidence at all as to how the sample was stored between the time it was taken from the greyhound at 10.26 pm on 26 January 2024, and the time it was sent to the Respondent at 12.21 pm on 29 January 2024, almost three days later. Given that Mr Adams apparently took the sample to the Chittaway Bay Post Office to be sent to the Respondent, he would presumably have been in a position to give evidence of the conditions under which it was stored. Why he did not do so, in circumstances where a primary issue in the appeal is the chain of custody, is not explained.

16. The second, is that this is the second occasion in recent weeks that where I have addressed evidence of a failure to properly complete a pro-forma document.[15] In both cases the document in question was an integral part of the disciplinary process. I again make the observation that failures of that kind are entirely inconsistent with best practice.

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[13] TB 199 at [6].
[14] TB 201.
[15] See *Phillips v Greyhound Welfare and Integrity Commission,* 10 December 2024 at [21].

The analysis of the sample

17. On 6 March 2024, David Batty, the Director of Racing Analytical Services Limited, issued a Certificate of Analysis of sample V815007 stating that the sample arrived in good condition on 31 January 2024, with seals intact, and certifying that upon analysis, it was shown to contain Metformin.[16]

18. The reserve sample was sent for analysis on 6 March 2024.[17] On 22 April 2024, Mr Batty wrote to the Respondent, certifying that it too had been analysed and found to contain Metformin.[18]

SUBMISSIONS OF THE PARTIES – THE CHAIN OF CUSTODY ISSUE

Submissions of the Appellant

19. It was submitted on behalf of the Appellant[19] that Mr Adams' failure to properly complete the Custody document fatally compromised the chain of custody, to the point where I could not be satisfied that an essential element of the charge, namely the presence of the prohibited substance in the greyhound's system, had been established.

Submissions of the Respondent

20. It was submitted on behalf of the Respondent that when the evidence was viewed in its entirety, I could be satisfied that the relevant chain of custody had been established.[20] Whilst it was accepted by the Respondent that the completion of the Custody document was deficient,[21] it was submitted that this amounted to nothing more than an *"administrative error"* which had no material bearing on the issue I am required to determine, and was certainly not fatal to the Respondent's case.

[16] TB 35.
[17] TB 46.
[18] TB 38 – 39; TB 47.
[19] Submissions at TB 121[4].
[20] Submissions at TB 193 [8].
[21] Submissions at TB 194 [9]

21. The Respondent relied on the provisions of r 154(5) and (6) of the Rules which governs the status of a Certificate of Analysis. It was submitted that the Certificates in this case were conclusive, and that there was no evidence upon which to find, in terms of r 154(8), that there was a material flaw in the relevant process.

22. Finally, both parties referred me to a previous determination of the Tribunal (differently constituted) in *Chloe Bilal v Greyhound Welfare and Integrity Commission*.[22] I have made reference to that determination below.

CONSIDERATION

23. It is appropriate to commence by reference to r 154 of the Rules which, at the time of the commission of the alleged offence, was partly in the following terms:

> ***154 Testing procedures, and the evidentiary value of certificates of analysis***
>
> **...**
>
> *(5) A certificate of analysis signed by a person at an approved laboratory who is authorised to and purports to have analysed a sample ("A" portion) is, with or without proof of that person's signature, prima facie evidence of the matters contained in it in relation to the presence of a prohibited substance for the purpose of any proceeding pursuant to the Rules.*
>
> *(6) A second certificate of analysis signed by a person at an approved laboratory who is authorised to and purports to have analysed another portion of a sample (the reserve ("B") portion) which confirms that the prohibited substance detected in the reserve ("B") portion and identified in the second certificate of analysis is the same as the prohibited substance detected in the "A" portion and identified in the first certificate of analysis constitutes, with or without proof of that person's signature and subject to subrule (8) below, together with the first certificate of analysis, conclusive evidence of the presence of a prohibited substance.*
>
> ...
>
> *(8) Notwithstanding the provisions of this rule, certificates of analysis do not possess evidentiary value and do not establish an offence if it is proved that the certification, testing or analysis process which preceded the production of a certificate of analysis, was materially flawed.*

[22] A determination of 14 March 2023.

24. In *Bilal,* the Tribunal noted that a *"mischief identified by the Appellant is that in the six days between 23 April and 28 April 2022 there is no evidence of the storing and transporting of the sample in a sealed bag".*[23] That "mischief" was not dissimilar to that which arises on the evidence in the present case, namely that there is a complete absence of evidence as to how, where, and under what conditions, the sample was stored between when it was taken from the greyhound on 26 January 2024, and when it was sent to the Respondent on 29 January 2024, almost 3 days later. Having read the Tribunal's determination in *Bilal,* it is not clear how (if at all) the mischief which was identified was resolved. I am left to assume, given the Tribunal's determination,[24] that it did not conclude that it caused any failure in the chain of custody. Even if that is correct, cases are fact specific. I am not bound, by virtue of the decision in *Bilal*, to reach the same conclusion in the present case.

25. Perhaps of greater assistance is the determination In *Goddard v Greyhound Welfare and Integrity Commission*,[25] in which I addressed a chain of custody issue, In that case, there was considerable scientific evidence going to the issue of custody and analysis, against a background of which I said the following:[26]

> *[63] The parties agree that the onus of establishing the one fact in issue lies on the Respondent, and that the standard of proof is on the balance of probabilities. Put simply, that means, in the context of this case, that I must be satisfied that it is more probable than not that at the time that the Appellant presented the greyhound to compete in the event, the greyhound was not free of any prohibited substance (in this case, Boldione). In respect of the onus and standard of proof, three matters need to be noted.*
>
> *[64] The first, is that in my view, this is a case to which the standard discussed in Briginshaw v Briginshaw[27] should apply. That decision is authority for the general proposition that where a case involves the making of a serious allegation, and where the resolution of that allegation may result in significant consequences for the person against whom it is made, the decision-maker must be reasonably satisfied that the allegation is made out. In determining whether such a state of reasonable satisfaction has been reached, the decision-maker must scrutinise the evidence closely, and must bear in mind that the case brought cannot be*

[23] At [29].
[24] At [125].
[25] A determination of 17 June 2024.
[26] At [63] – [67].
[27] (1938) 60 CLR 336; [1938] HCA 34.

established by inexact proof, or the drawing of indirect inferences.[28] *There could not possibly be any dispute that the allegation in this case is a serious one, nor could there be any dispute that the consequences to the Appellant are not significant. Indeed, the latter is self-evident from the length of the disqualification which was imposed.*

[65] The second, is that I am not bound to make a finding, one way or the other, in respect of the fact in issue. In other words, I am not bound to make a finding that the fact established, nor am I bound to make a finding that it is not. It is open to me to conclude that Respondent has failed to discharge the burden of proof that it bears, without making a finding about the fact in issue one way or another. An inability to find a fact which is alleged does not establish the truth of the contrary.[29] *In the context of this case, if I am unable to be satisfied that the Appellant presented the greyhound when it was not free of a prohibited substance, that does equate to a finding that he did not do so. What it means, is that the Respondent has failed to discharge its onus of proof.*

[66] The third, is that rr 158(6) and (7) operate to provide that the certificate of the RASL constitutes prima facie evidence of the presence of Boldione in the A sample, and the certificate of NZRLS constitutes conclusive evidence of the presence of that substance in the B sample. Accepting that to be the case, as I must, the issue in the present case is whether I can nevertheless be satisfied that it is more probable than not that the greyhound was presented with Boldione in its system bearing in mind the scientific evidence which is before me. If I am not so satisfied, then the matter ends at that point. If I am so satisfied, the Appellant seeks to invoke the provisions of r 156(8) which is in the following terms:

> *Notwithstanding the provisions of this rule, certificates of analysis do not possess evidentiary value and do not establish an offence if it is proved that the certification, testing or analysis process which preceded the production of a certificate of analysis, was materially flawed.*

[67] The fact that the Certificates constitute conclusive evidence of the presence of Boldione in the sample taken from the greyhound does not mean that it is not open to the Appellant to argue that the test results may, for the reasons advanced, constitute what has been described as a "false positive". However, I reiterate that I will be required to consider r 156(8) ***only*** *if I am satisfied that the Respondent has discharged its onus, and the fact in issue I have identified is established on the evidence.*

26. I concluded[30] that the Respondent had not discharged its onus. It is not necessary for me to set out the basis on which I did so. It is sufficient to emphasise that although there was an issue in that case about the storage of samples, there was

[28] See *Briginshaw* at 360-362 per Dixon J.
[29] See generally *Kuligowski v Metrobus* (2004) 220 CLR 363; [2004] HCA 34 at [60].
[30] At [71] and following.

also considerable scientific evidence, on both sides of the record, addressing it, to which I referred in my determination. To the extent that some view might be taken that the expert opinions which were given in that case, the material parts of which are recorded in the determination, would be capable of supporting the present Appellant's case, it need only be said that there are no expert opinions included in the evidence presently before me. It would therefore be entirely inappropriate, for the purposes of determining the present appeal, to take into account expert opinions given in another case. In the absence of any such evidence, the Respondent is entitled to the benefit of rr 154(5) and (6) as to the conclusiveness of the Certificates of Analysis.

27. In terms of r 154(8), I would incline to the view (without having had the benefit of hearing detailed submissions in the present case) that the reference to the *"certification, testing and analysis process"* should be construed as including the circumstances in which samples are stored prior to being sent for analysis. However, even if that approach were taken, I am unable to conclude in the present case that the process was materially flawed in terms of r 154(8).

28. As I have said, the evidence in the present case is completely silent on how, where, and in what circumstances, the sample was stored prior to being sent to the Respondent. Given that a similar issue was apparently raised in *Bilal* (which was decided almost 2 years ago), a "*mischief*" of that nature (as it was described) is seemingly not uncommon. Whilst the absence of any evidence as to the storage of the sample does not establish the existence of a material flaw in the process, it is surprising, to say the least, that no evidence was adduced in respect of it. This is particularly the case in circumstances where it can be reasonably inferred that Mr Adams would have been in a position to give that evidence.

29. The onus of establishing a material flaw for the purposes of r 154(8) rests on the Appellant. That onus has not been discharged. If, for example, there was evidence that the samples were stored in the absence of refrigeration for almost 3 days, and if there was scientific evidence that such storage conditions promoted

the deterioration or degradation of the sample, that would be one thing. But there is no such evidence before me. To reach a conclusion in those circumstances that the conditions surrounding the storage of the sample, or the failure of Mr Adams to properly complete documentation, give rise to a material flaw of the kind to which r 154(8) is directed, would involve impermissible speculation in which I am not prepared to engage.

30. That said, I am compelled to state that I have found those aspects of the evidence to which I have referred somewhat troubling. The matters raised by Mr Bryant in submissions[31] are not without merit and I have considered them carefully. Needless to say, it is a matter for the Respondent how it implements its processes, and how it conducts its practices. However, for my part, I am unable to dismiss what occurred in this case as amounting to nothing more than "*administrative errors*". They may not be fatal to the Respondent's case in this instance. That is not to say that the opposite conclusion might not be reached in other circumstances.

31. For all of these reasons, I am satisfied that the offence is made out.

SUBMISSIONS OF THE PARTIES – PENALTY

Submissions of the Appellant

32. The basis of the Appellant's position on penalty is constituted, at least in part, by the proposition that generally speaking, presentation cases of this kind fall into one of three categories, namely:[32]

    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;

[31] Particularly at Transcript 3.27 – 4.20.
[32] See generally *McDonough* [2008] VRAT 6.

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.

33. It was the Appellant's submission that in circumstances where the Respondent did not allege that the present case fell into Category 1, I would be satisfied on the evidence that it fell into Category 3. In this regard, it was submitted that:

(i) the Appellant suffers from Type 2 Diabetes and Stage 2 chronic Kidney disease for which he is prescribed medication, the active ingredient of which is Metformin;[33]

(ii) I should conclude that the substance was present in the greyhound as a consequence of some incidental (but unspecified) contact, which could be *"as simple as licking the hand of the Appellant"*.[34]

34. It was further submitted,[35] in terms of the Appellant's subjective case, that he:

(i) is 86 years of age;

(ii) has been a licenced participant in the greyhound racing industry since 1960

(iii) relies on his involvement in the industry to provide him with an interest, and to keep him busy and socially active; and

(iv) has limited years of participation in the industry remaining due to his age and health.

[33] TB 122 at [7].
[34] Transcript 5.21.
[35] TB 123 at [16] – [20].

35. It was acknowledged on the Appellant's behalf that he had a number of prior entries in his disciplinary history, but it was submitted on his behalf that any matters dealt with under the previous administrative regime controlling the greyhound racing industry should not be taken into account. The primary basis of that submission was that the integrity of that previous regime, or at least some of the people within it, was questionable.[36]

Submissions of the Respondent

36. It was submitted on behalf of the Respondent that the possibility raised by the Appellant as to the circumstances in which the substance had come to be present in the greyhound were not sufficient to place it in the third category specified above.[37] The Respondent also pointed out that there was no evidence as to what, if any, remedial steps had been taken by the Appellant in this regard.[38]

37. As far as the Appellant's subjective case is concerned, it was submitted that when addressing previous disciplinary issues, the Appellant had consistently sought to rely upon his age, such that the weight to be afforded to that factor was reduced in the present case.[39]

38. The Respondent also took issue with the submission made by the Appellant as to the subjective importance of his participation in the industry. The Respondent's position in this regard was based upon a telephone message left by the Appellant with an officer of the Respondent, a Mr Phillips, on 13 May 2024, a transcript of which reads as follows:[40]

> *Uh, um, Pete, Pete, it's, it's, uh Ray Lee mate. Umm, listen, I, I, told that bloke to give me times, but I haven't got the time to, uh, if you get a chance today would you just hear that case and, finish it all up. I'm finished. Just finish it all up so I can get, get rid of these dogs, ok? Thanks mate.*

[36] Transcript 9.13 – 10.11.
[37] Transcript 15.15 – 15.31.
[38] Transcript 15.33 – 16.15.
[39] Transcript 19.5.
[40] TB 51.

39. All of that said, it was expressly conceded by the Respondent that it would be open to me to impose a penalty less than that which was imposed at first instance.[41]

CONSIDERATION

40. I have, in a number of previous determinations, emphasised the distinction between a *submission* on the one hand, and *evidence* on the other. In doing so, I have endeavoured to make the point that the latter is necessary to support the former. In the present case, the submissions advanced on behalf of the Appellant in relation to his state of health were (apart from a somewhat non-descript medical record) largely bereft of any evidence to support them. Whilst this was said to be due to the Appellant's limited circumstances, the fact remains that at the very least, the matters relating to the Appellant's health could and should have been addressed in an evidentiary statement.

41. Given that the Respondent took no issue with any of these factors, I have effectively treated the submissions as evidence. However, I should make it clear that such an approach is not to be regarded as being reflective of that which I will take in these matters generally. I accept that under cl 17 of the *Racing Appeals Tribunal Regulation 2014* (NSW), I am not bound by rules of evidence, and may inform myself in any way I consider fit, subject to rules of natural justice. Even when full weight is given to those provisions, some limit must be placed on the degree of latitude than can properly be extended to a party, particularly where that party is legally represented. Put simply, and as a general proposition in terms of matters coming before the Tribunal, if submissions are not supported by evidence, then the party seeking to rely on such submissions runs the risk of them being rejected.

42. Whilst I am not able to reach a conclusion in the present case as to the specific circumstances in which the substance came to be present in the greyhound, the

[41] Transcript 16.30 – 16.31.

fact that the prohibited substance is an active ingredient of medication prescribed to the Appellant for a diagnosed condition is obviously significant. It is a fact which tends very much in favour of a conclusion that it is more probable than not that the presence of the prohibited substance in the greyhound came about as a consequence of some form of innocent transfer. That places the offending into the third category identified above, and thus at the lowest level of objective seriousness, and the lowest level of culpability.

43. As to the suggested inconsistency between the submissions made on the Appellant's behalf as to his ongoing wish to participate in the industry, and the message he left for Mr Phillips, it may well be the case that what the Appellant said to Mr Phillips was said out of frustration. A 64 year career as a participant would tend to indicate that involvement in the industry is a matter to which the Appellant attaches some importance. I therefore place no weight on any suggested inconsistency.

44. The Appellant's disciplinary record does not assist him. He has two prior offences of a not dissimilar nature in the past 18 months. The suspension imposed in the most recent of those offences expired on 4 June 2024. There was also a previous matter before the Tribunal in December 2012.[42] Although none of those matters appear to involve the same substance as that which relates to the present charge, I am unable to accept the submission that those matters should not be taken into account. They are relevant, because they form part of the Appellant's disciplinary history. The fact (if it be the fact) that a former Chief Steward acted corruptly[43] does not, of itself, alter the fact of Appellant's disciplinary history. Whilst it is important that such history be assessed against a background of what can only be described as a lengthy period of participation in the greyhound racing industry, considerations of personal and general deterrence remain relevant to an assessment of penalty.

[42] Commencing at TB 63.
[43] Submissions at [17].

45. I have been provided with a number of previous determinations in matters of this nature. Without engaging in an analysis of each of them, a number involved a different substance (*Meloxicam*).[44] Moreover, whilst the penalties imposed in those cases were substantially less than that imposed on the Appellant, some of the participants had blemish-free disciplinary histories.[45]

46. For the reasons I have previously stated, it is appropriate that the Appellant have the benefit of a discount of 25%. Whilst I accept that his participation in the industry provides him with an interest, and a vehicle for social interaction, those factors are of limited weight.

47. In my view, whilst the circumstances of the present case call for the imposition of a suspension, any such period should itself be wholly suspended. That outcome is not inconsistent with the decisions to which I have been referred. Moreover, suspension of any penalty is particularly appropriate in this case, given the Appellant's recent history. If he were to offend again, particularly during the period of suspension, he could expect limited leniency to be shown to him. He could also expect that in the event of a finding of guilt for any similar offence, any unexpired portion of a suspended penalty would likely be activated.

48. In all of the circumstances, I consider a suspension of 6 months, fully suspended, to be the appropriate outcome. In reaching that conclusion, I have placed considerable weight on the category into which the offending falls, as well as the Respondent's express concession that a penalty less than that which was imposed at first instance is open.

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[44] See for example *Lord* (27 December 2023) at TB 73 and following; *Harper* (11 July 2019) at TB 76 and following; *Swain* (9 September 2020) at TB 78 and following; *Knowles* (27 December 2022) at TB 80 and following.

[45] See for example *Lord* who had a disciplinary history of 60 years without any similar offending and who was fined $500.00 and conditionally suspended for 12 months.

THE COSTS APPLICATION

49. I have already set out the circumstances in which the costs application has been made. In short, it arises from the Respondent's amendment of the charge, so as to aver the correct prohibited substance.

Submissions of the Appellant

50. The Appellant took issue with the proposition that the averment of the incorrect particular was properly regarded as little more than an "*administrative error",*[46] and submitted that what had occurred had caused the Appellant unreasonable costs.[47] In short, it was submitted that costs had been expended upon the preparation of a case based on an allegation that the substance was Meloxicam, in circumstances where that case was subsequently abandoned, and that this had resulted in an unfair burden being imposed on the Appellant.[48] Mr Bryant filed an itemised account which establishes that the Appellant has incurred a total of $6,952.00 in solicitor/client costs, along with disbursements of $250.00, for work done up to and including 13 November 2024 which was the final hearing date.

Submissions of the Respondent

51. The Respondent expressly conceded that an error had resulted in the Appellant incurring unnecessary costs.[49] However, it was submitted that the costs should be *"shared between both parties, as both parties failed to pick up the error".*[50] I am unable to accept that proposition. It entirely overlooks the fundamental fact that the error was that of the Respondent, not the Appellant, and that such error caused the original case brought against the Appellant to be abandoned.

52. It was further submitted on behalf of the Respondent that:

[46] Submissions at [8].
[47] Submissions at [9].
[48] Submissions at [12] – [14].
[49] Submissions at [8].
[50] Submissions at [8].

(i) whilst the particularisation of the incorrect substance was an error, the Respondent had moved to address it as soon as it was brought to its attention;[51]

(ii) in doing so, it had acted as a model litigant;[52]

(iii) in terms of delay, the Appellant had filed further evidence at late stage;[53]

(iv) this is not a jurisdiction in which costs follow the event;[54]

(v) costs should only be awarded *"if the conduct is so blameworthy"* as to warrant the making of an order;[55]

(vi) the Appellant's decision to engage legal representation was his own, and was not compelled by any action on the part of the Respondent[56] (the suggestion being that this was somehow a factor tending against an order for costs being made in the Appellant's favour);

(vii) the costs sought were excessive in any event.[57]

CONSIDERATION

53. Both parties agree (as do I) that in light of the time at which the appeal was brought, the issue of costs should be dealt with pursuant to the provisions of cl 19 of the *Racing Appeal Tribunal Regulation 2015* (NSW) (the Regulation) which is in the following terms:

> ***19 Costs***
> *(1) On determining an appeal, the Tribunal may order that a party to the appeal pay all or a specified part of the costs of another party to the appeal (including the payment of costs in respect of the hearing or inquiry by the Appeal Panel, Racing NSW, the Greyhound Welfare and Integrity Commission, Greyhound Racing New South Wales, HRNSW, a racing association, a greyhound racing club or a harness racing club in respect of the decision appealed against).*

[51] Submissions at [9].
[52] Submissions at [10].
[53] Submissions at [11].
[54] Submissions at [12].
[55] Submissions at [12].
[56] Submissions at [13].
[57] Submissions at [14].

(2) The Tribunal must not make an order under subclause (1) unless the Tribunal decides--

(a) the appeal is vexatious or frivolous, or

(b) a party has caused unreasonable delay in the conduct of the appeal, or

(c) a party has caused another party unreasonable cost by the manner in which the appeal has been conducted.

(3) On service on a party to an appeal of an order for the payment of costs, the amount of costs specified in the order--

(a) is payable by the party to the person specified in the order as the person to whom the costs are to be paid, and

(b) may be recovered as a debt in a court of competent jurisdiction.

54. Cl 19 of the Regulation says nothing about the basis on which costs should be assessed if the making of an order is considered appropriate.

55. The Appellant relies upon cl 19(2)(c) of the Regulation.[58] As previously noted, the Respondent concedes that its error caused "*unnecessary*" costs. Cl 19(2)(c) refers to costs which are *"unreasonable"*. In a recent decision of *Walters v Harness Racing New South Wales,*[59] I had occasion to consider the provisions of cl 19(2) and said the following:[60]

[48] Both cl 19(1)(b) and (c) involve unreasonableness. In the case of cl 19(1)(b), the element of unreasonableness refers to the delay occasioned in the conduct of the appeal. For the purposes of cl 19(1)(c), the relevant unreasonableness relates to the costs incurred by the manner in which the appeal has been conducted.

[49] The Cambridge Dictionary defines the word "unreasonable" as meaning:

... not based on, or using, good judgment; not fair;

56. Consistent with the Respondent's concession that the costs were unnecessary, there can be little doubt that the costs were also unreasonable. The Respondent has not filed any evidence explaining how it was that the incorrect substance was particularised. It is open to infer, bearing in mind the definition of the word

[58] Submissions at [5].
[59] 28 November 2024.
[60] At [48]-[49].

"*unreasonable*" set out above, that the decision to aver that the prohibited substance was Meloxicam was not based on good judgment. It follows that the Appellant has incurred unreasonable costs and should have the benefit of an order in his favour pursuant to cl 19(2)(b).

57. As to the remaining submissions of the Respondent, I make these observations.

58. First, I accept that the Respondent moved to address the matter once the error was found, and that it acted as a model litigant in that respect. That does not mean that the Appellant has not incurred unreasonable costs.

59. Secondly, I accept that this is not a jurisdiction in which costs follow the event. The making of an award of costs is governed by the exercise conferred by cl 19.

60. Thirdly, the discretion to award costs must be exercised strictly according to the terms of cl 19(2)(b). To put a "gloss" on those terms by reference to the discretion being exercised only when a party is "*blameworthy*", is to invite error. The terms of cl 19 do not use the term *"blameworthy"*. Even if I were to accept the Respondent's submission, it is clear that in terms of unreasonable costs, it is the Respondent, and not the Appellant, who is blameworthy in the relevant sense.

61. Fourthly, any litigant, in any proceedings, in any jurisdiction, has the fundamental right to engage legal representation if he or she so wishes to do so. The Appellant in the present case exercised that right – as did the Respondent. The fact that the Appellant's exercise of that right was not compelled by the Respondent is entirely irrelevant to any issue bearing on the discretion to award costs. It is not open to the Respondent, in defence of an application for costs, to somehow seek to call in aid the fact that an Appellant exercised his or her right to engage legal representation.

62. Fifthly, the Respondent's reliance on delay is irrelevant. Whilst cl 19(2)(b) makes reference to delay, the Appellant relies on cl 19(2)(c)[61] which makes no such reference.

63. Sixthly, in my experience, the hourly rate charged by Mr Bryant, namely $400.00 plus GST, is entirely reasonable and certainly not excessive.

64. Accepting that, for the reasons given, the Appellant is entitled to an order for costs in his favour, I turn to the question of assessment. In that respect, the following considerations are relevant.

65. First, and although not expressly stated, it is to be inferred from Mr Bryant's submissions that he seeks costs on a full indemnity basis. Whilst the Respondent's conduct caused the Appellant to incur unreasonable costs, it was not such as would justify an indemnity costs order in a Court. An order for the full amount of the costs is thus not appropriate.

66. Secondly, in my view, the appropriate approach is to consider what would be likely to be received on an assessment ordered by a Court in terms of party/party costs. As a general proposition, such an assessment yields an amount approximating to 70% of solicitor/client costs. As I have already noted, cl 19 of the Regulation is silent on all of these considerations. Ultimately, I must strive to do justice between the parties. I am satisfied that the approach I have outlined meets that objective.

67. Thirdly, in the context of this case, the unreasonable costs are limited to those which were incurred by the Appellant preparing for a case based on the presence of Meloxicam in the greyhound. That case, which was ultimately abandoned by the Respondent, was a different case to that which the Appellant was ultimately required to meet. On that basis, the Appellant is entitled to an order for costs up

[61] Submissions at [5].

to and including 6 September 2024, which was the date on which I issued my determination allowing the Respondent's application to amend the particulars. That is subject to one exception. The Appellant should not have the benefit of the costs incurred in opposing the application to amend, in circumstances where such opposition was entirely unsuccessful.

68. With these matters in mind, and by reference to the itemised bill provided by Mr. Bryant, the costs relevantly and unreasonably incurred by the Appellant were as follows:[62]

    (i) 28 May 2024 - $748.00
    (ii) 5 June 2024 - $748.00
    (iii) 6 June 2024 - $220.00
    (iv) 12 June 2024 - $528.00
    (v) 1 July 2024 - $176.00
    (vi) 5 July 2024 - $220.00
    (vii) 14 August 2024 - $1,496.00
    TOTAL - $4,136.00

69. 70% of that amount is $2,895.20 and that is the amount I propose to award. The only disbursement, namely the appeal fee, will be refunded to the Appellant by a separate order, given his degree of success on the appeal.

ORDERS

70. For the reasons given I make the following orders:

1. The order made on 28 May 2024 pursuant to cl 14(1)(a) of the *Racing Tribunal Regulation 2015* (NSW) is vacated.
2. The charge against the Appellant contrary to r 141(1)(a) of the *Greyhound Racing Rules* is established and the Appellant is found guilty of that offence.
3. The appeal against penalty is allowed.

[62] Inclusive of GST.

4. The penalty imposed at first instance in quashed.
5. In lieu thereof, a suspension of 6 months is imposed, to date from 1 January 2025.
6. The suspension in order [5] is wholly suspended conditional upon the Appellant not committing any further offences during that period.
7. Pursuant to cl 19(2)(b) of the *Racing Appeals Tribunal Regulation 2015* (NSW), the Respondent is to pay the Appellant's costs in the sum of $2,895.20.
8. The appeal deposit is to be refunded.

THE HONOURABLE G J BELLEW SC

23 December 2024