RACING APPEALS TRIBUNAL

NEW SOUTH WALES

TRIBUNAL: MR D Armati

Ex Tempore decision

18 March 2019

APPELLANT: Ms Sarah Fellowes

SEVERITY APPEAL

GRR 98(7)

DECISION

1 Appeal upheld

2. GRR 98(1)(b) appellant discharged

3. Appeal deposit refunded

1. The appellant appeals against the decision of stewards, constituted by an inquiry panel, of 5 October, 2018 to impose upon her a period of disqualification of her trainer's licence. for 12 months.

2. The allegation in relation to that determination was a breach of rule 97A(7). Of the words of that sub-rule the charge preferred on 3 April, 2018 was in the following terms:

> "That you, Sarah Fellowes, are deemed to have had permanently banned prohibited substances in your possession at your property in Seaham where you were in charge of greyhounds.
>
> Particulars of Charge:
>
> (1) On 4 April 2017 the NSW Police and GRNSW Investigators conducted an inspection of the property at 2D Giles Road, Seaham.
>
> (2) During the inspection of the Property, the following were located:
> (a) anabolic steroids; and
> (b) pentobarbital.
>
> (3) The Substances are permanently banned prohibited substances under Rule 79A of the GRNSW Greyhound Racing Rules.
>
> (4) You were in charge of the greyhounds that were located at the Property on 4 April 2017. Accordingly, you are deemed to have the Substances in your possession."

3. At the inquiry on 5 October, 2018 when confronted with that allegation the appellant pleaded guilty. By her appeal of 11 October, 2018 the appellant admitted the breach of the rule. This, therefore, is a severity appeal only and accordingly the facts do not need to be analysed in respect of the matter in great detail.

4. The evidence has comprised the exhibits and transcripts before the stewards and their decision. In addition, the appellant has tendered a further 14 character references making 17 in total.

5. The issue is one of penalty. The rules are silent as to a specific penalty for this breach; it is necessary, therefore, to firstly determine the objective seriousness of the conduct and then have regard to what is an appropriate civil disciplinary penalty in response to that conduct while looking at the circumstances of the facts involving the matter, the subjective matters of the appellant in determining what is the appropriate message to be given to this appellant and to the industry and the community looking to the future.

6. Briefly, the facts are that the appellant was licensed some nine months prior to this breach. Some two years prior to the inquiry the appellant and Mr Wayne Vanderburg commenced residing together at the licensed property. When Mr Vanderburg came to that property he brought with him a tallboy. In other words, a clothing-type cupboard of some size. It had drawers. Located in that tallboy in one of the drawers was the subject series of drugs. On execution of a search warrant those drugs were found by the police, Mr

Vanderburg was prosecuted for the possession of those drugs and fines imposed upon him.

7. Of interest is that on the same day his brother John Vanderburg was also the subject of the execution of a police search warrant, he was also found in possession of not the same number of, but similar types of drugs, was prosecuted and fined and in addition, he was warned off for a period of two years by an inquiry panel of stewards on 30 October, 2018 in relation to possession matters and an inquiry which he did not attend. He is one of the referees of this appellant.

8. The drugs in question are said to be of a most serious category. Indeed, they are. They are permanently banned prohibited substances and certainly from 1 January 2016 a number of them were so banned. Their presence, therefore, on licensed premises or more accurately the premises of a licensed person is, therefore, prohibited.

9. The drugs in question were pentobarbital, which Dr Karamatic, regulatory veterinarian in Victoria, described to the stewards in a report is a drug generally used for the purpose of euthanasia of animals. In addition, there were a number of anabolic or androgenic steroidal agents described as follows. Testosterone, testosterone cypionate, testosterone enanthate, testosterone propionate, stanozolol and 1-dihydrotestosterone undecylenate. As said, they were all permanently banned prohibited substances.

10. The testosterone-based products were said to be, by Mr Vanderburg to the stewards, obtained by him for the purposes of treating female greyhounds to regulate their season. Dr Karamatic indicates the drugs have other uses which, of course, lead to them being prohibited in relation to the performance-enhancing nature of them. There is no doubt that the drugs of themselves fall into the most serious category because the pentobarbital is a category 1 of five drugs in greyhound rules and the testosterone-related drugs are category 3. It is not necessary to analyse precisely what they might have been used for because they simply were not allowed to be there.

11. On an assessment of the objective seriousness of the drugs they, therefore, fall in the first case of pentobarbital into the most serious category and in respect of the testosterone-based products into a category of considerable seriousness, not the most serious category. A bare possession of these drugs by a licensed trainer at their property would lead to a finding of a breach of the most serious kind. The message to be given for such a possession would be, therefore, serious. It would be a very strong message to the individual trainer and require a message of considerable gravity to other trainers and one which when reflected upon by the community at large would give an appreciation of the gravity with which the regulator treats such a possession.

12. But this is not a bare possession case, it is a deemed possession case. The facts do not establish the possession of these drugs by this appellant. There has been no submission to the contrary. It is not necessary to more closely analyse all of the appellant's evidence to the inquiry. It can be summarised on the basis that the appellant told the stewards that she was not aware of the presence of those drugs in the tallboy. The evidence is that she had no reason to have gone to that tallboy which solely contained possessions of Mr Vanderburg. It included such things as family photo albums, clothes, socks and the like and no doubt other items.

13. There is no evidence that the appellant would have had any reason to have suspected the presence of those drugs in that tallboy. There is comfort in that conclusion by reason

of the fact that the appellant was only licensed for some nine months and there has been no positive swab returned in respect of these drugs in any greyhound that she has in either out of competition or in competition testing.

14. It is the evidence of Mr Vanderburg to the stewards that those drugs had been prescribed to him some 10 years earlier. The pentobarbital because he said, and named a particular vet who gave it to him on the basis that, should he have a greyhound who is as injured as one that vet had put down, that he would have available to him that pentobarbital to euthanize the dog immediately. It cannot be said that such possession of pentobarbital as a scheduled drug would otherwise have been able to have been administered by him properly because it was one which was only allowed to be administered by a veterinarian. However, he is not on trial, as it were, here.

15. In relation to the testosterone products, the Tribunal has given some description of those drugs and their use. His evidence to the inquiry was that he had a range of different testosterone-based products for greyhounds in season-based purposes on the basis that different dogs reacted differently in relation to the control of them coming into season or otherwise and, therefore, different types of drugs were needed and these had all been veterinarily prescribed and in addition, at the time he came into possession of those other drugs it was legal for him to do so.

16. It is important to also recognise that the issue of penalty in this matter is in respect of the conduct of this appellant, not in respect of her partner Mr Wayne Vanderburg, nor critically in respect of his brother Mr John Vanderburg. There is no evidence of any discussion, knowledge, reason for possession, reason for use in this appellant by reason of their possession. The appellant points out that in the nine months she has had dogs presented to race and has had no positives. Therefore, there is no evidence that this appellant was put on notice of the existence of those drugs in that tallboy. Notwithstanding, of course, this is a deemed possession matter it is necessary to have regard to the fact that this appellant was not actually possessing, intending to use, being cognisant of others using or the like.

17. There was some issue about whether the four greyhounds which were actually present on the property at the time of the police and GRNSW inspectors attendance were subject to training or not. There is no doubt that these dogs had been trained, there is no doubt that some of them raced before the subject date of the visit and some raced after, but the uncontested evidence in respect of three of the greyhounds is from the owners of those greyhounds in the documents provided by way of both character reference and fact to the stewards inquiry.

18. One of the dogs Iron Bar Bob was owned by Bridget Vanderburg and she was seeking assistance in finding a home for the dog and it was only placed with the appellant on a temporary basis. The greyhound Bambi's Billions was owned by a Mr Condron and he said it was only in the appellant's possession for one or two days. The dog I'm a Doll was owned by Mr John Vanderburg who has been named already, a dog that had only been placed with her on a temporary basis. Each of them gave evidence the dog was not placed with her for the purposes of training. The evidence in respect of the fourth dog Lariko is less clear but does not have to be analysed in any great detail.

19. Viewed on an objective seriousness basis these facts fall into a less serious category of a deemed possession. It is not a deemed possession where there can be established any form of suspicion in the deemed possessor.

20. The fact of her culpability, her breach of the rule and her admission of it, is that she had greyhounds present, she was licensed and the drugs were there and they were there without her knowledge.

21. It is necessary to have regard to the acceptance or otherwise of those remarks by character references. There are 17, this case does not require a close analysis of each of those 17. The respondent quite fairly acknowledges that the appellant is of good character.

22. There is no doubt that she is highly regarded within the family for whom a number of references have fallen. They, in essence, describe her love of animals, her care and attention to people, in particular, her patience, her dedication to her work, her integrity, reliability and honesty, her concern for welfare of greyhounds, her assistance to others in the community in addition to the welfare of animals, that she has become as a stepmother, a very supportive person both in respect to Mr Vanderburg himself and his family. She has been a businesswoman of recognition, she is currently an established nurse in a responsible field with a good reputation from her working colleagues. She has had an interest and love of greyhounds and, indeed, that took her into the United Kingdom moving about looking at greyhounds and their training. That is a sufficient summary of her character.

23. The Tribunal accepts that despite the fact it is only a nine month licensing history that there are no priors, a licensing history of such length cannot give to her the substantial discounts that would otherwise be necessarily available to a trainer of longstanding with no priors. Nevertheless, there are no priors. She cooperated with the stewards, she has admitted the breach to the stewards from the outset and has maintained that admission before the Tribunal. The stewards quite fairly allowed her 25 per cent discount from a starting point and the Tribunal is of the same opinion that a 25 per cent discount should be extended to her.

24. Having regard to issues of objective seriousness as described by the Tribunal and the otherwise good character of this appellant with no prior matters, and it is important to recognise that this Tribunal is imposing a penalty upon this appellant, not upon her partner, nor upon his brother. As was said as long ago as Waterhouse v Bell when assessing a person, the conduct of their husband and/or partner is not always an issue upon which that person be visited with the others sins. In this case, it is necessary to assess this appellant and not others.

25. This appellant to date has served 5 months and 13 days of a disqualification imposed by the stewards on the 5 October, 2018 and against which she did not apply for a stay. The Tribunal is of the opinion that objectively considered that period of time as of itself would be commensurate with any maximum possible penalty but, indeed, would exceed it. Without taking into account subjective matters, that length of penalty would not have fallen from this Tribunal. The Tribunal is of the opinion on its analysis of the objective seriousness that the 12 months the steward inquiry panel considered to be appropriate was greater than that which the facts as now analysed require.

26. In view of the fact that some 5 months and 13 days have already been served the Tribunal is of the opinion that no further penalty should be imposed.

27. The Tribunal has available to it rule 98(1). 98(1)(b) allows, if a charge is proved and there is an opinion that it would be inappropriate to inflict any punishment or anything more than a nominal punishment that the outcome may be, without proceeding to record a finding of guilt, that the matter be discharged. If such conduct is engaged upon, sub-rule 98(2) requires a person, the beneficiary of it, to be of good behaviour for a period of 12 months, in other words, not to breach the rules.

28. Having regard to those findings it is not necessary to set out a starting point for penalty then apply discounts for the plea and other subjective circumstances.

29. The severity appeal is upheld.

30. Pursuant to GRR 98(1)(b) the Tribunal imposes no penalty and discharges the appellant noting the provisions of GRR 98(2).

Submissions on Appeal Deposit

31. The appellant paid an appeal deposit, it was a severity appeal, the appeal has been successful.

32. The Tribunal orders the appeal deposit refunded.