RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR DB ARMATI

EX TEMPORE DECISION

MONDAY 6 MAY 2019

APPELLANT ANTHONY GANNON

GREYHOUNDS AUSTRALASIA RULE 86(f), (q) and (ag)

SEVERITY APPEAL

DECISION:

1. Appeal upheld
2. Concurrent penalties of suspensions of 1 month, 3 months and 1 month to commence 31 October 2018 imposed
3. 25 percent of appeal deposit refunded

1. The appellant appeals against the decision of the GRNSW Inquiry Panel determination of 31 October 2018 to impose upon him monetary penalties and suspensions. The rules that were relevant to those determinations were 86(f), (q) and (ag).

2. Relevantly, 86(f) provides:

> "A person (including an official) shall be guilty of an offence if the person-
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> > "(f) engages in, publishes or causes to be published, broadcasts or causes to be broadcast, the use of any contemptuous, unseemly, improper, insulting, or offensive language, conduct or behaviour in any manner or form towards, or in relation to-
> >
> > > (iii) the Controlling Body, or a member of the Controlling Body; or
> > >
> > > (iv) any other person having official duties in relation to greyhound racing".

Rule 86(q) is, relevantly, in the following terms:

> "A person (including an official) shall be guilty of an offence if the person-
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> > (q) commits or omits to do any act or engages in conduct which is in any way detrimental or prejudicial to the interest, welfare, image, control or promotion of greyhound racing".

Rule 86(ag) is in, relevantly, the following terms:

> "A person (including an official) shall be guilty of an offence if the person-
>
> > (ag) fails to comply with a policy adopted by a Controlling Body".

3. The appellant was the subject of an inquiry by a specially convened Inquiry Panel, and that Inquiry Panel was convened with terms of reference. As a result of those terms of reference the Inquiry Panel called upon the appellant to show cause in respect of three items of conduct and, in respect of each item, seven allegations.

4. The conduct related to posts by the appellant on Facebook. They were in the following particularised terms:

> "A comment posted by Mr Gannon on Facebook on 6 April 2018 regarding Morris Iemma, GRNSW Chairman, which stated: 'I know one grub in a suit, our Chairman, Morris Iemma…. He's on Canterbury football board know (sic) wonder they're fucked'."

Next:

> "A comment posted by Mr Gannon on Facebook on 25 April 2018 regarding Madeleine Love, GRNSW General Counsel, which stated: 'Mick, forget Tony, he won't last a year. There is another evil cunt inside GRNSW, the biggest danger to our survival, appointed by Newson … Love'."

And thirdly:

> "A comment posted by Mr Gannon on Facebook on 22 March 2018 regarding Paul Newson, Deputy Secretary for Liquor, Gaming and Racing; Tony Mestrov, GRNSW CEO, and the GRNSW Board, which stated: 'This makes the recruiting company process a sham. The facts Newsum (sic) wanted Mestrov and Lemma (sic) wanted Brown a disgrace…. 100% mate the board and Mestrov are doing nothing'."

5. Of those seven matters in relation to the Iemma comment, the Inquiry Panel found him not guilty of three, did not charge him in respect of one, and found a duplicate in respect of another. The effect of that was that he was found guilty of two. Sections 86 (f) and (ag) for the appeal.

6. In respect of the Love comment, he was found not guilty of two but guilty of three; not charged in respect of one, and another as a duplicate. Sections 86 (f), (q) and (ag) for the appeal.

7. In respect of the Board comment, he was found not guilty of four, not charged in respect of one and found guilty of two. Sections 86 (q) and (ag) for the appeal.

8. That left a total of seven matters upon which penalty was imposed. Those are for subsections (f), (q) and (ag).

9. The Inquiry Panel did not specify individual penalties for each of those seven breaches. In respect of the matters, they grouped them into the three groups of Iemma, Love and Board and imposed a common penalty for each of the breaches in the following terms. In respect of the Iemma comment, a fine of $1000 and a four-week suspension. In respect of the Love comment, a $3000 fine and a three-month suspension. And in respect of the Board comment, a $1000 fine and a four-week suspension. The Inquiry Panel ordered each of those periods of suspension to be served concurrently.

10. With this appeal, the appellant sought to contest three of the adverse findings and the penalties for all seven. By his grounds of appeal he narrowed those matters down in relation to the seven matters by not contesting, in respect of Iemma, the two adverse findings; in respect of Love, two adverse findings, subsections (f) and (ag); but did contest, with his grounds of appeal in respect of the Love matter, one matter, subsection (q); and, in respect of the Board matter, contested each of the two matters.

11. That meant that this Tribunal convened to hear three defended matters and seven penalty matters. At the outset of the hearing, and after a brief adjournment, the appellant admitted the three matters that he had previously been contesting. This appeal, therefore, became a severity appeal only in respect of the seven adverse findings made by the Inquiry Panel.

12. The evidence has comprised the brief of evidence together with oral evidence of the appellant.

13. The first matter to determine is the objective seriousness of each of the breaches.

14. The Tribunal cannot lose sight of the fact that the appellant, as a licensed person, agreed, by accepting the privilege of a licence, firstly, to be bound by the rules but, secondly, became bound by the 11 April 2016 introduction of the new Public Comment Policy. Relevantly, that policy states:

> "Industry participants should not make any public comment that:
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> a) is unreasonably detrimental or prejudicial to the interest, welfare, image, control or promotion of Greyhound Racing; or
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> b) unreasonably uses any contemptuous, improper, insulting or offensive language, imagery or other content towards or in relation to a Greyhound Racing Official exercising their powers, or performing their duties or functions in relation to greyhound racing."

15. The comments, when taken together, are not in compliance with that policy in respect of each of the three groups of matters, although differently in respect of each.

16. The Facebook comments were made to a group which is said to have access to some one thousand people which is not said to be a closed group. It is open, therefore, to any member of the public to have read and

accessed this material. Whether that was known to or considered by the participants is not known.

17. The comments have to be put in context. The various participants in the Facebook exchanges – and there were a number of them and it is to be noted that two others of them were called before the stewards, and the Tribunal will return to that – engaged in a discussion in relation to their beliefs about the operation of the industry. They were fully entitled to do that. They were fully entitled to engage in criticism of the regulator, its representatives and the employees of the regulator.

18. The issue, however, here, which the appellant by his admissions does not deny, is that his individual comments were such that it went beyond proper conduct but that as particularised against him, and in accordance with the breaches alleged, his conduct became wrongful. The fact that others may or may not have been called is not relevant. The Tribunal has to deal with this appellant and what he said.

19. The Inquiry Panel came to certain conclusions in respect of the conduct, that it was, so far as the Iemma and Love comments were concerned, objectively serious and insulting and offensive.

20. In respect of the Love comment, the words must be considered grossly so. This was an employee of a regulator – in essence, someone entitled to go about their employment by a regulator without being the subject of such grossly and offensive remarks – an employee, as is so often the case, essentially unable to defend herself, who is left exposed to the ridicule and damning nature of the remarks of such an appalling type which the appellant used.

21. The gravity of that conduct, the use of the word in particular, cannot be lessened by reason of the fact that the appellant himself says – and said to the Inquiry Panel and to the Tribunal – that that is the type of language he uses on an ordinary day-to-day basis. He is quite entitled to do that, provided the forum is appropriate. As a licensed person bound by a regulatory scheme, coupled with a public comment policy which he accepted applied to him by maintaining his licence, he has gone beyond that which he is entitled to do in his own world. He has publicly engaged in this conduct contrary to a rule.

22. In addition, it is said to be disparaging of the industry because it impacts on that individual and the industry. That was the Inquiry Panel finding. The Tribunal agrees with it.

23. In relation to the Board comments, a different approach is appropriate. The Board does not stand above criticism, and nor do its members or, indeed, do employees in the industry. A robust and proper debate is an

acceptable means of conducting an industry. It is said, however, here, contrary to the appellant, that the robustness in which he engaged became damaging by reason of the implications of misconduct and/or corruption in those associated with its regulation. The Tribunal agrees with those conclusions by the Inquiry Panel; they do not need amplification. The legitimate target, the subject of legitimate criticism, has been unnecessarily maligned, contrary to a reasonable exercise of robustness.

24. In assessing the objective seriousness, whilst is purely an objective test, in relation to each of these matters, it is proper to have regard to the fact that the appellant has expressed to the Inquiry Panel and the Tribunal a genuine belief in that in which he engaged. In other words, he felt that the people he named were not doing that which was best for the industry. That takes it beyond straight malice or entirely wrongful conduct but lessens it to the extent that it reflects an improperly expressed genuine belief. As the Tribunal emphasises, it is the manner in which he wrongly expressed that genuine belief that is the mischief for which he must be the subject of a penalty.

25. In considering objective seriousness, it is necessary to have regard to the integrity and welfare of the industry and, importantly, by reason of the public comment policy, the image of the industry. The troubles which have befallen the greyhound industry cannot be disregarded, and they are not. It is fair to say that, regardless of the appellant's views about those charged by government with the function of, as it were, repairing it, that they are entitled to expect that licensed persons with the privilege of a licence will do their best to ensure its proper survival rather than its undermining.

26. It is, therefore, when the Tribunal comes to consider the objective message to be given, that those who wish to be part of the industry must behave in a way which is not detrimental to that image and that the public generally can expect that any criticism of the industry regulator and its employees and the like is going to be informative to them on a fair and proper basis. That boundary was crossed here.

27. So far as considering the subjective message to be given to this individual appellant, he remains strongly of the views he has expressed. He has expressed remorse for his conduct; he has sought to apologise to Ms Love. That is relevant in looking to the future to determine what penalty is appropriate for his conduct, having regard to all of the facts presently available to the Tribunal.

28. In assessing objective seriousness, other cases are to be regarded. The Tribunal has been given a considerable number of them. In general, they are not of assistance. They merely indicate that the regulator has formed the opinion that those who abuse stewards, whether at race meetings or otherwise, should be the subject of adverse findings and that they should

involve penalty. The majority involve monetary penalties, and some of them are very low.

29. The Tribunal is of the opinion that of the great bulk of matters – and it will not deal with them in any great detail – the only one that has passing relevance is that of Hooper, a 12 August 2014 stewards' determination in relation to a publication on Facebook which was found to be improper. What was published is not in the inquiry report. Hooper had pleaded guilty and the fine of $250 was wholly suspended for six months. He had expressed contrition and removed the post from the Facebook page. He had 21 years in the industry with nothing prior, an involvement in the industry and industry references. The emphasis was on the image. It is not known if it was published, so that does not assist in finding parity here.

30. Objectively viewed, the Tribunal is of the opinion that the conduct is serious. The impact upon the industry, as expressed, was, in the Tribunal's opinion, substantial and it is ongoing. The Tribunal is of the opinion that periods of suspension must be a starting point in respect of each individual breach.

31. The other penalties available, namely, the possibility of a disqualification, were not considered by the Inquiry Panel appropriate, nor does this Tribunal. The aspect of monetary penalty for other matters will be touched upon in a moment.

32. The personal circumstances of this appellant – his subjective circumstances – must be considered.

33. He describes having been associated with this industry all of his life. He became a registered owner a long time ago and became a licensed public trainer in the 90s. He has no prior relevant matters adverse to him. He is entitled to have that past good record taken into account.

34. He has given evidence today that he is now out of the industry. He has given evidence today of hardship. He describes, as he did in brief terms to the Inquiry Panel, that he was for a period of three months on workers' compensation as a result of a motor vehicle accident but that has now finished. He told the panel he could not afford to pay penalties; he implies that in his evidence today.

35. He has apologised to Ms Love, as has been expressed, and indicated his remorse for his comments.

36. He is out of the industry, a factor which is relevant to looking to the future for any message that must be given to him. He has indicated that he has no intention of returning to the industry by that comment.

37. He is not assisted by the fact that he has not removed the posts but his evidence is that he did not know that he could do that, nor essentially how he could do it. The Tribunal accepts that evidence.

38. He was subject to a suspension by the Inquiry Panel when they delivered their decision on 31 October. He originally sought a stay to this Tribunal but for a long period of time did not give a reply to the Greyhound Racing NSW submission opposing that stay and in essence from the period of his appeal on 7 November 2018 through to the time when the opposition to his stay application on 3 December 2018 was given to him, he took no further steps to pursue that stay until he withdrew it with his grounds of appeal on 31 January 2019, that in fact being the date upon which the longest of the periods of suspension expired. He has therefore served a substantial penalty, certainly one considered appropriate, in part, by the Inquiry Panel.

39. There is one further matter on subjective circumstances and that is his admission of the breaches. The history has been set out. He did not admit anything before the Inquiry Panel; adverse findings were made against him as set out; he did not admit some of those matters on lodging his appeal; he did not do so in his preparation for hearing, he did so, however, on the morning of the hearing.

40. For the reasons that will be apparent in the determination the Tribunal is making, it is not necessary to apply mathematical formulae. Suffice it to say that in respect of the matters which he admitted by his grounds of appeal he would otherwise have been entitled to a 15 percent discount. In respect of the three matters which he admitted today, he would only be entitled to a 10 percent discount. However, mathematical formulae are not required.

41. In determining penalty, the Tribunal is asked by the respondent, the regulator, to embrace the penalties the Inquiry Panel considered to be appropriate. The appellant has not expressed any alternative, he merely asks for a lesser penalty.

42. The determination the Tribunal has made is this – and it is required to have regard to each individual matter: in respect of the Iemma matters, it forms the conclusion, as did the Inquiry Panel, that that is less serious conduct than that which related to the Love comment. It is appropriate to have regard to the Love comments to look to what is a possible maximum remaining penalty by reason of the objective seriousness of it but having regard to his subjective circumstances.

43. The Tribunal looks to the Love matters to provide, as it were, a starting point on objective seriousness. In those matters he was subject to a three-month suspension and a substantial monetary penalty.

44. Hardship of itself is not a reason not to impose a monetary penalty if that is considered a proper outcome in conjunction with his conduct. As the Tribunal said as long ago as Thomas v Harness Racing NSW in 2011, if an appropriate outcome is necessary on the facts and circumstances of an individual case, and that of itself occasions hardship to a licensed person, then that has to be the ultimate outcome of the objective facts. Here, however, there were no specific figures on hardship but the Tribunal accepts any monetary penalty would occasion a hardship.

45. The Tribunal is persuaded by the fact that he has served a suspension. That is a strong factor. Is the suspension a sufficient outcome for his conduct?

46. In the circumstances, the Tribunal has determined in the Iemma matters that he should be subject to a concurrent one-month suspension for each breach.

47.In the Love matters a concurrent three-month suspension is appropriate for each breach.

48. In the Board matters, the Tribunal forms an opinion that a concurrent one-month suspension is appropriate for each breach.

49. It is, therefore, that there is a possible maximum period of suspension of five months.

50. The Tribunal looks to whether or not each of those suspensions should be served cumulatively or concurrently. The rules provide that unless a determination to the contrary is made, they should be cumulative.

51. Having regard to the fact that all of this conduct occurred in one forum over a relatively short period of time, although in three matters, it essentially was an ongoing course of conduct, not individual and isolated matters and not matters for which there are separate breaches, as it were, the Tribunal has determined that the suspensions should be served concurrently.

52. There is then the issue of whether fines should be imposed.

53. Having regard to all of the facts, the Tribunal is satisfied, particularly on a limited parity basis, that a three-month suspension is a more than adequate penalty for the conduct in which he engaged. No monetary penalties will be imposed.

54. In each of the seven matters, for the reasons expressed, there will be a concurrent penalty noting that in each of the three groups of matters, the penalties of one month, three months and one month will apply to each individual breach.

55. The appellant started his suspension on 31 October 2018, he has therefore served the three-month suspension which expired on 30 January 2019.

56. This was a severity appeal. The appellant has succeeded in respect of that severity appeal. The severity appeal is upheld. As to the appeals against breach, it is noted they were all withdrawn.

SUBMISSIONS MADE IN RESPECT OF APPEAL DEPOSIT

57. At the close of the matter, application is made for a refund of the appeal deposit. After some comments from the Tribunal, the submissions were that there should be a partial refund. In respect of that, it was pointed out that the appeal was only partially successful.

58. It is noted that the original major issue was whether there were breaches of the rule or not. That was not successful. There is, in relation to penalty, partial success.

59. There will be a 25 percent refund of the appeal deposit.
