RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR DB ARMATI

EX TEMPORE DECISION

FRIDAY 14 JUNE 2019

APPELLANT JUDITH RICHARDSON

GREYHOUNDS AUSTRALASIA RULE 83(2)(a) X 2

DECISION

1. Breaches found established
2. Appellant discharged under Rule 98(1) conditional upon Rule 98(2)
3. Appeal deposit refunded

1. The appellant appeals against the decision of the Inquiry Panel of 18 January 2019 to impose upon her a monetary penalty of $750 for a breach of the prohibited substance rule.

2. There are two breaches; the fine is the same in each matter. The stewards particularised the first charge as follows:

> "that you, Judith Richardson, a registered trainer, while in charge of the greyhound Sunburnt Highway, presented the greyhound for the purpose of competing in race 9 at Dapto on 24 May 2018 in circumstances where the greyhound was not free of any prohibited substance."

The particulars are summarised to note the taking of the urine sample, its analysis by a first laboratory at 1341 ng/mL and by a confirmatory laboratory at 1267 and that that which was found was arsenic, which is a prohibited substance under the rules.

3. The second charge is in similar terms for a presentation on 30 May 2018 with readings of 1112 and 986.

4. The appellant denied the breaches before the Inquiry Panel and has maintained the non-admission of the breach on appeal.

5. The evidence has comprised the transcript and exhibits before the Inquiry Panel, its decision and a series of published documents by GRNSW in relation to arsenic. In addition, the appellant has put in evidence particulars that establish that on 21 March 2018 the greyhound had been presented to race at Wentworth Park. In addition, the appellant has given oral evidence.

6. The facts establish that the appellant was the trainer of the greyhound Sunburnt Highway on each of the dates of presentation, namely, 24 May and 30 May 2018. The facts establish that the appellant had nominated that greyhound to participate in the subject races on those dates. The facts establish that there was present in the greyhound on each of the subject dates the prohibited substance arsenic. The rules provide that arsenic at greater than a threshold of 800 is a prohibited substance.

7. On the face of it, therefore, the facts required to be proved by the respondent, GRNSW, are made good. On those findings, the two breaches appear to be clearly established.

8. The appellant raises two theories for consideration. The first relates to a failure of the regulator to comply with Rule 82 and, secondly, that when presented, the greyhound was at a level less than the threshold.

9. To deal with the first of those, Rule 82 is in the following terms:

> "When a prohibited substance or a permanently banned prohibited substance has been found upon analysis to be present in a sample taken from a greyhound which has been nominated or presented for an Event or other contingency provided for pursuant to these Rules, the Stewards shall, upon receipt of the accredited laboratory's certificate pursuant to Rule 81(1) officially notify the owner and trainer of the greyhound of the finding and that any inquiry into the circumstances surrounding the presence of the prohibited substance or permanently banned prohibited substance is to be held as soon as possible."

10. That rule raises for consideration a number of terms.

11. First, Rule 81(1), paraphrased, is that if a sample is taken by an accredited laboratory, then a certificate signed by that laboratory shall be, without proof of signature, "prima facie evidence of the matters contained therein for the purpose of any proceedings pursuant to these Rules". The Tribunal will return to the certificate the regulator had.

12. The second matter is that it raises the definition of prohibited substance and, relevantly here, that is not an issue and that is arsenic.

13. Thirdly, the rule also raises the issue of permanently banned prohibited substance. Rule 79A(2) deals with what are permanently banned prohibited substances. The rule is inelegantly drafted because in essence it raises matters to do in sub rule (1) with out of competition testing, but then within that rule sets out to detail permanently banned prohibited substances. The reason for that is that out of competition testing is designed to find permanently banned prohibited substances only.

14. Arsenic is not a permanently banned prohibited substance. Arsenic is endogenous to the greyhound. Arsenic is in virtually everything that humans and greyhounds are likely to be in touch with, including a considerable range of food, water, air, dirt and the like. Relevantly to this matter, it is found in water and is found in a number of substances regularly fed to greyhounds. It is certainly found in the substances fed to this greyhound which relevantly comprised kelp, sardines and brown rice.

15. The facts that are now established in relation to this Rule 82 issue are that the out of competition test was conducted at the appellant's kennels on 21 March. It is the appellant's evidence that that was carried out because the greyhound was nominated to compete in a final at Wentworth Park that night. And she has proved that it was so presented to race.

22. The rule, when read with 81, 79A and 83(2) in mind, relates to the presence of a prohibited substance, and that relates to the prohibited

substance in the greyhound on 21 March. Because the analysis of the A sample from that out of competition test satisfied the testing laboratory that, allowing for margins of error, a reading of greater than 800 was detected. Accordingly, a confirmatory analysis was taken and that produced a reading of 1600. There was therefore present in the subject greyhound on 21 March a prohibited substance at a level of 1600.

23. The other facts are that the laboratory notified the regulator of a zero return for prohibited substances and, in addition, for permanently banned prohibited substances on its certificate of analysis. The letters "ND" were marked on the report to the regulator. ND meaning nothing detected.

24. Mr Zahra gave evidence, as the Scientific Manager at the laboratory, that such a return of ND is made because no permanently banned prohibited substance was detected. It was an out of competition test and therefore prohibited substances were not searched for. It turned out to be clear that in fact the prohibited substance arsenic was present. But that was not reported to the regulator. The ND return was given. The regulator, therefore, did not have an 81(1) certificate indicating prima facie evidence that there was a prohibited substance.

25. It is to be noted that, as said, arsenic is not a permanently banned prohibited substance. Therefore, the practices in place between the laboratory and the regulator at that time were to the effect that the finding of a prohibited substance was not required to be reported for an out of competition test.

26. That then requires an analysis of whether this was in fact an out of competition test. Within the meanings attributed to the rules by the regulator and the laboratory, this was an out of competition test. However, looking at it in another way, the greyhound had been nominated on that very same day to compete in an event. Therefore, it could be said that a prohibited substance had been found in the greyhound which was nominated for an event. Therefore, it could be said there should have been a triggering of Rule 82.

27. An alternative reading of Rule 82 is that the rule, regardless of whether the greyhound was nominated or presented for an event, it fell within the meaning of "or other contingency provided for pursuant to these Rules". It was submitted to the stewards that those words must be taken, when the rules are read as a whole, to embrace an out of competition test. That was not accepted by the stewards in their finding. Is that what the words "other contingency" in the rules mean? There is no specificity about out of competition testing as being such a contingency. It is to be noted that Rule 83(2), in placing an onus relevantly upon a trainer, does so in three circumstances:

"83(2) (a) nominated to compete in an Event;

(b) presented for a satisfactory, weight or whelping trial or such other trial as provided for pursuant to these Rules; or

(c) presented for any test or examination for he purpose of a period of incapacitation or prohibition being varied or revoked".

There are, therefore, other "other contingencies" other than nominated or presented for an event contained within the Rule 83(2). A reading of the balance of 83 picks up similar types of connotations. Those sorts of things, namely, whelping trials or weight trials or incapacitation certificates would fall within the meaning of the expression "other contingency provided for pursuant to these rules".

28. As to whether Rule 79A Out of Competition Testing falls within the meaning of that expression "other contingency" does in fact not need to be determined to finality. It is open to consider that it does because it talks about permanently banned prohibited substances in the rule and they are relevant to out of competition testing and, of course, relevant if found in presentation matters as well.

29. And the reason that that does not have to be determined to finality is this: the submission is that the regulator failed to comply with Rule 82. If the regulator had done so and notified the appellant of the presence of arsenic at a level of 1600, which is greater than the threshold, she would have immediately taken action to correct her practices. In fact, she did so Immediately upon being notified by the stewards at a kennel inspection of the positives from the two race day samples. The diet of the greyhound was changed. The effect of the change of that diet was to reduce the greyhound's readings, which had been found at 1600, 1300 and 1100, to 95. That is because brown rice was removed from the greyhound's diet. It had been added to the greyhound's diet on veterinary recommendation. It is not necessary to determine whether any of the individual substances fed to the greyhound caused it to be greater than the threshold or whether it was just one of those products, particularly brown rice. Because it is not necessary for the regulator to establish how, when, why or by what route the prohibited substance came to be present. There are too many variables.

30. The fact is that the regulator did not know that there was a reading of 1600, which is greater than the threshold of 800, from the out of competition test on 21 March until requested to advise the regulator, and the laboratory, by email of 30 August 2018, provided advice that the sample was at 1600. Therefore, all of the arguments about the obligation upon the regulator to comply with Rule 82 were not at best triggered until 30 August, after all these events in question. Or, in any event, certainly not on 24 and 30 May,

being the dates of presentation. It is quite apparent that the laboratory knew but the regulator did not.

31. The words of 82 require action to be taken of notification and the conduct of an inquiry on receipt of the accredited laboratory's certificate. That obligation was simply not triggered prior to 24 May or 30 May because at that time the regulator had an ND certificate – nothing detected. The fact that the practices and procedures between the regulator and the laboratory were such that that was the way it was reported does not change the fact that the regulator did not know. Therefore, there can be no triggering of Rule 82 which might have assisted the appellant at the time that the conduct in question took place. There was therefore nothing upon which the trainer could have been advised which may have enabled her to have changed her practices before the first presentation on 24 May.

32. The other side of the matter is this: does a non-compliance with Rule 82, if it had otherwise been prudent, exculpate the appellant from her two presentation breaches as alleged against her? There is nothing in a reading of the rules which provides a defence to a presentation breach for a prohibited substance if Rule 82 is not complied with. Can there be implied some other legal principle which would enable this appellant or, indeed, other appellants in similar circumstances, to avoid liability for a presentation? That raises legal matters which have not been the subject of submissions to the Tribunal. As to whether it is a strict or absolute liability offence, as to whether there might be some defence equivalent to Proudman v Dayman, namely, if the appellant is able to establish a set of facts which, if established, would mean that she was not guilty of the breach are relied on.

33. The use of a Proudman v Dayman defence has been much read down by the NSW Court of Criminal Appeal as to when it does and to what facts and circumstances the actual conduct in question must attach. It has not been argued. The Tribunal determines it does not have to decide because it is not otherwise persuaded that anything has arisen in these facts and circumstances which would trigger such a defence. In any event, it is apparent from a reading of Rule 83(2), when read alone and when read in conjunction with Rule 83 as a whole, and read in conjunction with the prohibited substance rules as they are found in the context of the rules as a whole, that such a defence, as it is loosely called, would otherwise arise for consideration.

34. Therefore, in respect of the first ground of appeal that the appellant has been denied, as she described it, mandatory fairness or mandatory procedural entitlements is not made good. The respondent, upon whom the onus lies, overcomes that issue.

35. The next matter is that the appellant says that she has not breached the rule because at the time the greyhound was presented it cannot be established that the threshold was exceeded. To put those facts in context, she says that it cannot be proved that a reading greater than 800 existed at the time she kennelled the greyhound. She points out in her evidence that, when she kennelled it, it is her belief that it was not over the threshold, that the greyhound after kennelling was given water, it raced and was given water, it was placed in its swabbing kennel and given water, it was then swabbed. The fact that there were readings of those given before, which have been summarised on the evidence as 1300 and 1100, therefore cannot be proved.

36. To establish that, the greyhound itself, after a dietary change and the removal of whatever it was that was setting it over the limit – which in all probability was brown rice; that does not have to be determined – was, with the cooperation of the stewards, on presentation at Dapto on 30 August subject to a pre-kennel swab and a post-race swab. The pre-kennel swab was 45, the post-race swab was 95. Without applying mathematical niceties, therefore, to levels of 1300 and 1100, which were post-race swabs, it is said that 45 divided by 95 multiplied by 1300 or multiplied by 1100 would be less than 800. Therefore, at the time of presentation the greyhound cannot be shown to have been over 800.

37. The great problem for the appellant with that submission is that the rules are written in such a way that a post-race sample is not to be differentiated from a pre-race sample in determining the threshold. And the reason for that is the scientific reports that Dr Karamatic referred to, carried out by Greyhound Racing on two occasions, which provided for the establishment after analysis of a threshold of 800. In determining that threshold, a number of factors were taken into account. They include hydration, the stress of racing and matters of that nature because it was found that there was no substantial difference between pre- and post-race. Whilst it is acknowledged that there has been no specific scientific analysis of a level on a pre-race basis, compared to a post-race basis, the number of samples taken to produce the threshold figure of, on the second test, 18,157 greyhounds, some of which were pre- and some of which were post-race, some of which were hydrated and some of which were not; some of which were subject to more concentrated levels of urine, etc, which was subsequently tested or not, all of those matters make no difference because the threshold itself would still be exceeded.

38. The other difficulty for the appellant is that the actual availability of scientific expertise on any difference between the sampling on 30 August, when the diet was changed, as against sampling when the diet was producing an excessive amount of arsenic, does not enable a level of certainty to be found that the mathematics would be 45 divided by 95 multiplied by 1300 or multiplied by 1100 respectively. There is not that level

of certainty that the maths would be that simple, that the readings with the arsenic present at excessive levels would necessarily produce a figure below 800.

39. It is, therefore, that the necessary rule otherwise has to be looked at as to when does a greyhound, within the meaning of Rule 83(2) “present the greyhound”, fall into the rules? And that activates the definition rule, R1, which contains the definition of presentation, which is in the following terms:

> “‘presentation’ or ‘presented’ a greyhound is presented for an Event from the time commencing at the appointed scratching time of the Event for which the greyhound is nominated, and continues to be presented until the time it is removed from the racecourse after the completion of that Event with the permission of the Stewards pursuant to Rule 42(2) or is scratched with the permission of the Stewards.”

40. It is quite apparent that the way in which the regulator has addressed the matter, and has done so for many, many years, is that the word “presented” in Rule 83(2) is activated when the dog is kennelled and that presentation remains activated until the dog is removed from the course. Therefore, a urine sample taken from the greyhound at any time during that range of times is within the definition of presentation. To simplify the rule relevant to these facts, from the time it is kennelled until the time it is swabbed is sufficient to fall within the meaning of presented in Rule 83(2).

41. Therefore, whether it was able to be overcome on a mathematical calculation or otherwise, the rule is, and its application requires, that this greyhound was presented at the time it was swabbed and it was also presented at the time it was kennelled and there is no differentiation between the two.

42. In the circumstances, that second ground of appeal is not made good.

43. The third matter raised in the grounds of appeal dealt with difficulty with contacting the lawyer on submissions. That went in relation to matters to deal with penalty rather than breach and does not require further consideration.

44. The respondent satisfies the Tribunal that the appellant on each of the two occasions as particularised in each of the two charges has breached the rule. The breaches are found established.

The appeal against the adverse finding is dismissed.

SUBMISSIONS MADE IN RELATION TO PENALTY

45. The Tribunal, having found the appellant has breached the rule on each of the two occasions, has available to it by way of penalty a full range of penalties from disqualification through to effectively taking no action.

46. The facts are, relevant to penalty, and the key fact, the length of time over which this appellant has been a trainer of a limited number of greyhounds, the fact she has no prior matters, that the breach in question involved the prohibited substance arsenic, that arsenic itself is a naturally occurring substance. The Tribunal is satisfied on the facts in assessing penalty that it was a dietary-related failure. In that sense, there have been numerous warnings given to the industry about arsenic and feeding and the necessity for great caution about the time of presentation. There is no doubt that the appellant was ignorant of the fact that in all probability the brown rice which had been recommended to her was going to lead to these high readings – and they were high, and well above the threshold.

47. The facts are that there was an out of competition test. This appellant was not told of the positive result, which was known to the laboratory but not to the regulator, prior to her subsequent presentations. That does not mean that the regulator is responsible for a failure to take action that it should have taken if informed of the irregularity.

48. Rather, it goes to the procedures that are in place. This Tribunal does not have a recommendation role but it seems to it, when it is assessing penalty in this matter, that if a laboratory knew that a prohibited substance of such a high level was in a greyhound, there seems to be an obligation for that laboratory to notify the regulator of that fact so that the trainer in question is given timely advice of that fact. It does not become that the steward would be visiting the trainer to advise of a breach of the rule but rather that it would be a preventative measure to avoid a breach of the rule. At the end of the day, the most important factors here are integrity, and integrity by reason of a level playing field. A trainer who is unknowingly breaching the rule is subject to severe penalties. If that can be avoided, it is better for the industry.

49. There is also the aspect of welfare. This industry is driven by the need for welfare of the greyhound. It seems to this Tribunal that if a greyhound has a reading as high as 1600 for arsenic, whilst acknowledging it is endogenous and there was no evidence whether that's a harmful level, it is in the interests of the industry to have a trainer notified that whatever their practices are, there may be harm being occasioned to the greyhound. That welfare issue for the greyhound is paramount.

50. This appellant has at all times pursued her personal interests in relation to greyhounds with great vigour. She has done so properly in her own interests and, importantly, in the interests of the greyhound.

51. She has not admitted the breaches of the rules and her failure to do so is quite explicable by her belief of what the rules provided and what she believed was necessary. Normally she would not have any entitlement to leniency of up to 25 percent of an appropriate penalty because there was no admission of the breach. However, that is not an inflexible rule. It would seem to this Tribunal to be unfair to disregard leniency available to this appellant by reason of the way in which she has presented her case, with the interests of her greyhound at all times as paramount.

52. Other cases in the past do not help her. It is obvious that the decisions in relation to arsenic in this code have been based on the fact that trainers are presenting greyhounds to race in circumstances where dietary-related matters have not been addressed. This appellant is no different. It is noted that where there has not been a breach in the past there have been periods of, firstly, a disqualification of 6 weeks in the matter Cerveny of 2 February 2017. And it was a food-related matter, without knowledge. No aggravating factors. Long period of licensing with nothing prior. The matter of King of 5 April 2018. Similar facts. Suspension of six weeks. Other matters involving Attard, McKinnon, Proctor and Schwenke have involved fines in and around $600/$700.

53. This appellant essentially is no different from those. This was a feed-related presentation. And no admission. But these facts contain an essentially different ingredient to all of those as they have been summarised, and that is that which has driven the appellant at all times and about which the Tribunal has made findings of a technical nature and about which the Tribunal has indicated how these practices might be changed to prevent a repetition of this conduct.

54. This appellant has quite emotionally expressed to the Tribunal, in regrettable thoughts for her but understandably so, that she has had it with the industry. There is an obvious love of the greyhound and that would be a most unfortunate outcome for her both personally and for no doubt her family.

55. The Tribunal has reached the conclusion, notwithstanding the failure to admit the breach, notwithstanding that it has been necessary to conduct a defended hearing, that it should use Rule 98, and it does so regardless of the fact that precedent does not assist her.

56. Pursuant to Rule 98(1) the Tribunal determines, without proceeding to a finding of guilt in each matter, that the appellant be discharged. Having regard to all of the facts and circumstances, no additional conditions are imposed upon that which is mandated by Rule 98(2) that she does not commit any further breach for a period of 12 months.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

57. There are two aspects to the appeal deposit. The first is that it relates to the substantive finding that the rules were breached. That does not assist a refund. The second matter is that on penalty the appellant was successful. But in this matter there is a different issue and that is that which motivated the Tribunal to assess the need for perhaps a change in practices. The appellant has taken the opportunity to air those matters.

58. In the circumstances, the Tribunal orders the appeal deposit refunded.
