RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR DB ARMATI

EX TEMPORE DECISION

WEDNESDAY 4 DECEMBER 2019

APPELLANT SONIA KEMPSHALL

GREYHOUNDS AUSTRALASIA RULE 83(2)(a)

DECISION

1. Appeal dismissed
2. Penalty of 10 weeks' suspension imposed
3. Appeal deposit refunded

1. The appellant, licensed trainer Ms Sonia Kempshall, appeals against the decision of the Greyhound Welfare Integrity Commission ("GWIC") of 16 August 2019 to impose upon her a suspension of her licence for a period of 10 weeks for a breach of the prohibited substance rule.

2. That rule provides, relevantly, 83(2):

> "The trainer in charge of a greyhound (a) nominated to compete in an Event shall present the greyhound free of any prohibited substance."

3. On 28 January 2019 the appellant was a licensed trainer, presented the greyhound Floki Jappa to participate in a race, a pre-race urine sample was taken and arsenic was detected at concentrations, on first testing, of 1253 nanograms per millilitre and, in the confirmatory sample, of 1187, as against a permissible threshold in Rule 83(11) of 800.

4. The appellant was dealt with by way of written submissions before GWIC and pleaded not guilty. On her appeal she has maintained a denial of the breach of the rule and has appealed penalty.

5. The evidence has comprised a bundle of material on behalf of the respondent, which comprises the various documents necessary to establish the ingredients of the breach, which involve the sample-collecting process, seal bay records, certificates of analysis by laboratories providing the readings just referred to and various matters which would otherwise go to penalty. It also contained submissions to GWIC on whether or not the rule was breached or not.

6. The appellant has given evidence. The appellant called Chief Steward Ms Thorsby. The appellant was able to have played to the Tribunal a video of her attendance at a kennel. The appellant attempted to have played to the Tribunal a video downloaded of the subject kennels on the race night in question, 28 January 2019. Regrettably, that was not able, during the course of the hearing, to be played.

7. The issues for determination are whether the appellant was the licensed trainer of the subject greyhound – and that is not in issue – and whether she presented that greyhound to race – and that is not in issue. The definition of presentation has not been the subject of consideration. The appellant admits those matters. What the appellant states, and thus her plea of not guilty to GWIC and her denial of the breach to the Tribunal, is that she did not present the greyhound with that prohibited substance in it.

8. The rules are structured in such a way that the presence of the arsenic in the greyhound is able to be established by laboratory certificates, and it is. Within the extended definition of presentation, the ingredient of present is able to be established. The issue is whether the respondent should fail to

establish its case on the basis of an interference with the greyhound on the night in question which has caused arsenic to become present in it other than any action or inaction of the appellant about her training establishment or otherwise about her presentation of the greyhound to race. Not a contamination case as such. There is no evidence about contamination. It is the appellant's genuine belief, to use an expression of the Tribunal and not one that she has used, that this greyhound was nobbled.

9. The rules have been written in this code with less severity than applies, for example, in harness racing. In harness racing it is established by Tribunal decisions and Supreme Court and Court of Appeal determinations that a presentation and the presence of a prohibited substance is an absolute offence and the only defence is provided in the rules that the appellant can establish that there was a material flaw in the testing process, and the Tribunal has ruled, supported by the Supreme Court, that that is any part of the testing process, including the swabbing process. There is no such exculpatory rule in the greyhound rules.

10. The issue is whether there is, as it were, a defence or, to put it in the strict legal terms, a failure of the respondent to prove its case because of a nobbling.

11. There is no direct evidence. It is that a number of issues of concern have driven the appellant.

12. It might be noted that for a long time stewards and tribunals have been confronted with cases where there is a position taken by the presenting trainer that the reason for the prohibited substance in the greyhound cannot be explained. Long ago, tribunals commenced to express to the industry and its regulators, that is, that it is the case that the regulator does not have to prove how, when, why or by what route a prohibited substance came to be present in a greyhound. The reasons for that are many. That in virtually every case the regulator is not present and cannot ever establish why something came to be present and thus the case law and the rules are written on the basis it does not have to; it only has to establish the two ingredients to which reference has been made: presentation and prohibited substance.

13. Recent case law has distilled matters that would go to penalty that are relevant to those matters but not to the issue of whether the rule was broken. Nevertheless, there must be a consideration of the case advanced by the appellant.

14. It falls into a number of categories. Firstly – and it is not relevant to breaching the rule on this occasion – the appellant has previously been dealt with on one occasion for three presentations for the subject drug here, arsenic. That presentation took place in August 2016. Interestingly, in July

2016 the threshold for arsenic of 800 in Rule 83(11) was introduced. As the appellant said in her evidence, she had no knowledge at all at the time of that presentation that seaweed meal contained arsenic nor, indeed, that many other substances about a trainer's premises contain arsenic and that it is a likely source. It is not in evidence in this case, but the Tribunal has dealt with a number of arsenic matters, both in this code and the others, in which a great number of matters are shown to contain arsenic. Simply put: water, dirt, food and naturally occurring in the body, anyway. Thus a threshold exists.

15. The relevance of those remarks is that the appellant has established that immediately upon that presentation she took steps to eliminate the possibility of arsenic about her premises. She took advice from a vet, a Dr Newell, and from another vet. As a result of that, all possible arsenic sources of contamination were removed. It is, therefore, that the appellant is driven by a belief that there is nothing that would cause arsenic to be present in her greyhound from any of her practices, or from her premises.

16. The appellant gave substantial evidence about issues with other trainers and officials at Grafton and, indeed, as she described how she had been reduced from racing with some frequency of possibly eight to nine races to one or two races because of the confrontations that take place. The relevance of those confrontations is a belief that, because of an attitude towards her and her family, someone may have been out to nobble the greyhound to get her. She gave evidence, essentially uncontested, about the fact that other people have expressed the desire to have her out of the industry.

17. In that regard, Ms Thorsby was questioned, as she was called by the appellant, about matters such as a petition, about which Ms Thorsby had no knowledge and the petition is not in evidence, its precise terms and circumstances are simply not known to the Tribunal, it is the appellant's summary of that evidence, and it is to be noted that she is unrepresented, that it was to the effect of getting her out of the industry.

18. Ms Thorsby's response was that she had been informed that there had been discussions about removing the capacity of anyone who had a positive substance to having had a greyhound of theirs subsequently become Greyhound of the Year. That evidence does not assist on the issue.

19. Next evidence was given about another trainer who was the subject of police proceedings, the details of which are not in evidence, and that that same person has had, therefore, problems with the appellant, both in respect of inferences to be drawn from the appellant's conduct in respect of that matter and also by reason of an occasion at which that person's greyhound was in an adjoining kennel to the appellant's greyhound, a urine-soaked mat was placed on top of the cage such that there were concerns

about contamination going into the cage. An issue arose whether or not the appellant had a problem. It is quite apparent there was a discussion, which was not particularly amicable, between them and that was coupled with a belief that possibly that person may have done something on the basis that that person was present both when the second lot of prohibited substance matters involving this appellant and the drug heptaminol took place and also on the subject occasion of 28 January when the arsenic presentation took place.

20. In cross-examination, however, the appellant conceded that she did not have any evidence that that person had done anything to the subject greyhound. The appellant was not able to expand in any evidence as to observations of that person being present at or about or in proximity to the greyhound at any relevant time prior to the pre-race sampling which might have led to an opportunity to nobble the greyhound.

21. There are other people – committee members – with whom she has had confrontations, based upon her driven desire to see welfare and integrity at the highest levels, and by taking people on, as it were, in respect of various matters. She has, in her belief, become offside with committee members and others, particularly other trainers. The inference to be drawn from those matters is that those people may well have done something to her greyhound to cause it to have an arsenic positive.

22. All of those matters have to be read in conjunction with the appellant's evidence about concerns on the operation by the Grafton Racing Club of its kennelling operation on race days and a lack of proper security.

23. That security issue arises in two respects: firstly, as to a lack of adequate video surveillance of the kennels. It appears that of the range of race day kennels that are available and the image on the video to the extent it could be shown, shows that there is not vision to within the individual kennels except to a slight extent the first four of those kennels and that, therefore, anything can take place within those security kennels and not be subject to observation on video.

24. The second point is this, that the appellant has given substantial evidence about the laxity of the actions of both stewards and of kennel attendants and of those who are then allowed to handle greyhounds within the secure kennel areas to the extent that it is possible nobbling could take place. It is her evidence that kennel attendants leave their positions where they should make observations of people who are proximate to other trainers' greyhounds and that there is every opportunity in the way kennels are designed that some substance can be slipped to a greyhound in a kennel. Those matters are established.

25. She has a number of grievances, it might be said, in respect of those matters and that she says that staff have been subject to advice about not carrying items which are capable of producing positives such as Coca-Cola, chocolate, sweets and antidepressants into kennelling areas. And it is, by inference, that trainers carrying the same substances could, whilst unsupervised, because the kennel attendant is not paying attention, go into those areas and do it. Those matters are established.

26. The question is, however, can those findings be elevated on the totality of that evidence to establish that there can be comfortable satisfaction about the operation on 28 January, in the subject kennel in which the greyhound was located, that there was a nobbling?

27. The appellant has tried at great lengths to establish each of those matters to which reference has been made on the basis she is driven by a genuine belief that she has done nothing wrong and that someone has done something. Each of those matters has been carefully considered. To the extent that has been necessary, the ones she has established have been referred to.

28. But the gravamen of this case falls not upon general practice but upon the establishment, because of conduct relating to general practice, that the possibilities of it occurring in fact, on a circumstantial consideration, are at such a level that there cannot be that comfortable satisfaction that the security in the operation was at an appropriate level and that a nobbling did take place.

29. As was put to the appellant, her case is speculative. The Tribunal fully understands the weight that she wants to be given to that speculation and to the concerns and she is genuine about them, there is no doubt about that. But at the end of the day, she carries no burden; the burden is on the respondent, the regulator.

30. The respondent satisfies the Tribunal that there is nothing about the operation at Grafton on 28 January 2019 which has led to anything which would cause the prima facie nature of the certificates and of the ingredients required to be established as having been found.

31. In those circumstances, the appellant's appeal against the finding of the breach of the rule is dismissed.

SUBMISSIONS MADE IN RELATION TO PENALTY

32. The issue for determination is penalty.

33. The matter involves arsenic. The categorisation of arsenic needs to be considered as to its severity, it being noted, as the Tribunal reflected, that it

is an endogenous substance, that it occurs in many places. Here the readings are well above the threshold. The case has not advanced on the basis that that of itself occasions any greater severity. It is not a marginal exceedance.

34. The regulator has chosen to put in place penalty guidelines. The Tribunal does not in this decision set out its approach to these matters, it uses them, and just for the purposes of this case, the limited remarks are that for certainty and understanding of the regulator, the stewards and those involved in decision-making as to what likely penalties will flow. This is Category 5. The way the penalty guidelines are worded provides for a starting point of 12 weeks disqualification and an increase for prior matters, reductions for admission of the breach or plea of guilty and other mitigating factors.

35. This Tribunal has expressed now for a considerable number of years its opinion that a presentation with a prohibited substance destroys the level playing field, strikes at the very heart of integrity of the industry and has a substantial impact upon the public's perception of an industry where there is what is in other cases blatant cheating so far as drugging animals is concerned to get an advantage or somehow to disadvantage a greyhound for betting purposes.

36. For that reason this Tribunal has expressed an opinion that a disqualification is an appropriate penalty in respect of presentations for prohibited substances. Indeed, the penalty guidelines reflect that as well.

37. At the outset of this case the Tribunal reflected with the parties upon the fact that the appeal in question involved not a disqualification but a suspension, and that was for a period of 10 weeks. As a result of submissions made the Tribunal is not asked – and was not asked – to give consideration to imposing a greater penalty than that which GWIC found to be appropriate, which was a suspension. It is not for the Tribunal to reflect further, therefore, upon a disqualification. A Parker warning was not given to this appellant for those reasons. The Tribunal merely indicates that it considers that an unexplained presentation with a prohibited substance in circumstances where it is the third occasion on which a trainer has been dealt with and which does not lead to a disqualification demonstrates substantial leniency.

38. Turning then to the question of whether a suspension or some other penalty should be imposed, it is that the Tribunal cannot find its way in its view about the leniency of a suspension to consider lesser penalties. It then becomes an exercise, if there is to be a suspension, of its length.

39. The matter having moved from a disqualification of something like 18 weeks under the penalty guidelines now down to a suspension means that

already many of the very strong subjective factors in favour of this appellant have been taken into account.

40. There is, of course, no discount for an early admission of the breach. The second ingredient about which there might be a discount of cooperation with the stewards or, in this case, with GWIC would very much fall in the appellant's favour. This appellant has conducted herself, both before GWIC and before the Tribunal, most appropriately.

41. The appellant has established a number of matters which were found in the decision. They indicate that this appellant has a very strong belief about administrative failures at the operation of the Grafton track. This appellant has justified grievances about the relationships that other people have with her and their failure to, as it were, give her the respect she deserves because of her stance in respect of welfare and integrity, views which the Tribunal can understand motivate her very strongly.

42. The appellant took steps to address any possible repetition. The Tribunal has accepted that.

43. The Tribunal has accepted that on occasions the appellant is able to establish in uncontested evidence that kennel attendants failed to give proper supervision and thus she feels in her submissions, both written to GWIC and expressed to the Tribunal, that she has been let down by the regulator in respect of the way in which it runs its meetings. It is not for the Tribunal to reflect further upon those matters, they are referred to because of the motivation in the mind of the appellant and the Tribunal's acceptance that she is genuinely of those beliefs and those motivations.

44. The appellant expresses in her penalty submissions that a penalty would be unfair for those many reasons. As the Tribunal reflected upon in its decision, the how, when, why and wherefore are not required to be established. The harness racing regime has been described in submissions to the Tribunal and adopted by the Tribunal and now reflected upon on a number of occasions as being draconian. It is. "If there's a presentation and it's a prohibited substance, it doesn't matter how it got there, you're guilty."

45. This regime, as was said, is slightly less draconian but nevertheless it is written in a way that simply says if you do those things then the penalty guidelines require you be penalised for it. The Tribunal does not analyse that further, a penalty is appropriate.

46. There are strong subjective factors which were given substantial weight about health, sole income, hardship which will be occasioned and matters of that nature. To the extent that that hardship is raised, the Tribunal again reflects, as it referred to as long ago as Thomas in 2011, that if the facts of a case are such that a penalty is appropriate and that hardship will

necessarily flow from it, then that is the ultimate conclusion that is appropriate.

47. The Tribunal does not find that the personal circumstances of this appellant cause it to move away from what, objectively viewed, was the seriousness of this conduct and the penalty that should be imposed for it.

48. The Tribunal does not intend to disturb the penalty that is, in its view, as expressed, a lenient one.

49. A suspension is appropriate, having regard to what would be imposed in respect of similar cases referred to in the submissions handed up. The matters of King, Brown and Wilson – in which suspensions were given with lesser prior history matters than this appellant, mean that a period of some many weeks is necessary.

50. This is a third presentation case but a fifth penalty consideration.

51. There cannot be a lesser penalty than 10 weeks and that the Tribunal considers that period gives substantial weight to the personal beliefs and the personal circumstances of this appellant way and above those which would otherwise be appropriate.

52. In the circumstances, the appeal against penalty is dismissed.

53. The Tribunal imposes a period of suspension of her licence for a period of 10 weeks.

54. The Tribunal notes that a stay was granted in respect of this matter on 20 August 2019 as against a decision which took effect on 16 August 2019. The calculation of when that suspension expires is a matter for the regulator.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

55. The appellant makes an application for a refund of the appeal deposit.

56. The appellant has failed in respect of both limbs of her appeal and normally there would be no hesitation in ordering the deposit forfeited.

57. However, the Tribunal notes financial hardship, health issues, a considerable number of matters which go beyond the usual in this case, that the appellant has chosen to air and has successfully aired.

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