RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR DB ARMATI

EX TEMPORE DECISION

FRIDAY 6 MARCH 2020

APPELLANT MORGAN FENWICK-BENJES

GAR 83(2)(a)

SEVERITY APPEAL

DECISION:

1. **Appeal dismissed**
2. **Period of disqualification of 4 years from date of suspension**
3. **Appeal deposit forfeited**

1. The appellant appeals against a decision of the Greyhound Welfare Integrity Commission (GWIC) of 13 December 2019 to impose upon him a period of disqualification of his licence for a period of four years.

2. The order was made in the following terms:

> "To disqualify Mr Fenwick-Benjes for a period of four years with (a) 38 weeks and 1 day suspended due to the period of interim suspension served from 21 March 2019 and (b) the remaining period of disqualification to be served commencing on 13 December 2019 and expiring on 21 March 2023."

3. The Commission laid against the appellant a charge for a breach of Rule 83(2)(a) which relevantly provides that the trainer of a greyhound nominated to compete in an event shall present the greyhound free of any prohibited substance. The Commission particularised that breach in terms that the appellant, as the registered owner/trainer in charge of the greyhound, presented it for race five at Gosford on 23 December 2018 and it was not free of the prohibited substance which was found to be amphetamine.

4. The appellant denied the breach of the rule to GWIC and GWIC conducted its preparation for the case and held two days of inquiry, at the conclusion of which it determined that the breach of the rule was established. The Commission then stood the matter over for penalty submissions, and in those penalty submissions the appellant sought to change to a plea of guilty.

5. This Tribunal notes that in addition to the charge the subject of this appeal there were 12 other matters before GWIC and for which there is no appeal. Accordingly, the evidence before GWIC covered more than the subject appeal.

6. On this appeal the appellant has raised the issue of severity only and remains of the plea of guilty that he sought to enter in the penalty submissions.

7. The evidence before the Tribunal has comprised the evidence before GWIC and the transcript of its two days of hearing. Whilst additional exhibits were marked in these proceedings, they essentially comprised the evidence before GWIC. In addition, there is tendered some extracts from the Greyhound Racing website.

8. The appellant has given oral evidence and been cross-examined.

9. The first issue is to determine objective seriousness. This was a presentation with amphetamine, which the rules provide is a permanently banned prohibited substance. The evidence establishes that it was at a level of 5 to 10 nanograms and it is an agreed fact that that is a low level.

10. The reasons for the presence of the permanently banned prohibited substance amphetamine in the greyhound and detected on post-race sampling has not been explained to a level which would exculpate the appellant from responsibility.

11. An expert report of Dr Major was called by the appellant. In that report and his oral evidence he examined the absence of metabolites, whether the reading was a high level and whether the reading was performance-enhancing. In respect of those last two matters, as just found, at 5 to 10 nanograms it is a low level. It is to be noted also that it is no issue, as it was found by the Commission and an agreed fact here, it was not performance-enhancing.

12. The issue as to the presence of the substance remains unknown. The appellant was interviewed by an inspector, expressed surprise, shock and great disappointment at the positive reading and essentially remained unable to explain it. He embarked in some conjecture in his evidence to the Commission in respect of the fact that he observed the person who caught the dog as the handler at the end of the race, a Mr Duggan, to be a member of a household in which the presence of amphetamines was not in issue. That is as high as the appellant could put it.

13. The evidence of that handler, Mr Duggan, to the Commission, having acknowledged the presence of amphetamines within the family members who live within his home, when it was put to him that he may have had it on his hands and transmitted it to the greyhound, that it was a possibility. It is to be noted that the regulatory vet, Dr Ledger, gave evidence by way of written report as to the usual formalities, which are not in issue, about amphetamine as a prohibited substance etc, and was prepared to concede that it was a possibility that there could be such a form of transmission.

14. Dr Major, at the Commission, having pointed out the low level, sought to establish as well that the absence of metabolites meant that there was environmental contamination, and he referred to various reasons why and in particular that which was found in other cases, for example, the ready transmission of cocaine and obviously other drugs like amphetamine on monetary notes. As to the absence of metabolites, he conceded that there was a level of detection in a laboratory carrying out a qualitative and not quantitative test that it may not have been detected.

15 Dr Zahra from RASL said that in his opinion and his experience the absence of metabolites was not a factor as amphetamine can pass through a greyhound without producing metabolites or, if it did, the one metabolite it might produce of hydroxyamphetamine may well have been below the level of detection.

16. That brief summary indicates that there is no evidence that would enable a finding to be made that the amphetamine was present as a result of

contamination by Mr Duggan or as a result of contamination in the handling process. It is more to the fact that the totality of the evidence satisfies that the amphetamine passed through the greyhound.

17. As just stated, that therefore means in a case where, as is always the situation with a presentation with a prohibited substance matter, it is not a burden upon the regulator to establish how, when, why or by what route a prohibited substance came to be present. The rules as they are written, and to which those who take the privilege of a licence are bound, merely require the regulator to establish the presentation, the fact that it was in this case by the trainer, and that there was present a prohibited substance and that is sufficient to found the offence.

18. The gravity of the breach, however, remains a relevant matter on penalty, if as tribunals in Australia are now determining post the decision in VCAT of Kavanagh v Racing Victoria, that three categories need to be considered. Justice Garde in Kavanagh in VCAT on 27 February 2018 had adopted that which was a determination earlier of Judge Williams in the case of McDonough – and still the reference to McDonough is not available to this Tribunal – but looked at the three categories where, relevant to this matter, category 3 may raise aspects of blameworthiness. But category 2, where at the end of the day the fact determiner does not accept the explanation given or is unable to determine an explanation. Category 1 is not activated here where the aspects of blame can be attributed to the trainer.

19. Justice Fagan recently in Kavanagh v Racing NSW in New South Wales also said that it is appropriate to consider a case where it is not possible to find blameworthiness in the trainer or, alternatively, that a trainer could not have made any other reasonable inquiries as to what might be a reason that a prohibited substance came to be presented in an animal that raced.

20. Therefore, having revisited those matters, this Tribunal determines that it is a case where it is not able, other than by pure conjecture, to determine how the amphetamine came to be present in the subject greyhound at the race and accordingly it is, so far as a consideration of penalty is concerned, having regard to those old decisions of McDonough and the decision of Kavanagh in Victoria, reinforced by the decision of Kavanagh in New South Wales, that it is a category 2 matter, and the appropriate penalty provided for such conduct is to be imposed.

21. In determining the gravity of that conduct, the objective seriousness, it is imperative that the Tribunal maintain the integrity of the industry and the welfare of the greyhound.

22. Here, the integrity of the industry is obviously that which requires there be a level playing field and that greyhounds be presented to race absent any prohibited substance. That is essential for the maintenance of the public

perception of the industry to the effect that all animals participate equally and that they can safely place their bets or follow the industry, if they are not bettors, or be involved in the industry if they are licensed trainers, owners and the like on the basis that others will compete fairly against them.

23. The aspect of welfare is not highly pressed in this matter. Welfare of a greyhound obviously mandates that it not be subjected to the presence of amphetamine.

24. The objective seriousness is reduced by the fact it was a low level and would not have been performance-enhancing. The aspects, therefore, of any public perception and the need for integrity based upon a level playing field is a reduced concern on objective seriousness by reason of those facts.

25. It is necessary to turn to consider some matters on objective seriousness about this appellant. He has three prior matters. They fall into two presentations, and for these purposes, there being no submission to the contrary, are to be treated as two priors.

26. To put those priors in context, it is the fact that this appellant first became licensed as an owner/trainer on 3 June 2016, a relatively short time ago. On 6 April 2017 GRNSW dealt with him on a plea of guilty for a presentation to race with cocaine and its two principal metabolites. That occurred because the appellant left the greyhound in the control of an unlicensed person and the stewards found the result of the contamination was in all probability due to that person's activities and/or conduct. The appellant's culpability there was assessed on the basis of a husbandry failure and the usual matters about his personal circumstances were taken into account and a period of disqualification of 12 months was imposed. That presentation occurred on 23 December 2016.

27. Prior to his disqualification the second group of matters occurred, and that was on 4 February 2017 where on two occasions he presented greyhounds to race with theobromine. Each of those occurred on the same day. There was a plea of guilty, the same subjective circumstances were considered and a period of disqualification of seven months was imposed to be partially concurrent only with that first breach.

28. He became relicensed on 9 October 2018 after serving that period out of the industry and as proximate as 23 December 2018 the subject breach occurred.

29. To put those priors in context, he has only really been licensed for exceptionally short periods of time where he was asked to, but failed to demonstrate to the industry and its regulator, that the privilege of a licence was something that should be available to him on the basis that he complies with the rules.

30. The Tribunal expresses that it has rarely had to deal with such a poor record where a trainer, effectively on three, but, it is assessed, on two occasions, within a short space of time of being licensed has been the subject of orders putting him out of the industry and then within a matter of weeks, it might be said, of getting the privilege of a licence back, commits a further serious prohibited substance offence and, indeed, in respect of two of the now four presentations they have been permanently banned prohibited substances, being the subject amphetamine and a prior cocaine. It is to be accepted that in respect of the first of those matters, the cocaine, there were matters of exculpation and they were husbandry failure matters and failing strictly to comply with what was required of a licensed person.

31. He has had little opportunity, too, because of his offending, to demonstrate that he has learnt the lessons from his previous breaches. It might be said he has not, because he is back again. Any assessment of an appropriate objective seriousness of his conduct on this occasion cannot be lost in respect of that short licensing period and those number of prior matters in such a short period of time.

32. Turning then to his subjective circumstances.

33. He is a hobby trainer; he has a full-time job otherwise. As stated, a short period of time in the industry. His personal circumstances are relatively briefly outlined in the GWIC decision. He has given evidence today and been subject to cross-examination. He gives evidence that he is the sole carer of a 10-year-old child for whom he has full financial responsibility. The relevance of that to his capacity to train greyhounds eludes the Tribunal. It is purely a personal circumstance. It is noted.

34. He gives evidence that he suffered property damage, unspecified, in recent floods. He gives evidence, substantially unspecified, of proximate damage to his property in recent bushfires. There was a bit of damage, unspecified. And he was involved in moving animals and helping family friends who all pitched in together to assist. It is submitted those activities in relation to floods and bushfires are subjective factors that stand in his favour. The Tribunal is satisfied that anyone who assists others in the times of bushfires demonstrates a certain strength of character which warrants recognition if they fail in respect of other matters in society. But it is really vague evidence and difficult to quantify.

35. He gave evidence of the cost to establish his training facility.

36. Those essentially are the subjective factors which he calls in aid.

37. The other key subjective factor to which the Tribunal always has regard is a ready admission of the breach. That is because it carries with it a utilitarian value to the regulator, but also it contains an early expression of remorse.

This appellant did not admit the breach. Indeed, he contested it. It was a two-day hearing. A decision was required to be given. He seeks to enter a plea of guilty after he has been found guilty. The utilitarian value of that is zero. There is no benefit to this regulator whatsoever. To the extent that he has admitted the breach to the regulator, there is virtually no utilitarian value in his admission of the breach to this Tribunal. The only benefit he gets from any of those matters is his cooperation with the stewards, because the Tribunal has said if the two factors exist of a plea of guilty and cooperation with the stewards, then a discount of 25 percent might be given if it was made early. Of course, objective seriousness can, in certain circumstances, in any case, mean that regardless of the strength of subjective factors, no discount should be given against the appropriate penalty for objective seriousness. However, there was cooperation here. He is entitled to the benefit of it. To do otherwise would not encourage all who are dealt with by regulatory Commission officers or by stewards of cooperation and the making of their job more readily achievable. He will be given a discount in respect of that cooperation, but nothing for the plea of guilty part of it.

38. On subjectives, his licence history gives him no further benefit of a discount.

39. This Tribunal expressed as recently as Swain, as it has on a number of occasions, its concern that the Penalty Table has been written on the basis that a penalty will be increased because of prior matters. It would be preferable if the table was written as, for example, it has for Harness Racing, and as, for example, would apply in the criminal law, but more demonstrably known to the community at large in respect of prescribed concentration of alcohol offences. Harness Racing, for example, prescribes a starting point for a first breach and then a starting point for a second breach and in some cases a starting point for third and higher breaches. It does not seek to start at a zero prior and then aggravate it. The traffic laws for the prescribed concentration of alcohol, provided by the provisions under those laws, provide that for a first breach a starting point is given, but if there is a further breach, the starting point is given as being higher. It is not treated as finding some extra to add.

40. Be that as it may, there is here a penalty table. The Tribunal only briefly, for the benefit of this appellant, repeats its often expressed mantra that it will treat those matters of a penalty table as guidelines and not tramlines. In other words, the Tribunal is not bound to carry out the mathematical calculation which has driven the Commission in its determination. The Tribunal acknowledges that for certainty of the regulator, its stewards and of those who are to be dealt with by the Commission there is some guidance to be found as to what a likely outcome is and how it will be achieved.

41. In essence, that penalty table provides for this breach a starting point, as a category 2 matter – amphetamine, a permanently banned prohibited substance – of a disqualification of three years. It then says there will be added

to that for prior matters a period of either, in this case, three years or 18 months. And it then provides for certain mitigating matters, one of which is a low level, for which relevantly here there would be a nine-month discount, and an early guilty plea of a further nine months. Other mitigating circumstances such as personal circumstances or exceptional circumstances allow for other discounts indeed, under the heading “other exceptional circumstances”, the maximum could be relevantly three years. It might also be noted that for a prior category 4 matter, which is the theobromine matters, that there would in all probability be an increase of some period of time as well.

42. All of that led to a calculation, with additions and subtractions, of a penalty of disqualification of four years backdated to the time at which he was subject to an 83(2)(a) suspension.

43. The Tribunal, taking guidance only from that timetable, considers its first function is to determine what is an objective seriousness for this breach. The Tribunal determines that it must be greater than a three-year starting period that would otherwise be considered appropriate for one offending for the first time. The Tribunal considers that for a person with two prior matters such as this, one of which is more serious than the other, that there should be a starting point of not less than 18 months for the previous cocaine-related matter, and the starting point of not less than some 11 months, which equates to the total matter for the theobromine matters. That would give a starting point of 5 years and 5 months. The Tribunal considers that that is not untoward having regard to the gravity of a category 2 presentation on a third occasion.

44. It is then a question of what discounts should be given.

45. The Tribunal has determined in respect of the cooperation matter that that alone should allow a discount of three months.

46. In respect of the various subjective circumstances to which reference has been made, the Tribunal has determined there will be a further discount of 5 months.

47. That makes a total for subjective circumstances of 8 months – very roughly, if mathematics was to be required, some 13 percent.

48. In addition, as provided for, it is appropriate that, because the regulator considers it appropriate, the low level, and lack of performance-enhancing effect therefore, warrants a discount of some 9 months or as it would be equivalent in percentage terms.

49. That gives discounts which equate to some 17 months, which brings back the discounts, from a starting point of 5 years and 5 months, to a disqualification period of 4 years.

50. Is that appropriate having regard to the parity cases to which the Tribunal has been taken? Perhaps the most relevant is Swain.

51. Swain received 18 months. Swain had greater subjective factors, and, indeed, the principal one was a full-time trainer with a considerable number of greyhounds in training and 27 years in the industry. Although there were prior matters, and the Tribunal analysed that in detail in Swain and does not set out to repeat it, it is satisfied that the facts of Swain, where 18 months was considered appropriate, can be distinguished from the facts in this matter.

52.As to the other cases to which the Tribunal was taken, they provide ball-park figures with their various differentiations, which is so often the case.

53. The end result is that the Tribunal has to determine whether a four-year period of disqualification adequately reflects the gravity of this case. The Tribunal is of the opinion that it does. The Tribunal has arrived at its determination by different means, but not totally dissimilar means, than those which would apply from the use of a penalty table.

54. The Tribunal determines that there be a period of disqualification of 4 years, which is to commence on the date of the 83(2)(a) suspension.

55. In those circumstances, the severity appeal is dismissed.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

56. Application is made for a refund of the appeal deposit. The function of the Tribunal is to determine whether it is refunded, refunded in part or forfeited.

57. This was a severity appeal against a disqualification. That appeal was dismissed. The Tribunal sees no reasons advanced as to why the appeal deposit should be refunded.

58. The Tribunal orders that the appeal deposit is forfeited.
