RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

WEDNESDAY 15 JULY 2020

APPELLANT ALLEN WILLIAMS

GREYHOUNDS AUSTRALASIA RULE 83(2)(a)

SEVERITY APPEAL

DECISION:

1. **Appeal upheld**
2. **Penalty varied to suspension of licence of 7 weeks**
3. **Appeal deposit refunded**

1. The appellant appeals against a decision of the Chief Executive Officer of GWIC, that is, the Greyhound Welfare & Integrity Commission, of 4 May 2020 to impose upon him a period of suspension of his licences for a period of 10 weeks.

2. The allegation against him is a breach of 83(2)(a) of the Greyhound Racing Rules and that is in terms that a greyhound shall be presented to race free of a prohibited substance. And the precise terms are:

> "83(2) The owner, trainer or person in charge of a greyhound –
>
> (a) nominated to compete in an Event;
>
> shall present the greyhound free of any prohibited substance."

The Chief Executive Officer particularised that in the following terms:

> "That you, a registered owner trainer, while in charge of the greyhound Typhoon To Excel, presented the greyhound for the purpose of competing in race 9 at the Wentworth Park meeting on 9 November 2019 in circumstances where the greyhound was not free of any prohibited substance.
> The prohibited substances detected in the sample of urine taken from the greyhound prior to the event were lignocaine and 3-hdyroxylignocaine.
> Lignocaine and 3-hdyroxylignocaine are prohibited substances under Rule 1 of the rules."

3. The appellant's determination by the Chief Executive Officer was dealt with on the papers. In accordance with the usual practice, he was sent a series of notifications and one of those was an opportunity to admit the breach of the rule – in other words, to plead guilty – and he determined that he would plead not guilty.

4. In accordance with usual practice, he was invited to make a submission. It is fair to say that submission was rather brief. In essence, he, to paraphrase it, said that he wasn't guilty and he looked after his greyhounds. It is fair to say that the Chief Executive Officer was not assisted in her decision-making process by the lack of assistance provided by the appellant. Be that as it may, the decision of 4 May was made, the suspension imposed.

5. An appeal on all grounds was lodged with the Tribunal. In due course that was quickly changed to a severity appeal only.

6. The evidence before the Tribunal has comprised the bundle of material that was dealt with by the Chief Executive Officer, which contained the usual

notification matters, the formalities of drug reports and the like, a report of regulatory vet, Victoria, Dr Karamatic, and the notice of decision.

7. The evidence in addition that has been provided to the Tribunal comprises a further report of Dr Karamatic and in addition the appellant has put in evidence an agreed statement of facts and a bundle of material which contains, importantly, evidence going to an issue of contamination, and character references. The appellant has given oral evidence and been cross-examined.

8. This is a severity appeal. By that reason it is not necessary to examine each of the ingredients of the breach, which are fully admitted. The appellant makes no contest of the fact that he presented the greyhound to race as alleged and that the drug and its metabolite are prohibited substances.

9. It is important to note that the drug in question is contained in 14 prescribed medications approved for use in greyhounds under veterinary Schedule 4 requirements, and in addition is found in 155 human over-the-counter medications. Lignocaine is used for pain relief and for cardiac stabilisation. It generally has a half-life of 24 hours, but if given in doses which caused accumulation, it could have a half-life of 11 days.

10. Dr Karamatic in his first report gave evidence of prior Greyhound Racing NSW cautions to greyhound trainers, supported by the 5 September 2019 GWIC warning, on care to be taken by trainers in the meat that they source. In other words, trainers were put on notice – and had been for some time prior to that document on notice – of the caution to be used in the source used for meat to be provided to greyhounds. In essence, they were put on notice that contaminants can be found in greyhound meat from knackeries in particular, or other sources.

11. For example, it is well known to the regulator, the participants and the Tribunal that for the purposes of treatment of animals that are subsequently slaughtered and become greyhound meat, they are given various injections and the like during the course of their life, and in addition, at abattoirs are sometimes given various medications for the purposes of assisting in euthanasia. If not controlled, those substances, consistent with the 5 September 2019 warning, can find their way into a greyhound and, critically and relevantly, into a greyhound to be presented to race. Thus the note of caution. The Tribunal will return to the contamination issue.

12. Dr Karamatic's further report in evidence today essentially looked at the issue of the quantity of the drug and its metabolite found in the subject sample. But on the basis that there are no research studies undertaken into concentrations of that substance and its metabolite, nothing useful can be gained. But importantly Dr Karamatic opined as follows:

> "Based on those apparent concentrations 'unlikely that a therapeutic dose was administered close to the time of this sample being taken and more likely that a smaller dose (e.g. contamination) was provided closer to the time of sampling, or a larger dose provided earlier'."

13. That is, there are three possibilities. Critically, the middle of those is a possibility of contamination by reason of the dose.

14. The appellant has been associated with the industry since 1989 when he became an owner. In 2017 he became a licensed attendant. In 2015, a licensed breeder. In 2016, a licensed stud operator. And, critically, an owner trainer in 2016. It is his owner trainer's licence that is subject to the suspension.

15. He purchased his current property where he has carried out his activities some four years ago and, on his evidence, he has spent one million dollars in fitting it out to a state-of-the-art facility. He spends something like $100,000-$120,000 a year in the maintenance of that facility. It is apparent that he takes great pride in it and it has been well received by the former regulator and by the current regulator. And, indeed, other persons are visitors to his property for the purposes of viewing how a state-of-the-art facility can be created and operated. Consistent with his involvement with his greyhounds, all of his prize money is put back into the property.

16. The appellant has given substantial evidence about his passion for this industry and love of greyhounds. And, indeed, that he substantially cares for these greyhounds, as it were, as they were his family. And he does his best he can for them and, indeed, acknowledges in his own evidence that he goes over the top in his provision for his greyhounds. At the time of his evidence he has 23 greyhounds in training, it being noted that he was granted a stay by the Tribunal, by consent, in respect of this suspension pending the determination of the appeal.

17. He was a landscaper but has effectively retired from that or, as he described it, semi-retired after 40 years. The relevance of his landscaping will be turned to when the references are touched upon.

18. It is quite apparent that he, as described, takes great pride in ensuring the welfare of his greyhounds. That is relevant because it is his evidence that he uses Dr Kwong as a veterinary surgeon for his greyhounds and has Dr Kwong attend his property with considerable frequency and between them they take great care to ensure that everything in relation to the operation of this training facility is at best practice and in compliance with the rules.

19. The appellant had been purchasing his meat for the greyhounds from Farra Pet Foods. That business had been operating from 1975 until it closed in December 2019, the Tribunal noting that this presentation was November 2019. The operator of that has provided, Mr Chambers, evidence in support of the appellant and describes how he became disillusioned with his supplier in Victoria and was challenging that supplier in Victoria and, indeed, went on to have his meat tested and found in September or October 2019 that bacteria was present in the meat. There was some concern it may have been horse meat rather than beef meat, but there is no evidence to support that. Critically, the evidence of Mr Chambers is that he had conversations with the appellant about the quality of the meat.

20. The appellant has quite fairly and properly sought to put in a case of contamination. That is understandable because it is his case that he has done nothing in relation to his actions as a trainer which would cause the presence of the drug and its metabolite in the subject greyhound for the particular race or, indeed, of any of his greyhounds at any time.

21. In that regard, he has gone to Mr Chambers to try and find some support. But Mr Chambers' statement is not of great assistance because it talks about a standard of a meat, the presence of a bacteria and issues of quality but, critically, an inability to carry out tests or analysis of the meat. The appellant, of course, by reason of the passage of time after the presentation and cessation of meats from December 2019 from Farra Pet Foods, was obviously not able himself to have any tests conducted of the subject meat or, indeed, any subsequent batches of meat, which may have provided some assistance to him.

22. The evidence of Dr Kwong is also called in aid in relation to the actions of the appellant. Dr Kwong, in a report of 1 June 2020 for the purposes of this Tribunal hearing, and at this stage his character reference will also be read out, states that he considers the appellant after 20 years as a client to be honest, polite and good-hearted, charitable by helping people in need, who suffered shock and disbelief at the positive that was here, and who is a person that Dr Kwong believes would not have the motive or capability to knowingly do anything to jeopardise his position, because he is a proud and fair trainer with an impeccable history and one who has taken precautions to prevent this happening again.

23. Dr Kwong opined as follows:

> "We performed a thorough search of all human and pet medications present, supplements and additives, with no known answers to the source of contamination. I discussed with Allen that in my opinion the most likely source of a local anaesthetic – lignocaine – positive was meat contamination."

24. The aspect of contamination is therefore raised by Dr Kwong, as it is by the appellant. As the Tribunal said, the appellant raises contamination on the basis that he can think of no other reason.

25. The Tribunal forms the conclusion that it is satisfied by the respondent that it is not able, on the balance of probabilities, to find that contamination was the source of the presence of lignocaine in this greyhound and that it came from contaminated meat. It is speculative only.

26. The relevance of that issue is, however, remains this: that it is a reflection of the concern and care and the efforts that this appellant has taken to try and find a source. It is possible it was, but it cannot be more than speculative.

27. The objective seriousness of this matter needs to be assessed. Objective seriousness has as a starting point in the Greyhound Racing Rules the penalty provisions set out in a table by the regulator. It was originally established by Greyhound Racing New South Wales but has been adopted by GWIC, and it is the GRNSW Penalty Table.

28. The relevance of that, as the parties acknowledge here, is that it is a guideline only, it is not a tramline either for the regulator or the Tribunal. But for the benefit of this appellant here, the Tribunal indicates that it considers that it must give weight to the table because to do otherwise would not leave the regulator, trainers or those who observe the industry with any level of certainty as to what likely outcomes will flow from breaches of the rules involving prohibited substances.

29. Importantly, the table has five categories and the subject drug and its metabolite fall into the least serious category – that is, Category 5. The first category deals with those that affect performance, right through to those such that are here, that are registered for use with greyhounds and have human use.

30. The table is informative and is essentially drawn in a way, with one exception, that in a civil disciplinary penalty matter such as this when it is the function of the Tribunal to impose a protective order and not a punishment and in doing so look to the future, and in doing so determine what message should be given to this particular appellant, what message must be given to other licensed persons and those who observe the industry, such as the public and bettors and the like, as to what are the likely consequences for a breach must be considered. In addition to the penalty table there is, of course, the issue of parity, to which the Tribunal will return.

31. Category 5 has the starting point of 12 weeks' disqualification. The Tribunal pauses to reflect on that issue that it is a disqualification, not a suspension. No reference was made by the Chief Executive Officer, and nor

have the parties in their submissions really touched upon the fact, that what has happened here, and against which the appeal has been laid, is a suspension. The table provides a disqualification. There has, therefore, already been a markedly substantial discount in penalty given. A reduction from a disqualification to a suspension has considerably different outcomes for a licensed person.

32. The Chief Executive Officer determined, consistent with the table, that there be a starting point of 12 weeks. The Tribunal sees no reason to digress from that period of 12 weeks.
33. It is the submission of the appellant that a lesser penalty, possibly a fine, or if that is not to be the case, a suspension, which itself should be suspended, is an appropriate outcome in all the circumstances.

34. The respondent, the regulator, on the other hand submits that the decision of the Chief Executive Officer is appropriate. That is, that it be a suspension. Nothing more is asked for. The Tribunal was not asked to consider increasing the order from a suspension to a disqualification and accordingly it shall not.

35. As just reflected, therefore, there has been a substantial discount already given to this appellant regardless of other factors of objective seriousness and regardless of subjective factors. Therefore, the objective seriousness determination having been reduced to a suspension, what else should be considered on objective seriousness?

36. This drug is categorised as a least serious type of drug, it had a low concentration. There is the possibility that it may have come from contamination; that is acknowledged.

37. Submissions have been made that the decision in McDonough, which in fact is the decision referred to by VCAT in Kavanagh, and Justice Garde merely adopted the decision of McDonough in Kavanagh rather than make the decision himself, and McDonough has not yet been sourced from the Kavanagh decision as to when it was given in Victoria, is that there be three categories of findings. It is the submission of the respondent here, that category 2 is appropriate. The Tribunal is of the same opinion. It is of the view that those three categories remain appropriate on presentation matters, as they do on administration matters. And here this appellant has sought to advance an explanation which the Tribunal has not accepted. The Tribunal cannot accept that he would fall into the least serious third category of a person who is able to establish that he was blameless.

38. And the other part about the application of McDonough, as adopted in Kavanagh, is that in Victoria there is no penalty table such that the aspect of categorisation, as is appropriate in Victoria, is a matter where there is some

tension with a guideline table in any event. However, the two can stand together in determining objective seriousness.

39. The Tribunal is satisfied that this matter can be assessed at the lower end of the scale of seriousness. The matter, therefore, is one in which a suspension is appropriate. But having regard to all of the facts that are here, there be a starting point of 12 weeks.

40. The subjective factors to which other discounts should be imposed are as follows.

41. The Tribunal has reflected at length in respect of this individual person and his involvement with the industry.

42. The first matter usually to look at is an admission of the breach and, if so, what benefit should be given for that.

43. Firstly, the appellant did not admit the breach before the Chief Executive Officer. It is fair to say, however, that she was not greatly troubled in the determination she had to make by the submission made by the appellant and that she was caused to go out and gather further evidence, or additional evidence to that which she already had, because of issues raised by the appellant. In essence, he did not agree he offended at all, he simply said, “I deny it”. There is nothing in her decision that indicates that she was required to turn her mind with any great trouble to finding the breach established. Nevertheless, it was not an admission.

44. By his appeal he made no admission. He subsequently did. That is based upon legal advice. He now accepts, and expresses by reason of his admission, not only by that admission itself, remorse and contrition for his breach, but he has expressed it most clearly in respect of his oral evidence to the Tribunal. He regrets that all this has happened and the impact it will have upon other people. In addition, it is reflected in the references to which the Tribunal will return.

45. The Tribunal cannot give a 25 percent discount for that history. The Tribunal has reflected in recent times that it must be careful not to simply attribute discounts to those who deny the matter before the original regulatory decision-maker and then take a chance that they can get a lesser penalty simply by appealing and changing their plea. That would send the wrong message.

46. There was nothing about the appellant’s actions here, however, that troubled the regulator when the original appeal was lodged. Nor, in essence, did it trouble the Tribunal by reason of the preparation of a case for a defended hearing. It quickly became an admission and, in essence, neither the appellant was put to cost, the regulator was not put to cost and the

regulator has not incurred additional costs of the Tribunal by reason of its preparation for a defended matter.

47. There is, therefore, a utilitarian value in that plea in addition to the remorse and contrition and acceptance of responsibility that it reflects. Whilst specific percentages are not required, the Tribunal considers, as it has in other cases of a like nature, that a discount of 10 percent is appropriate.

48. Turning then to the other subjectives.

49. The length of history of this appellant as a licensed owner trainer is limited. It is only four years. That is not a long period of time compared to many others with which the Tribunal has had to deal. It is not a strong factor on a substantial discount. Nevertheless, it is one in which, with his other forms of registration since at least 1989, he has not been found in breach of any rule of importance. That is not to say that every rule is not important, but he has had four matters in history to deal with whelping and registration and, indeed, entering a kennel area when he was not authorised to do so, not matters which the regulator puts forward as having any substance in the decision here, and the Tribunal is of that view that it is not other than a good past record which he can call in aid.

50. The appellant himself has done substantial work for this industry. That is reflected in his references rather than his own evidence, and the Tribunal will turn to those references in addition to that of Dr Kwong, to which reference has been made and which is adopted for the purposes of the subjective assessments.

51 There is the undated reference of David Polley, a rigging, scaffolding and yard logistics business owner who has known him for five years and worked with him in training, racing and other aspects of the greyhound industry. He says he is a person of complete integrity and maintains consistently high standards and his establishment is one of the best in Australia. It is one which engenders in the appellant pride in all aspects of greyhound racing, and that he would always present his animals in a first-class condition. The appellant has told Mr Polley that he is adamant that he has done nothing which would cause this presentation positive. And Mr Polley opines that the appellant would not do anything knowingly to do so. Mr Polley says it is difficult to accept he would knowingly breach the rules because he is a person of integrity and honesty and that this matter has had a serious and adverse effect upon him because of the appellant's own high reputation.

52. The next is by Ryan Freedman, undated. He writes under the NSW Greyhound Breeders Owners & Trainers Association heading, namely, Gosford Greyhounds. He is there the Manager of the Gosford Greyhound Racing Club, to be noted, a person associated directly with the regulation of

the industry. He has known the appellant for 20 years through his work – that is, the appellant's work – with the NSW Greyhound Racing Alliance. He describes him as a model participant who cares and prepares for racing at the highest level, with attention to detail. Mr Freedman doubts that the appellant would do anything adversely and detrimental to his reputation or to the welfare of his greyhounds.

53. The next is by Darren Hull, Bulli Operations Manager of the NSW Greyhound Breeders Owners & Trainers Association, in a reference of 29 May 2020. He has been the track operations manager for some 18 years at Bulli and has known the appellant since he took up racing and finds him to be honest, of the highest integrity and has the best presented greyhounds in condition and demeanour, who is a person who is polite and upfront and an asset to the industry.

54. The next is undated by Trevor Stanton and describes the appellant as a person who stands out amongst trainers with respect to all who are associated with him in the way he is respected for the treatment of his animals and his staff. He describes the appellant's facilities as gobsmacking and immaculate. He says he has both a love for animals and the greyhound industry as a whole with integrity and has taught others a love for the industry.

55. The next is undated by Richard Griffiths, Chief Executive Officer Richmond Race Club. Again, a person in a licensed or regulatory role. He is a long-time friend. He describes the appellant as a supporter of the Richmond Race Club, having been a sponsor, provided financial assistance and staff support and carried out voluntary landscaping facilities. He describes him as honest, genuine and humble with a love and passion for the industry and a faultless record.

56. The next is by David Ryan, a Chief Financial Officer, of 10 June 2020, who has known him for 25 years professionally and personally. Describes him as professional, passionate, diligent and honest and also has no hesitation in supporting his character.

57. The appellant also puts in evidence kennel inspection reports which indicate the high quality of his facilities in the minds of the GRNSW inspectors who looked at the property.

58. It is, therefore, that the appellant is assessed on those character references and on his own evidence, and it is not in contest from the respondent, that he is a person who has the utmost integrity, has a passion for the industry, has an interest in the industry, importantly, presents his dogs at the highest level and demonstrates his love and welfare for the greyhound. In addition, critically, he is supported in respect of the voluntary

work he has carried out for the industry. The subjective factors are very strong.

59. The final factor in assessing objective seriousness and starting point, to which the Tribunal has made reference, and the very strong subjective features is that at the end of the day there has to be a protective order which is consistent with the gravamen of the conduct. That is, that in some cases the objective seriousness outweighs all of the personal subjective factors of an appellant.

60. Guidance is obtained by issues of parity.

61. One of the cases put forward is the decision of Galea in Victoria. Firstly, the Victorian decisions can be distinguished on the basis they do not have a penalty table nor in particular the starting point-type table for a category 5 drug of a 12-week disqualification against which discounts can be applied.

62. The matter of Galea involved both a presentation and an administration. In essence, in Galea the trainer mistook a particular product and sprayed it on the dog's ears, the effect of which was to cause the positive. The disciplinary board in Victoria assessed the presentation and administration as inadvertent and there were admissions of breach, and because of that carelessness imposed on the administration a fine of $1500, of which there was some suspension, but no additional penalty for the presentation. That decision stands on its own, in the Tribunal's opinion, and is for that reason, and for the reasons expressed, not of great guidance.

63. The next matter relied upon is a GRNSW decision of 1 March 2017 of a steward in respect of the appellant North, which was for the subject drug and its metabolite. There was an early guilty plea, as distinguished from here, and there was an inadvertent contamination case, the same as raised here, but the steward was there not able to find the the contamination substantiated. There a suspension of 9 weeks was imposed. That, it can be concluded, was based on a 12-week suspension starting point – and the reason for a suspension and not a disqualification is not expressed – and with a 25 percent discount for an early plea, giving a 3-week reduction on that suspension to a 9-week suspension.

64. Therefore, if any parity was to be found, there is to some extent a finding in respect of North, which would indicate on an early plea matter a 9-week suspension.

65. Looking then again at the penalty guideline table, the Tribunal to date has only referred to the starting point; it has not referred to aggravating and other factors. It is not necessary to do so. There is no issue here that this low reading contains no aggravating factors, and the Tribunal has reflected on numerous occasions aggravating factors are not a matter to increase a

starting point but that they are factors which should be taken into account in determining objective seriousness from the outset. It is against that initial starting point of objective seriousness that the subjectives are to be considered, and the penalty table deals with guilty pleas, levels of substance and personal circumstances. All of these are otherwise taken in to account here.

66. The effect of the Chief Executive Officer's determination on the facts before her, which were virtually none, were that there should be a two-week reduction. It is the Tribunal's reflection that the Chief Executive Officer, based upon the complete lack of information given by the appellant to her, was very generous in giving any discount at all, let alone a two-week discount.

67. This case is different on appeal, however. The Tribunal has evidence. It has substantial evidence. It has different evidence. The Chief Executive Officer's decision is not considered to be, therefore, an outcome which must necessarily be adopted because it was based upon different evidence. In any event, it is the Tribunal's decision as to what penalty should be imposed, subject, of course, to the caution given in Kavanagh's case that the Tribunal should be careful to adopt procedural fairness before it does what the Tribunal considers to be its function, now tempered by Kavanagh's case, that it should not go out on a frolic of its own in determining penalty by increasing parts of it, but the total penalty, without giving procedural fairness.

68. Therefore, the Tribunal's conclusion in respect of this matter is this: it has a starting point of a 12-week suspension. That, it reflects again, and importantly, is a substantial reduction from a disqualification. That reduction is important because it must be reflected in the fact that greater reductions should not be given.

69. The Tribunal is of the opinion that a more substantial period of discount can be given because of the evidence now before it. Percentages are not essential. The Tribunal has already reflected on a 10 percent discount for the plea before it for the reasons earlier expressed. It comes to a conclusion that it is open to draw a further discount of roughly a further third. It does not have to be an exact percentage because the mathematics become difficult.

70. The effect of all of that is that the Tribunal has determined that it can give a discount of 40 percent for those subjective factors. That needs to be rounded to some extent and the Tribunal has determined that that discount be a period of 5 weeks.

71. Therefore, the discount of 5 weeks is considered to leave a suspension of 7 weeks. Is that fair, having regard to aspects of hardship and financial impact and the impact upon these greyhounds? The Tribunal says this, as it

did as long ago as Thomas in 2011, that if as a result of conduct the Tribunal determines that a penalty is appropriate, and the impact of that penalty would be financial or other hardship, then that is the consequence of a person's failures and not that of a cause to lead to other determinations. Those aspects of hardship and the like, which have been pleaded, will not lead to a further discount.

72. The Tribunal upholds the severity appeal.

73. The Tribunal imposes a period of suspension of the owner trainer's licence of 7 weeks.

74. Application is made for a refund of the appeal deposit.

75. This was a severity appeal, in essence. That appeal has been successful. No submission is made to the contrary. Whilst the appellant has not quite succeeded to the extent that he wished to, he nevertheless has enjoyed success on the appeal.

76. The appeal deposit is ordered to be refunded.
