

**RACING APPEALS
TRIBUNAL
NEW SOUTH WALES**

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

THURSDAY 1 OCTOBER 2020

APPELLANT KELLIE FOGARTY

**GREYHOUND RACING RULE 127(10)
and (11)**

**APPEAL AGAINST GWIC DECISION
NOT TO GRANT EXEMPTIONS**

DECISION:

- 1. Appeal upheld**
- 2. Appeal deposit refunded**

1. The appellant, licensed breeder Ms Fogarty, appeals against the decision of GWIC not to grant exemptions for her greyhound All Quality in accordance with GRR 127(10) and (11).
2. On 3 August 2020 a veterinary certificate was issued by a Dr Newell which accompanied the appellant's application of 10 August 2020 entitled "Breeding Exemption Application Form".
3. The matter was subject to an issue prior to the commencement of the hearing as to whether there was jurisdiction. The respondent GWIC does not dispute there is jurisdiction and that matter does not have to be further examined.
4. The question for determination is whether the Tribunal, standing in the shoes of the Controlling Body, determines that the exemptions required by subrules (10) and (11) of 127 should be granted.
5. The evidence has comprised the documents that accompanied the application, which critically include the application and a medical certificate of Dr Newell, a dated certificate by Dr Yore which accompanied a previous application, and various letters of factual matter advanced by the appellant, together with the actual decision of 26 August 2020. In addition the appellant, Dr Newell and Dr Hunter gave evidence.
6. The decision appealed against is under the hand of regulatory vet Dr Hunter and states, relevantly:

"I am writing to inform you that your breeding exemption application has been declined.

I have taken into account (1) the fact that this greyhound is over 10 years of age; (2) she has already whelped seven litters.

It is my opinion that further artificial insemination and delivery and the potential risk of this breeding outweigh the benefits."
7. Rules 127 (10) and (11) are as follows:

“(10) The owner of a breeding female, or the person with authority to breed that female, shall not cause her to be mated if that breeding female is over eight (8) years of age without prior veterinary certification of appropriate health and fitness, and the approval of the Controlling Body in writing. The approval granted by the Controlling Body under this sub-rule will be to allow one (1) service/insemination only, irrespective of the result of said

service/insemination. The veterinary certification must be obtained within 120 days prior to the date of the service.

(11) A breeding female cannot be used for breeding more than three (3) litters without prior veterinary certification of appropriate health and fitness for further litters, and the approval of the Controlling Body in writing. The approval granted by the Controlling Body under this sub-rule will be to allow one (1) additional service/insemination only, irrespective of the result of said service/insemination. The veterinary certification must be obtained within 120 days prior to the date of the additional service.”

8. The test that is required to be considered, as expressed, requires the Tribunal to determine whether it is satisfied that the totality of the evidence before it satisfies it that it should issue an approval that would satisfy both (10) and (11).
9. (10) and (11) contain two ingredients once certain factors are enlivened.
10. The first of the factors enlivened under (10) is that if the greyhound is over eight years of age. It is.
11. The next issue is whether there is a veterinary certificate of appropriate health and fitness. There is.
12. The next issue, as stated, is that an approval is required.
13. There is a further qualification that the veterinary certificate must be within 120 days prior to the date of service, and the certificate is dated 3 August, and obviously meets that.
14. Under (11) the test is if there is to be more than a third litter, it will be the eighth, and again, there is necessary approval, there is a veterinary certificate, the test is whether the approval should issue and the 120 day date of the certificate is met.
15. So in essence, the test boils down to the question of whether the discretion to give approval should be exercised.
16. The Tribunal does not have the benefit of a statement of policy as such which might accompany this rule. Interestingly, evidence was given by Dr Hunter, regulatory vet, today, heard for the first time by this licensed breeder, that there is an internally fixed set of criteria against which these applications are assessed. That has not been

published. It takes the appellant by surprise. It is of surprise to the Tribunal that it has not been published.

17. And the reason for that is this: that the exercise of (10) and (11) requires the exercise of a discretion. A discretion must not be fettered by extraneous reasons. In other words, if there is a test that is prescribed in a rule, then it is a discretion exercised within the boundaries of that test which must be considered.
18. That is not to say, however, that when dealing with issues of welfare of the greyhound, and they are paramount matters, that a number of matters might not otherwise be in the mind of the Controlling Body and therefore the Tribunal as to what is the reason of a limitation on eight years of age and not more than three prior litters, and that enables bringing in the various matters to which Dr Hunter has made reference. In other words, they are not extraneous factors which would improperly fetter a discretion.
19. The appellant is at pains to point out, supported by the veterinary certifier Dr Newell, that this greyhound is fit for that which she wishes it to engage in. It is noted that the greyhound is currently in season and the breeding aspect must take place virtually straight away. The effect of that is this: this greyhound is currently 10.
20. By the time it delivers this litter, if the application is granted, she will be just 11. It is noted that the test is engaged against a dog greater than eight years of age.
21. The appellant describes the greyhound as a pet and one who is a first-class mother of pups in the sense that she will stay with them till they are five months of age, she will nurture them, she will ensure they are fed, she will ensure that they are appropriately protected by her as a mother.
22. It is quite apparent also from the totality of the evidence, this greyhound having had seven prior litters, that it is the opinion of the appellant, supported by Dr Newell, that there are no matters in this greyhound's history from those past seven litters which occasion any concern to the appellant as to the capacity of this greyhound to carry this further litter without any harm to the greyhound.
23. Dr Newell is aware – and he is the treating vet for the greyhound – that it has no other health issues which are of concern to him. It is noted that for the purposes of providing his certificate, Dr Newell examined the greyhound and in accordance with what is accepted by the two vets who have given evidence here to be a rather superficial test, that each of the matters upon which he is required by the form to

report all certify in favour. It must be said that an actual examination of the greyhound itself in the circumstances of this case is a very important factor.

24. Also, coupled with the fact that Dr Newell has been associated with this dog for some time and is associated with the greyhound industry, to which the Tribunal will return, for a considerable period of time, and it is accepted by the regulatory vet Dr Hunter that he is able to, qualified to and in all probability could quite properly assess the greyhound as fit in the terms he has outlined for this further breeding exercise.
25. The regulatory vet did not examine the greyhound, and that is normal, it appears.
26. The regulatory vet refers to a number of matters that she has determined from her experience over the last 14 years of practice, based principally upon some 10 years in research and development involving the breeding of dogs, not greyhounds, but the Tribunal accepts her evidence that physiologically they are the same as the breeding dogs with which she was associated in her research. And it is noted in passing that whilst it is a matter for that research body, that greyhounds over six years of age with one previous caesarean section and a certain number of litters would not be further bred. However, that is in that regime; this is a regime for the regulator for greyhounds and its tests.
27. The various regulatory vets for greyhounds have come together and, as stated, formed an unpublished policy consideration. Firstly – and they accept that there are outliers which means that their discretion is not unreasonably fettered by this test – they will not issue an approval if a greyhound is more than 10 years of age – and here this greyhound fails that test. That it will not be allowed to have more than six litters – here this greyhound has already had seven and they seek approval for eight, so it fails that test. It has not had more than six previous surgical procedures – and here it has eight, so it fails that test. It must not have had two caesarean sections – it meets that test, it has had one. And it must not have been more than three years since it last had a litter, and the last litter was in 2019, so it meets that test.
28. So in essence, beyond the provisions of subrules (10) and (11), the issue of number of surgical procedures with which this greyhound does not meet the test would mean it would not otherwise pass those tests. The aspect of not more than 10 years of age and not more than six litters is covered by (10) and (11).

29. The issue of Dr Hunter's evidence essentially is that, to adopt the term that apparently is common, this is a geriatric greyhound. In other words, it is more than eight years of age. It is noted the evidence said some have been treated by Dr Newell up to 17 years of age. And it is Dr Hunter's concern that, absent the various tests that the greyhound vets have put together, she is concerned principally about the various problems that can arise with a greyhound as it ages. In essence, none of them are of surprise.
30. She referred to adverse reactions from heart, lungs, muscles, skeletal systems, liver, kidneys, blood and the like. All of those appear to be, with no disrespect, quite expected problems as any body ages. And in addition, particularly with greyhounds, there is a need, therefore, for extra precautions being taken because of the possibility of other types of problems that might arise, and the list is not sought to be exhaustive but was by way of demonstration only, of uterine rupture or inertia, of dystocia and the like.
31. It is noted here that some of the evidence turns on the issues of the means by which the greyhound will be bred, and that is by natural breeding, by artificial insemination and, in particular, by transcervical procedures. Here it is proposed to be transcervical. The totality of the evidence satisfies the Tribunal that that is the lowest risk to the actual greyhound itself for the means of the breeding to take place.
32. All of the risks with age described by Dr Hunter are quite understandable and no doubt reflected in the policy decision to introduce, in 2015, the subrules (10) and (11). These rules are here for the welfare of the greyhound. This policy is not here for the benefit of the breeder as such because the rules are written for the benefit of the greyhound and its welfare and have been amended accordingly. Of course, this is an industry which relies upon breeding and licensed breeders are an essential ingredient to it and their rights and obligations must be respected.
33. The question then becomes what weight is to be given to Dr Newell's certification and the evidence that he has given? To paraphrase it, it is quite clear that accepting the increased risks with age, accepting that certain procedures that are undertaken may increase risk and others mean a reduction in the veterinary examination of a greyhound before certain procedures take place, he nevertheless remains of the opinion that he put in his certificate that the subject greyhound is fit for purpose.
34. The two vets referred to their experience. Dr Hunter does not seek to advance her level of experience to match that of Dr Newell – 46 years in the industry compared to her 14 indicates the greater experience

that he has, but it does not mean his opinions are necessarily to be preferred to hers. That is not the test that has to be considered. The question is whether on the totality of the evidence each of the factors identified in the policy reflected in the rule, each of the factors identified by the regulatory vets that they take into account and each of the matters which go beyond those listed matters, but are obviously there as to the risk to a greyhound are in essence not in contest between the two vets, that the application should be granted.

35. The balance then becomes what is the issue in respect of this greyhound as against the two tests. It is quite apparent this greyhound is well past, if it may be so described, the limitations which the regulatory body, and supported by Dr Hunter and other regulatory vets, considered to be appropriate for the greyhound. Relevant specifically to the test here, it will be 11 when the birth takes place and it will be an eighth litter, not a third. They are considerably over and above the policy limitations.
36. The Tribunal makes it clear that for the purposes of this determination it ignores that other test which is that which the vets apply of six surgical procedures. In any event, there is a balance because whilst there have been six surgical procedures exceeded because it is eight, it is only one C-section compared to two. So to some extent there might be some balance there in any event.
37. The evidence of the appellant is very persuasive. She satisfies the Tribunal that she would not be pursuing this exercise if she did not have a personal belief that this greyhound is fit to engage in this further breeding. The Tribunal accepts she would not expose the greyhound to that by reason of any personal desire for financial gain as against the welfare of the greyhound. The Tribunal has the benefit of hearing from her as the breeder and the owner and the supervisor of this greyhound as to what might be described as outlier conditions of this greyhound. In particular, her fitness, her parenting and her lack of problems in any prior breeding exercise. Seven litters is a lot, eight seems a considerable number against three. But the evidence that is here indicates on each occasion that the greyhound has come through, to use a loose expression, with flying colours.
38. It might be noted – and it is not part of the case the Tribunal is asked to consider – that there is what is known as an 80/60 rule. In other words, the pups of this greyhound have to have 80 percent of them named and 60 percent of them having raced and a certain number of them having won. That has not formed part of this case and is not further examined. But it is reflective of the fact, and dealing with it in passing, that there is nothing else about this greyhound that is of concern.

39. This is not an easy determination. The weight to be given to the position taken by GWIC, the policy determination, the considerable excesses over which this appellant seeks a discretion to be exercised mean that there are troubling matters.
40. Dr Hunter touched upon the fact that there can be outliers. Dr Newell, with all his experience, has assessed the greyhound as being fit for purpose. If Dr Newell did not have the experience in respect of greyhounds generally and this greyhound in particular, and the benefit of having assessed it as to be fit for breeding by reason of examination, this application would not be granted.
41. Balancing those matters against the policy determinations, the appellant satisfies the Tribunal that it should exercise its discretion to issue the approval that is required by both subrules (10) and (11).
42. In those circumstances the Tribunal notes that (10) and (11) are otherwise met and accordingly it is appropriate that the appeal be upheld, and the Tribunal so orders.
43. The appellant makes application for a refund of the appeal deposit. The appeal has been upheld. The Tribunal is satisfied, there being no opposition to it making such an order, that it should order the appeal deposit refunded.
44. The appeal deposit is ordered to be refunded.
