RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

MONDAY 28 SEPTEMBER 2020

APPELLANT LEON CUNNINGHAM

RESPONDENT GWIC

GREYHOUNDS AUSTRALASIA RULE 83(2)(a)

SEVERITY APPEAL

DECISION:

1. Appeal dismissed
2. Penalty of 12 weeks' suspension of licence imposed
3. Appeal deposit forfeited

1. The appellant, licensed person Mr Leon Cunningham, appeals against a decision of GWIC of 23 June 2020 to impose upon him a suspension of his licence for a period of 12 weeks for a breach of Rule 83(2)(a). Summarised and relevant to these proceedings, that rule is in the following terms:

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

2. In summarised terms in the decision, as compared to the detailed particularisation in the Notice of Proposed Disciplinary Action, GWIC particularised the breach as follows:

> "Mr Cunningham presented the greyhound Supreme Flash for the purposes of competing in race 2 at the Grafton meeting on 3 February 2020 in circumstances where the Greyhound was not free of any prohibited substance.
>
> Prohibited substance(s): Caffeine and its metabolites theophylline, paraxanthine and theobromine."

3. The determination before GWIC was made in writing by the Chief Executive Officer based upon written submissions.

4. The appellant, when confronted with the Notice of Proposed Disciplinary Action, pleaded guilty and his penalty was determined on that basis. By his appeal, he has pleaded not guilty.

5. At the commencement of this hearing, after an exchange between the appellant and the Tribunal, the appellant changed his plea to guilty. This then became a severity appeal only.

6. The evidence has comprised the bundle of material before GWIC, which comprises what might be described as the usual documents of laboratory certificates, veterinarian report and certification and the written explanation of the appellant, to which the Tribunal will return, and now, of course, includes the bundle comprising the Disciplinary Action Decision of 23 June 2020.

7. In addition, the Tribunal has a number of written submissions from the appellant to which it will turn, as well as oral evidence from the appellant. Prior to the commencement of the hearing the respondent very helpfully provided a submission and has relied upon that.

8. This being a severity appeal, it is not necessary to examine the evidence surrounding the circumstances of this breach in detail. Suffice it to say that the fact of presentation is established, and is done

so not only by the plea but by the facts, within the meaning of the extended definition in Rule 1.

9. The appellant's position is that he has not intentionally administered anything containing caffeine, or what might lead to its metabolites, to this greyhound at all.

10. It might be noted that it was the evidence of Dr Karamatic to the GWIC investigation that there are 68 therapeutic goods administration human registered products which contain the substances and they include such straightforward things as coffee, tea, soft drinks, energy drinks and sports supplements, and it is well known from other cases that it is also a by-product of the consumption by a greyhound of chocolate.

11. Staying with Dr Karamatic for the moment, whilst he did not have a quantitative assessment by the laboratories, on a qualitative assessment it was possible to determine that the levels of each of the drug and its metabolites were low and Dr Karamatic opined that that was consistent with the various cases with which he has had to deal.

12. Dr Karamatic also pointed out in his report that GWIC in August 2019 published a document entitled "Spike in caffeine related positive swabs" and another document entitled "Caffeine fact sheet", each of which was designed to bring to the attention of trainers the importance of ensuring that various products such as those common ones to which Dr Karamatic referred are not given to greyhounds, particularly if they are to be presented to race. The caution is a salutary one that many products contain caffeine and their ingestion by a greyhound will lead to prohibited substances being present.

13. It is noted that the appellant has given evidence that he follows a natural-sources food regime such that he has eliminated possibilities of such prohibited substances as the present one, to the best of his ability, from being present in his greyhounds when presented to race.

14. In support of that, he points out the past swab history of this greyhound and two others which he has presented to race, all of which, from a number of positive swabs – and the number is not given – have provided clear results.

15. Staying again with the racing history of the subject greyhound under the care of this appellant, his evidence is that it has had 90 prior starts for one win and whenever tested, as just expressed, it has been clear of prohibited substances. It is also noted in his evidence that the greyhound is raced for enjoyment, not only of the appellant but of the greyhound itself, which apparently responds to racing in a favourable way. The appellant points out, and the Tribunal accepts, that this

greyhound is, as is so often the case in this industry, a treasured family pet.

16. The appellant points out, in an effort to ascertain what might possibly have happened, a number of matters. Firstly, that the greyhound did not perform any better in this race than it would normally; that he emphasises very much the low level, consistent with it not being performance-enhancing, although of course the various ways in which the subject prohibited substance reacts in a dog area all designed to improve performance. Low levels, however, consistent with a qualitative reading here, are reflected in this result. The greyhound ran fifth. It did not do any better than it normally does. It therefore has not, on the face of it, been given a prohibited substance for the purpose of winning this particular race.

17. The appellant continued in his endeavours in his written submissions to try to assist both GWIC and the Tribunal to ascertain what in fact might have happened and how this substance came to be present. For example, he points out that adjacent to the Grafton greyhound track there is a caravan park and that car parkers using that caravan park have unrestricted parking to the greyhound parking areas. He opines in his submission of 26 June 2020 that a person in those circumstances dropping a piece of chocolate and the greyhound having a possibility of consuming that chocolate, it may well have been so contaminated.

18. Also in his submissions he points out the race day protocol. The Tribunal, having explained the breadth of the presentation rule definition in Rule 1 of the rules, does quite fairly point, out as it does to many appellants in respect of these type of presentation matters, the fact that the greyhound is in fact not always in the actual control of a presenter, a trainer, a person having the control of a dog on race day, because it is placed in kennels – although they are secured and sealed – and, of course, for the purpose of voiding and the like, it moves about common areas where other greyhounds have been and, of course, it comes from a car, through a car park usually, to a presentation area and is then, after racing, removed to those areas and there is perhaps some concern in the mind of the appellant that at those times the substance may have somehow come to be present.

19. The appellant also brings to attention a number of matters in his submissions, particularly that of 25 June, about his concerns on processes. Those do not need to be examined because they do not go to the ingredients of this breach, nor to the subjective factors or mitigating factors to which the appellant has turned. For example, just to summarise them, trainers being warned about which dogs are to be pre-race swabbed and the capacity therefore to target competitors' dogs in times when they are vulnerable.

20. The fact of the matter is that the Tribunal understands, as it has so often expressed in the past, in respect of trainers who find themselves in the position of this appellant, that they remain perplexed by what has happened. But the fact is the rule is written, the penalty table is written, the parity cases to which the Tribunal will turn in due course, are decided on the basis that intent to breach this rule is not relevant.

21. The mere ingredients of trainer presenting to race with a prohibited substance brings into play the issues of integrity of the industry and, of course, welfare of the greyhound, as well as the aspect of what should be the consequence of any civil disciplinary penalty in providing an appropriate message to this particular appellant or trainer, to the industry at large, such as other trainers and presenters to race, as well as to the betting public and the public in general that the level playing field required by the complete elimination of prohibited substance is paramount to the integrity of the industry and that is so in various ways.

22. The appellant at the end of the day can only surmise on the lines just outlined, but in his submission of 8 June 2020 to GWIC he thought, by way of surmise, that he may have left a coffee cup exposed and that the subject greyhound, to quote him, “helped herself to a sip”. And he relies upon the report of Dr Karamatic to support the fact that in various scenarios a small quantity could have been ingested sufficient to produce these positives.

23. At the end of the day, the fact that this appellant is driven by an accepted and genuine belief that he has engaged in nothing of a wrongdoing nature is of course slightly tempered by the possibility that he has engaged unwittingly in a husbandry failure. That is not possible to determine. It may provide an explanation.

24. Some time ago, in a decision in Victoria called McDonough in the harness racing industry, the Tribunal member there opined about various scenarios which need to be considered by a decision-maker on civil disciplinary matters such as this. That case was adopted in Kavanagh, which is a Victorian Civil and Administrative Tribunal decision of 27 February 2018 in which the presiding member, Justice Garde, summarised the three possibilities identified in McDonough as being where the decision-maker decides that the presenter has engaged in the wrongdoing with knowledge and in those cases the heaviest of penalties is appropriate. The second case – and these are broad summaries of His Honour’s decision – is that at the end of the evidence the decision-maker is simply unable to decide how the prohibited substance came to be present or is not comfortably satisfied to accept the explanation of the presenter. In those cases, the

standard penalty is appropriate. The third category is where the decision-maker is satisfied by the totality of the evidence, to the level of reasonable satisfaction as required, that the presenter satisfies the decision-maker the presenter was blameless, in which case no penalty or a minimum penalty may be appropriate. Kavanagh does not need to be more closely analysed. This Tribunal has adopted it and applied it since it was delivered in a number of cases in this and the other two codes.

25. The facts here are that he falls into Category 2. The appellant carries no burden of proof whatsoever. The respondent, the regulator, on all of the evidence, satisfies the Tribunal that this cannot fall into Category 3 of blamelessness because the evidence simply cannot be at that level. A Category 2 then requires a standard penalty.

26. What then is a standard penalty? That requires assessment of objective seriousness of the conduct of this appellant and then a consideration of his personal circumstances which involve mitigating factors and subjective factors. This is a standard presentation of a caffeine-related greyhound to race. The Tribunal simply does not know how this low level of caffeine came to be present. It accepts on the totality of the evidence that it was not performance-enhancing, nor was intended at any stage, obviously, or it would be in the first category, to be so. It is, therefore, a standard type of objective seriousness breach.

27. In that regard, the regulator has published a penalty table. That penalty table assesses this drug as Category 4. Dr Karamatic gave evidence that this is Category 4. The penalty table is a mere guideline and not a tramline. The Tribunal must make its own determination but, as it has expressed so often, will not divert from those if the facts and circumstances of the case indicate their appropriateness, because it provides a level of certainty to the regulator, trainers and those who observe the industry as to what likely outcomes will flow from any breach.

28. Here, Category 4 provides a starting point of 24 weeks' disqualification. Not suspension, not fine, but disqualification. There are aggravating factors provided for that might increase these matters, and none of those exist here. There are reduction factors to which the Tribunal will return, and the regulator considered those as well.

29. The Tribunal's starting point, therefore, is a disqualification of 24 weeks. Is that an appropriate outcome? The Tribunal will return to parity. But parity quite clearly indicates that this regulator has not considered for some time that facts such as this one for this particular prohibited substance warrant a disqualification.

30. This case is one in which the regulator submits that the decision of the Chief Executive Officer of a 12-week suspension is an appropriate outcome and the appellant, as he did to the regulator, and as he does on this appeal, submits that if anything he should have no penalty, because of all the facts, or at worst, a very nominal penalty of a monetary nature.

31. The circumstances of the appellant are to be considered next. He has been a trainer for four years. He has no prior prohibited substance matters. He has an obvious interest in this industry. He describes himself as the oldest apprentice. His age is not known, but he has only been four years in the industry. He describes his assistance to the industry being that he has provided guidance in respect of the design of the Grafton racing track and also makes himself available as a catcher for any trainer or presenter who is in need of one. Those are matters which certainly stand in his favour.

32. He satisfies the Tribunal that he is not a cheat by nature. Nor is he a cheat as a training presenter of greyhounds to race. The appellant has attempted to provide an explanation for what might have happened and the Tribunal has reflected upon that.

33. He has prior to this breach engaged in an appropriate attention to his husbandry practices by the use of natural sources of food and gives the example in his submissions that he avoids vitamin B12 because of the possibility of cobalt positives if substances such as that are used.

34. The appellant in the Notice of Proposed Disciplinary Action had indicated to him that he would get, if he pleaded guilty to the regulator, a full discount of 25 percent for that. And in addition, there would be consideration of other discounts for subjective facts.

35. At the outset, the Tribunal notes that he pleaded not guilty to it and it is open to the Tribunal not to give him the benefit before it of that 25 percent discount. However, it is apparent from his explanation that it was his belief, misplaced as it is, that to have an appeal he had to plead not guilty. As a result of explanations given to him and before evidence was taken, he admitted the breach.

36. From the utilitarian value of it to the regulator, firstly, the original decision-maker, the Chief Executive Officer, was not inconvenienced by having to decide the actual guilt or innocence. That was a benefit and utilitarian. Here the regulator had to prepare for a defended case. But having regard to all of the evidence that is here, the way in which it was given and the way in which it was proposed to be given, the Tribunal is satisfied that that has not occasioned to the regulator any substantial additional cost or inconvenience which should lead to a

subsequent discount in reduction for a plea of guilty. In those circumstances, the 25 percent plea of guilty discount will be given.

37. The next issue is what sort of discount should be given for the other personal circumstances. It is the Tribunal's opinion that the Chief Executive Officer was exceptionally generous in giving 25 percent. This Tribunal, based upon the facts and circumstances before it, would not have been disposed as an initial decision-maker to be so generous. Those matters, consistent with other decisions, might have led to something like a 10 percent discount, not 25 percent.

38. Therefore, the additional facts that have been given today about assistance to the industry in track design and acting as a catcher do not persuade the Tribunal that a greater discount than that which was previously available on the facts should be given. The submission today on behalf of the regulator is that all of the subjective facts should lead to a 25 percent discount in addition to that for the plea of guilty. If that is the submission, and there is no request for a Parker-type warning which would indicate a heavier penalty, the Tribunal is of the opinion that it also should leave the matter where this appellant gets a 25 percent discount for subjective facts.

39. It is then a question of what type of parity needs to be considered in respect of other trainers and presenters who have offended this rule. At the outset, the appellant is of the opinion in his evidence and submissions that he is being singled out, unfairly dealt with, that he has been given a penalty which is not commensurate with either the facts or his personal circumstances. That is, he puts it in the terms that the regulator applies a one size fits all and he has been bullied. The Tribunal rejects that submission. It is not consistent with the facts and circumstances of this matter, its awareness of the way in which the regulator operates. But it entirely ignores aspects of parity to which the submissions provided by the regulator confirm. The regulator has provided seven cases of its own in which it has dealt with caffeine and its metabolites.

40. Summarising those cases – and they run from October 2019 virtually up to the present time – in very brief and summary terms, they are as follows.

41. Wright, 50 years trainer, no priors, plea of guilty, explanation, personal circumstances, reviewed practices and expressed remorse, 10 weeks' suspension of which six were suspended.

42. Zarb, eight years' experience, one prior, plea of guilty, personal circumstances, 16 weeks. The Tribunal pauses to note that absent any lengthy history that here there was a prior and that would have led to a

loss of reduction of a not insubstantial amount, although not expressed here.

43. The next matter is Spiteri, 22 years' experience, no priors, no plea of guilty, reviewed practices, two matters, suspension of 10 weeks in one, 12 weeks in another. It might be noted that there the absence of a plea of guilty probably led to a loss of a particular discount.

44. The next matter is Osborne, 16 years' experience, no priors, a plea of guilty, a review of practices, 12 weeks' suspension.

45. The next is Micallef, 35 years in the industry, one prior, plea of guilty, an explanation given, review of practices, 12 weeks. It might be noted there was in all probability there a balancing of the fact there was a prior with the very lengthy history in the industry, and noted to be a greater penalty than that given to Wright, where there was 50 years in the industry.

46. The next matter is Ivers, 29 years in the industry, one prior, plea of guilty, an explanation, review of practices, 12 weeks' suspension. That matter falls squarely with a consistent decision made between Micallef and Ivers.

47. Next is the matter of Gorton, seven years in the industry, no priors, plea of guilty, personal circumstances, review of practices and remorse, given 14 weeks.

48. There, there is a strong element of parity for Gorton with this appellant: four years in the industry, no priors, a plea of guilty, explanation, personal circumstances and it was considered 12 weeks. Here it could be said that the 12 weeks was in fact generous to him if the Gorton precedent was to be relied upon. The reasons for distinguishing Gorton and this appellant are, on those bald facts, not apparent.

49. Firstly, therefore, the Tribunal determines that this be a suspension matter. It does not determine it to be a disqualification. It rejects the submission of the appellant that this matter warrants no penalty or that there be a low fine. Fines have not been the outcome. These other appellants would rightly say: on the basis of parity, why did this appellant get a fine and we were all suspended? The answer to that, in the Tribunal's opinion, is that it, in the circumstances, does not see that this case is so driven by matters of lack of objective seriousness and strong subjective factors that it should distinguish this appellant from the others by giving him the very strong leniency that he invites.

50. The Tribunal considers that the outcome for this appellant not only is generous in a suspension to start with, compared to a disqualification,

but it has dealt with that. It considers that the 14 weeks that it could well have imposed if it had looked at the recent case of Gorton would have been, of course, greater than the 12 weeks here. The appellant's personal circumstances the Tribunal has reflected upon, when he was generously dealt with, in its opinion, by a 50 percent discount.

51. This is a severity appeal. The Tribunal is of the opinion that the appeal should be dismissed.

52. The Tribunal determines, as it is required to do, that there be a period of suspension of 12 weeks.

53. It is not the function of the Tribunal to determine the starting point or ending point of that suspension, noting as it does that there was a stay of its decision on 30 June and the appellant has given evidence today that his suspension was not lifted immediately by GWIC. The actual commencement and conclusion dates, therefore, are a matter for the regulator to determine in conjunction with the appellant.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

54. At the conclusion of the matter the appellant makes application for a refund of the appeal deposit.

55. The appellant originally appealed on the basis of not guilty, he changed that plea to guilty, it became a severity appeal. That severity appeal has been dismissed. The Tribunal has imposed a penalty.

56. Consistent with its determinations on similar facts in the past, the Tribunal determines that the appeal deposit be forfeited, and that order is made.
