RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

DECISION IN CHAMBERS

11 AUGUST 2020

APPELLANT BRENDAN WHELAN

RESPONDENT GREYHOUND WELFARE & INTEGRITY COMMISSION

GRR 83(2)(a) x 2

DECISION:

1. Appeal dismissed.
2. Penalty of suspension of 16 weeks on first charge and 20 weeks on second charge to be served concurrently.
3. Directions issued on appeal deposit

1. Licensed owner trainer Brendan Whelan appeals against the decision of the Greyhound Welfare & Integrity Commission ("GWIC") of 13 December 2019 to impose upon him periods of suspension of his licence for 16 weeks and 20 weeks concurrent for two breaches of the rules.

2. The rule in question is 83(2)(a), which relevantly states:

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

3. The stewards particularised the breaches relevantly as follows:

> "Charge 1: That you, a registered owner trainer, while in charge of the greyhound Axle Whelan, presented the greyhound for the purpose of competing in race 7 at the Grafton meeting on 8 July 2019 in circumstances where the greyhound was not free of any prohibited substance. The prohibited substance detected was atenolol."
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> "Charge 2: That you, a registered owner trainer, while in charge of the greyhound Axle Whelan, presented the greyhound for the purpose of competing in race 2 at the Lismore meeting on 6 August 2019 in circumstances where the greyhound was not free of any prohibited substance. The prohibited substance detected was atenolol."

4. The inquiry conducted by the Chief Executive Officer was effected in writing and without a hearing and the appellant pleaded not guilty. The appellant has maintained to the Tribunal on appeal that he did not breach the rule and the appeal was, at the specific request of the appellant, by consent of GWIC, dealt with by the Tribunal upon written submissions and lodged evidence.

5. The evidence considered by the Chief Executive Officer was contained in a usual brief of materials relating to the collection of the sample, testing and analytical laboratory results. GWIC lodged a veterinary report by Dr Karamatic of 21 October 2019. Email exchanges between the appellant and GWIC, principally relating to testing of bottled water used at the two racing events, was outlined. Those documents established that there were no water-testing results available. The appellant put in evidence that the prohibited substance entered from an external source but did not expand upon it. Various submissions were made.

6. The additional evidence lodged on the appeal has principally arisen because the Tribunal raised with the respondent upon receipt of the grounds of appeal the fact that the appellant had put in issue the fact that

the greyhound in respect of the second charge was pre-race swabbed and that was negative, and the post-race swab was positive, and in addition, the appellant put in issue the fact that the drug in question is a blocker and yet the greyhound won on each occasion.

7. In response, the respondent lodged a further report of Dr Karamatic of 19 May 2020 and a statement of 11 May 2020 by Scientific Manager at Racing Analytical Services Ltd, Mr Paul Zahra,.

8. The appellant put in evidence a veterinary report of a vet practising at Walnut Veterinary Clinic and dated 18 December 2019 – the signature on the two-page report is indecipherable.

9. On the appeal and by his grounds of appeal and various emails, the appellant has identified the following issues: it is impossible for a trainer to know the presence of the drug; the drug is a blocking agent and yet the greyhound won; for Charge 2 the pre-race swab was negative yet the post-race swab was positive and there is an issue as to which of those results is correct; the greyhound was in the care of GRNSW staff between the two testing times; the possibility of GRNSW staff taking the medication which relates to this drug; subjective matters; meat is not safe from contamination; everyone is a potential carrier; the substance entered from an external source; the dog was presented free of prohibited substances; mandatory water use; shared use of kennels and wash-down areas with people who use medication; parity.

10. By his veterinary evidence the appellant puts in evidence that the vet has known the appellant for 10 years and he is a person of the highest integrity with profound respect for the rules of greyhound racing. He seeks to establish the highest levels of care for his animals. That atenolol is a drug primarily used to drop blood pressure and giving therapeutic doses would have a profound effect on excitability and endurance. It would have negative effects on performance and is a stopper. The drug is one of the most commonly prescribed blood pressure medications among human patients in Australia and is excreted unchanged through the kidneys and via skin from sweat glands. The vet opines that the most likely way any dog would access the drug is from coming into contact with human urine. The dog would be highly attracted to such urine. In addition, it is stated that contamination may have occurred in the meat supply chain by a meat worker accidentally dropping some of their medication into the meat during processing. The vet continues that the fact that the dog actually broke a track record is such that any contamination would be below a therapeutic level.

11. The appellant continued in his submissions that the levels detected were very low at a minimum level of machinery detection. Because of those very low levels it is submitted that the respondent has failed to give direct evidence to show that untested bottled water and/or contact with GRNSW

staff has not added to the fragile levels in question. In addition, it is submitted that as the drug causes fatigue, dizziness, vomiting and diarrhoea, that his greyhound could not have broken a track record after suffering those symptoms.

12. The lengthy submissions on behalf of the respondent follow the usual formal proofs and deal with the matters raised by the appellant in his submissions.

13. The appellant relies upon the first report of Dr Karamatic to establish that atenolol is a prohibited substance. The appellant does not take issue with that evidence and it is not necessary for it to be further examined.

14. The appellant's vet has provided certain comments in respect of the drug and Dr Karamatic's first report expands upon those matters by indicating that there are no veterinary medications which contain the subject drug but there are some 64 human prescribed drugs which do. Dr Karamatic confirms that the drug is a blocker and also has an effect on arrhythmia. It has an elimination half-life of 3.2 hours. Dr Karamatic referred to Victorian guidelines of August 2016, but there is no evidence this came to the notice of the appellant and is disregarded. Dr Karamatic also referred to 2012 publications of the former GRNSW about care in use of personal medications. Dr Karamatic's report continued that the testing carried out was qualitative and not quantitative but notes that there is evidence that the levels here were, for the first charge, 2 ng/mL and for the second charge, 4 ng/mL. Dr Karamatic continued that, as is usually the case, it is not possible to determine whether the levels in question were the result of recent exposure to a small amount, an earlier exposure to a large amount, or a very recent administration. Importantly, Dr Karamatic pointed out there are no administration studies in greyhound urine to compare concentrations of atenolol.

15. As a result of the issue raised by the Tribunal as to a greyhound winning after it had consumed a blocker, Dr Karamatic was asked to and provided his second report.

16. Dr Karamatic stated that there is no threshold in the rules for the subject drug, therefore its presence in any greyhound is a breach of the rules. Conceding that there have been no studies of performance-enhancing in a greyhound of the use of this drug, and it is not possible to do so, does not mean that a conclusion should be reached that the drug has no effect on performance. He opined that even a small amount of drug has a potential to influence performance. He also noted that the issue of greyhounds performing well after the administration of a blocker is not unusual. This is because the amount of the atenolol in the blood was below therapeutic concentrations. He opined it was unlikely that the drug caused an appreciable effect at the time of the race.

17. Again in answer to a question raised by the Tribunal as to how a pre-race sample could be negative and a post-race sample positive, the respondent obtained the report of Mr Zahra.

18. Mr Zahra confirmed that the first test for the pre-race sample showed an indication of the presence of atenolol but that the level was not sufficient to progress the sample to a confirmatory analysis because of the low concentration being near the method's limit of detection. The first sample was retested. Again from that pre-race sample the level of detection did not enable a confirmation of the presence of the drug. He opined that because the samples were taken at least one hour apart it is feasible that the presence of atenolol may be confirmed in one and not the other. This would arise because it is most likely due to the concentration of atenolol being relatively slightly higher in the post-race sample.

19. The submission for the respondent clarified matters relating to an error in the 13 December 2019 decision corrected on 17 December 2019. Other than the fact that the appellant noted these matters, nothing arises from this issue, nor its subsequent correction, and the matter is not further analysed.

20. The submission continued in relation to the estimated levels which, being low, were acknowledged to be in favour of the appellant. The submission continued, however, that as there is no threshold, the presence on race day at any level is prohibited.

21. The submission continued that there is no need to analyse the effect of atenolol on the greyhound because it is not necessary to prove performance enhancement as the rule only deals with the capability of affecting an action or effect on the greyhound's systems.

22. The respondent's submission continued that the appellant had not provided any direct evidence or any explanation for the detection of atenolol in the samples.

23. It is submitted that the GWIC swabbing policy had been complied with and there has been no submission to the contrary.

24. The submission continues that based on the evidence now available to the Tribunal the difference between the two samples taken on the second day for pre-race and post-race establish nothing is established in favour of the appellant. Accordingly, it is submitted that the submission that a post-race positive can be cancelled out by a pre-race negative is not sustainable.

25. The Tribunal understands the difficulties that have confronted this appellant in trying to identify to his satisfaction reasons for the presence of

the prohibited substance in his greyhound on two occasions. In particular, he has obtained veterinary evidence to support his case.

26. However, the difficulty for the appellant, as is so often the case, is that his theories are not established by evidence. They remain speculative. There is nothing adduced which can be elevated to a level of comfort that has not been eliminated by the respondent to the effect that there is some external reason for the presence of the drug in the greyhound on two occasions.

27. There is no evidence that the type of bottled water provided by the respondent at the races and used by trainers contains the subject drug at all, let alone at any level which would subsequently be detected.

28. It is acknowledged that the subject drug can be excreted from a human who has consumed it via sweat glands and urine. There is simply no evidence at any level of any human who may have consumed the subject drug being present at any time that the subject greyhound was presented to race and that if they were, they were likely to or did excrete the subject drug through their glands or alternatively urinated in any area where the greyhound was likely to be present. The level of speculation is simply too great.

29. Whilst contamination from meat has been recognised in the past, here there needs to be some evidence to the effect that a meat worker was likely to or could possibly have dropped a tablet of the subject drug into the meat processing system such that its presence could, even on the remotest possibility, have become present in meat consumed by this greyhound on two occasions. It had to be on two occasions because of the gap between the two races and the half-life of the drug.

30. It is not necessary to examine performance affectation. it is not a matter to be proved by the respondent.

31. The respondent has provided credible evidence to explain the difference between the negative pre-race and the positive post-race on the unchallenged evidence of Mr Zahra.

32. The character evidence of the vet from Walnut Veterinary Clinic is accepted as establishing that vet's opinion that the appellant is a person of integrity with respect for the rules and provides the highest care to his animals. However, those matters do not go to the question whether there is any exculpation from the two ingredients that need to be established by the respondent to prove a breach of the rule on two occasions.

33. The fact that the greyhound broke a track record does not of itself establish that it could not have he stopper in it. That has been examined

earlier. It did as established by the urine tests. the greyhound on the evidence could still run well with this low level of the drug.

34. The issue of the greyhounds suffering from fatigue, dizziness, vomiting or diarrhoea, if they consume the drug is irrelevant as there is absolutely no evidence whatsoever from the appellant that at any stage those matters did occur. The point being that whilst they may be, on the appellant's opinion, side-effects of the taking of a drug in a human, there is no evidence of that affectation upon a greyhound. In any event, there is no evidence that very low levels of detection of the drug in a greyhound would necessarily mean that it should have suffered from any of those symptoms if it had consumed a drug at any given level.

35. Lastly, the evidence satisfies the Tribunal that the testing regime was correctly carried out in accordance with protocols and that the subject samples that were tested were those required to be tested and each of which then produced the positive results. That speculative concern of the appellant is not established.

36. The appellant's ground of appeal to the effect that he could not have known of the presence of the drug in food or on the ground is not an issue that has to be addressed because knowledge of those matters is not the ingredient of the offences.

37. The appellant put in evidence an extract from the Harvard Health Publishing of the Harvard Medical School of a document entitled "Reading the new blood pressure guidelines". Nothing relevant is established by that document.

38. Those pieces of evidence, submissions and conclusions enable the Tribunal to assess whether or not the respondent has proved the two essential ingredients of a breach of the rule.

39. In both cases it is necessary for the respondent to adduce evidence that: the appellant was a trainer, and that is not in issue; that the greyhound was nominated to compete in an event on each occasion, and that is not in issue; and that there was present in the greyhound on each of those occasions the drug atenolol, and that that is a prohibited substance, and those matters are established.

40. Accordingly, the respondent establishes the breaches of the rules as particularised. The various facts, submissions and arguments for the appellant do not disturb those findings.

41. The appeal against the findings of the breaches of the rules is dismissed.

42. The next issue is penalty.

43. On the issue of penalty, the Greyhound Racing Penalty Guidelines categorise this as the most serious type of drug, namely, Category 1, and this provides for a disqualification of 260 weeks for a first offence.

44. The respondent acknowledges the Tribunal's usual approach on appeal matters is to treat these as guidelines and not tramlines, but to seek to consider them to ensure consistency.

45. These are civil disciplinary proceedings where a protective order is required.

46. The Chief Executive Officer determined a starting point in her first deliberations of 24 weeks and 36 weeks' suspension and, of course, lower levels were subsequently imposed after submissions.

47. A suspension is a major step of leniency from a disqualification. And a period of 24 weeks and 36 weeks, as initial considerations, a very long way short of 260 weeks.

48. The Chief Executive Officer determined originally, based upon low levels and parity, that they be the starting points.

49. The Tribunal is asked to confirm the decision of the Chief Executive Officer on this appeal and impose the same penalties. The Tribunal is not asked to increase those penalties. The Tribunal has not gone back to the appellant and indicated a warning that if he continues with his appeal the Tribunal is considering a higher penalty than that imposed by the Chief Executive Officer.

50. In those circumstances, the Tribunal will not consider a higher penalty as it is not asked to do so. The Tribunal considers that the penalty imposed at first instance was extremely lenient for a Category 1 drug. The fact that a suspension is considered appropriate and not a disqualification, and, secondly, a suspension which is approximately one-thirteenth of the guideline penalty must be considered.

51. This is a Category 1 drug which is a blocker. This fact is not lessened by reason that the drug is also within Category 5 as a human prescribed medicine but it is of a less serious classification in that Category by reason of that fact a compared to other stoppers which are not. The message to be given to any trainer presenting a greyhound to race with a blocker in it must be a salutary one, not only for the trainer but for the industry at large. It is objectively serious.

52. The effect of the request not to impose a greater penalty and other factors mean that the message to be given here must be seen as a lenient one.

53. The subjectives advanced by the appellant are that he has been a trainer for combined periods of time in Victoria and New South Wales for 10 years and has no prior matters. He is assessed by the veterinarian from Walnut Veterinary Clinic as providing the highest level of care to his animals. The character reference of high integrity and profound respect for the rules is also taken into account. There are no other subjective factors advanced by the appellant.

54. The issue of parity appears to have played a substantial part in the penalty decision-making process here. There are seven cases.

55. Robinson, a 2010 matter where a three-month suspension was given for a trainer with a plea of guilty, 50 years' experience, no priors, and there was an inadvertent administration.

56. Bell, a 2015 matter, a monetary penalty of $1000 after a plea of not guilty, with 42 years' experience and industry participation, with no priors and a low reading.

57. Collison, a 2017 decision, in which a fine of $750 was reduced, at the appellant's request, to a suspension of six weeks after a plea of guilty, an unknown length of time in the industry, no priors, and a change in husbandry practices, with good character.

58. Next is Cassar (first), a 2019 decision in which an eight-week suspension was given on a plea of guilty for a trainer with 10 years' experience and no prior matters, who had addressed husbandry practices.

59. Richardson a 2020 matter had a six-week suspension of which three weeks was suspended, on a plea of guilty, with 45 years' experience, one prior matter in which there was an explanation for the conduct, and a low reading.

60. Next is the 2020 decision of Bailey where a six-week suspension was given with three weeks suspended on a plea of guilty, with 50 years' experience, no priors, a reasonable explanation and a low reading.

61. A second Cassar matter of 2020 in which a 12-week suspension was given on a plea of guilty, with 10 years' experience, and further amendment of husbandry practices advanced.

62. Those matters that exist post the introduction of the Penalty Guidelines from 2015 onwards all appear to the Tribunal to be lenient. However, they

are matters of parity and this appellant is entitled to say that his comparable circumstances should lead to comparable outcomes here.

63. The second Cassar matter can be ignored as it was a very recent second breach. The first has an element of comparability about it with 10 years and no prior matters and an eight-week suspension, which is not dissimilar to the other matters. Interestingly, none of them get close to the 16 weeks and 20 weeks imposed here.

64. A problem for the appellant is that since he was dealt with by the Chief Executive Officer he has been found to have breached the rules twice in Queensland for the same drug and was given concurrent periods of suspension of six months which were to be suspended after serving four months. Those matters are subject to an appeal. Those matters were committed prior to him being dealt with by the Chief Executive Officer here and the Queensland matters were dealt with on 3 March 2020.

65. Those matters do, however, have a salutary impact upon the message to be given to this appellant, notwithstanding that they are subject to appeal. That arises because it appears that he has not learnt his lesson and changed his husbandry practices to avoid this type of offence occurring.

66. While the penalties here appear to be more than those that were considered appropriate on prior occasions, they are, when separately looked at by the Tribunal, considered to be objectively serious and warranting, as the Tribunal outlined, penalties greater than those that were considered appropriate by the Chief Executive Officer.

67. The Tribunal considers itself bound to give full weight to the parity matters. Each of those has penalties far below the guidelines.

68. The combination of the fact that the Tribunal is not asked to impose a heavier penalty in circumstances where there has been no admission, expression of remorse or contrition for the conduct and notwithstanding the subjective factors in his favour mean that the Tribunal is of the opinion that the severity appeal should also be dismissed.

DETERMINATION

69. In each of the two charges, the appeal against the adverse finding is dismissed. In each of the two charges, the severity appeal is dismissed.

70. The Tribunal imposes upon the appellant a suspension of his licence in respect of Charge 1 for a period of 16 weeks and in respect of Charge 2 a suspension of his licence for 20 weeks, each of which periods are to be served concurrently.

71. In view of the fact that the appeal has been entirely unsuccessful, the Tribunal proposes to order the appeal deposit forfeited. However, if the appellant makes an application for refund of the appeal deposit in whole or in part within seven days of receiving this decision, the Tribunal will give consideration to that application. If no such application is made, then the Tribunal will formally order the appeal deposit forfeited.
