RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

WEDNESDAY 3 MARCH 2021

APPELLANT WAYNE BRADLEY CHANDLER
RESPONDENT GWIC

GREYHOUNDS AUSTRALASIA RULE 83(2)(a)

DECISION:

Appeal dismissed
Appellant discharged conditional upon no further breach of the rules for a period of 12 months
50 percent of appeal deposit refunded

1. The appellant appeals against a decision on 31 January 2020 of the Chief Executive Officer of GWIC to impose upon him a monetary penalty of $1000, of which $500 was suspended for a period of 12 months on condition, for a breach of Rule 83(2)(a).

2. The charge as preferred against the appellant was in the terms of 83(2)(a), which relevantly provides:

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

GWIC particularised the charge as follows:

> "That you, a registered owner trainer, while in charge of the greyhound Satay, presented the greyhound for the purpose of competing in race 1 at the Taree meeting on 8 June 2019 in circumstances where the greyhound was not free of any prohibited substance
>
> The prohibited substance detected in the sample of urine taken from the greyhound after the event was salbutamol. Salbutamol is a prohibited substance under Rule 1 of the rules."

3. The appellant was dealt with by the Chief Executive Officer on the papers based upon a plea of not guilty made to GWIC, and upon his appeal has maintained that he did not breach the rule.

4. The evidence has comprised a brief of material which was before the Chief Executive Officer, which critically contained what might be described as the usual documents setting out the taking of the samples, the analysis and, in addition, critically contained a report of regulatory vet Dr Karamatic and a statement of witness Peter Daniel. Various other documents were subsequently put in evidence comprising sample results of seven other greyhounds tested at that meeting. In addition, Dr Karamatic has given evidence, together with Mr Daniel and the appellant.

5. Rule 83(2)(a) needs to be placed in respect of two other key rules. The first is Rule 80(2), which relevantly provides:

> "Where the Stewards require samples ... A Steward or other authorised person is equally authorised to take such sample from a greyhound pursuant to any established procedures for the collection of samples."

80(3) then provides where such a sample is taken and certain steps followed:

> "A report signed by a person who purports to have taken the sample shall be, without proof of the signature thereon, prima facie evidence of the matters contained therein …"

And Rule 81 relevantly provides:

> "Where a sample taken from a greyhound has been analysed by an accredited laboratory pursuant to Rule 80(3), a certificate signed by an accredited laboratory officer shall be, without proof of the signature thereon, prima facie evidence of the matters contained therein for the purpose of any proceedings pursuant to these Rules."

6. To put that in context, therefore, this is a presentation case. The analysis of the rules and evidence is diminished by reason of the fact that the appellant admits that the drug salbutamol was detected in the greyhound at the time of its sampling and that salbutamol is a prohibited substance. The evidence of Dr Karamatic otherwise establishes those facts.

7. Having established those facts, therefore, the necessity to more closely analyse 80 and 81 diminishes. The issue becomes: was there a presentation in a breach of 83(2)(a)? And it is important to recognise that Rule 1 provides that the presentation commences at the time of the completion of nominations for scratching and continues until the greyhound was removed from the racecourse. It is not simply at the time the dog is placed in the holding kennel pending its removal to race or, indeed, subsequently, for example, at the time it provides a sample or, indeed, during the sample process. Presentation is a very extensive term.

8. Essentially, the case is this: the appellant says that he cannot explain how salbutamol came to be present in his greyhound. He is not an asthmatic. No member of his family is an asthmatic. The person who travelled in his vehicle with him to and from the races, Mr Maher, was not an asthmatic. No one associated, therefore, with the appellant takes asthmatic medication. The evidence of Dr Karamatic is that the prohibited substance salbutamol is found in asthma medications. Classically, the most common being Ventolin.

9. In this case, the sample collector, Mr Daniel, was an asthmatic and has been virtually all his life, and he takes salbutamol through the product Asmol. He was able to resort to his Asmol puffer that he was carrying on him when he gave his evidence. He described it as being providing a 100 mcu, in his belief, as the contents of the whole of the container, but in fact as Dr Karamatic points out, that is the standard dose administered by the depression of the inhaler and its absorption.

10. Regardless of that, in this case the amount of salbutamol detected in the sample, by estimate, as it was not analysed, was 1 nanogram per ml. Dr Karamatic provided evidence that that is a low-dose, that it has been his experience in looking at salbutamol detections in greyhounds that a range of 1 to 10 might be detected, therefore, 1 is a low range. There is no doubt that salbutamol is a performance-enhancer, not an issue in these proceedings.

11. Returning then to this matter and its proofs, this is a de novo hearing and accordingly the burden is on the regulator, the respondent GWIC, to prove the breach of 83(2)(a), the presentation rule. The appellant does not carry any onus. The appellant has, however, opined on two occasions to GWIC in the Chief Executive Officer's determinations, a series of explanations as to why he says he is not at fault and that it is therefore a contamination case. In his grounds of appeal he has repeated those submissions. In his evidence, he has touched upon those matters to which his grounds of appeal relate.

12. As was the usual case, when the sample was taken the appellant was required to sign the sample collection process form. He did so, and by doing so certified that he had no complaints about the process. It was the second occasion on which a dog of his had been sampled. He says he is not familiar with the process, he did not really understand it, he had his concerns but believed it was appropriately carried out.

13. When the A sample was detected as positive, steward Mr Hynes attended upon the appellant. As is usually the case, surprise was expressed. Ignorance of the drug was expressed. Mr Hynes quite fairly reported, and subsequently took action as a result of, the comments made by the appellant during the kennel inspection to the effect that he had concerns about the process undertaken by Mr Daniel, and Mr Hynes summarised them in his report, having noted no other matters of any concern about the kennel inspection, the greyhounds of the appellant or the products he had at his premises, and having noted again the fact that the appellant and his family were not salbutamol users.

14. Summarising Mr Hynes' report, it refers to concerns of the appellant at the time of taking of the sample, that there were breaches of protocol, that he had told his partner those concerns on arriving home, and essentially they were that the sample was not collected until a couple of hours after the race – and Mr Hynes noted it was taken at 2:55 pm, as shown on the sample collection form – and that before the sample was taken, the appellant had informed Mr Hynes that the lids from the sample bottles had been removed and sat on a bench in the swab preparation area unattended until there was a return to the sample collection area and the bottles were still there. He described the club official, now known as Mr Daniel, to be extremely inexperienced and unsure of himself and that he had passed comment to Mr Daniel that it was non-procedural.

15. The appellant has maintained those complaints, as the Tribunal shall call them, since that time, throughout his submissions, as described, and his evidence. The fact that the appellant signed the form to indicate his acceptance at the time of taking of the sample is not seen as preventing him from now raising the issues that he does. The Tribunal accepts his explanation. On many occasions the Tribunal has not accepted those explanations on the basis of what is often called recent invention. On this occasion, however, the Tribunal accepts that the appellant had those concerns, he expressed them that very evening to another person, and has maintained them in a very consistent fashion ever since. Nothing essentially turns on that.

16. The real issue is whether salbutamol came to be present in this greyhound as a result of contamination. A considerable amount of evidence has been led to deal with the processes and whether or not Mr Daniel followed them. It might be noted at this stage that another person in fact actually took the urine sample, and that was a person Lauren Bramble.

17. The sampling process referred to in Rule 80(2) has been put in evidence and it is a document which is entitled: “Racing Analytical Services Ltd 13 May 2016” and entitled “Guidelines for Sample Collection Urine and Blood”. That sets out what might be described as the required procedural steps for taking relevantly of a urine sample. Some of those matters relate to the kits themselves, removal of matters from the kit and the like, none of which are in issue here.

18. The critical parts of it are these and they are paraphrased. That is, after checking that the kit is complete and all of the appropriate barcodes and the like are present and that it is not a faulty kit, the then critical steps are: rinse the collection pan thoroughly under running water; using the control fluid provided rinse the collection pan and return the control fluid to the original bottle, cap firmly and ensure its security; collect the urine in the collection pan; if a urine sample cannot be taken, repackage the entire urine kit back into the original bag and return to the laboratory, a blood sample should then be taken; wash the control fluid through the other two sample bottles, capping and shaking each one, and return the control fluid to the original bottle and cap firmly; note: alternatively, the two sample bottles can be rinsed with the control fluid immediately after the collection pan is rinsed, providing that the security of the bottles during the urine collection process is guaranteed; divide the urine into each of the two empty rinsed bottles and cap them firmly. And the rest of it is not in issue.

19. It is important to note that the rinsing of the sample bottles can take place before the collection of the urine. It is the evidence of Mr Daniel that that is the process he followed.

20. The Tribunal accepts that the onus is on the respondent, GWIC, to establish, in accordance with the provisions of Rule 80 sub rule (2), that the sample was collected in accordance with that procedure.

21. Mr Daniel has been associated with the Taree Greyhound Racing Club for a great number of years and has been its secretary for the past 20 years, he said in evidence. He has had various positions with the club. Over those years, he has undertaken training in respect of the sample processes. His evidence was at best vague on when he last undertook such training and he was uncertain whether it was immediately prior to or immediately after the subject sampling in June 2019.

22. Over his time he has collected some 600 samples. That satisfies the Tribunal that he is experienced in the collection of samples. He made no reference to the Racing Analytical Services document and whether he complied with that. A reading, however, of his statement, which was in evidence before GWIC and dated 10 September 2019, a date soon after these events and therefore fresh in his mind, sets out his normal process. The Tribunal is satisfied that the normal process he describes in his statement is that which is required by the Racing Analytical Services document and therefore the requirements of Rule 80 sub rule (2).

23. Critically, it refers to hand washing at the same time as the ladle is washed and that the control sample process through the ladle and the A and B sample bottles is undertaken by him prior to urine collection.

24. One of the possible sources of contamination can be eliminated early, and that is the appellant's specific evidence and recollection that Mr Daniel washed his hands. The need, therefore, on the evidence of Dr Karamatic, for him to have also worn gloves as a possibility, according to him on his reading of the New South Wales rules, is eliminated. That is, the washing of the hands is sufficient, on Dr Karamatic's evidence, to remove contaminants of salbutamol from his hands.

25. It is the appellant's case that Mr Daniel was unwell, that he was, on a hot day, displaying symptoms of stress, breathlessness and the like. The unchallenged evidence of Mr Daniel is that he did not consume his Asmol in the kennel area. That need not be analysed because that is the evidence of the appellant. He said he did not, during the sample collection process, see Mr Daniel use his inhaler. It was otherwise Mr Daniel's evidence that if he was to use his inhaler he would take himself to the office where he would sit down, rest, gather himself, then take one or two puffs of his inhaler, wait and then return to his duties.

26. That would seem to the Tribunal rather incredulous if he was to be suffering acutely, but he said he did not suffer acutely and had not for many years. Therefore, there is no need to analyse further whether that was credible evidence or not. It eliminates the possibility of the transmission of salbutamol by aerosol spray in the kennel area as a result of anything done by Mr Daniel.

27. That leaves the possibility of contamination by hands, and that has been eliminated by the acceptance of the appellant that Mr Daniel washed his hands. And Dr Karamatic confirms that that removes that as a possibility.

28. Mr Daniel has changed his evidence. In his statement he referred to the fact that it was he who carried out the whole of the subject sampling by using the following terms in his statement:

> "The first swab, V620484, I completed myself, giving a running commentary on the process to Lauren Bramble as an observer."

29. The Tribunal notes several points about that statement. Firstly, the numbered swab is the swab in question. Secondly, that Lauren Bramble was there as an observer and that the regular vet who would otherwise have been there was not present. Ms Bramble then carried out the remaining 7 swabbing matters under the supervision of Mr Daniel. It became Mr Daniel's oral evidence that in fact Ms Bramble did the actual urine collecting but that he did all other processes in the collection process.

30. That leaves Ms Bramble as a possible contaminator. She has not given evidence. As to her status as an asthmatic or otherwise, it is not known. As to whether or not she had access to, or exposure to, anyone else using salbutamol-based products at or about the time of her participation in this matter is not known. The respondent says that any such conclusions to be drawn from that evidence are speculative and therefore cannot be used against the regulator.

31. The Tribunal has given consideration to whether or not the failure to call a witness who may have given material evidence leads to a conclusion that she would not have given favourable evidence on those points just identified. Such a failure would, of course, be fatal to the case for the respondent because it would mean that the respondent is unable to eliminate a possible source of contamination. And it is a critical source because Ms Bramble handled the ladle. And it is critical because Dr Karamatic informed the Tribunal in his evidence today that if, consistent with the procedures of Mr Daniel, he having washed the ladle then rinsed the control sample through it and rinsed the control sample through each of the bottles A and B, then returned the control sample to the control sample bottle, then sealed each of the three bottles, it would mean that it was still

possible for contamination to occur after that point and before the urine samples were divided and placed into the A and B sample bottles.

32. Dr Karamatic's evidence as set out has eliminated a number of earlier sources and left open, by the use of the following terms, admittedly dealing with the issue of hand washing and not with the subject issue to which the Tribunal is now examining. He said this in his report:

> "If hand washing was inadequate, salbutamol would have had to contaminate either the urine sample directly, that is, finger placed in ladle, or both urine sample bottles/lids but not the control sample bottle."

33. The latter part of that is eliminated but it is the finger in ladle-type issue to which he has made reference that remains.

34. That then leaves the remainder of Dr Karamatic's evidence to be examined and critically, he having said there were no administration studies, his report having referred to half-life in humans and its elimination times etc, said this in response to questions from the Tribunal: not knowing how long with the lack of any administration studies, would it take, the Tribunal in general terms asked, for salbutamol to become present in the urine? And he said, "Generally, 15 to 30 minutes", agreeing, however, there had been no administration studies in dogs. What that means to the Tribunal is this: that if Ms Bramble had salbutamol on her hands or by aerosol transmission and either of those methods was used to put salbutamol in the ladle before, during or after the urine went into the ladle, it would nevertheless take 15 or 30 minutes for it to become present in the urine.

35. There is no evidence of Ms Bramble having taken salbutamol by inhaler, on the evidence of the appellant. The time taken to actually take the subject sample by Ms Bramble was not given. There is, therefore, the finding that if it was to be through the ladle, there would need to have been 15 to 30 minutes for it to have taken an effect in the urine.

36. The other possibility of Dr Karamatic was absorption through the mucous membranes, and assuming that Ms Bramble might have somehow transmitted by touching the dog's mucous membranes – and there is no evidence of that – that would nevertheless be an absorption period of 15 to 30 minutes before it showed up in the urine. Therefore, the actions or inactions, the participation by possible contamination of Ms Bramble is eliminated.

37. That then leaves the case that the Tribunal is unable to determine the cause of the presence of the salbutamol.

38. The Tribunal returns to the test it must consider. That is, that on its findings, Rule 80 has been complied with and 81(1), enabling the prima facie finding of the certificates, remains intact. The presence of the salbutamol in the greyhound as a prohibited substance is not in dispute. And the fact that the greyhound was actually presented to race is not in dispute. It leaves, therefore, that the various scenarios which the appellant has so carefully and consistently set out do not in fact provide a reason for the presence of the salbutamol in the greyhound Satay at the time of the sampling. That then means that there is nothing about the use of prima facie evidence, nor anything about a failure of the respondent to establish its case.

39. In those circumstances, the Tribunal finds that the appellant has breached Rule 83(2)(a).

SUBMISSIONS MADE IN RELATION TO PENALTY

40. The Tribunal having found the appellant has breached the rule must determine the issue of penalty.

41. Rule 95 provides a range of penalties from fines through disqualification and the like. The other power is Rule 98 which, upon finding an offence proven, if the Tribunal determines not to inflict punishment or not more than a nominal punishment, that it can in essence impose a bond. The issue is whether it is appropriate on this case.

42. The appellant did not plead guilty and therefore that usual extensive aspect of leniency is not activated. It is, of course, highly relevant to a Rule 98 matter.

43. The appellant himself has been licensed, at the relevant time of this matter, for a period of up to 14 years. He has no prior matters. He only has limited swabbing history which does not stand in his favour.

44. The appellant has at all times maintained his innocence and the Tribunal accepts and understands that and understands the reasons he has expressed for it. Its decision does not support his belief in that, however.

45. The matter has been one in which the Tribunal, while it was in its findings unable to determine why this salbutamol, the prohibited substance, was present, can find nothing in the evidence that has been adduced in the case that is against him that indicates any blame on his behalf. It is often the case that the regulator and the Tribunal are not able to determine the how, when or why such a substance came to be present, and indeed that does not have to be proved. But that on this occasion, having regard to the nature of the substance and its relative frequency in the community, it is the case

that there is not some unanswerable issue that this appellant has failed to address.

46. The Tribunal also notes that precedents set out in the written submissions, were matters in which in the cases of both Dargan of February 2019 and Mahoney, also of February 2019, the particular trainer was a user of Ventolin, and whilst they could not explain it, that may well have provided reasons for the positives.

47. Here, this appellant and his family and people associated with him are not users of the substance and that further elevates the aspects on his behalf of blamelessness. There is nothing, for example, of a husbandry nature as to the operation of his kennels which might have led to a concern which would otherwise lead to a loss of leniency.

48. The Tribunal does not find the imposition of any of the Rule 95 penalties to be appropriate, and should they be, they would have been nominal only.

49. In those circumstances, the Tribunal uses Rule 98 and it orders that, without proceeding to a conviction, the appellant is discharged on condition that he does not commit any further breach of these rules for a period of 12 months.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

50. The Tribunal orders 50 percent of the appeal deposit refunded.
