RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

WEDNESDAY 10 MARCH 2021

APPELLANT JESSIE FOTHERGILL
RESPONDENT GWIC

GREYHOUNDS AUSTRALASIA RULE 86(d)

SEVERITY APPEAL

DECISION:

1. **Appeal upheld**
2. **Penalty of 10 weeks suspension imposed**
3. **Appeal deposit refunded**

1. The appellant has appealed against a decision of GWIC of 16 December 2020 to impose upon her a period of disqualification of five months for a breach of Rule 86(d).

2. The relevant parts of 86(d) are that:

> "86. A person shall be guilty of an offence if the person
> (d) being a… trainer …makes or causes to be made a falsification in a document in connection with greyhound racing or the registration of a greyhound."

3. GWIC particularised that in summary form as being that on 2 January 2020 GRNSW received from the appellant an email entitled Change of Greyhound Prizemoney Split form dated that day relating to prize money associated with the greyhound Carson County and that subsequent inquiries indicated that the signature on the document purporting to be that of the registered owner Jason Formosa did not match his signature and he denied signing the form or consenting to any change to it, and that accordingly the appellant falsified his signature.

4. The appellant pleaded guilty to that charge but her then legal representative qualified it as an admission based upon the fact that the appellant had consent to do it.

5. GWIC conducted an inquiry and the evidence for that inquiry is before the Tribunal. And essentially the critical documents from that, which remain for consideration on this severity appeal, are the statement of Mr Formosa, the statement of the appellant and various associated documents that the appellant produced through her solicitor to support her version.

6. As stated, the appellant pleaded guilty, she has maintained that and this is a severity appeal only.

7. The evidence has comprised the just described document – and that was a very brief description – together with a bundle of documents provided by the appellant, and reference will be made to those. In addition, Mr Formosa and the appellant gave evidence.

8. The first issue to decide is the objective seriousness of this conduct, which brings into consideration the necessity need to impose upon this appellant a message to indicate to her that this type of conduct is not to be tolerated, but, more importantly, to indicate to the industry at large that the falsification of documents lodged with a regulator in a licensing jurisdiction, where a licence is a privilege, will carry with it in all probability the loss of privileges or other penalties.

9. Objective seriousness in this matter is canvassed in the actual particulars themselves. That is, the allegation that the appellant signed the form without the consent of the owner, with the desire to have to come to her a financial benefit, which was prize money if the greyhound was to win. It since turned out it did and there was prize money, although the appellant says she has never had any of it.

10. The appellant has put in a substantial volume of evidence going to her mental state and to her reason for signing the document. That relates to the period of time at which she engaged in the conduct but, more importantly, the impact that this matter has had upon her to date.

11. It is trite to say that the regulator must expect that licensed people will respect the rules and comply with them and ensure that only documents that are properly completed, signed and lodged are received by the regulator. Mayhem would follow if there was not that expectation of compliance. That makes the conduct serious. It makes it, therefore, objectively serious, warranting consideration of a substantial penalty. And it is to be remembered that any penalty is protective and not punitive and must carry with it the message that has been described, particularly ensuring the integrity of the industry, as just outlined.

12. This case is quite unusual. It can be distinguished from each of the parity cases to which the Tribunal will return. To some extent, absent a plea of guilty, it would have been necessary to determine the veracity of the evidence of Mr Formosa and the appellant. It is still necessary to do so, for the reasons that will now be canvassed, but it is less critical.

13. At the outset, the Tribunal has to indicate that, whilst Mr Formosa was not on trial and was acting under caution from the Tribunal that he did not have to incriminate himself, he caught himself out in various of his own answers in not telling the truth to the Tribunal. That is consistent with what the appellant says is his character. There are many instances of conduct in which he is said to have engaged which he denied.

14. It is not necessary to go through the very many allegations which the appellant has set out in her documentary evidence and confirmed as true and correct and supplemented in her oral evidence.

15. The appellant was a licensed trainer in Victoria. The greyhound Carson County was apparently based in Victoria. The appellant had, some eight years before this conduct, moved into the premises of Mr Formosa and for three years resided in his house, together with some of his children. He denied that. After about three years, a caravan was acquired and placed on the property and the appellant resided in that caravan.

16. The relationship between them requires examination from three points of view: the intimacy of their relationship, the physicality of that relationship and the documentary material which was effected during the relationship.

17. In relation to the first, regrettable as it is because it has caught Mr Formosa out in a lie, it is necessary to determine whether there was a relationship between them. The appellant says there was. Mr Formosa said in his evidence, when cross-examined:

> "There was no relationship so I don't know what you're talking about. We were friends, there was no relationship."

18. It was put to him that it was a sexual relationship. He said that was not true.

19. It is the appellant's evidence that a child was conceived. Mr Formosa was questioned about that and in relation to him attending various appointments with the appellant in relation to that pregnancy. He said, when it was put to him that it was in relation to his child, that, firstly, yes, he attended the appointments and he didn't think so that it was his child and then he said – and this is the most telling evidence in the whole case:

> "it could have been mine".

20. Now, how could a person who has absolutely denied any intimacy then be prepared to make a concession when confronted with that somewhat telling evidence that it could have been his? Simply put, he was lying when he was first cross-examined. He lied when asked about those matters in his statement to an inspector. That colours the rest of his evidence.

21. The second part of it, which is not critical but does go to the mental status of the appellant relevant to now but not to when she signed the document, it has to be said, is that he was violent towards her and was on many occasions. A number were put to him; he denied them all. Interestingly, there is a form of corroboration of one of the incidents and that is this, that it is said that an argument took place – it is not necessary to go through all the details – which involved furniture, dogs, hiding in rooms and so on, but that he struck her with a water bottle. The appellant has put in evidence a photograph of her scalp showing the wound that she says was inflicted by that action. That provides an independent form of corroboration. It captures the evidence of Mr Formosa in yet another lie. It is not necessary to further go through all of the physical violence that took place.

22. The third part is that the appellant relies very much in her wrong conduct on the basis of what had taken place in the relationship involving documentations and activities. There was much evidence about the work done by the appellant for Mr Formosa in relation to Mr Formosa's children.

Unchallenged is the evidence that the appellant effectively operated all of the documentation requirements for Mr Formosa in relation to his children at school, in relation to sport, in relation to other activities. In doing that, the appellant, in Mr Formosa's name, signed various documents and did various things.

23. In addition – and the list is not said to be exhaustive, it is not necessary, because the Tribunal accepts the appellant's evidence on these matters – she engaged in numerous other documentary activities for the appellant: transferring of greyhound registrations and nominations, completing VicRoads documentation both in relation to registration and tolls, having post office box access, dealing with his harness racing licence application, completing PayPal documentation and making payments through that in his name and on his behalf with his credit facilities, forwarding various bills to him and on other occasions paying numerous accounts on his behalf, such as meat bills, outstanding toll accounts in which there were recovery proceedings and the like.

24. In essence, Mr Formosa was only prepared to agree to the fact that in relation to some of those matters he had a credit card lying in, it appears, the front desk of the property to which numerous people, including the appellant, his family and strangers, had access to pay bills and do other things on his behalf. That type of laxity and personal credit protection is consistent with the way in which he requested the appellant to, and the appellant on his behalf, sign numerous documents using his name and his signature. Those matters can, of course, be the subject of wrongful conduct and it is not necessary to examine that so far as the appellant's credit is concerned because she has maintained that she engaged in that conduct at all times.

25. Therefore, the Tribunal accepts that the appellant had a belief that, consistent with her other actions, she could do that which she did.

26. But what about this industry and its regulatory requirements? In her statement to the inspectors, she said that she had – and allowing for the exaggeration – millions of times completed greyhound-related documentation on his behalf. Setting aside the exaggeration, it is consistent with her oral evidence in any event.

27. Next is the issue of what happened with this actual greyhound, Carson County. It was owned by Mr Formosa. The appellant had on numerous occasions taken from Mr Formosa, at his request and by their mutual agreement, various other greyhounds as giveaways. On some occasions, registration transfers were effected; on others, they were not.

28. It is, therefore, that the appellant, in relation to the particular greyhound, says that she acted in accordance with the usual position between them as to the taking of possession of the greyhound. There is corroborative evidence

from Sarah Fothergill, the appellant's sister, about taking Carson County on 30 October 2019, and that confirms – and it is not in issue – that she in fact was given the greyhound.

29. The conflict is in respect of the terms upon which that transfer took place. It is Mr Formosa's evidence that he gave no consent to a change in prize money form, which is the document signed by the appellant using his name. He says he gave no consent to her signing that form.

30. The appellant says that she had a Snapchat conversation with him in which that was discussed and in which he gave her express consent to sign the form on his behalf. He denies that conversation took place. The appellant is unable to reproduce any telephone-type communication to corroborate that that took place. Suffice it to say, having regard to the credit findings made in respect of Mr Formosa to date, when it is necessary to assess whether the appellant is accepted as against him, the Tribunal leans to the appellant.

31. There is an issue about what would be paid for the greyhound. The evidence of Mr Formosa is that he agreed to the transfer but wanted $500. It has been the appellant's evidence at all times that that was never discussed, it was a giveaway. That is consistent with the totality of the evidence.

32. It is the appellant's evidence that it was the agreement that, if prize money was won, then $500 would be given to him. Not that it was an agreement to pay $500 for a giveaway. It would hardly be a giveaway, consistent with other evidence, if there was a $500 fee to be paid for it. The Tribunal accepts that the $500, consistent with the appellant's evidence at all times, was to come from prize money, if any.

33. Armed with all of that information, the appellant then engaged in the wrongful conduct for which she has admitted a breach of the rule.

34. There is one further fact that does not appear to have had much air time in this proceeding, and that is this: that in addition to all of those other beliefs, it is the fact that if Mr Formosa gave the greyhound to the appellant, as the Tribunal has found that he did, then it was her greyhound. Therefore, subject to the legalities of transfer by the regulator, both in respect of registration of ownership and in respect of prize money, each of which is apparently required, that the appellant was nevertheless entitled to the benefit of the greyhound's racing and winning. That diminishes the gravity of her conduct in signing a prize money form in his name because she was otherwise entitled to that prize money, in the Tribunal's opinion, at law. Subject, of course, to the regulatory transfer requirement, which is a registration requirement, not a title right. That diminishes the gravity of the conduct.

35. In assessing, therefore, objective seriousness, there is the fact, as the Tribunal has set out, that the conduct was, in the context of the belief that the

appellant was justified in what she was doing but wrong in fact at law, and also acting with what was consistently the conduct of Mr Formosa in other matters as well as in transfer matters, in any event. And, finally, that she was otherwise entitled to the proceeds of the greyhound's success.

36. It is necessary then to look at parity at this stage of the proceedings to see what is an objective starting point on seriousness. A number of cases have been given.

37. One is the 2015 decision of Johnson, which is a Greyhound Racing NSW decision, where Mr Johnson, a track-related official, was given a warning off for 12 months for counselling, and a Mr Sheather a trainer was given a six-month disqualification for falsifying that the greyhound had completed a trial. Mr Sheather was dealt with by the Tribunal on 15 March 2016 on appeal and the Tribunal imposed that same six-month disqualification. In essence, that appeal dealt with the making concurrent, rather than cumulative, of another penalty for other wrong conduct by Mr Sheather.

38. In that decision of Sheather of 15 March 2016, the Tribunal dealt with four other parity cases, to which reference has not been made here. They are set out in detail in that decision and the mere results are referred to for the purposes of parity considerations. Cowling, 12 months' disqualification. Baxter, 10 months' disqualification. Certoma, 12 months' disqualification. Zahra, two months' disqualification.

39. It is, therefore, that in relation to Greyhounds NSW, disqualifications are considered appropriate for this type of conduct.

40. The Tribunal has often reflected on the inutility of using decisions from other jurisdictions in determining appropriate penalties in this jurisdiction. As each jurisdiction says when those words are uttered, no disrespect is intended to other jurisdictions and the reasons by which they came to those decisions. It is particularly critical not to be bound too closely by decisions in the other two codes – harness racing and thoroughbred racing. Each of them have their different rules, their different penalty tables, where they apply, but different penalty provisions, in any event. Sometimes under guidelines.

41. The decisions that have been talked about are 2019 Smart, Harness Racing Victoria, fined $1000. 2009, Carlyle, greyhound racing Queensland, $500 plus probation. 2018, McCoy and Patti, Queensland greyhound racing, $1500 and $600 respectively. 2019, Torney, Harness Racing Victoria, $4000. 2017, James, greyhound racing Queensland, 12 months' disqualification. The Tribunal notes in respect of that matter that there was an intent by the defaulter there to harass another licensed person. That makes that matter quite distinguishable.

42. Having regard to each of the facts of those matters, whilst the ones that have been referred to all dealt with the equivalent of 86 and, in some cases, the same 86(d), in other cases, different matters, they all involved signing documents when they should not have been, and it is interesting that they involve, interstate-wise, with the exception of James, monetary penalties. James can be distinguished. Johnson becomes a slightly different matter because he was an employee. That leaves Sheather, a six-month disqualification, but considering the subjective factors there, Sheather had been licensed for some 60 years. So that that was, no doubt, a lesser period of disqualification.

43. Does the objective seriousness of the appellant's conduct, within the tests delineated, warrant a disqualification?

44. The Tribunal is not of that opinion. The facts and circumstances have been canvassed in detail. It is that the message that is required to be given is much diminished. It is a message which must be in consideration of the actual facts and circumstances here, and they are quite unique. It is the past history of signing documents that causes the Tribunal to move from a disqualification to a suspension.

45. The Tribunal is of the opinion that, objectively, a four-month suspension is an appropriate starting point for this conduct.

46. It is then a question of considering subjective circumstances.

47. Firstly, the plea of guilty to the commission and the maintenance of that on appeal entitles the appellant to a 25 percent discount, and there is no demurrer from the respondent on that.

48. The second issue is what should be given for other subjectives.

49. The appellant has put in a most extraordinary number of references and it is not necessary to read them all on to the record. The Tribunal turns to look at the more recent ones.

50. Peter Ward, 3 January 2021 referring to her remorse, the financial and mental impact upon her, her kindness towards greyhounds, understanding of the seriousness of the matter and that she won't reoffend.

51. Sally Doolette, 5 January 2021, a friend who finds her to be a genuine person with a true passion for greyhounds, expressing extreme remorse and learning her lesson.

52. Carla-Sue Ingram, 20 January 2021, similar matters. Weighed down with guilt and remorse, a great one for looking after greyhounds, understands the deterrent nature required and there is no risk of her reoffending.

53. Luke Wenlock, 14 January 2021, has had the appellant as a trainer of his greyhounds, how disappointed the appellant is in her own conduct, that she in fact would be a perfect ambassador, and is very good at looking after greyhounds.

54. There are then a number of old ones: Shannon Ellis, Ian Garland, Craig Taliano, Vince Tullio Maxwell Auld, Brooke McDonald- Blair,Dr Reardon, Graeme Dunn, Bradley Keel, Tracey Miles, Danny O'Bree, Petra Marek, Gail Lemin, Peter Parr, Lyn Smith, Noel Massina. Having regard to the number of those, they shan't be read onto the record. In essence, they canvass similar matters to the recent referees. There are many of them. There are licensed people involved, there are people associated with the industry involved. They establish the appellant otherwise as a person of good character, extremely remorseful and unlikely to reoffend.

55. Those matters must be balanced by the appellant's offence report. It does not help her. It entitles her to no further discounts. It does not mean that a heavier penalty should be imposed but that discounts are lost. In essence, she has had numerous failures to comply with the regulatory regime in respect of documentation. She has had two prior presentation and one related administration matters with prohibited substances. She has engaged in comments on social media and other detrimental conduct. She has made false or misleading statements to stewards, and other conduct as well.

56. But, critically, she has been dealt with under the same rule in 2014. That matter, as submitted to the Commission on her behalf, can be distinguished. It did involve a false form, and that is the common ground. However, it might be described as a silly prank gone wrong. She sought to register as a trainer a name Shack Peanut. She was appropriately dealt with and punished for that indiscretion. Suffice it to say that none of those matters were taken into account in elevating objective seriousness, but her record means she gets no other discounts.

57. She has put in evidence the impact upon her of these proceedings. So far as the impact upon her of the behaviour of Mr Formosa, the Tribunal does not consider that that is a factor which is a subjective factor which should lead to any further discounts. To the extent that that has been considered, it was taken into account in obsessing objective seriousness.

58. She has received, as a result of the impact upon her of her wrong conduct, counselling and references to counselling by her medical practitioner. She has self-reported to a medical practitioner a number of symptoms which for privacy will not be read onto the record. She has undertaken – and again for privacy reasons there will not be a reference to it – various treatment regimes to assist her in respect of the impact upon her of these proceedings, and that is said to be ongoing.

59. The Tribunal accepts that her conduct has caused her to suffer substantial impact in her mental and personal life and that that is ongoing.

60. It is said that there is hardship by reason of the financial impact upon her. The Tribunal accepts that is the case. There has been collateral financial impact to her now partner Mr Colaiacovo, and the Tribunal accepts that evidence.

61. However, the Tribunal, as has been its position since its harness racing decision in Thomas in 2011, acknowledges that financial impact can naturally flow from wrong conduct and the appropriate loss of privileges that are a consequence. But in most cases, that is the inevitable outcome of wrong conduct and should not lead to further discounts. There is nothing established factually here that satisfies the Tribunal that a greater discount should be given for financial impact.

62. That deals with all the issues that have been canvassed in the proceedings on subjective facts. In those circumstances, the Tribunal determines that there will be a discount for the plea of guilty and a further small discount in respect of the other subjective factors. But it must emphasise that that is a small discount because there is a substantial loss of discounts by reason of her poor past record.

63. The Tribunal having determined a four-month starting period, which is assessed at 16 weeks, determines that there be a six-week discount. Precise mathematics is not required.

64. That means, in effect, that the appellant is suspended for a period of 10 weeks.

65. The Tribunal notes that there was a short period of disqualification before it granted a stay on 23 December 2020 and the appellant has been suspended since that date. In effect, it means that the appellant has served the penalty that the Tribunal has determined.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

66. Application is made by the appellant for a refund of the appeal deposit.

67. This was a severity appeal. The penalty has been reduced. The appeal has been successful. There is no opposing submission.

68. The Tribunal orders the appeal deposit refunded.
