RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

FRIDAY 18 JUNE 2021

APPELLANT PETER OLDFIELD

GREYHOUNDS AUSTRALASIA RULE 83(2)(a)

SEVERITY APPEAL

DECISION:

1. **Appeal upheld**
2. **10 weeks' suspension imposed, 4 weeks conditionally suspended for 12 months**
3. **Appeal deposit refunded**

1. Licensed trainer Mr Peter Oldfield appeals against the decision of GWIC to impose upon him a period of suspension of his licence for a period of 10 weeks.

2. The charge against him was under GAR 83(2)(a), which relevantly provides as follows:

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

3. There were detailed particulars, as normal, but in essence the particulars, critically, are that on 8 January 2021 the appellant presented the greyhound Freeway Lass at Goulburn to compete in race 7 and as a result of a post-race urine sample, the prohibited substances caffeine and its metabolites theophylline, paraxanthine and theobromine were detected.

4. There is no dispute in these proceedings that each of those are, collectively and individually, prohibited substances nor that the greyhound was presented to race with the prohibited substances in it.

5. The appellant underwent an investigation process of the normal type and a hearing was not conducted by GWIC but the determination of its penalty was based upon the papers and, in particular, written submissions on behalf of the appellant.

6. The appellant, when confronted with the charge, immediately pleaded guilty. The appellant has maintained that admission of the breach of the rule on this appeal. This, therefore, is a severity appeal only and the necessity to examine the facts in great detail falls away.

7. The evidence has comprised the standard brief, which in essence is all the formal documents going to sample collection, analysis and the like. It importantly includes the detailed submissions on behalf of the appellant to GWIC and GWIC's decision and, in addition, the supporting material advanced on behalf of the appellant to GWIC, which included references. The additional evidence on appeal has been the statement of the appellant on 26 May 2021 and an additional reference. The Tribunal will return to the references.

8. This being a penalty determination, it is necessary to have regard to some key principles which the Tribunal must apply. The Tribunal has expressed in literally some hundreds of decisions on penalty the principles which are applicable. They will not be read into this decision in detail.

9. The key principles are that the Tribunal has to determine a protective order, not by way of punishment but by way of the maintenance of the integrity of the industry. To do so, the Tribunal must determine the objective seriousness

of the conduct in which the appellant has engaged and the rule which he has breached and then look to what his personal circumstances are – his subjective matters – to determine whether there should be any discount from that appropriate penalty for objective seriousness. In some cases, no discount is given at all.

10. In determining objective seriousness, the Tribunal has, since the introduction of the GRNSW Penalty Table, adopted by GWIC, in October 2012 considered that that table should be considered by the Tribunal but it is not bound by it. As the Tribunal has stated in dozens and dozens of cases they are guidelines, they are not tramlines. They provide assistance to GWIC, as it is now, in determining a penalty, but also of importance to the Tribunal in considering that table, because its application provides a degree of certainty to the regulator and its officers, as well as to participants and those who represent them, as to the likely outcome of particular types of conduct.

11. This is a prohibited substance presentation and prohibited substance presentations have, virtually since racing started and they were able to be detected, been considered as serious matters warranting substantial penalties. The reason for that need not be detailed in this matter. In essence, it is the level playing field. That is, that each greyhound competes equally on its merits with each other greyhound in a race and not supplemented by substances which may cause it to perform better or, in many cases, to perform worse.

12. Another issue is, of course, integrity. There is no welfare issue on this matter. But integrity goes to that level playing field and the reputation of the industry.

13. The issue of parity will be touched upon. It is necessary to have regard to the Penalty Table and to what it provides. There are five categories of seriousness so far as prohibited substances are concerned. This one falls in the second least serious of Category 4. And the Category 4 is a particular substance that has the ability to improve or impact racetrack performance and which are not otherwise as serious as the ones covered in earlier categories such as steroids, stoppers and the like.

14. Here it is not known, to go to the facts, what was the level of each of the prohibited substances detected, as to whether they were low, medium or high. It is not the case for the respondent, GWIC, to this appeal that there was a performance-enhancing level detected.

15. Category 4 provides for a starting point of 24 weeks and it is critical to recognise immediately at this stage that that is a disqualification of 24 weeks. Indeed, all the way through to Category 5, the least serious, which is where a permitted substance such as a veterinary-prescribed substance etc is

administered but, contrary to the rules, in excessive levels, obviously, has a starting point of 12 weeks disqualification.

16. It is, therefore, that the regulator, originally GRNSW and subsequently GWIC in adopting the GRNSW Penalty Table, have determined that for prohibited substance matters the privilege of a licence will be lost under a disqualification. Anything less than a disqualification is a substantial discount. The Tribunal has expressed now for years that it is the Tribunal's opinion, as presently constituted, that presentations with prohibited substances should warrant a disqualification.

17. There has been some lessening of that stance by reason of the application of what are now known as the McDonough principles post the decision of Justice Garde in Kavanagh v Racing Victoria Limited [2018] VCAT 291. The effect of that is that it is now more a duty to focus upon the actual conduct of the presenter – in this case the appellant, a trainer – and put it into one of three categories. Although, as the Tribunal expressed as recently as Atkins v RNSW, RAT NSW, 9.6.2021, those categories do not necessarily cover the field.

18. Those categories are when there has been clear and positive evidence of the administration of a drug which was in circumstances perhaps associated with carelessness and the like, which would be the most serious category.

19. The second category is where, at the end of the day, the Tribunal is not able to determine the source of the prohibited substance or accept an appellant's explanation.

20. And, thirdly, where it is able to be established by the appellant, in this case, that the appellant was blameless. That is, there was nothing the appellant did that could be criticised. In which case, in those latter category 3 matters, it is possible that no penalty at all might be imposed or, if there is to be a penalty, it might be nominal.

21. However, in respect of category 1 and category 2, it is that it is the decision in McDonough, and adopted in Kavanagh and applied by the Tribunal here, that a category 2 matter carries with it what penalty is provided for by parity, based on objective seriousness, or looking at a penalty table, again based on objective seriousness.

22. It has been stated for many years that the how, when, why and wherefore a drug came to be present in an animal presented to race does not have to be proved. And that is going all the way back to the stage at which it is simply not possible for a regulator, without admissions or inculpatory evidence, to be able to determine why the drug was present. Many a trainer is not going to say why a particular substance was present; and in other cases, it simply cannot be determined.

23. This is a case in which it is an agreed fact that it is not able to be established how the prohibited substances came to be present in this greyhound when it was presented to race.

24. There has been some speculation by the appellant, and it is understandable speculation, because the character references and his own statements indicate that he is not a person who appears to have a character that would lead him to administer caffeine or a similar-type product such as chocolate and the like to his greyhounds. He is not able to say how. His speculation is perhaps it licked something either at the racecourse or elsewhere.

25. The Tribunal notes the submissions on behalf of the appellant today that there may be some change in the approach adopted by the regulator to the rules as they are written or the application of penalties either by way of penalty table or otherwise to particular conduct in similar circumstances to these.

26. It is also possible that there may be some requirement for the course provider – here it was at Goulburn – to ensure more adequate protection is given to trainers by ensuring that it is, as far as is humanly possible, not likely that a greyhound is able to pick up prohibited substances by licking water bowls, where they are required to be provided when kennelled, or, indeed, about the empty-out area where it is possible something was dropped.

27. However, those are matters for the future. The Tribunal is required to consider the rules and the Penalty Table as they are now written and as they have been implemented by the application of principles of objective seriousness and generally.

28. Objectively, therefore, the seriousness of this conduct is within the category of matters identified by the Tribunal. A prohibited substance, a presentation, no explanation, and no explanation able to be accepted because it is merely speculative, leads to the imposition of a penalty consistent with those which have been considered appropriate by the regulator and Tribunals in the past. That requires a consideration of parity.

29. The difficulty with many parity cases is that they do not clearly delineate on many occasions what discount was given for subjective facts over and above a particular starting point. This is not a starting point fixed by the rules themselves but a starting point fixed by a penalty table which the Tribunal, on the facts of this case, considers not to be an inappropriate starting point. That is, disqualification, 24 weeks. That is a simple objective seriousness application to the conduct of this appellant.

30. To put the appellant's mind at rest immediately, a disqualification will not be imposed. There are various reasons. It was not considered appropriate by

GWIC at first instance, and nor is there any submission made by GWIC on this appeal that a disqualification should be imposed. In addition, it is apparent from the numerous parity cases to which the respondent has taken the Tribunal that suspensions have been considered appropriate both by the Tribunal and by GWIC in recent times.

31. The Tribunal will, therefore, give a substantial discount by reducing the original starting point of a disqualification to a suspension.

32. It is then necessary to have regard to the facts and circumstances of this case and determine what that period of suspension should be. It starts at 24 weeks. Is that an appropriate period? On precedent and parity, no. The reason for that is this: the Tribunal has been greatly assisted by a series of parity cases on behalf of the respondent.

33. The appellant put forward, in addition, various cases. They, however, do not deal with the same substance. And whilst the various principles may have been apt to apply here, the ones which the Tribunal dissects from various other cases have been stated already. Accordingly, the parity cases for the appellant will not be analysed further.

34. Those for the respondent are in fact a total of seven and they will simply be named by name of trainer, penalty and year. Erwin, 12 weeks' suspension, 2021. Ivers, 12 weeks' suspension, January 2020. Micallef, 12 weeks' suspension, May 2020. Osborne, 12 weeks' suspension, May 2020. Wright, 10 weeks' suspension with six weeks conditionally suspended, December 2019. Burgess, 12 weeks' suspension, November 2019. Pomfrett, 10 weeks' suspension with six weeks conditionally suspended, October 2019.

35. For anybody required to impose a civil disciplinary penalty, and, indeed, in the sentencing world of the criminal law, issues of parity can be informative, but it is the exception that precise facts upon which this penalty is to be determined have fallen to be determined elsewhere. There are some key differential issue matters in relation to each of those cases. The key ones are: length of time as a trainer, priors or no priors, admission of breach and then, invariably in virtually all of them, personal circumstances, good character, remorse and review of animal husbandry practices.

36. To distil those, the Tribunal will deal with them under subjectives. But, critically, the periods of suspension have fallen almost invariably at either 12 weeks, but reduced in the cases of Wright and Pomfrett to 10 weeks, by reason of length of time as a trainer. Those are also subjective matters.

37. It is, therefore, that it is able to be discerned that a starting point of 24 weeks was considered appropriate and that was then discounted down to some unexpressed period by reason of the particular drug in question, being caffeine and its metabolites, to a starting point slightly greater than the

general 12 weeks or 10 weeks, because there were then discounts for other factors. The Tribunal does not have to express a precise starting point. But that gives an indication that here there is to be a starting point less than 24 weeks, and the Tribunal will do likewise.

38. Turning then to the subjectives.

39. The appellant has, in his statement of 26 May 2021, set out his history. He is very proud of the fact that he has never been the subject of a disciplinary action and has been licensed for 31 years. He has been keen to point out to the Tribunal, as did Mr Shaw in the submissions to GWIC and in the submissions to this Tribunal, that he is a person who is very keen to look after the welfare of his greyhounds, and it has to be said – and this is not critical of him, it is not seeking to lessen that – it is invariably the case, unless there is a greyhound welfare issue, that everyone with whom the Tribunal has dealt has had a love for the sport and for the individual greyhounds that they have the privilege of racing. Or, indeed, post-racing, keeping them, often as pets. Here the appellant has done that.

40. In addition, he has made donations of greyhounds to Camp Quality, post their racing careers or otherwise, and Camp Quality is known to be an organisation that helps children suffering from cancer. And that is to his credit and is a substantially important factor.

41. He, of course, in his statement denies, and it is a common fact, any administration by him and he expresses that he has attempted to prevent them from consuming illicit substances, and having regard to his period of time as a trainer, that is obviously a correct statement. He again speculates – and the Tribunal has referred to that – as to the cause.

42. He refers to his financial difficulties which involve not only the fact that he is a pensioner but that he relies upon what he can from this industry to supplement that pension, he having exhausted all of his other resources. The Tribunal understands the hardship to which he refers. This Tribunal has said, somewhat harshly but maintains it has to be the position, that if the facts warrant it and if the consequences of the appropriate penalty are the creation of hardship, then that is the consequences of a person’s failures and is consistent with the loss of a privilege of a licence because of those failures.

43. The appellant has called in aid several referees.

44. Those that were before GWIC are Mr Peter and Ms Raylee Shearer of 29 March 2021. Mr Shearer has been a track official and they are aware of the allegations against him, which they consider to be out of character, and they assess him as honest and responsible and always willing to help others when in need.

45. The next is by Jodi Micallef – and the Tribunal notes that name has been referred to already – 30 March 2021. She describes the appellant as an amazing dog man who would never intentionally give an animal anything that may harm it or be illegal. He is an honest man and his record is perfect. She is the daughter of the appellant as the reference starts by saying “my father”. The Tribunal only notes this. It does not discount this reference. But references by relatives, particularly close relatives, must often be read down because of the emotive nature of a desire to support that relative. However, what she says, the Tribunal accepts. He treats his dogs better than humans and they are spoilt and deserve all the love he gives them.

46. The next is by Kevin Connolly of 30 March 2021. Known the appellant for 40 years to be good and honest. Never intentionally given his dogs anything illegal. And always presented his dogs in an appropriate fashion. And also he refers to the appellant’s assistance with fund-raising efforts.

47. The next is by Richard Carriage, undated. Describes him as having a good, honest and reliable friendship of over 40 years. He has been a handler for him and a kenneller and he knows him as a person who would never use any types of drugs or enhancing medications. And, indeed, the appellant is expressed by Mr Carriage as being totally against that sort of conduct in the industry.

48. The next reference to the Tribunal is that of Ashley Dwyer, who has been a greyhound club member, industry-registered participant, a club chairman and Greyhounds Australasia Board member. The Tribunal pauses to note the weight to be given to that reference by reason of those offices held, particularly in the category of a regulatory role.

49. He has known the appellant for 25 years. He is a credit to the industry, meticulous in his care and presentation of greyhounds. Always has compliant kennels. And he is satisfied the appellant has taken all reasonable precautions in preparation and presentation to race.

50. Unfortunately, he then goes beyond that which a referee should do, but they need to be referred to. He says he should not be penalised. That is not even the submission made on his behalf. And he then sets out to tell the Tribunal why the rules should be changed. Well, that is not the position of a referee to tell the Tribunal imposing a penalty how rules should be changed. They will be disregarded.

51. Those, then, are the key subjective facts. The ones upon which substantial weight is placed are length of time in industry, no explanation, all reasonable steps taken, a charity donor and a person who has a love and care for dogs and is supported by his referees in that sense. In addition, hardship to which reference has been made. He has enjoyed also, it is lastly

submitted, a good reputation, which has now regrettably suffered damage by reason of this presentation.

52. Those are strong subjective factors. In addition, he has pleaded guilty to the Commission and has maintained that on appeal and, consistent with the Tribunal's now imposed regime, adopted by this and the other NSW code regulators, there will be a 25 percent discount for that admission and his cooperation with the Commission and the Tribunal throughout the processes.

53. The Tribunal accepts the appellant as a person of good standing who is not able to explain what happened and is unlikely to allow this type of conduct to occur again in the future.

54. Accordingly, the message to be given to this appellant by way of a civil disciplinary penalty diminishes substantially. Nevertheless, there remains the need for what is a general message to other licensed persons, an indication to the regulator in its considerations, and an indication to the public at large, including, importantly, the betting public, that presentations with caffeine and its metabolites, which have that potential to affect – although it is not the case here – performance is such that there must be a penalty. It is not submitted to the contrary on his behalf.

55. Having determined that the disqualification will be reduced to a suspension, having determined that the starting point be reduced from 24 weeks to something less, having then considered a discount for his plea of guilty and a discount for his personal facts, which include personal circumstances, good character, record, remorse and review of animal husbandry practices, there is then a need to find why he should receive a different penalty to that which was considered appropriate by the regulator for similar types of facts.

56. The key ones are Wright of 50 years with no priors and Pomfrett, 60 years with no priors. In addition, in each of those matters the trainer was able to identify the source of the husbandry failure, a substantial factor for a discount which this appellant is not able to embrace. He simply does not know.

57. The factors that stand in his favour are not a contribution to the greyhound racing industry but his welfare contributions to his greyhounds and his contributions to charity. He is 30 years in the industry, not 50 or 60, as were Wright and Pomfrett respectively, and, as emphasised, he is not able to identify the source. Each of those, on a brief reading of the facts, would be category 2 on the McDonough principles, in any event, as is this appellant.

58. Therefore, the Tribunal determines he should not be subject to the same penalties in respect of Wright and Pomfrett, which effectively were that they served four weeks' suspension, because each of them was given 10 weeks of which six weeks was conditionally suspended.

59. The Tribunal has determined, looking at the totality of the facts, that there be a suspension of 10 weeks. In recognition of the similarity, to the extent it has been identified, in Wright and Pomfrett, part of that suspension itself should be suspended. The Tribunal is not of the opinion that he should enjoy the same length of suspension of six weeks as each of Wright and Pomfrett enjoyed. It is to be less. That lesser period of suspension will be four weeks.

60. The order of the Tribunal is that the severity appeal is upheld.

61. The Tribunal imposes a period of suspension of 10 weeks, of which four weeks is conditionally suspended for 12 months.

62. That effectively leaves a period of suspension of six weeks.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

63. The appellant makes application for a refund of the appeal deposit. It is not opposed. It was a severity appeal; he has been successful. The Tribunal orders the appeal deposit refunded.