

**RACING APPEALS
TRIBUNAL
NEW SOUTH WALES**

TRIBUNAL: MS SALLY DOWLING SC

**RESERVED DECISION
2 JULY 2021**

APPELLANT: MERLE CLARKE

**RESPONDENT: GREYHOUND WELFARE &
INTEGRITY COMMISSION**

**GWIC GREYHOUND RACING RULES
RULE 83(2)(a)**

DECISION:

- 1. Appeal dismissed**
- 2. Suspension of 4 weeks**
- 3. Appeal deposit forfeited**
- 4. Liberty to apply within 7 days in relation to the forfeiture of the appeal deposit.**

Introduction

1. The appellant, Ms Merle Clarke, appeals from a decision of the Greyhound Welfare & Integrity Commission (**GWIC**) on 1 February 2021 finding her guilty of a breach of Rule 83(2)(a) of the GWIC Greyhound Racing Rules (**Rules**), namely failing to present a greyhound for racing free of any prohibited substance.

Background

2. The appellant is a greyhound trainer registered with the GWIC. The appellant was first registered in 1979 and has been a registered trainer for over 40 years.
3. On 23 June 2019, the appellant presented the greyhound, 'Timely Wish' (**Greyhound**) at Mudgee for the purposes of competing in race 6.
4. On 23 June 2019, shortly before race 6, a urine sample (V624848) was taken from the Greyhound (**Sample**).
5. On 25 July 2019, the Sample was first analysed by Racing Analytical Services Limited (**First Laboratory**) and tested positive to the presence of theobromine.
6. On 11 September 2019 further analysis was conducted at a different laboratory, the Racing Science Centre (**Second Laboratory**), which confirmed the presence of theobromine in the Sample.
7. Theobromine is a methylxanthine drug that acts of smooth muscle in the cardiovascular and respiratory systems to relax blood vessel and bronchial walls in airways.

GWIC Rules

8. Rule 83 of the Rules provides, relevantly:
 - (2) The owner, trainer or person in charge of a greyhound
 - (a) nominated to compete in an Event;
.....shall present the greyhound free of any prohibited substance.

(3) The owner, trainer or person in charge of a greyhound presented contrary to sub-rule (2) shall be guilty of an offence.

9. Rule 1 defines “prohibited substance” as:

(a) Substances capable at any time of causing either directly or indirectly an action or effect, or both an action and effect, with one or more of the following mammalian body systems:

- i. the nervous system
- ii. the cardiovascular system
- iii. the respiratory system
- ...
- vii. the urinary system
- ...

(b) Substances falling within, but not limited to, the following categories:

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- xxxii. bronchodilators; ...
- xxxv. central nervous system stimulants; ...
- lvii. stimulants;
- lviii. sympathomimetic amines;
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The decision of the GWIC and the procedural history of the appeal

- 10. On 3 December 2020 a hearing was conducted before Mr Matthew Tutt, Director of Integrity and Legal Services, GWIC. The appellant appeared in person and made submissions directed to liability and penalty.
- 11. On that date, GWIC determined that the charge under r83(2)(a) was proven and the appellant was found guilty of the offence. A penalty of 4 weeks suspension was imposed.
- 12. On 1 February 2021, GWIC notified the appellant of its decision.
- 13. By notice dated 2 February 2021 the appellant lodged a Notice of Appeal to this Tribunal and sought a stay of the GWIC decision.
- 14. On 3 February 2021, by consent, the Tribunal granted a stay of the GWIC decision pending the hearing and determination of this appeal.

15. The appeal was heard in person before the Tribunal in Sydney on 19 May 2021.

Grounds of Appeal

16. By letter dated 26 March 2021 and fax dated 13 April 2021, the appellant outlined the basis for her appeal to the Tribunal. The appellant identified the (sometimes overlapping) grounds for her appeal as:
 - (a) The swab leaked and so is not able to be tested or relied upon due the probability of contamination;
 - (b) The Laboratory certificate of analysis contains the statement: "All seals intact. Urine leaked."
 - (c) The documents provided originally were flawed, and later redacted versions were provided by the Commission;
 - (d) There was no betting analysis provided that would indicate a motive for the appellant to have committed this offence;
 - (e) There was no proof provided to support the claim that the Greyhound competed in the race at betting odds of \$4.00;
 - (f) The vet report provided in this matter relies upon articles written about studies conducted by other persons rather than the firsthand experience of the author;
 - (g) The Laboratory sample document is flawed;
 - (h) The Sample Receipt does not have a signature or details of the person receipting the samples at the Laboratory;
 - (i) The Sample Collection document refers to the greyhound 'Speedy Boltaz' not the subject Greyhound;
 - (j) The Sample Receipt contains a comment regarding a small sample for the sample identified as V634849 (not the subject sample);
 - (k) That she believes there has been a reference to the swab taken from the Greyhound as sample V624849 rather than its actual identifier of V642848;

- (l) There was no intention by the appellant to administer the Greyhound with the substance theobromine;
- (m) That she has never received a copy of the confirmatory sample provided by the Confirmatory Laboratory;
- (n) Mr Tutt, the original decision maker in this matter, promised the appellant that she would receive a fine only for this offence.

Evidence

- 17. The respondent tendered the exhibits relied upon at the GWIC hearing, namely:
 - A1: Sample identity document V624848
 - A2: Racing Analytical Services Ltd(RASL) Kit Audit Document 19/1891
 - A3: Greyhound Sample Collection Operations Sheets and Chain of Custody dated 23 June 2019
 - A4: Kennel bay seal record from Mudgee on 23 June 2019 and copy of seal 0726056
 - A5: RASL Sample Receipt dated 26 June 2019
 - A6: Result from race 6 at Mudgee on 23 June 2019
 - A7: A Sample: Certificate of Analysis from RASL dated 25 July 2019 with cover letter dated 25 July 2019
 - A8: Copy of Letter from GWIC to the appellant notifying of detection of a prohibited substances and inquiry dated 2 August 2019
 - A9: B Sample: Certificate of Analysis from the Racing Science Centre dated 11 September 2019 with covering letter of RASL dated 13 September 2019, with detailed report summarising the analytical data
 - A10: Veterinary Opinion Statement of Dr Michelle Ledger dated 6 November 2019
 - A11: Registration and disciplinary history of the appellant.
- 18. The appellant relied upon the letter and fax referred to above, supplemented by oral submissions.
- 19. By her written evidence and submissions, the appellant repeated her plea of not guilty.
- 20. In relation to the question of guilt, the appellant emphasised that she has no knowledge of the origin of the theobromine in the Greyhound. She noted that she has been a registered greyhound trainer for over 40 years, in which time she has never been charged with a swabbing offence. The appellant

noted that the Greyhound had a poor racing history and the race in question carried minimal prizemoney.

21. The appellant noted that the Sample was recorded as having leaked and submitted that this affected the reliability of the analysis. She submitted that the level of theobromine was low.
22. On the issue of penalty, the appellant stated that she currently cares for 130 greyhounds, of whom 50 are currently racing. She employs 3 full time and one part time staff and relies upon income from racing and boarding fees. The appellant submitted that without the income from racing it would be difficult for her to maintain the dogs she cares for and retain her employees. The appellant stated that she requires \$3000 per week to cover her expenses.
23. Brief oral evidence was also given by Mr Simms, kennel hand and trainer.
24. Mr Simms gave evidence that:
 - a. He was solely responsible for the feeding and handling of the Greyhound in the period leading up to and at the race.
 - b. To treat his chronic sinus Mr Simms daily used a medicinal product called "No-Doz"
 - c. Following the positive swab of the Greyhound, Mr Simms has learned that "No-Doz" contains theobromine.
 - d. Mr Simms had never informed the appellant that he used "No-Doz."
 - e. Neither Mr Simms nor the appellant knowingly administered any product containing theobromine to the Greyhound.

Submissions of the parties

25. The appellant relied upon the letter and fax referred to above and the oral evidence of Mr Simms, supplemented by oral submissions, as noted above.
26. The respondent relied upon written submissions, and handed up a number of disciplinary action decisions by GWIC on the issue of penalty.
27. Of note, the respondent reiterated that the appellant has not been charged with *administering* the substance, but rather of having *presented* a greyhound that was not free of prohibited substance.

Decision

28. An appeal to the Racing Appeals Tribunal is an appeal by way of rehearing and does not require the appellant to prove error on the part of the original decision maker. The standard of proof is one of "comfortable satisfaction."

29. The results of testing by both the First and Second Laboratories indicates the presence of theobromine in the Sample. For the reasons that are detailed below, there is nothing in the manner in which the Sample was collected or handled that suggests that the results of the Laboratories should not be accepted as reliable.
30. The evidence of the Chief Veterinarian Officer for GWIC, which is accepted for the reasons below, is that theobromine is a stimulant that affects the respiratory, cardiovascular, nervous and urinary systems of dogs.
31. Accordingly, theobromine falls within the definition of “prohibited substance” in Rule 1.
32. In relation to the matters raised by the appellant, the Tribunal find as follows.

The integrity of the swab and analysis (grounds of appeal (a) and (b))

33. The Certificate of Analysis dated 25 July 2019 stated, in relation to the Sample, “All seals intact. Urine leaked.” The submission that the leakage of the sample rendered the result unreliable is rejected for two reasons. First, notwithstanding that there was leakage of some urine, the reference to “all seals intact” suggests that the leakage occurred within the sealed packages that contained the Sample. Despite the leakage the Laboratory was able to and did analyse the sample, again suggestive that the leakage was not considered to have affected the integrity of the sample. Secondly, and of decisive importance, analysis of the B Sample by the Second Laboratory (the Queensland Racing Integrity Commission) was not affected by any leakage and returned the same positive result for theobromine. This corroborates the Sample and supports the conclusion that the leakage did not affect its integrity.
34. In relation to the appellant’s complaint that the RASL Sample Receipt was not signed and lacked commentary in relation to the Sample, the Tribunal notes that there is no requirement that this document be signed and further notes that the identity of the RASL officer who received the samples is noted on the Receipt. The lack of commentary is not suggestive of anything other than that there was nothing considered to be noteworthy about the sample received. It is not evidence of the compromise of the Sample.
35. In relation to the submission that the documents provided originally were flawed and that later redacted versions were provided by the Commission, the Tribunal accepts the explanation provided by the respondent in correspondence with the appellant and given at the hearing, that the original documentation erroneously included the personal information of another trainer and greyhound sample. The provision of documents containing

another person's personal information was clearly a mistake and the later redaction of that document has no relevance to the issues before the Tribunal.

There was no proof provided to support the claim that the Greyhound competed in the race at betting odds of \$4.00 and no betting analysis provided that would indicate a motive for the appellant to have committed this offence (grounds of appeal (d) and (e))

36. In relation to the evidence of betting odds, Exhibit A6 is a printout of the meet results for Race 6 at the Mudgee Meet on 21 June 2019 published on the website 'thedogs.com.au', the official site of Greyhound Racing NSW. It is a business record published by the one of the peak bodies of greyhound racing. Exhibit 6 is proof that the Greyhound raced in Race 6 at betting odds of \$4.00.
37. It is not alleged that the appellant bet on the Greyhound in order to take advantage of the presence of a prohibited substance and there is no requirement for the Respondent to provide any betting analysis.

Lack of basis for expert opinion in the vet report (ground of appeal f)

38. A report dated 6 November 2019 was prepared by Dr Michelle Ledger, Chief Veterinary Officer of GWIC (Exhibit A10).
39. The appellant's submission that the Veterinary Report is not based on experience or specialist knowledge and is based on research into the effects of theobromine on humans rather than dogs, is not sustainable.
40. Dr Ledger is the chief veterinary officer of GWIC. She supports her opinion that theobromine exerts effects on the respiratory system, cardiovascular system, nervous system and urinary system, by reference to a paper by A. Grip-Jonsson *Administration and Detection of Theobromine in the Dog* published in the Proceedings of the 10th International Conference of Racing Analysis and Veterinarians, Sweden 1994.
41. Dr Ledger has the relevant experience and expertise to express an opinion on the presence of theobromine in the Sample and the effect of that substance on dogs. Furthermore, Dr Ledger's opinions are appropriately explained and supported by relevant academic research.

The Respondent's documentation is flawed because the Sample Receipt does not have a signature or details of the person receipting the samples at the

Laboratory and the Sample Collection document refers to the greyhound 'Speedy Boltaz' not the subject Greyhound (grounds of appeal (g), (h), (i))

42. The lack of a signature on each page of the Sample Receipts does not render that document unreliable, particularly in circumstances where the author of the document is identified by name.
43. The reference to the greyhound "Speedy Boltaz" on the Sample Collection Operations Sheet that was originally supplied (unredacted) (Exhibit A3) has no relevance to this proceeding. The Sample Collection Operations Sheet details multiple samples taken from various dogs. There is no merit in this complaint.

The Sample Receipt contains a comment regarding a small sample for the sample identified as V634849 (not the subject sample) and this may be a reference to the swab taken from the Greyhound as sample V624849 rather than its actual identifier of V642848 (grounds of appeal (j), (k)).

44. The comment on the Sample Receipt made in relation to the sample identified as V624849 ("Ext low – non-existent") has no relevance to this proceeding. This is a notation observing the sample to be low. It is an observation made about a sample with a similar, but different number to the Sample. It may be presumed that had the Sample been "non-existent" then the two laboratories would not have proceeded to test it.
45. The appellant's complaints regarding the respondent's documentation are without merit.

There was no intention by the appellant to administer the Greyhound with the substance theobromine (ground of appeal (l))

46. As noted above, the appellant has not been charged with *administering* the substance, but rather of having *presented* a Greyhound that was not free of prohibited substance. On the question of whether the appellant breached rule 83(2)(a), intention is not determinative (although it may be relevant to penalty).
47. There is no evidence that the appellant knew of the presence of theobromine in the Greyhound or that she deliberately administered the substance. On the contrary, the evidence of Mr Simms offers a likely explanation for the presence of the substance to the ignorance of the appellant.

48. Despite Mr Simms' evidence that he may have inadvertently been responsible for the ingestion of theobromine by the Greyhound, it remains the responsibility of the appellant, as a registered trainer, to ensure that any dog under her charge is presented free of any prohibited substance.

The appellant has never received a copy of the confirmatory sample provided by the Confirmatory Laboratory (ground of appeal (m));

49. The appellant complained that she had not received the confirmatory sample, but only the results of the testing by the Second Laboratory. The respondent submitted that the Confirmatory Sample is not returned to the respondent; it only receives the Confirmatory Sample results. The Confirmatory Sample results were provided to the appellant on 24 January 2020 and referred to her in the hearing on 3 December 2020.

50. The failure to return the Sample to the appellant does not render the testing and notification process unfair. It is not a basis to refrain from determining the matter.

Mr Tutt, the original decision maker in this matter, promised the appellant that she would receive a fine only for this offence (ground of appeal (n)).

51. The Respondent tendered the transcript of the hearing before Mr Tutt, Director of Compliance and Legal Services. The question of penalty is addressed at pages 65 to 68 of that transcript. At no time did Mr Tutt represent that the appellant would receive only a fine rather than a suspension and this ground of appeal is rejected.

Conclusion on liability

52. The Tribunal is comfortably satisfied that the appellant did breach rule 83(2)(a) GWIC Rules in that she did present the Greyhound at Race 6 Mudgee Races on 21 June 2019 not free from a prohibited substance, namely theobromine. The various facts, submissions and arguments for the appellant do not disturb those findings.
53. The Tribunal finds that the presentation of the Greyhound with a prohibited substance was likely due to the actions of Mr Simms in handling the dog after having consumed "No-Doz".
54. The Tribunal makes no finding as to whether the appellant knew of the dog's ingestion of the substance.
55. The appeal against the findings of the breach of the rules is dismissed.

Penalty

56. The initial decision maker imposed a penalty of 4 weeks suspension, being an 18 week suspension reduced to 4 weeks in recognition of the appellant's strong subjective case – a reduction of 73%.

Penalty guidelines and precedents

57. Theobromine is classified as a category 4 prohibited substance (a substance that has the ability to improve or impact performance not already included in categories 1, 2, 3 or 5).
58. For a breach of rule 83(2)(a) involving a Category 4 prohibited substance, the penalty guideline prescribes disqualification for 24 weeks.
59. The regulator's penalty guidelines are to be treated as just that - guidelines, not as rigid "tramlines". However, it should be noted consistency in penalty is an important consideration to ensure certainty across the industry and that similar conduct attracts similar consequences.
60. The following penalty decisions concern the presentation of greyhounds with theobromine.
61. In *The matter of Brian Stephens* (22 July 2020) a trainer of approximately 29 years' experience with no prior swabbing offences admitted to one charge of presenting a greyhound with theobromine. The decision maker imposed a penalty of 4 weeks suspension.
62. In *The matter of Steven Beddoes* (24 March 2020) Mr Beddoes, a trainer for 20 years, admitted the charge at the earliest opportunity. He had no prior disciplinary matters. He was suspended for a period of 8 weeks.
63. In *The matter of Julius Perrett* (16 March 2020) a trainer of 22 years standing with two prior convictions for swabbing offences denied the charges. He was found guilty and a penalty of 10 weeks suspension imposed.

Decision

64. The presentation of a greyhound with a prohibited substance destroys the level playing field that is required to ensure fairness in sport. It is conduct that damages the integrity of the industry and has a substantial impact upon the public perception of the greyhound racing industry. Presentation offences are of their nature serious offences. That being said, the circumstances in which it seems the drug may have been administered in

this case, by a person other than the appellant and without her knowledge, somewhat reduces the seriousness of the offence.

65. A strong subjective case was advanced by the appellant. She has held a trainer licence in NSW for more than 40 years and has had no prior swabbing offences. The appellant employed three workers and the Tribunal accepts her submission that a period of suspension would impact on her ability to earn income to support herself, her employee and her dogs.
66. Although the Tribunal accepts that a period of suspension will cause some hardship to the appellant, it does not find that the personal circumstances of the appellant are such that a period of suspension should not be imposed.
67. The respondent submitted that a 4 week period of suspension was appropriate, in light of the seriousness of the offence, the appellant's subjective case, the penalty guideline and the precedents referred to above.
68. The Tribunal does not intend to disturb the penalty imposed at first instance. A period of 4 weeks suspension is appropriate and is imposed.
69. Given that the appeal has been entirely unsuccessful, the Tribunal proposes to order the appeal deposit to be forfeited, in the absence of any application to the contrary, which must be made within 7 days of this decision. If no such application is made, then the appeal deposit is forfeited.
