RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

WEDNESDAY 18 AUGUST 2021

APPELLANT MARK CRAIG

GREYHOUNDS AUSTRALASIA RULE 86(o) X 2

SEVERITY APPEAL

DECISION:

1. **Appeal upheld**
2. **Penalties – Charges 1 and 2: 9 months disqualification, 3 months conditionally suspended; 3 months of penalty on Charge 2 to be served cumulatively**
3. **25 percent of appeal deposit refunded**

1. The appellant, licensed trainer Mark Craig, appeals against the decision of the GWIC Internal Hearings Panel of 11 June 2021 to impose upon him for two breaches of the rules a total period of disqualification of 12 months.

2. The appellant faced two charges for breach of Rule 86(o). Rule 86(o) relevantly provides:

> "A person shall be guilty of an offence if the person has, in relation to a greyhound or greyhound racing, done a thing, or omitted to do a thing, which, in the opinion of the Stewards or the Controlling Body, as the case may be, is negligent, dishonest, corrupt, fraudulent or improper, or constitutes misconduct."

The first allegation was particularised as follows:

> "That you as a registered public trainer acted dishonestly and improperly by nominating the greyhound Urana Fernando registered in your trainership on 19 February 2021 in circumstances when you knew the greyhound was not going to compete in the race at Gunnedah on 25 February 2021."

The particulars of the second charge:

> "That you as a registered public trainer acted dishonestly and improperly by failing to withdraw the nomination of greyhound Urana Fernando when the greyhound was no longer in your custody and you knew it was not going to compete in the race at Gunnedah on 25 February 2021."

3. When first interviewed during the inquiry stage, the appellant made full and frank admissions. When confronted with charges, the appellant, in a submission to the panel, made full and frank admissions. He did that in two ways: firstly, in respect of an interim suspension and, secondly, in respect of submissions on what penalty, having regard to his admissions, should be imposed upon him.

4. A penalty was imposed in respect of the first matter and worded in the following terms, to which the Tribunal will return:

> "Charge 1: To disqualify you for a period of six months with a further period of three months conditionally suspended for a period of 12 months on the condition that you do not breach Rule 86(o) or any like rules in that time.
>
> Charge 2: To disqualify you for a period of six months with a further period of three months conditionally suspended for a period of 12

> months on the condition that you do not breach Rule 86(o) or any like rules in that time."

Notations to the charges:

> "The penalties to be served cumulatively and the time served under interim suspension since 1 March 2021 taken into account as time served, causing the periods of disqualification to expire at 12 am on 1 March 2022."

5. The appellant, as stated by his appeal, maintains his admission of the breach. The necessity, therefore, to examine the facts in greater detail falls away.

6. The evidence has comprised the standard brief of evidence and the critical factors contained in that are matters that go to an interview of 10 March 2021, to which reference has been made as to ready admissions; the factual scenario; a copy of a prior decision of this Tribunal in respect of a breach of 86(o) by this appellant on two occasions and dealt with by penalty decision of the Tribunal on 23 June 2015; and the panel decision of 11 June 2021. Importantly, that brief also contains each of the three submissions to which reference has been made.

7. The grounds of appeal of the appellant contain, by consent, a number of statements of fact and set out the appellant's case and the facts he relies on to support it.

8. This case is a severity appeal and it is up to the respondent to satisfy the Tribunal of the penalty that should be imposed on appeal.

9. In written submissions, and maintained in oral submissions today, the respondent invites the Tribunal to come to the same conclusions as the panel and impose the same penalty as the panel imposed. The Tribunal is not asked to impose a greater penalty. The appellant, consistent with his submissions throughout, asks that a lesser penalty be imposed and that the Tribunal consider a suspension or a fine.

10. The starting point in these matters is the principles to be applied in a case such as this. In its decision of 23 June 2015, the Tribunal set out at length the legal principles to be applied. They are not repeated and are adopted. The Tribunal critically set out the means by which objective seriousness is determined and then an application of any reduction appropriate for subjective circumstances and then the principles that relate to cumulative or concurrent. For the purposes of this decision, as it is the same appellant with the same breaches, it is only necessary to give a very brief summary.

11. This is a civil disciplinary proceeding in which the function of the Tribunal is to determine a protective order and not to engage in punishment of a transgressor. On the facts of this matter, the critical issues are the message to be given to this appellant and also to the industry at large which will also incorporate in a general message a clear sign to the public and, critically, the betting public of the attitude to be taken by a regulator and, as required here, an appeals tribunal in sending a message as to the impact of this type of conduct upon the integrity of the industry. This is an integrity and not a welfare case. The integrity that is enlivened here, on the submissions of the respondent, are that there is serious misconduct. It is necessary, as stated, to determine the objective seriousness of this conduct and then look at subjective facts.

12. Briefly, the facts are that the appellant was a licensed public trainer; he had in his care not fewer than two greyhounds; he was negotiating to have the sale of one of those greyhounds, that named in the particulars; he wished to have his other greyhound, Jabeni, race for its benefit. The negotiations were being conducted on behalf of an owner for whom the appellant has expressed a desire not to have continuity, and it might be noted in passing the appellant indicated to the Tribunal in submissions that he does not seek to return to train.

13. Be that as it may, the greyhound was, at the time that he effected the nomination set out in the particulars, in the position of going to be transferred from him and sold. In fact, it went with another greyhound and the facts in relation to that other greyhound do not need to be examined.

14. The compounding fact was that he was then approached by the secretary of the subject race club, Gunnedah, to encourage him to keep the greyhound nominated on the basis that the fields would otherwise fall away. The appellant describes in his various submissions the practice, as is necessary, in country regions, where there are limited fields, to ensure that races are able to be conducted with the necessary minimum number of starters, that trainers will, for the benefit of the industry, in some cases nominate every dog in their kennel to make up the fields. That is a perfectly acceptable and proper practice.

15. It is, however, that there is conduct here which transgressed that requirement and the appellant does not shy from it. The fact is that the dog was not to be in his trainership and the fact that he quite frankly admits he knew he should have withdrawn it but just simply did not do so. Those are a sufficient explanation of the facts.

16. The integrity issues that have enlivened the concerns of the regulator here are such that if there is to be a common practice of this nature, then it is a wrong one and transgressors must be called out and brought to heel with an appropriate protective order. That is, that they should not nominate

greyhounds they should not be nominating and they should withdraw them at an appropriate time if the facts are there. It is said to be deceitful and wrongful, as particularised, to comprise the breach of the subject Rule 86(o) on both occasions. The appellant does not hide from the fact that his conduct can be so described.

17. It is, therefore, that this is a serious breach. The critical fact is the message to be given. This case carries with it a greater necessity for that message to be driven home to this appellant personally, but also, importantly, for that general message, to which reference has been made. That arises because this appellant was dealt with for virtually the same conduct in 2015. There, he nominated a greyhound to race which could not possibly have raced because it was injured, and he falsely indicated that he was withdrawing it on the basis that it had suffered a recent injury. The critical matter is the first of those. It is precisely the nomination conduct in which he engaged on this occasion.

18. The Tribunal reflected in 2015 of the necessity to give him a message he should not do that. There could not be a clearer and more graphic example of a case in which that message was not taken to heart. He acted with full knowledge of its wrongfulness. It is, therefore, that in this case, in assessing objective seriousness, the message to be given to this appellant is greater than it would be the case for others.

19. It is important to note that it is still the fact that the conduct in which he engaged must be the subject of the penalty and not a punishment again for past conduct. The Tribunal does not fall into that error. It assesses objective seriousness on the message and not a repunishment.

20. Secondly, the message to be given to the industry and public at large must reflect the fact that this appellant was only dealt with some six years ago for precisely the same type of conduct. It is, therefore, that a salutary protective order is required.

21. On the previous matter, the Tribunal determined a starting point of eight months for similar conduct. In doing so, it had regard to various precedent matters, the critical one being for precisely similar conduct of Cowling. Cowling received a six-month disqualification. The Tribunal notes that this appellant in 2015 was given two periods of six months' disqualification. That is, a starting point of eight months and a 25 percent discount.

22. It is, therefore, that the Tribunal is of the opinion that the conduct in which he engaged here, armed as it was with his knowledge of his past transgression, warrants that in each matter the starting point be not less than 12 months disqualification on each breach.

23. It is a question of what, if any, discount can be given for subjective factors and then a consideration of cumulative or concurrent.

24. In respect of his subjective facts, when the Tribunal dealt with him in 2015, he had been training for a considerable number of years. He was given the benefit of no prior record. He cannot call that in aid on this occasion because in 2015 he engaged in the same conduct. At best it could be said that he has gone six years without breaching the rules again and he is entitled to have the benefit of that.

25. The most critical aspect of the appellant's submissions touch upon his personal circumstances in the industry as to its impact upon him and his capacity to participate, but also upon his family. The Tribunal understands most strongly that this is an industry in which family participation is critical for its survival and the encouragement of people to participate in the industry, but, more importantly, for the social outlet it gives to so many people – a social outlet at these times that is relevant, and the Tribunal has reflected in many matters of recent times of the different circumstances in which the community and the industry finds itself as a result of COVID. It is important to recognise that any well-being matters in times of COVID, where that impact upon the community of itself causes other well-being issues, must be taken into account.

26. The Tribunal notes that the appellant has young family who have a strong desire to participate in the industry. He made reference in his submissions today that his family has recently put forward a race in honour of a family member and he was unable to present the trophy. A reflection of the impact of the penalties upon him of disqualification rather than, of course, of suspension.

27. He describes the impact of these matters upon him as affecting his well-being. He describes in his submission that he is required to take medication for the aspect of impact, and for privacy that will not be read into this decision. The Tribunal accepts that his conduct on this occasion has been reflected in his well-being and health and it is important that that is recognised, and it is.

28. As harsh as it is, however, the Tribunal has reflected for many years now, and first started to do so in the harness racing case of Thomas in 2011, that hardship can in some cases be the inevitable consequence of conduct. The loss of the various privileges, and the impact to which the Tribunal has made reference upon this appellant, are often the inevitable outcome of conduct and do not in all circumstances warrant that there be a reduction for subjective facts. It is not submitted in this case, and the Tribunal does not reject subjective facts on the basis that they are outweighed by objective seriousness, notwithstanding past history.

29. On subjective facts, the appellant cannot call in aid a good past history. That is particularly the case when he has breached the same rule only six years ago. That principle, when applied in subjective circumstances, means that there is a loss of a discount, not an increase in penalty, as was considered in respect of objective seriousness for the message to be given. That is particularly so when the subjective facts of adverse impact were advanced in the same terms in 2015.

30. The key and critical subjective factor is his cooperation with the regulator, his ready admission, his full and frank statement of facts and acceptance from the very beginning of his understanding of wrongdoing. But, critically, this appellant stands out in respect of his agreement that his conduct was egregious and, in that regard, because of the need to protect the industry, that it warrants a penalty be imposed upon him.

31. His early admissions – and it was before he was even charged – are such that the 25 percent discount, which the Tribunal and the regulator reflect as appropriate in correct circumstances, should be applied to him, and it shall.

32. The next matter is whether or not there should be other discounts over and above those to bring down the Tribunal's starting point of 12 months to anything less. The fact of a prior of the same conduct has the impact that the remaining subjective factors to which the Tribunal has made reference do not warrant that of itself there be a greater discount than 25 percent. This also means a lesser penalty of suspension or fine are not appropriate.

33. The effect of that, therefore, is that in each matter, from a starting point of 12 months, there will be a three-month reduction to make in each matter a disqualification of nine months' disqualification.

34. The Tribunal notes that that was the penalty sought to be imposed by the regulator and the Tribunal has described how it came to that conclusion, which happens to be the same. The Tribunal notes that the wording – and it is no criticism – of the actual decision was not to impose a period of disqualification of nine months and then impose a suspension of three months of that nine months. But nothing turns on that.

35. The next issue is should there be any further reduction in respect of that penalty? The panel determined that of those nine months in each matter there be a further suspension of three months. It is there that the Tribunal takes into account certain facts that stand out in this matter. Firstly, the encouragement of the appellant to engage in the conduct in which he did by the secretary of the Gunnedah racing meeting. No criticism is directed to that secretary; she acted entirely properly. She did not act to encourage this appellant to act in breach of the rules but simply, consistent with a desire for nominations for races, she was encouraging trainers to nominate. The

Tribunal, whilst it does not exculpate the appellant from his wrong conduct, accepts that that was a factor in his mind in respect of the second matter in particular and his continuity of wrong conduct in respect of the first matter.

36. There is then the issue – and it can be taken into account at this stage – of what the Tribunal considers to be a greater cooperation than would otherwise be the case that the appellant engaged in from the outset, and the Tribunal also reflects upon his mental well-being.

37. For slightly expressed different reasons to those of the panel, the Tribunal also determines, despite the fact that the message required of him would not otherwise seem to indicate it appropriate, that the Tribunal will itself suspend three months of those nine-month periods in each case on the same conditions. Again, the Tribunal reflects that, consistent with the submissions made by the regulator on this appeal, it determines that it comes to the same conclusions. That is not a reflection of a mirroring but of coming to a same conclusion by slightly different reasoning.

38. The next issue is whether the penalties should be cumulative or concurrent. The rules require that they be cumulative. In its decision of 2015, the Tribunal reflected at some length on the principles to be applied. Here, the regulator determined that the two penalties be served cumulatively.

39. The principles require consideration of whether there was a continuity of conduct or one series of conduct which might have flowed from an initial act. Here the Tribunal considers that the conduct was reasonably proximate in time, involved one greyhound and one race, and that it flowed from an aspect of wrongful conduct when the initial nomination was made. There is no doubt that the failure to withdraw, which comprises the second breach, was separate and discrete conduct, and a penalty has been determined appropriate for that conduct.

40. But it is, in the Tribunal's opinion, somewhat bound up in one course of conduct. Ordinarily, that would lead to consideration of possibly total concurrency. However, there was separate conduct. There was an occasion on which reflection was required and not embarked upon to ensure a second type of breach did not occur.

41. The other aspect is, as the Tribunal reflected earlier, what was in his mind by reason of a desire to nominate, whilst there was of course some benefit to him from having a race in which his other greyhound, Jabeni, could participate. Nevertheless, there was that aspect of desire for assistance of the industry.

42. The Tribunal here digresses from the conclusions of the panel. It does not see that all of the facts and circumstances just outlined warrant that the second penalty be totally cumulative upon the first.

43. It determines that the second penalty be 50 percent cumulative upon the first penalty.

44. The effect of that, therefore, is that in respect of the first penalty, there is nine months' disqualification and three months of that is conditionally suspended, giving him effectively to serve six months.

45. He then has a second period of disqualification of nine months, three months of which is conditionally suspended, again to give him six months to serve. Of that second six-month period, three months is cumulated on the first penalty.

46. The condition of the suspensions is that the for a period of 12 months the appellant does not breach GR86(o) or any like rules in that time.

47. The effect of that, therefore, is that the appellant will be disqualified for a period of nine months. The Tribunal is not asked to disturb the starting point which the panel considered appropriate, which was from 1 March 2021. Therefore, the disqualification will expire nine months from 1 March 2021 subject to any call up for breach of the condition.

48. Application is made for a partial refund of the appeal deposit in the sum of one-quarter, that being the amount of the discount the Tribunal has found appropriate compared to the initial penalty. That is not opposed.

49. The Tribunal orders that 25 percent of the appeal deposit be refunded.