RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

FRIDAY 17 SEPTEMBER 2021

APPELLANT CHRYSTAL HENSING

RESPONDENT GWIC

GREYHOUNDS AUSTRALASIA RULE 83(2)(a) x 4

SEVERITY APPEAL

DECISION:

1. **Appeal upheld**
2. **Penalty varied**
   Charge 1: 6 weeks suspension
   Charges 2 to 4: 7 weeks suspension on each
   Penalties to be served concurrently
3. **Appeal deposit refunded**
4. **Commencement of penalty deferred for 9 days with allowance for 1 day served prior to stay and to conclude on 12 November 2021**

1. The appellant appeals against the decision of GWIC of 11 August 2021 to impose upon her a total period of suspension of 12 weeks for 4. breaches of Rule 83(2)(a).

2. That rule relevantly provides as follows:

> "83(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. GWIC advanced four charges against the appellant and they all relate to the prohibited substance arsenic.

In summary terms, they are:

> Charge 1. 30 March 2021. Greyhound Bruce Mick Glenn. Maitland.
>
> Charge 2. 10 April 2021. Greyhound Bones McCoy. The Gardens.
>
> Charge 3. 30 April 2021. Greyhound Bruce Mick Glenn. The Gardens.
>
> Charge 4. 1 May 2021. Greyhound Bones McCoy. Wentworth Park.

4. In each case the particulars set out that the arsenic was present at a level greater than the threshold of 800.

5. The appellant was subject to the usual internal processes by GWIC in which they advanced to the appellant an opportunity, with all the facts given to her, to indicate various steps that she would wish to take. The appellant did not complete the form in the way in which she anticipated that she had and subsequently, at her request, an inquiry was conducted by the Integirty Hearing Panel at GWIC. And at that inquiry the appellant pleaded not guilty. She did so with statements to the effect that she had not administered anything to the greyhounds. The panel members took some time in explaining to the appellant what in fact she was asked to plead to, namely, a presentation, and the appellant maintained a plea of not guilty. The charges were subsequently found established, penalties imposed and an appeal lodged.

6. The penalties in fact imposed were each of a suspension and, in respect of Charge 1, 7 weeks; Charge 2, 9 weeks; Charge 3, 10 weeks; Charge 4, 12 weeks, each to be served concurrently, which effectively became a period of suspension of 12 weeks, to operate from 11 August 2021.

7. By her appeal, the appellant in her notice of appeal did not mark on that document whether it was an appeal against the adverse finding and/or

penalty. The evidence is she subsequently obtained legal advice and with her grounds of appeal filed on 23 August 2021, the appellant pleaded guilty and the matter became a severity appeal only.

8. The evidence has comprised the brief of evidence of the respondent, which basically contains all of the appropriate proofs and various submissions by the appellant, the transcript of the inquiry of 11 August, and the determination. It also contains the Notice of Proposed Disciplinary Action, to which reference was made.

9. The matter has proceeded before the Tribunal on submissions with no fresh evidence.

10. The first issue for determination is objective seriousness and then a consideration of whether there should be any discount for subjective circumstances.

11. In each case here, the arsenic was at a level greater than 800, obviously, and in each case, either 1600 or in excess of 1600, greater readings not being given. The Tribunal notes that the first presentation was on 30 March and the last, 1 May, a total period of some 32 days. That there were two greyhounds involved and that obviously each was presented twice. The Tribunal notes that there was no regulatory intervention given to the appellant between the first breach on 30 March and the last breach on 1 May.

12. There are, as it were, in assessing objective seriousness, four separate matters and each must be the subject of an individual penalty. But, importantly, there was a continuity of conduct, because these are presentation matters. They are not administration matters. It is not that there are therefore four separate occasions on which the appellant has, on the evidence available, done something to each of the greyhounds to effect the levels which were subsequently found on presentation and sampling.

13. The Tribunal, therefore, in assessing objective seriousness, has regard to the fact that the appellant has on four occasions presented and not administered.

14. On the issue of objective seriousness, the evidence at the end of the case is that the Tribunal is not able to determine why these greyhounds were presented with excessive levels. The appellant carried out research upon notice being given to her. The appellant has sought to try and find out some source and she has examined the issues of feeding and possible contamination.

15. In respect of feeding, she was giving her greyhounds sweet potato, pumpkin and sardines. She was not able to determine, other than by her

own inquiries, that there was knowledge that these matters then contained arsenic, she ceased using those products, and the Tribunal notes on objective seriousness it is relevant to the necessary message that she has amended her husbandry practices.

16. Secondly, she sought to try and find a source from the neighbouring Yates chemical or other product facility that adjoins her property. The reason for that was that Yates produces products, that there was heavy rain at or about the time of the first presentation, that there was a belief in the appellant that arsenic may have come from those neighbouring premises. The Tribunal notes that proximate to the first presentation she had moved her greyhounds – the subject greyhounds, in any event – to a kennel which was closer to the Yates facility and her boundary with it and some 180 metres from it. The appellant quite fairly concedes in submissions that she has no evidence that anything has come from Yates which would have caused the arsenic at the levels detected. It is not necessary to more closely examine those matters.

17. The effect of those two research issues by the appellant, acknowledging that she has made an effort to find out, is that at the end of the day the appellant is not able – and the burden is upon her – to establish how the arsenic came to be present. It is noted that the only onus upon the respondent GWIC is to establish that the appellant was the trainer and, secondly, that the greyhound was presented and, thirdly, at the time of presentation a prohibited substance was present. Once each of those ingredients is established, the rule is breached. It is not necessary for the respondent to establish the how, when, why or wherefore of the reason for the presence of the prohibited substance.

18. Arsenic at a level of 1600 is well in excess of 800 and is as high a reading as can be obtained, it appears, on the testing facility's machinery. Those readings, therefore, can be distinguished from other parity cases where lesser readings were determined.

19. Objectively, therefore, in assessing a starting point for penalty, there is firstly consideration of the McDonough principles. The background to that has been expressed in numerous decisions and do not need detailing in this decision. The Tribunal finds that the appellant falls within Category 2 of McDonough, and it is that the objective seriousness penalty is one which is to be the starting point. That is, that the Tribunal cannot determine at the end of the day why the prohibited substance came to be present. It is to be distinguished from the more serious Category 1 when the Tribunal is able to determine on evidence that the appellant was involved in an administration, and the third category does not arise where the appellant can be found to be blameless.

20. What then is an appropriate starting point?

21. The regulator has published a penalty table which is entitled GRNSW Penalty Table, adopted by GWIC. It is a 2012 publication. It places this particular drug as Category 5, and that is the least serious category. And the table provides a starting point of 12 weeks. The Tribunal is not bound to adopt that. However, it considers that, for reasons of parity and certainty, that is an appropriate starting point on objective seriousness. That is, that applying a McDonough Category 2, the appropriate penalty is to be that which is considered appropriate on objective seriousness. There is nothing else about objective seriousness that would cause the Tribunal to consider a higher or a lower starting point. Therefore, the starting point is 12 weeks' suspension in respect of each matter and it is a question of whether that is appropriate.

22. Firstly, the Tribunal notes that it has referred to a suspension. As the Tribunal reflected at length in the decision of Kempshall, an appeal of 16 August 2019, a starting point of a suspension is a substantial discount of itself to a disqualification, which the Penalty Table provides. However, each of the parity cases which have been given to the Tribunal – and there are 11 of those – has comprised at the highest a suspension; some were fines. None involved a disqualification.

23. Therefore, the Tribunal has not started with a disqualification. It is not asked for by the respondent and, having regard to recent Supreme Court case law, the Tribunal could not in any event, without going down a substantial procedural fairness process, look to anything more than that which the respondent has asked for, and that is the suspensions which the panel considered to be appropriate.

24. Therefore, what might otherwise be a major discount of suspension and not disqualification is not taken into account as part of the discount processes for this particular appellant on the facts of this case. That is not to say it may not in other cases, that will be a matter for other cases.

25. What then from a starting point of 12 weeks is considered to be appropriate? The subjective facts need consideration.

26. In respect of those, the Tribunal also reflects upon the message to be given on an objective seriousness factor for this appellant, which is also relevant to the subjective factors, which is that the appellant, whilst not able to explain, has undertaken research and has changed her husbandry practices. Those are important matters both objectively and subjectively. Those efforts warrant that there be a discount on subjective facts.

27. The first starting point in respect of discounts for subjectives is admission of a breach of the rule or not.

28. The normal practice adopted is that when there is an early plea of guilty, an admission of the breach, with full cooperation with the stewards, that a 25 percent discount be given. Here the appellant did not plead guilty before the panel and the Tribunal is quite satisfied that the panel members – in particular, the Chair – went out of their way to try and explain to the appellant that all that had to be established is the three ingredients to which the Tribunal made reference, that it was not an administration matter and that if each of those three things were there, she should really be pleading guilty. However, without the benefit of her legal advice, she adhered to her plea of not guilty.

29. She did not immediately on notice of appeal indicate acceptance of guilt. That came with legal representation. However, it is quite apparent from the transcript that the panel members were not greatly troubled, other than by going to the explanation that they did, in the determination that they made, because on a presentation matter, with aspects of, under this code, strict liability, that their determination was almost a given. As the Tribunal has said, they were not greatly troubled, they were not put to further research, there was not a requirement for an adjournment, for example, while further information was gathered and the like. The inconvenience occasioned, the lack of utility occasioned, is at the lower end of the scale.

30. The plea before the Tribunal was entered effectively before any steps were taken in preparation by the respondent and the respondent was not inconvenienced by the failure to indicate prior to 23 August a period of a short space of time after the stay was granted on 12 August to enter her plea. There is therefore some utilitarian value left.

31. The Tribunal has reflected on those particular timings of an admission in numerous prior decisions and does not determine that a full discount of 25 percent is appropriate for that late plea. It, consistent with its usual approach to these matters, considers a discount of 15 percent would be appropriate for those matters.

32. Then the other subjective factors.

33. Firstly, the appellant is a professional greyhound trainer. It is her sole source of income. At the time, she had 45 greyhounds in her kennels, 10 of which were, up to the time of the inquiry, available for presentation to race.

34. The appellant has no prior matters. The appellant has been subject to numerous swabs, which have not been positive in the past. The appellant will lose prize money. The appellant has been licensed for five years and, as stated, has no prior matters.

35. Subjectively, as the Tribunal has reflected, she has taken steps to eliminate a possible continuation by anything she could do on the property consistent with what her research has found.

36. There are the then the further facts of the appellant's family circumstances. The panel was reflective, quite fairly, of the recent loss of the appellant's partner and the two burdens that has imposed upon her.

37. The first one is that she had to take over the full training responsibilities and, secondly, it has been financial. The financial burden in respect of the fact that she has lost someone else who can help to produce income.

38. But, secondly, encapsulated within that financial burden are problems in relation to her former partner's estate and the ability to have that finalised, such that greyhounds which were apparently in his name, or otherwise registered to him in some way, cannot be transferred to her and therefore, on the submissions made, are not capable of racing and earning income. They are matters which all lead to a consideration of discounts.

39. The Tribunal is further satisfied that, subjectively, this appellant quite clearly has the message in respect of presentations for positive substances, particularly arsenic, and has taken strong steps to eliminate those matters and accordingly there is nothing which would cause any of those subjective discounts to be lost to her.

40. The objective circumstances do not warrant that the subjective facts be disregarded.

41.The Tribunal determines in respect of those additional subjective facts a discount of 20 percent.

42. The Tribunal pauses at this stage to note that this is an appeal de novo. It is for the Tribunal to determine an appropriate penalty itself, subject to procedural fairness, as it has reflected upon, and having regard to the fact that the respondent does not seek any increased penalty but that the penalties the respondent considered to be appropriate be those which the panel imposed.

43. The means by which the panel came to determine penalty were apparently bound up to some extent with the original Notice of Proposed Disciplinary Action and discounts of up to 25 percent on each matter which were given based upon those. But at the end of the day the Tribunal does not propose to follow the table that the respondent considered appropriate. No disrespect is intended. But when Charge 1 is 7 weeks and Charge 2 is a 9 weeks, then Charge 3 is 1 week and Charge 4 is 2 weeks, the mathematics appears troubling. An explanation was given for it. It relates to

the proposed disciplinary action. But that is not an approach the Tribunal considers appropriate.

44. There is the further factor then that if there is a starting point of 12 weeks in the Penalty Table, that the first matter of 7 weeks is a 42 percent discount; the second of 9 weeks is a 25 percent discount; the third of 10 weeks is a 16 percent discount, and the fourth one gets no discount at all. Those matters, with respect to the panel, are not ones which the Tribunal considers to be an approach that it favours.

45. The Tribunal has determined a starting point of 12 weeks' suspension in respect of Charge 1. There will be a discount then on the two factors of 15 plus 20 percent. Mathematical precision is not required. That would otherwise equate to 35 percent. Without mathematical exactitude and the difficulties applying it to the calculation in weeks, the Tribunal determines that that be a 33 percent discount for subjective factors.

46. Therefore, in respect of Charge 1, the starting point for penalty is an 8-week suspension.

47. The Tribunal then considers the issue of parity as to whether or not that is an appropriate outcome for this appellant, having regard to other determinations by both the Tribunal and the regulator.

48. Firstly, the Tribunal disregards the decision of Kempshall, referred to earlier, because the Tribunal expressed there at paragraphs 37 and 48 that it considered on the facts of that matter the penalties imposed by the regulator to be exceptionally lenient. But because it was not asked to do anything other than impose those penalties, it did not impose higher penalties. But it considers it can disregard that for the purpose of this matter because it considers the outcome to be far too lenient on the facts of that matter.

49. The most recent case was Gilbert. Five months training, no priors, a 6-week suspension, similar subjective facts, the only difference subjectively was a reading of 1392 compared to 1600 or greater here, a difference which makes no outcome on a parity basis.

50. The next matter was Cathcart. Nine years as a trainer, no priors, a 6-week suspension, admittedly a lesser reading, but other than that the facts were similar.

51. The Tribunal refers to facts as "similar" because it has already talked about discounts being less in this matter for the plea of guilty being late.

52. There is then McKinnon. Thirty-seven years, no priors, a suspension of 12 weeks wholly suspended, but in addition a fine of $750.

53. There are then a number of other matters: Clarson, Burton, Bell, Wilson, Jenner, Winters and Brown, each of which had vastly more training experience, between 22 and 49 years, to summarise the lot of them, which led to lesser penalties, in some cases fines, or wholly suspended. To the extent that there are any outliers there, for consistency, the Tribunal disregards them.

54. The closest it gets to then is Cathcart, in which a six-week suspension was imposed, on nine years' training. That is relatively proximate.

55. Having regard to all of the parity cases to which reference is now necessary, the Tribunal determines that the starting point of 12 weeks, reduced by that one-third to 8 weeks, nevertheless leaves, on the totality of the facts and circumstances, and in particular on a parity basis, an excessive penalty.

56. The Tribunal therefore determines in respect of Charge 1 there will be a 6-week suspension.

57. The next issue is what is to be done with Charges 2 to 4. The Tribunal reflected at some length on the fact that there was no intervening act, there were two greyhounds, there were four races. There is nothing different in the facts between Charge 1 and Charge 4, essentially, other than that they are more matters. The Tribunal has reflected on many occasions that a person who breaches the rule on one occasion should not expect to have the same penalty imposed upon that person as one who breaches on more than one occasion. There therefore must be some form of penalty imposed additionally in respect of additional breaches, namely, matters 2 to 4.

58. In those circumstances, therefore, the Tribunal determines that in respect of each of those matters there will be an additional 1-week suspension. That is, a total increase of 3 weeks.

59. There is then a requirement to consider the totality principle in respect of all of those matters and decide whether, on objective seriousness, reduced for subjective circumstances, that is an appropriate penalty for all of the conduct.

60. Two things. Firstly, the panel considered concurrency to be appropriate, and there is no submission to the contrary here. Having regard to the facts and the circumstances, notwithstanding the fact the rules provide for cumulation, it is appropriate that it be otherwise ordered in this case. In those circumstances, each of the four penalties will be served concurrently.

61. There is then a totality issue as to whether or not what effectively becomes a 9-week suspension is appropriate. The Tribunal has reflected

again on all of the facts and circumstances here and considers that the increase from 6 weeks to 9 weeks is a greater period than is appropriate, both on a parity basis and on the facts and circumstances of this case.

62. It determines that in fact the appropriate penalty for each of Charges 2 to 4 is a period of suspension of 7 weeks.

63. The orders, therefore, are these. That in respect of Charge 1 there be a period of suspension of 6 weeks. In respect of Charges 2 to 4, in each matter there will be a period of suspension of 7 weeks.

64. The penalties for charges 1 to 4 be served concurrently.

65. The effect of that is that the total penalty to be served is a suspension of 7 weeks.

66. The Tribunal notes the appellant served one day before a stay.

67. In the circumstances, therefore, the Tribunal orders that those periods of suspension commence on 17 September 2021 with an allowance for 1 day served before the stay was granted.

68. Under Rule 95(5), the Tribunal defers the commencement of the penalty for a period of 9 days.

69. The suspension shall expire on 12 November 2021.

70. That effectively is a lesser period of suspension than the respondents considered appropriate, and in the circumstances, the appeal against severity is upheld.

71. Application is made for refund of the appeal deposit. It was a severity appeal. The appeal has been upheld. There is no submission to the contrary.

72. The Tribunal orders the appeal deposit refunded.