RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

FRIDAY 17 SEPTEMBER 2021

APPELLANT MICHAEL HOOPER

RESPONDENT GWIC

GREYHOUNDS AUSTRALASIA RULE 83(2)(a)

SEVERITY APPEAL

DECISION:

1. **Appeal upheld**
2. **Penalty varied to a fine of $1000**
3. **Appeal deposit refunded**

1. The appellant appeals against a decision of the hearing panel of GWIC of 3 August 2021 to impose upon him a fine of $1500 for a breach of Rule 83.

2. The relevant parts of the rule are 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. The particulars are that the appellant presented the greyhound Valentina Bale on 26 March 2021 at Richmond and there was detected subsequently from a pre-race sample the drug ethynylestradiol, which will be referred to as "the prohibited substance".

4. The appellant, when notified of the positive, immediately indicated to the regulator that he admitted the breach. He maintained that in the inquiry process and has maintained that admission on appeal. This is a severity appeal only and the necessity to examine the evidence in greater detail falls away.

5. The evidence has comprised the brief of evidence served upon the appellant for the purposes of the hearing and, critically, contains the relevant proofs, as well as a substantial amount of correspondence between the appellant and the regulator as he made inquiries and comments in respect of certain matters, together with his submissions to them.

6. The additional evidence provided on appeal is a letter of vet Dr Edward Humphries, of 25 August 2021, which basically refers to a different seasonal suppressive agent in greyhounds, but also makes reference to the subject drug from which the prohibited substance detection occurred, of Levlen ED, which he prescribed and which was used in accordance with the prescription of Dr Humphries on the subject greyhound.

7. The first thing to determine is objective seriousness.

8. There has only been one prior case of the detection of this prohibited substance, the matter of Wort, to which the Tribunal will return. There have, of course, been numerous matters dealt with by the regulator and by the Tribunal in respect of other oestrus suppressing agents and drugs which are subsequently found, or metabolites of drugs that are subsequently found. Those matters have not formed any part of this case.

9. The facts are that the appellant was running out of a particular drug that he had. He sought veterinary advice from Dr Humphries who, as stated, prescribed the Levlen ED, and the appellant subsequently administered it, not knowing he was in breach of the swabbing policy.

10. There are some important facts relative to objective seriousness and which also touch upon subjectives.

11. That prior to the administration of the substance, the appellant undertook research of two years of records of positive returns in respect of the subject drug he was to administer and none were recorded.

12. The first administration occurred only some three weeks prior to the presentation. The appellant states that in doing so he was doing so for a proper greyhound training and permissible purpose, and that is the suppression of oestrus in greyhounds to race, and that is quite correct. There was therefore no deliberate, reckless or careless actions by the appellant and it is particularly important to note that it was done under veterinary advice. As the regulators in this code and the others, and tribunals have said throughout this country for many years, a trainer cannot rely solely upon veterinary advice in administering substances to a greyhound. Here, the appellant has done that which was otherwise required of him, he did make his own inquiries.

13. The level detected was low at 10, although there is no threshold for the particular drug. There is no issue that it was not performance-enhancing on the facts of this case. Or to the extent that there is some possibility that the greyhound was presented in a way which would enable it to have raced better, that at that level there would be no performance-enhancing effect gained by such an administration, nor, it appears on the evidence, that administering the tablets in accordance with veterinary advice would itself produce performance enhancement.

14. The regulator uses publications by Greyhounds Australasia as well as its own publications to bring matters to the notice of trainers. Here in 2018, Greyhounds Australasia published a warning to industry about the drug Norethisterone. In the course of that document, there was reference to the fact that many other products, including the prohibited substance, can be found in this substance to which the warning noted and that it was not an exempt substance. The regulator itself provides a list of permissible suppressing agents and it does not include the subject drug Levlen ED. The appellant should have known that. He should have acted on it. He, however, acted upon the veterinary advice.

15. The Tribunal also notes that the appellant has indicated to it that he did not know that Greyhounds Australasia had published such a warning. But the Tribunal also notes that it was in respect of a different drug, although in passing it made reference to the subject prohibited substance.

16. The objective seriousness, therefore, is that the actions of the appellant are less serious than would otherwise be the case. That is because he acted under veterinary advice providing a drug for a permissible purpose but

it was one which was not regulator-recommended and which then subsequently led to the positive. There was no performance-enhancing. The Tribunal is of the view that the objective seriousness can be viewed at a lower end of the scale, particularly when a substance is at an apparent low level and not performance-enhancing level, in any event.

17. The message that must be considered as being given to this appellant diminishes by reason of those facts. The Tribunal is particularly persuaded by the steps taken by the appellant prior to the administration of the subject drug to ensure that he was acting properly.

18. The guidelines provide a starting point for a first breach of the prohibited substance rules of a 12 months' disqualification. This appellant in 2013 had a positive to caffeine and its metabolites which led to a 12-week suspension. The appellant has advised the Tribunal that that related to an inadvertent consumption of a spilled energy drink in a vehicle and in circumstances where the appellant attempted to clean up the spill, apparently did not effect that properly, and the subject consumption by the greyhound, it appears on all the facts, led to the positive. That is a prior matter. This appellant, as the Tribunal often says, cannot expect to be dealt with in the same way as any other person who presents without priors. The effect of that is that the Penalty Guidelines increase the starting point penalty from 12 weeks' to 24 weeks' disqualification. GWIC did not refer to that increase.

19. The matter has some age – 2013 – and the Tribunal has regard to the circumstances outlined by the appellant in his submissions as to how it occurred and not being a deliberate breach of the rules. It is, therefore, that that prior matter is given less weight against the appellant than would otherwise be the case when it comes to considering reductions. The starting point, however, is one which is noted to be higher.

20. In relation to starting points, the guideline provides a disqualification. The regulator has consistently imposed for Category 5 matters suspensions. The only precedent given is the matter of Wort, which was a $1500 fine, reduced from a starting point of $2000. Same substance, low level, admission at early opportunity, 18 years' experience, no relevant priors and based on other precedents. This appellant, of course, has a prior and in that sense he is also to be distinguished from Wort.

21. It is, therefore, that the Tribunal cannot adopt a starting point of a disqualification because it would be inconsistent with precedent, and also on this matter the submissions for the respondent are that the monetary penalty considered to be appropriate by the panel should be the penalty imposed. Therefore, the matter moves also on those submissions from a suspension to a fine. It is a question then of determining what is an

appropriate starting point for such a fine and determining what if any discounts should be given. The Tribunal will return to that.

22. The subjectives for the appellant are that, as stated, he loses an element of leniency that would otherwise be available to him by reason of the fact that he has a prior matter. The appellant, however, subjectively, in the Tribunal's opinion, is entitled to rely upon the early admission of the breach for which a 25 percent discount was considered appropriate by the panel, not opposed on appeal and supported here, and in the Tribunal's opinion should be given to him. But subjectively the message also is reduced by reason of the fact that this appellant did not blindly go into his actions but researched them and took professional advice. The Tribunal is satisfied he is unlikely to reoffend in respect of this type of presentation.

23. The other matters upon which the Tribunal touches are that the appellant has been a trainer for some 28 years. The Tribunal is satisfied that the discounts to be given on a subjective basis should, by reason of the steps taken by him – and they were three major steps: veterinary advice, the use of a product that is otherwise for a proper purpose in greyhounds and his checking of the records – are such that a substantial discount should be given to him. It should be a greater discount than the 25 percent given simply for the admission of the breach, and he was only given 25 percent by the panel, nothing further for other subjective factors. For example, 28 years in the industry should lead to more than a basic plea of guilty or admission of breach discount.

24. All of the facts, therefore, bring the Tribunal back to a consideration of what is an appropriate penalty. The facts, objectively viewed, warrant a starting point of a $2000 fine, to be distinguished from Wort on the basis that the Tribunal considers that is appropriate having regard to the fact that the appellant can be distinguished from Wort for the reasons outlined. Noting also the substantial discount already given to him. A starting point of a $2000 fine is what the respondent imposed and suggests here- no Parker warning on a starting point was suggested. The Tribunal proposes to reduce that, not by the 25 percent considered to be appropriate by the panel, but by 50 percent.

25. In the circumstances, therefore, the Tribunal has to decide whether the ultimate outcome of a fine of $1000 is appropriate for the conduct. It is less than that which the regulator seeks, it is more than that which the appellant considers on a parity basis to be appropriate. The Tribunal does not consider that the other cases dealing with other drugs and circumstances provide such a strong foundation where lesser penalties were considered for other types of drugs adequately reflects the objective seriousness of this matter and the message to be given.

26. The conclusion is that the Tribunal imposes a monetary penalty of $1000.

27. The penalty is less than that which was considered appropriate by the panel. The severity appeal is therefore upheld.

28. Application is made for refund of the appeal deposit. It was a severity appeal. The severity appeal has been successful. The refund application is not opposed. The Tribunal orders the appeal deposit refunded