RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

WEDNESDAY 17 NOVEMBER 2021

APPELLANT MERLE CLARKE

RESPONDENT GWIC

GREYHOUNDS AUSTRALASIA RULE 83(2)(a)

SEVERITY APPEAL

DECISION:

1. **Appeal upheld**
2. **7 week suspension of licence imposed**
3. **Appeal deposit refunded**

1. The appellant, licensed trainer Mrs Merle Clarke, appeals against the decision of the stewards of GWIC of 7 September 2021 to impose upon her a period of suspension of 10 weeks for a breach of the prohibited substance rules.

2. The rule relied upon is 83(2)(a), which in simple terms is that a trainer of a greyhound nominated to compete in an event shall present the greyhound free of any prohibited substance.

3. The particulars are that on 22 March 2021 the appellant presented the greyhound Too Bias at Bathurst and subsequent urine sample testing produced a positive to theobromine.

4. The appellant takes no issue with each of the particulars, nor the breach of the rule. Before the Commission the appellant in written submissions admitted a breach of the rule. She has maintained the admission of that breach on appeal. As a severity appeal, the necessity to examine the facts in greater detail falls away.

5. The appellant gave evidence today and was cross-examined. The balance of the evidence before the Tribunal is the uncontested and usual brief.

6. The key facts firstly require consideration of objective seriousness. In that regard, this is a substance which is commonly found in greyhounds. There are a number of recent cases, to which the Tribunal will return, for penalties imposed for presentation with the substance.

7. It is established on the evidence that the appellant simply cannot explain, despite all of her best endeavours, inquiries and research, as to why theobromine was present in the subject greyhound. One of the difficulties for her – and again, the Tribunal will return to that – is that this is her second theobromine presentation in recent times.

8. On 23 June 2019 she breached the same rule with the same substance. She was not able to explain at the end of the day in that case why theobromine was present. Just touching on it for a moment, the Tribunal notes it was dealt with by the GWIC officers on 3 December 2020, a date prior to the commission of this breach. The facts available to the Tribunal do not indicate the date upon which the appellant was first notified of the positive to that June 2019 presentation with theobromine. Therefore, the period of time over which the appellant has been obliged to ensure her husbandry practices are appropriate is not certain. But certainly, on 3 December 2020, when GWIC imposed a four-week suspension, she was more than on notice.

9. The GWIC decision was the subject of an appeal, which was contesed. The decision of GWIC had been made after a contested hearing there. As has been pointed out in submissions, there were 14 grounds of appeal run before Tribunal Member Dowling and the Tribunal determined to dismiss the appeal, find the breach established and impose a four-week suspension.

10. The objective seriousness, therefore, falls within what has been accepted, it appears without any demurrer in recent years, of the application of the McDonough principle set down by Judge Williams, certainly adopted by Justice Garde in Kavanagh in Victoria in the VCAT on 27 February 2018. That is, of the three categories, it falls into the second category.

11. At the end of the day, the Tribunal is not able to determine how that prohibited substance came to be present. It is, therefore, that the penalty considered appropriate on the facts and circumstances of the case is one which the facts necessitate.

12. To be clear, it is not Category 1 when the blame can be sheeted quite clearly home to the appellant and where therefore a penalty in the upper range may be considered appropriate. Nor is it Category 3 where the appellant can establish that she was blameless and therefore could face no penalty whatsoever, as was the ultimate outcome in Kavanagh.

13. The case is one in which the Tribunal raised with the respondent the fact that numerous recent decisions on this drug, and other decisions in which the Tribunal has reflected in relation to other drugs, appear to have outcomes that are entirely unrelated to the GRNSW Penalty Table, which was published on 8 October 2012 and applied consistently by GRNSW stewards and the Tribunal from that time onwards. It was adopted by GWIC when it came into effect on the commencement of the 2017 legislation and has been applied by GWIC and by the Tribunal since.

14. Recent decisions, however, appear to make no reference to that table in any fashion whatsoever. In passing, the Tribunal notes that if it had to apply here – and it will not be – it would provide for a second breach within two years of a starting point of 48 weeks' disqualification. Here, the offer to the appellant by GWIC was that there be a starting point of a suspension, not a disqualification, and it be of 16 weeks, not of 48 weeks. No reference has been made at any time to a starting point of a 48-week disqualification.

15. The Tribunal proposes to entirely disregard, by consent of the respondent, that penalty table for the purposes of this decision. The Tribunal will be guided by parity. And parity, of course, can only be relevant to the extent that the facts and circumstances of this case warrant that the parity matters be considered.

16. On objective seriousness, therefore, it is necessary to look at parity.

17. Firstly, in relation to parity, there is the appellant's own appeal result of 2 July 2021 by Tribunal Member Dowling in which a four-week suspension was imposed on this appellant for the same substance in an unexplained presentation. It might be noted in passing, that there was no discount for a plea of guilty. But there the Tribunal Member Ms Dowling referred in detail to the subjectives, and the Tribunal will return to those.

18. The other cases, in time order, where there was an admission of breach are, firstly, Antonelli, 11 February 2021 – and each of these is by GWIC – a four-week suspension after an admission of breach, with one prior for a trainer of 58 years' standing, who has made a substantial contribution to the industry and amended his practices as a result of the positive finding. The Tribunal is invited to give weight to Antonelli by the appellant by indicating that four weeks might be an appropriate outcome here, on similar facts. The respondent says that Antonelli can be distinguished because Antonelli has a 58-year history compared to 44 of the appellant and in that case it was a different substance. Antonelli's prior was a 2020 fine for a presentation with metformin. The Tribunal will return to its reflection on Antonelli. Whilst it was not expressed in the published reasons for decision, it is possible Antonelli had, on those determinations, a starting point of possibly eight weeks.

19. The next is Stephens, 22 July 2020, a four-week suspension on an admission of the breach with no priors, and 29 years licensed as a trainer, with 33 years as an attendant, with evidence of good character and of change of practices. It is difficult to determine a starting point there, but possibly something like six weeks or thereabouts.

20. Next is Boersma, 22 July 2020, four weeks' suspension on admission of a breach with no priors, and 48 years' experience, which of course is similar to this appellant in that latter fact, with a possible starting point based on those figures of six weeks.

21. Next is Beddoes, 22 June 2020, an eight-week suspension after an admission of the breach with no priors, and 20 years' experience which is less, of course. On the Tribunal's calculation, a possible starting point of 12 weeks.

22. Next is Robert Roderick, 1 November 2019, eight weeks' suspension, admission of the breach, no priors, 30 years' experience with substantial remorse expressed, and possible starting point of 10 weeks.

23. Next on the same date is Paul Roderick, a relative, an eight-week wholly suspended suspension on an admission of the breach, with no priors and only 15 years' experience. But there, an owner trainer who did not have the care of the greyhound at or about the time of presentation.

24. Able to be distinguished from those is Perrett, 16 March 2020, a plea of non-admission of the breach, compared to each of the others, a 10-week suspension, two priors, only 22 years' experience. As best can be calculated, a 12-week starting point may have been the consideration of the officers.

25. The Tribunal notes that Perrett could well be disregarded as it appears to have been unduly lenient having regard to all of those facts. However, it is there, it is a decision of GWIC.

26. If, therefore, each of those matters is considered, the starting points are quite various. They are difficult to discern as they are not precise and expressed in the reasons for decision. It is not taken on the Tribunal's estimate or guesstimate, it might be said, of what it might have been as a determinant of a starting point in respect of this matter. Those remarks and calculations were merely to provide some sort of understanding of what might have been the starting point for which reductions were considered appropriate.

27. Antonelli has some substantial weight to be given to it. The dissimilarities are a 15-year difference in registration, about 25 percent longer, on a rough calculation, than the appellant. That, of course, is really marginal as this appellant has had 44 years, but nevertheless it is a longer period, to which Antonelli was entitled to a greater discount. His one prior was a different substance, although similar in timing as a prior to that of this appellant's prior.

28. Those matters do not require an examination of theobromine and its benefits or detriments to greyhounds presented to race. That is an unexpressed view in each of the decisions and does not need further analysis. Simply put, it is a prohibited substance.

29. On considering these matters, the Tribunal has come to a conclusion, it not being suggested to the appellant to the contrary, that these facts warrant a suspension.

30. That conclusion is reached by the necessity to impose a message to this appellant that repeated breaches of the rules will lead to a more substantial penalty than a first breach by reason of the fact that the message has not been received as it should have been, mitigated, of course, by the fact that this appellant made efforts to find out why and simply remains totally uninformed why her greyhound presented again with a prohibited substance.

31. The message also is appropriate to be given to the industry at large that a person who has breached the rules a second time within reasonable proximity cannot expect to be dealt with as leniently as others.

32. Having regard to those facts, the Tribunal determines a starting point in this matter of a suspension of 10 weeks.

33. It is a question of what discounts can be applied, if any, to that. The Tribunal notes that it is a different conclusion than that which is a possible outcome before the officers because they in their Notice of Proposed Disciplinary Action referred to a starting point of 16 weeks, and that would not seem to accord to the Tribunal with any of its rough calculations of possible starting points for others upon a parity basis.

34. The subjectives of this appellant must be read down on the basis that it was only on 2 July 2021 that she called in aid each of those same subjectives. It is the Tribunal's opinion that the discount to be given to the starting point must be less on this occasion than it was before. It could be said, of course, having received the benefit of 44 years as a person with no priors, that the penalty imposed in July 2021 was less than it would otherwise be. Here it could be said her starting point is not 44 years but four months, the difference between July 2021 and November 2021. The Tribunal does not adopt that approach but it does adopt an approach that the discount is to be less.

35. Those subjective facts, in addition to the 44 years of training, are that the appellant is – and she has given evidence of it so it is referred to in the decision – 82 years of age. She has been associated with the industry for a very long period of time. She has been a participant up until her coming out of grace as a result of these presentations, a person highly regarded in the industry. She has contributed to it. That is reflected by the fact that two or three times a week she presents greyhounds to race all over the North West – Bathurst, Moree, Gunnedah, Dubbo, Coonamble for example.

36. At the present time, she has 45 greyhounds in training. She has 152 on her property. 135 of them are hers. Many of them have been taken in and kept by the appellant once they were of no benefit to others who owned or trained them. Those are very strong subjective facts.

37. The appellant is occasioned by reason of taking on those additional greyhounds and by a reason, not unsurprisingly, of the requirement to maintain them, that she has two employees. Previously, she had three. That has had to be reduced by reason of the impact of the earlier loss of the privilege of a licence upon her.

38. She has given evidence that it costs her some $2500 per week with all-up expenses to run her kennels. It is, therefore, that the loss of prize money and previous loss of breeding income by reason of times when she could not exercise her licence have meant that she will, of course, suffer substantially on the loss of a privilege. But the appellant, on the submissions

made, understands that there will be a loss of privilege as a result of this second presentation and, as harsh as it is, the consequences that will have to flow to her will mean – and the Tribunal fully understands – financial hardship. However, as the Tribunal has reflected for a very long period of time, if a penalty is appropriate and a hardship will follow, then that must be the consequence of the wrong conduct.

39. The appellant has called in aid two referees to support the findings of good character to which the Tribunal has made reference.

40. The first is an undated document by Nadine Allen of Gilgandra Veterinary Clinic, who has a working relationship with the appellant of over 15 years. States the appellant has always presented her dogs to the clinic in good order and prepared to do what was required as a result of veterinary advice. And that the appellant has demonstrated a thorough knowledge of greyhound policies and shows care and compassion towards the animals and a strong knowledge of husbandry and greyhound racing careers. She describes the appellant as a compassionate dog owner, struggling hard to provide exceptional care to her greyhounds, and always is professional in her interactions with the veterinary clinic.

41. The next is by Anthony Salmon of 21 July 2021. He has known the appellant for 21 years and has found her to be a person of the utmost integrity with respectful standing in the community, an honest and reliable person. Importantly, he refers to the fact that the appellant was the secretary/treasurer of the Coonabarabran and District Greyhound Racing Club, where she was held in high esteem and showed considerable professionalism. He describes her as extremely competent and undertakes any role with an enviable commitment.

42. The Tribunal, of course, has had the benefit of observing the appellant herself and accepts that those referees have properly characterised the appellant as a person of good character and good standing, prepared to assist the industry, and those are matters which stand in her favour.

43. As the Tribunal has reflected, the weight to be given to the subjective factors must be reduced by reason of a second breach. The Tribunal is careful not to remove a discount in a double-counting sense in that it has already reflected on the necessity for the message to be given to be greater because of the second breach by reason of, therefore, taking away reductions to which the appellant would otherwise be entitled and double-penalising her. It does not.

44. The Tribunal is conscious that the message aspect has led to a starting point of 10 weeks.

45. A discount, of course – and a substantial one – is in respect of her admission of the breach. She has done so from the outset. The Tribunal accepts that that is a genuine acceptance of wrongdoing, unexplained as it is, and as hard as the appellant has tried to find and prevent this type of thing happening.

46. In total, therefore, the appellant, when considered against others, has, therefore, the admission of the breach, the years in the industry, the fact that employees are retained and there is an expense associated with that, she has good character, she has made a contribution to the industry, she has attempted to amend her practices to meet the possibility of further presentations and breach.

47. At the end of the day, the Tribunal determines that there be a discount for those matters, when taken together, of three weeks. Precise mathematical calculation over and above the 25 percent discount which, of course, will be two weeks, is not necessary.

48. The effect, therefore, is that the 10-week starting point is reduced to a final outcome of a suspension of seven weeks.

49. That, therefore, is a successful outcome in respect of a severity appeal, and the severity appeal is upheld.

50. Application is made for a refund of the appeal deposit. It was a severity appeal. That appeal has been upheld.

51. The Tribunal orders the appeal deposit refunded.

I52. The Tribunal notes, pursuant to Rule 95(5), that it has in recent times exercised that function which is said to be vested in the Controlling Body. The Tribunal defers the commencement of the seven-week suspension till midnight tonight.