RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE PENALTY DECISION

MONDAY 15 NOVEMBER 2021

APPELLANT RODNEY MCDONALD

RESPONDENT GWIC

GREYHOUNDS AUSTRALASIA RULE 106(1)(d) and 106(2)

PENALTY DECISION:

1. **Severity appeals dismissed**
2. **Penalties: Charge 1 – 6 months disqualification**
Charge 2 – Reprimand
3. **Commencement of penalty deferred under GAR 95(5)**
4. **Appeal deposit forfeited**

1. The issue for today's determination is penalty flowing upon the decision of the Tribunal of 15 October 2021 to find against the appellant and that his appeal against the adverse finding of two breaches of the rules be dismissed. The decision contains the charges and they need not be repeated.

2. In submissions today, the respondent, GWIC, submit that the Tribunal should form the same conclusions on penalty as the hearing panel, which is for Charge 1 a six months' disqualification and for Charge 2 a reprimand.

3. The appellant submits that the determination in respect of Charge 1 is excessive. No issue is taken, if there is to be any form of penalty, with a reprimand for Charge 2. In essence, it is submitted that there might be a suspension or, alternatively, if there is to be a disqualification, that that disqualification itself be suspended under Rule 95(3), and, in any event, it is submitted that six months' disqualification is excessive.

4. The additional evidence before the Tribunal comprises the statement of the appellant of 12 November 2021.

5. This being a civil disciplinary hearing, it is necessary for the Tribunal to determine not punishment but a protective order. That protective order, relevant to this matter, is directed to both the integrity of the industry and, importantly, the welfare of greyhounds. This essentially is a welfare case but integrity plays no less an important role.

6. It is first necessary to determine the objective seriousness of the conduct as found and then turn to the subjectives.

7. It is important in a welfare case that consideration be given to the seriousness of the conduct and that then be reflected in the message to be given. That message has two limbs. Firstly, having regard to all of the evidence now available to the Tribunal, the message to be given to this appellant to ensure that like conduct is not repeated. But critically at the moment, the message to be given to the industry at large is one which requires that it be made quite clear that welfare of the greyhound is paramount, that the regulator and those who participate in the industry will ensure that welfare is of the highest consideration in any actions taken. Welfare has been a substantial focus of the regulator and, indeed, the Government in recent years.

8. In this case, the Tribunal is of the opinion that the conduct warrants, on objective seriousness, a substantial message to be given to the industry at large. The message for this appellant on objective seriousness can be reduced for the reasons that will be set out.

9. It is not necessary to revisit the entirety of the findings of 15 October 2021. They are adopted collectively and individually. But critically to come out of them are the following matters.
10. Those which necessitate a stronger message are these: the greyhound suffered a fracture; it suffered at or about the time of that fracture various injuries consistent with what is now known to have been a fracture; the greyhound had yelped, it could not weight bear, it had difficulty of a gait, it limped. Critically, it suffered long-term damage. It was unable to corner when trialled and therefore subsequently was rehomed. It was the expert veterinary opinion that the injuries would be ongoing, not only in respect of the limb itself but also in respect of the impact of the greyhound changing its gait to favour that injury and thus having impact upon other limbs.

11. There are two charges here. One was not obtaining veterinary treatment and the other was the impact of pain and suffering that was a consequence. Here, the pain and suffering which the greyhound suffered was not relieved by the aspirin, that type of treatment regime embarked upon by the appellant, given to it. The Tribunal's findings, based upon the expert evidence, are quite clear that aspirin would not have relieved the pain and suffering of this greyhound.

12. It is also quite apparent from the findings, reflected in the appellant's statement today, that the telephone call to a vet, having regard to what should have been apparent to the appellant, was insufficient. It is important, as the Tribunal reflected in its decision, that the standard to be applied does not impose a burden upon those responsible for greyhound welfare to take them to a vet for every type of injury, minor or otherwise. It imposes a subjective test upon, for example, a trainer. But also it is a high-level objective test. It is one which mandates that the first consideration is not the pocket of the trainer nor the trainer's personal belief but what is best for the greyhound. What does its welfare mandate? Here the findings were against the appellant.

13. On objective seriousness, on the other hand, as might be contrasted to other cases which could be considered, there were substantial findings in favour of the appellant.

14. It is submitted that the appellant did not cause the injury. Little weight is placed upon that, although it is a correct statement of evidence. What caused the injury does not mean what has to follow for treatment.

15. The Tribunal found the appellant is a long-experienced trainer, well regarded by those who spoke for him on the issue of whether he breached the rules or not, as maintaining the importance of welfare of the greyhound but also he and they demonstrated he is capable of assessing an injury to determine whether veterinary treatment is required.

16. The Tribunal accepted the subjective belief he formed as to the nature of the injury and the fact that in his opinion it was not necessary to seek greater veterinary treatment than he did. The Tribunal found that not every indicia of a fracture was apparent to the appellant because it was not greatly affected in relation to the various matters to which the Tribunal has made reference, and the decision clearly reflected the Tribunal's acceptance of the corroborating evidence of the appellant's now wife, Ms Edenborough, and her nephew Mr Patrick Edenborough, to that effect.

17. The appellant was driven – and remains driven – by a concern for the welfare of his greyhounds, and this greyhound in particular. The Tribunal found he did seek veterinary advice. It was the failure in respect of the matters associated with that which led to the adverse finding. He did treat the greyhound. He provided aspirin, he provided rest, he separated the greyhound, he observed it frequently. It was the finding that those matters were not appropriate for the injury suffered and the pain and suffering that was the consequence. The Tribunal found he did follow veterinary advice.

18. The objective seriousness also requires a projection to the future in respect of this individual trainer. It is that whatever protective order is required, it must be about what is likely to occur in the future and then to ensure that a welfare order is made.

19. In that regard, the appellant has given evidence by way of a statement to the Tribunal today. In that statement on the issue of objective seriousness he reflects at length upon his understanding of the Tribunal's findings as to where he failed and what he must do in the future. He accepts he needs to change his practices in respect of his assessment of injuries and the timings and need for veterinary treatment.

20. One aspect of determining a starting point for penalty is parity. This case, like so many, does not throw up like cases. There are five referred to in the submissions: Cartwright, Prest, Kraeft, Wilson and Carter.

21. Cartwright was an appeal decision of this Tribunal of 8 October 2021. That case involved an appellant on a severity appeal who had presented a greyhound to race, it had become injured, he was advised orally and in writing to immediately take the greyhound for veterinary assessment. He did not. The Tribunal reflected on the reasons for that and they do not need great canvassing. In essence, he did not read the written message. The greyhound did not receive treatment, it was self-treated by the trainer, and the greyhound was subsequently euthanased. It had a fractured hock. The pain and suffering aspects, not dissimilar to here, were assessed by that appellant as being virtually negligible. The Tribunal determined a starting point of 12 months and reduced that by reason of subjectives, but, more importantly, with an admission of the breach, to an eight-month disqualification. Two things. Firstly, 12 months was considered appropriate

for that failure to obtain veterinary treatment where there was a fracture, not dissimilar to here. But in considerable contrast, there was a substantial reduction for an admission of the wrongful conduct not available to this appellant.

22. The next matter is Prest, a decision of 1 September 2021 by GWIC, where the appellant had placed breeding bitches in one kennel without muzzles and left them unattended for 30 minutes and when he returned one of the greyhounds was so severely injured that it was necessary to take it to a vet where it was immediately euthanased. There he pleaded guilty and received a 12-month disqualification. If a discount, which was not referred to specifically, of approximately 25 percent was given, then there would have been a starting point, very roughly, of about 15 months for that, reduced by the plea and the subjectives to 12 months.

23. The next matter is Kraeft, a decision of GWIC of 8 September 2021, where the appellant transported a number of dogs in an unventilated vehicle on a 35-degree day. The greyhound in particular, the subject of the charge, suffered severe effects as a result of that treatment and required substantial veterinary treatment for at least 15 days after the transportation of the greyhound. The appellant had pleaded guilty and was issued a six-month disqualification, which would mean probably an eight-month starting point, although not expressly stated, less that 25 percent discount.

24. The next matter is Wilson, GWIC, 29 November 2020, where the Tribunal does not have great details. It was an undue suffering case. The greyhound was treated by a vet afterwards for the injuries. There was a plea of guilty and a four-month disqualification with two months of that suspended. It is unclear to the Tribunal on the facts it has available precisely what the undue suffering was or the cause of it. The Tribunal finds that precedent of little assistance.

25. The next matter is raised by the appellant, and that is of Carter, a decision of GWIC of 10 November 2021, in which a trainer provided non-prescribed treatment of a worming nature prescribed for horses to four greyhounds, together with some flea treatment, and the next morning each of the four greyhounds was dead. The effect of that was a six-month disqualification on a plea of guilty.

26. Those cases indicate, therefore, that starting points for this type of conduct could range from 15 months to something like six months. In none of those cases was the starting point less. It is a matter, of course, as the Tribunal emphasises most strongly, of finding objective seriousness for the conduct here, not driven by what happened in other cases where there are dissimilarities.

27. Reflecting upon this conduct, but more importantly the factors which the Tribunal finds to be objectively seriousness, the Tribunal firstly does not conclude it is the most serious type of case, nor does it conclude it should be viewed at the lower end of the scale as the appellant invites.

28. The Tribunal has determined that, contrary to the submissions for the appellant, a suspension is not appropriate having regard to these facts. The Tribunal determines that a disqualification is appropriate.

29. The Tribunal determines that the starting point of that disqualification is eight months. It is a question of what reduction is available and what, if any, alternative type of penalty determination is appropriate.

30. Firstly, on subjectives, this appellant has not admitted a breach. There is, therefore, no discount of 25 percent from that starting point for a ready admission of the breach. There was, of course, cooperation at all times, but that cooperation is a subset of a plea of guilty and that is not elevated on the facts here to give any discount on the plea basis.

31. The appellant has been at pains – and quite properly so – from the time he first made submissions to GWIC, on his detailed submissions to the Tribunal and on his submissions on penalty, to assist the Tribunal by explaining the substantially difficult circumstances in which he finds himself. The Tribunal accepts each of those facts.

32. Summarised, they are that he uses two premises. The first is his mother's premises in Cowra where he maintains 76 greyhounds – 16 racing, 10 breeding and 50 pups. He is a breeder, obviously. His mother lives there alone. The appellant has resided there in the past. His mother is unwell. The reason for that is not necessary for this decision. But it is such that the appellant is effectively her carer. He is required to attend at those premises to assist her in daily functions and, in addition, to transport her for medical and other needs.

33. In addition, he is a professional trainer. At the moment, it is costing him some $800 per week to feed his greyhounds, a reduced figure, because also at the moment he is earning some $900 per week as a casual abattoir worker. Not only does he earn, but the feeding costs of his greyhounds are reduced because he can purchase discounted meat at that abattoir.

34. He will lost the benefit of prize money if he is to lose the privilege of his licence. And that could be anything up to $1500 to $2000 per week.

35. In addition, premises-wise, his now wife, also a trainer with some four greyhounds in training, lives in Cowra and he effectively has been residing there. The Tribunal, noting both premises are in Cowra, inquired during submissions as to the possibility of some form of premises swap,

greyhounds swap and the like. It appears, with policies prohibiting transfers to family members, that a transfer of the appellant's greyhounds to his wife is not possible.

36. In addition, the evidence establishes that his wife works on a part-time basis and would not otherwise be able to care for his 76 greyhounds in addition to hers and her work commitments.

37. He has given evidence of inquiries he has made to endeavour to find others to take his greyhounds or to assist with them. It is quite apparent that he is struggling in respect of that. He has tried with his wife's nephew, Mr Patrick Edenborough, to have him come as an attendant, but there are issues there are about his capacity to do it because of other commitments and at best it might be possible, if the appellant can find money to pay him, to do it in the short term.

38. The appellant has called in aid a number of referees. In addition to the facts referred to in the 15 October 2021 decision, there are other facts given by the referees there referred to.

39. Paragraph 18 is the reference of Gambrill. In addition, the referee has described the appellant as training his greyhounds for some 11 years. He is a kind, compassionate, honest and hard-working person who has a compassion and care towards his greyhounds and never acts violently or aggressively towards them. Indeed, he goes above and beyond what would ordinarily be expected with greyhounds. He describes the appellant as highly respected in racing circles, a winner of races in the past. A highly valued and respected member of the Cowra community, volunteering his time over 20 years to the local racing club and the Cowra Magpies Rugby League Club.

40. In addition to the matters in paragraph 19 of the Tribunal's finding, Mr Oakman describes the appellant as a very caring person, compassionate towards his greyhounds. He has trained greyhounds for Mr Oakman and he finds him to be in the upper class of trainers and always being a person providing assistance at the races, both on a voluntary capacity and also to assist other trainers in any event. Mr Oakman states that if it was not for the appellant, Bathurst, Temora and Wagga would struggle to get race meetings as he supports all these clubs, being such an asset to the industry.

41. In addition to the findings in paragraph 20 of the decision, Paul Francis also says the appellant is caring, reliable and responsible for his greyhounds. He has a strong rapport with fellow greyhound trainers and racing enthusiasts, has integrity and "ridgety-didge" manner.

42. In addition to paragraph 21 of the earlier finding, Mr Phillip Reid says he is a friend and has assisted him with dogs, and he always provides the best care for his dogs and is a person of many achievements who is to be looked up to.

43. In addition to the findings in paragraph 22, Mr Kel O'Rourke has known him for some 30 years and finds him to be very obliging for all racing-type activities, as Mr O'Rourke is a racing broadcaster. He describes him as having a great level of compassion, being successful and showing a good work ethic, patience, perseverance and a high regard for animals and is "a champion bloke", admired and highly respected by all participants.

44. In addition to those referees, there is the reference of Jeff Collerson of 17 August 2021, who has been a greyhound correspondent and known the appellant for some 21 years and always impressed by his unassuming manner and he is unfailingly honest, helpful and sincere. He is a person of impeccable integrity and a harsh word is never said about him.

45. Mr John Patton,, on 18 August 2021, the Racing Manager for the Wagga and District Greyhound Racing Club has known the appellant for some 20 years personally and professionally. He describes him as an utmost gentleman, truly professional in the industry, always well-presented greyhounds and always known to have well-bred greyhounds. Importantly, he describes him as a fundraiser and being a person who is always first to donate money. He is extremely dedicated, detail-oriented, self-motivated and a man whose word is his bond.

46. Mr Wayne Billett, Chief Operating Officer of Greyhound Racing NSW, on 18 August 2021, describes the appellant as associated with the industry through strong family reasons for over 40 years and is known as a successful owner, trainer and breeder, well respected amongst his peers. Importantly, the appellant is a tireless volunteer for the Cowra Greyhound Racing Club and spends many hours ensuring that the track and its facility is always in first-class condition for racing and trialling. The appellant goes above and beyond the call of duty, and if it was not for him, the club would not be able to offer important trial services. In addition, the appellant is stated by Mr Billett to have contributed many hours to the administrative running of the Cowra club and would on race days carry out numerous tasks.

47. Mr Peter Garlick, Production Manager, Cowra Meat Processors, on 18 August 2021, has known the appellant all his life. The appellant is successful in the slaughtering industry, assists with junior rugby league clubs, is a golfing champion and assists with senior rugby league in Cowra. He is one of the leading trainers in the Central West with great pride in the presentation of his dogs, their well-being, health and welfare. A person held in high esteem as a gentleman in the Cowra community.

48. Next is by Adam Pengilly, journalist, 17 August 2021. Known him since at least 2007. A person with great care and attention to his greyhounds and who is highly respected within the greyhound racing industry and the wider local community. A person who takes the utmost care of his greyhounds.

49. Those lengthy and detailed references are all highly favourable to the appellant. It is important to note that over and above the looking after and welfare, therefore, of his greyhounds, he is a great assister to the industry on a voluntary basis, both to other participants but also to the local tracks and in addition goes beyond that by charitable works in the assistance of other sporting organisations.

50. The Tribunal accepts the referees' assessments of his character. They are strong subjective factors. They are factors very much in his favour. As the Tribunal found in its earlier determination, they give credence to the determination that accepted many of the things that the appellant said he believed and did which lessened the objective seriousness.

51. The subjective factors that stand in favour of the appellant in this case warrant a greater discount to the starting point than would otherwise be the case for many appellants in the appellant's position. As stated, he has not received the benefit of a 25 percent discount for a plea, but he will receive a 25 percent discount for his other subjectives. If, therefore, he had pleaded guilty, there would have been a discount of considerable proportions of 50 percent. But that is not the case. However, it does provide a measure of parity for others.

52. It is submitted that it would be disproportionate, when the ultimate determination of penalty is considered based upon objective seriousness and subjective factors, by reason of those great impacts upon him, his family and the Cowra district generally. There is a balance to be found in relation to proportionality and that is in respect of the message which the Tribunal emphasised so strongly at the beginning of its reasons for decision.

53. The Tribunal acknowledges, as it has for many years, that in some cases the imposition of a penalty which all the facts and circumstances warrant will have a substantial impact upon not only this appellant but family members and others in the industry. The Tribunal, reflecting upon the not insubstantial impact here, has determined that the objective seriousness, reduced as it has been by the subjective factors, does not warrant a further discount based upon those issues of proportionality on a hardship basis.

54. In respect of Charge 1 the Tribunal, for its reasons, comes to a determination that there be a period of disqualification of six months.

55. In respect of Charge 1 the appeal against severity is dismissed.

56. In respect of Charge 2, the Tribunal determines that, for the reasons expressed by the regulator and that Charge 2 arose on precisely the same objective seriousness facts as those that applied to Charge 1, namely, that the failure was in assessing the nature of the fracture and therefore the treatment required to reduce the pain and suffering, does not cause additional facts to be found on which a further penalty is required. It would otherwise be concurrent in any event. A reprimand is an appropriate outcome, as was found to be appropriate by the regulator, and was otherwise submitted by the appellant, despite the severity appeal, on the submissions made.

57. In respect of Charge 2 the appeal against severity is dismissed.

58. Accordingly, the outcomes are a penalty of disqualification of six months on Charge 1 and a reprimand on Charge 2, and in each case the appeal against severity is dismissed.

59. It not being opposed, under Rule 95(5), the Tribunal defers the commencement of the penalty for a period not exceeding 9 days.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

60. Application is made for refund of the appeal deposit.

61. The appeal was against the finding of the breach. There was no plea of guilty. The finding of the breach was established and the appeal dismissed.

62. In respect of severity, in both matters there was an appeal on severity. In both cases that was not successful.

63. The Tribunal understands the financial hardship that will follow. But those facts do not outweigh the appellant's failures to succeed in respect of the matter in whole or in part.

64. The Tribunal orders the appeal deposit forfeited.

POSTSCRIPT

65. In deliberating upon penalty the Tribunal considered and determined to take in to account the undermentioned but did not express those matters in its oral reasons.

66. There was not to be a further discount on subjective factors beyond the 25% given by reason of the prior offence of presentation with a prohibited substance. That was 2008 for prednisolone present after administration by the appellant following veterinary recommendation. A three month

disqualification. The age of the matter and it being under a different rule removed some of the loss of discount but a prior serious breach could not be ignored or other appellants who had no priors would be disadvantaged on penalty.

67. The fact the appellant as a disqualified person could apply for some limited exemptions on the prohibitions imposed by a disqualification. This was not considered to be of such that reductions for subjectives should be limited.

68. That the objective seriousness and required message did not warrant a suspension of the disqualification.