# RACING APPEALS TRIBUNAL NEW SOUTH WALES

## TRIBUNAL MR D B ARMATI

## EX TEMPORE DECISION

## MONDAY 30 MAY 2022

**APPELLANT STEPHEN FRANCIS**

**RESPONDENT GWIC**

**GREYHOUNDS AUSTRALASIA RULE 86(x)**

**SEVERITY APPEAL**

**DECISION:**

1. **Appeal upheld**
2. **Period of 6 months disqualification imposed to commence 9 March 2022**
3. **Appeal deposit refunded**

1. The appellant, licensed trainer and breeder Stephen Francis, appeals against the decision of GWIC of 14 April 2022 to disqualify him for a period of 7 months for a breach of Rule 86(x).

2. Rule 86(x) provides relevantly:

> "A person .. shall be guilty of an offence if the person-
>
> > (x) makes any statement which to his.. knowledge is false either .. in writing, by electronic means or by any combination thereof to a member of the Controlling Body, an officer of the Controlling Body, an employee of the Controlling Body,.. or an official in the execution of his/her duty."
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> The particulars of the Charge are:
> 1. That you, on 21 December 2021, as a registered Owner Trainer, made a false statement in a registration application, in circumstances where:
> > a. On 21 December 2021 you submitted an application via the online portal for a Public Trainer and Breeder registration with GWIC;
> > b. In that application you listed your residential and kennel address for the purposes of the registration application as 2/36 Gwen Parade, Raymond Terrace NSW ("Raymond Terrace address");
> > c. As part of the registration application, you have supplied photographs of the kennel area at the Raymond Terrace address;
> > d. As part of the registration application, you have supplied photographs of the whelping area at 16 Cook Drive, Swan Bay ("Swan Bay address")
> > e. At the time of lodging the registration application:
> > > i. You intended to utilise the Swan Bay address to conduct breeding activities; and
> > > ii. You falsely listed the address for your Breeder registration as the Raymond Terrace address

3. The appellant pleaded guilty before the Commission to that breach and has maintained the admission of that breach on appeal. The matter, therefore, is a severity appeal only. The necessity to examine the evidence in greater detail falls away.

4. The evidence has comprised the transcript of the hearing of 11 April 2022, the decision of the Commission of 14 April 2022, the Notice of Intended Disciplinary Action of 31 March 2022, which critically contained the application, photographs to support it, subsequent photographs given and the record of interview with the appellant of 26 February 2022. In addition,

the appellant has put in evidence a deed between the Verhagens and the appellant as to the right to use the premises at Swan Bay for kennelling and breeding purposes, and it is dated 18 January 2022.

5. In simple terms, the key issues are that the appellant in his original application provided photographs of his then Raymond Terrace premises at which he was registered on the basis that that was the premises at which the activity of breeding would take place. But he provided photographs of the Swan Bay premises. There are a number of other facts that go to that.

6. The appellant has been licensed as an owner trainer for some 16 years. He has no prior disciplinary history. He has conducted his owner trainer activities from Raymond Terrace. Those premises have been inspected in the past.

7. On 20 December 2021, there was on foot a Notice to Show Cause issued to a licensed person Verhagen in respect of the question whether a condition should be placed on his licences that would prohibit breeding activities at the Swan Bay premises.

8. On 21 December 2021, the appellant lodged his application for registration to incorporate the breeding activities. There was not photographs of the actual whelping facilities sufficient for the application to proceed, it being noted that applications of this nature at that time were assessed without inspection as a means of expediting applications and with a reliance by the regulator upon the production of photographs.

9. On 30 December 2021, a Commission officer emailed the appellant seeking further information in respect of the whelping area to be used. There were questions whether the whelping area depicted in the original application was sufficiently depicted. Various things were sought: separate beds, water bowls, carpet and temperature monitoring, for example.

10. On 4 January 2022, the appellant replied, providing photographs and a covering email. His covering email in general terms said that he enclosed a picture of the whelping box and described it and the various facilities that were with it, and a separate area with water bowls, fire extinguishers, power points, heat lamps and thermometers. It being, therefore, that the appellant was seeking to establish the suitability of the whelping area at Raymond Terrace but had produced photographs of the whelping area at Swan Bay.

11. The Tribunal accepts that the appellant said in his interview of 26 February 2022 to the inspector that as of mid-December he believed he had a right to use the Swan Bay premises as a whelping area, it also being a fact that, prior to that date, the Commission had imposed a condition on the Verhagens prohibiting that licence of Verhagen being exercised for the purpose of whelping at that Swan Bay premises.

12. As stated, on 18 January the appellant had the benefit of an executed deed between the Verhagens and himself and another which gave him the right to use the Swan Bay premises for, in broad terms, whelping purposes.

13. The mischief came undone because on 19 January 2022, the Commission had issued the licences sought in the application of 21 December in favour of the appellant. And again it is noted that that was done on the basis of the written application, the photographs and the email response, there having been no inspection.

14. Because of the actions involving the Verhagens, on 22 February, Commission inspectors had attended the Swan Bay premises where they discovered the appellant present with a breeding female and a litter of pups. The breeding female was registered to the appellant.

15. On 9 March, the appellant was suspended on an interim basis by the Commission.

16. The first issue to determine is objective seriousness.

17. The Tribunal notes that s 11 of the Greyhound Racing Act 2017 mandates that the Commission exercise its functions so as to ensure integrity and welfare.

18. The Tribunal has expressed in a number of recent decisions – and they will be referred to in more detail when parity is considered – of the necessity for a person with the privilege of a licence, or seeking the privilege of a licence, that they be honest at all times with the regulator, that the integrity of the industry is driven by the necessity for the regulator to be able to trust its participants, and for participants to expect that, when exercising the privilege of a licence, they will do so in accordance with the rules. That is, the receipt of a licence carries with it a burden and a privilege.

19. It is here relevant that, post-COVID and, secondly, in an endeavour to expedite procedures, the Commission has allowed applicants such as this appellant to, as described earlier, make their application and provide photographs. That expedition, that reflection of the need for protection of applicant and regulators because of COVID, carries with it that added burden on an applicant to be truthful.

20. The Tribunal reflected in Mabbott that the application for a renewal of a licence, the application for a licence itself, such as was the case here, is a simple one. The questions are straightforward. There is nothing difficult about them. The questions here to which the false answers were given and to which the plea appropriately relates were simple matters requiring an

honest answer, and the appellant has deceived by his actions in providing incorrect information in the application.

21. The Tribunal will return to the mischief of the 4 January email and its photographs in respect of what, if any, approach must be adopted to penalty.

22. The respondent in its decision of 14 April and in its submissions today invite the drawing of an inference adverse to the appellant based upon a family relationship and, from that inference, intention to deceive is to be imputed to the appellant's conduct.

23. The facts of that are brief. The Tribunal notes that on 15 December, the Notice to Show Cause was issued to Verhagen about the condition, as it has been described. That Verhagen is the father-in-law of the appellant. That the appellant was found at his father-in-law's premises, contrary to the conditions that had been approved for him for breeding at Raymond Terrace, with a litter of pups bred. It is therefore said it must have been apparent to the appellant that he was not entitled to carry out that breeding activity at Swan Bay because he had applied for it and received the benefit of it elsewhere.

24. As a matter of fact, the Tribunal also notes that, subsequent to these matters, he did make an application for a change of address and it was approved and he had, prior to making that application, telephoned the Commission and been told he was required at that stage to take no further action. But those steps were post the conduct here, which is pleaded against him.

25. The appellant here relies upon the fact that the Raymond Terrace premises had been inspected on a number of occasions and that the Swan Bay premises were known also to the inspectors because the Verhagens were licensed there. It is therefore said that, in essence, the mischief is reduced because the inspectors should be taken to have known that there were no whelping facilities at Raymond Terrace but there was at Swan Bay.

26.That may have some weight that could be attached to it. But in the Tribunal's opinion, it imposes too high a burden upon the application process, streamlined as it is. It is a streamlined process which places the burden upon the applicant, not upon the Commission. The Tribunal is not of the opinion that simply making an application would necessarily mean that the Commission should trawl through its records to see if there was anything about those premises or this applicant. Prudence would otherwise dictate that they should, but the Tribunal does not see that is something upon which the appellant can rely.

27. But critically, as the Tribunal reflected upon in paragraph 32 of Mabbott, a Tribunal decision of 30 November 2021, the appellant has given no evidence of any expectation that his application would be assessed on the basis that GWIC was armed with that knowledge, nor particularly the individual officer burdened with the duty of considering the application would be so informed.

28. Therefore, the Tribunal, in assessing objective seriousness, does not consider that the gravity of the appellant's actions is reduced by reason of imputed knowledge in the regulator.

29. Neither the inspectors nor the Commission at its hearing on 11 April 2022 put precise facts to the appellant in relation to the inference that is sought to be drawn and which was just summarised. The irresistible conclusion is available that the appellant acted dishonestly and with an intent to deceive by referring to Raymond Terrace in the way that he did, and the photographs that he produced to support those referrals, in the sure knowledge that the application would not be approved if he disclosed Swan Bay because of what the Commission knew about Verhagen and the Notice to Show Cause about no whelping at Swan Bay.

30. But absent something which links that irresistible set of facts to the knowledge of the appellant, the Tribunal does not have that comfortable level of satisfaction that it should use that in adversely assessing objective seriousness.

31. Suffice it to say that the appellant knew he could not use the Swan Bay premises, and that was the gravamen of the matter. His deception is one in relation to his own conduct as established, therefore, and not by inference.

32. The respondent has chosen to charge the appellant only with the breach in relation to the application of 21 December. The particulars do, however, extend to the subsequent conduct of 4 January of providing photographs of a different address.

33. The conduct of 4 January is capable of being the subject of a separate charge. The conduct of 4 January was, however, in the Tribunal's opinion, part of the application process in which he engaged. It was ongoing in relation to the application and not some conduct which occurred post the application. The respondent proceeded in its decision in finding that was an aggravating factor, and after consideration of objective seriousness and reduction for subjective circumstances and finding a then penalty, then increased it for that aggravating factor.

34. That approach is not advanced before the Tribunal today. It is said that his conduct – and it has been particularised – goes to objective seriousness. It is a principle of the criminal law that in determining an appropriate

sentence, it is impermissible to use facts which are those which relate to a separate but uncharged crime.

35. These are civil disciplinary proceedings and that principle has broad application to such proceedings. But there is a different measure here in determining a civil disciplinary penalty, and that is the necessity to look to the future in finding a protective order – not punishment, as it would be in the criminal jurisdiction, but a protective order.

36. And the gravamen of the conduct of 4 January is twofold. Firstly, it is particularised against him so there is nothing of a surprise. But, secondly, it goes to a troubling aspect of to what extent the Tribunal can be satisfied, if confronted with similar circumstances, this appellant will not engage in this type of conduct again. Therefore, the message to be given to him is to be a more substantial one than it would be if those facts did not exist.

37. There is a second limb of message, and that is the objective one, as to the necessity for those otherwise in the industry, or those looking at it from outside it, will understand that if a person, as part of an application process, misbehaves themselves, that the granting of or continued privilege of a licence is very much at risk.

38. The Tribunal proposes, therefore, to assess that issue on the question of objective seriousness. It does not elevate it to a stage where a greater penalty is mandated.

39. The issue of welfare and integrity has been briefly referred to, and the reasons for it are apparent.

40. On the issue of integrity simply expressed, in addition to those remarks earlier made, this industry cannot operate unless there can be that element of trust of the regulator in those who are licensed, or seek to be licensed, and the public could expect no less.

41. The issue of welfare here is slightly reduced. Welfare is a most key consideration.

42. The fact is that the premises used by the appellant for the breeding which was discovered were in fact, while subsequently found not to be, at least partially used for whelping purposes and were otherwise capable of being suitable. The fact that they were at that stage not to be used for that purpose of course does not assist. But there is nothing advanced here on behalf of the regulator that goes to a direct welfare concern for this breeding greyhound or its litter. It is the general welfare concern embraced by s 11 as described.

43. Parity needs to be considered.

44. Three cases have been referred to, two of them Tribunal decisions.

45. the first of which was Boyd, 8 October 2021, 86(x), for making false statements, and two charges in respect of veterinary matters and whether veterinary treatment had been given or not given. It does not need greater analysis. The Tribunal notes in that matter it considered on objective seriousness in respect of one of the matters a starting point of 12 months' disqualification. Because of personal reasons, which were referred to by the Tribunal but not set out in its decision for confidentiality reasons, that was reduced to 10 months. In respect of the second charge, it was considered to be much less serious, and a starting point of four months. The Tribunal does not find a starting point of four months to be appropriate here. The conduct there was, as it was here, simply making a false statement to a regulator.

46. The matter of Mabbott, Tribunal decision, 30 November 2021. Again, a breach of Rule 86(x), where there was a failure to declare past harness racing betting disqualifications. That case can be distinguished on the basis of that it was a renewal application, there had been numerous prior disclosures by that appellant to the Commission and its predecessor, and the history of the application was a key part in the Tribunal determining a starting point based upon a finding of carelessness, not deliberate conduct, as being less serious, and a starting point of 6 months was found to be appropriate, reduced for various reasons by a third to a disqualification of four months. The Tribunal distinguishes that six-month starting point on the basis that there, there was a finding of carelessness and there was a history of applications, neither of which are the findings here.

47. The other matter was a Commission decision of Grech of 28 July 2021. Disqualification of 9 months for breaches of 86(x) again. Where Grech failed to set out in an application for registration previous criminal charges relating to animal cruelty. And it is charges, not convictions. A starting point there of 12 months appears to have been found based upon a plea of guilty, therefore a possible 3 months' reduction for that, because a 9 months' disqualification was found to be appropriate.

48. It is submitted very strongly, both to the Commission and to the Tribunal, on behalf of the appellant that each of those cases is more serious, the conduct here is less so, and therefore the starting point must be substantially less.

49. However, the totality of those decisions contained within them differentiating conduct. But, in relation to two of them, a starting point of 12 months. As stated, Mabbott would seem to be less for the reasons just outlined.

50. Is 12 months a starting point appropriate for objective seriousness?

51. Another factor the Tribunal did not refer to, but does, in relation to the use of Swan Bay was that as of mid-December the appellant had, on uncontested evidence, in his mind a right to use those premises, in addition to the fact that they had been used for that purpose. And, as noted, subsequently that was reflected in a deed of 18 January.

52. The Tribunal does not determine, as it is invited to do, to find that this is simply some oversight. The Tribunal is quite satisfied that it was well within the appellant's knowledge that the photographs he originally produced, and subsequently produced, and which misled the regulator, were, as reflected in his plea, falsely so.

53. The appellant does not dispute, and it is to his credit, that the licensing regime is such that a disqualification must be imposed upon him. The Tribunal, therefore, does not reflect on whether lesser penalties, as a disqualification is the most severe outcome, should be considered.

54. The Tribunal has said that the objective seriousness does not warrant a heavier penalty by reason of the 4 January conduct, particularised as it was.

55. The Tribunal considers, however, that the message to be given to this appellant does warrant that starting point of 12 months. The parity cases do not satisfy the Tribunal it should be less and, to the contrary, provide comfort that the gravity of the conduct here, the facts and circumstances of his conduct, as overt as they were, cannot be seen to be tolerated when outside considerations by the public in a regulatory regime might be considered.

56. The starting point is 12 months' disqualification.

57. The Tribunal turns to his subjectives.

58. His 16 years licence has been referred to. The fact he has no priors has been referred to. And the fact that he is a full-time participant in the industry has been referred to.

59. The Commission, in the Tribunal's opinion, was fairly generous in giving him 25 percent for those factors. The Tribunal would have thought that they, when compared to numerous other similar cases, would not have warranted much more than 15 percent. However, it has not been suggested that less should be given for those matters. It has not been put to the appellant that less should be given, because that could lead to a heavier penalty.

60. The Tribunal will also give, for those subjective matters, a 25 percent discount.

61. There was a discount of 25 percent for his ready admission of his breach to the respondent, and maintained on his appeal. He has cooperated at all times with the Commission once he came under adverse notice, as he has with the Tribunal. There is no reason he should not receive that 25 percent discount.

62. The Tribunal notes that it has put out of its mind, having applied discounts to those matters, that there should be any increase for other factors.

63. That means a 50 percent discount. Fifty percent on 12 months is 6 months.

64. The effect, therefore, of that is this, that the Tribunal determines a period of disqualification of 6 months.

65. The severity appeal is upheld.

66. The disqualification will have a commencement date of 9 March 2022.

APPEAL DEPOSIT

67. Application is made for a refund of the appeal deposit.

68. This was a severity appeal. The appeal has been upheld.

69. There being no other factors which would cause the Tribunal to do otherwise than to order the appeal deposit refunded, the Tribunal orders the appeal deposit refunded.

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