RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

MONDAY 29 AUGUST 2022

APPELLANT TERRY DUNCAN

RESPONDENT GWIC

GREYHOUNDS AUSTRALASIA RULE 83(2)(a)

SEVERITY APPEAL

DECISION:

1. **Appeal upheld**
2. **Monetary penalty of $2000 imposed**
3. **Appeal deposit refunded**

1. The appellant, licensed trainer Terry Duncan, appeals against the decision of GWIC of 3 May 2022 to impose upon him a period of suspension of his trainer's licence of 16 weeks.

2. The breach of rule was in respect of 83(2)(a), and the nature of that breach of the rule was particularised as follows:

> "Mr Duncan presented the greyhound Blackpool Grace for the purposes of competing in race 5 at the Lismore meeting on 16 November 2021 in circumstances where the greyhound was not free of the prohibited substance levamisole."

3. The actual charge and its particulars, which were proffered in writing against the appellant, were in greater detail, but that summary is sufficient.

4. The appellant, when confronted with that allegation prior to and during the stewards' inquiry on 22 April 2022, pleaded guilty and has maintained that admission of the breach of the rule since.

5. The appeal, therefore, is a severity appeal only.

6. The facts have comprised what might be described as a standard brief of evidence, which essentially contains all of the documentary material to support the charge and the correspondence to and from the appellant in respect of it. In addition, the Tribunal has the benefit of the transcript of the hearing of 20 April 2022 and an email from GWIC veterinary officer Dr Kasia Hunter of 8 April 2022. The matter has essentially proceeded on the tender of that material. The appellant did not adduce any fresh evidence on appeal. In addition, with his notice of appeal and his stay application, the appellant set out certain additional factual matters.

7. The respondent, GWIC, made a detailed outline of submissions for the benefit of the Tribunal and the appellant had provided, prior to the hearing, in essence in the form of grounds of appeal, a five-page undated submission.

8. The appellant has been a participant in the industry up until the time of the breach for some 13 years, 10 of which are as a licensed trainer. In 2019, he moved to the subject property and had in training some 13 greyhounds. A bushfire occurred. The training facility was destroyed. It was necessary to set about rebuilding it. The rebuilding process was in operation when the major floods of recent times struck the general area in which the appellant trains and his property was destroyed again. This breach occurred on 16 November 2021, after the fires but before the flood.

9. The evidence is quite straightforward. The appellant, conscious of the need for welfare of his greyhounds, worms them. He was not able to buy his

usual worming product and advises the Tribunal today that he had some information that the worming product should be changed on a periodical basis, in any event. He purchased a worming product that he was not familiar with and the labelling on the box did not indicate anything to him untoward.

10. He wormed the subject greyhound and also, incidentally, wormed other greyhounds and, further incidentally, the greyhound which won the subject race, which was swabbed and negative.

11. There is no evidence before the Tribunal as to how it should assess the gravity of this breach on the basis of the appellant presenting two dogs, each of which had received the same treatment, only one of which was positive, and therefore is unable to determine – and is not asked to determine by the appellant – but merely reflect upon that as a fact. The simple issue is that the worming product was given, the greyhound was presented, it was positive to the prohibited substance but not its metabolites.

12. The appellant has, to the inquiry officers, as reflected in the transcript, indicated a genuine mistake. The Tribunal accepts that his treatment regime was for welfare purposes and for the concern of his greyhounds.

13. His husbandry failure, which is the gravamen of the objective seriousness in this case, is that he failed to turn his mind to what inquiries he should make of regulatory vets, of vets or others about the use of the subject worming tablet that he did use, what withholding period it might have and what other impact it might have upon his greyhound being presented to race.

14. The appellant points out in his submissions – and it is not inconsistent with worming tablets generally – that the greyhound performed as it was expected to perform, namely, that it came fourth, it being the fourth favourite. Interestingly, the favourite was not swabbed and the appellant's other greyhound was swabbed but negative, as has been referred to.

15. The Tribunal accepts the explanation. It was not a performance-enhancing treatment and it was not a performance-enhancing result. The objective seriousness of maintaining a level playing field was not in fact infringed.

16. It is necessary to have regard to objective seriousness as a first starting point and that requires, in particular, a consideration of what, if any, message should be given to this appellant, the industry generally and received by the public as to the consequences for this type of breach.

17. Part of the concerns reflected in the GRNSW penalty table, as it then applied, and which has been the subject of numerous decisions by the Tribunal, is that this appellant has a prior. That prior was for caffeine and its metabolites. That was then, under the old GRNSW penalty table, a category 4 substance, more serious than this, which is a category 5 substance. And, as a category 5, it has, under that table, a lesser range of penalties for a breach.

18. The message to be given to this appellant, and received by those others to whom the Tribunal has referred, must be a more serious one by reason of the fact that he has a prior. As the Tribunal has reflected on numerous occasions over the years, a person such as a trainer who has many years in the industry and has not come under adverse notice in respect of matters such as this must expect to be dealt with more leniently than someone who has transgressed. To do so otherwise would be unfair.

19. A precedent is relied upon by the respondent, and that is the case of GWIC involving Walter King of 8 June 2021, the subject drug. In that case, he was a trainer of 36 years with no priors, good character, had lengthy registration, again the use of a worming tablet, and with amendments to his husbandry practices and operations to avoid future positive swabs. A fine of $2000 was imposed.

20. That matter, of course, was dealt with under the old GRNSW penalty table, which at the time had a starting point of a disqualification of 12 weeks. It is to be noted that the regulator there considered not only was a disqualification not required but that a suspension was not required and the next most grave penalty of a fine – or monetary penalty as it is more aptly described – was imposed upon him.

21. Noting that point to start with, it has been the practice of the regulator – and a number of Tribunal decisions have reflected upon this – that disqualifications have not generally been imposed in recent times for category 5 presentations; they have generally been suspensions. The Tribunal has reflected on numerous occasions that that of itself carries with it a substantial degree of leniency.

22. The Tribunal jumps ahead for the moment to note the new penalty guidelines, issued in July 2022, now have three categories, and this subject drug of levamisole would fall into category 3, the least serious, and, interestingly, that category now has a starting point of a suspension, categories 1 and 2 being disqualifications.

23. So, consistent with what has been happening in recent times, suspensions have been the norm for this category of substance and will be potentially in the future as against a starting point under the old penalty table of a disqualification.

24. Here, it was a suspension, consistent with that past precedent. As the submission indicates, in considering objective seriousness and having regard to precedent, the case of King should be distinguished. Certainly, the 36 years with no priors is a major differentiation to this appellant.

25. But there are some factors in common, the decision itself not having been seen, the Tribunal relying upon the written submission summarising it, that there is good character and also changes to husbandry practices. There is nothing to suggest that this appellant does not have good character; he is assessed on that basis.

26. In addition, the appellant has gone perhaps further than King might have done – it is uncertain on the facts – by himself conducting a substantial amount of research into what happened here. He has spoken to the regulatory vets about where the subject positive came from. He has talked to other participants in the industry about worming tablets and generally. He has in place, as he sets out in his undated statement, spent many hours attempting to educate himself and now has a recourse to a databank to check products and to look more closely at information sheets, or otherwise inform himself of any risk of transgressing by treatment regimes in the future.

27. Those are major factors which the Tribunal considers appropriate on lessening objective seriousness.

28. The other matters on objective seriousness are, of course, that the Tribunal must find a protective order – it is not a function of punishment – and that protective order must carry a message.

29. Subjectively, in this case, the Tribunal is of the opinion that the message is much reduced. Firstly, a genuine mistake and, secondly, the actions taken since to change husbandry practices, and that the failure of the husbandry practice in this case was not a serious one because it was a treatment for welfare purposes. Balanced again, as the Tribunal has said, is the fact that it is not his first breach and the other one was proximate in time.

30. The Tribunal will not consider a disqualification, it would be not consistent with precedent, and it is not what is asked for, and it is not what was considered appropriate by the Integrity Panel at its hearing. A suspension is an appropriate starting point.

31. As to a length of that suspension, the Tribunal does not agree with the interpretation adopted by the respondent on this occasion. If the penalty table was to be considered, the starting point would be more than a 12-week suspension by reason of the fact that there is a prior. For the reasons

that will become apparent, it is not necessary to express a precise starting point as such.

32. The Tribunal turns to the subjectives. There is no issue here, adopted by the hearing panel, supported on the submissions today, that the plea of guilty, the cooperation and forthright approach to the regulator which the appellant has adopted entitles him, consistent with Tribunal and now regulator decisions, to a 25 percent discount on any penalty considered appropriate against him.

33. The other subjectives are that – and, again, contrary to King – his licensed period of time is 10 years compared to 36; his participation time is 13 compared to 36. That does not entitle him to substantial leniency. On the other hand, there is that period of 10 years, regrettably with the prior in it, which has, as has been indicated, been taken into account in a starting point, but, in any event, must lead to a reduction in leniency that would otherwise be given to him.

34. There are several other subjective factors. Firstly and foremost, financial impact. In that regard, as the Tribunal reflected during submissions, if hardship is a consequence of a failure to comply, then that is an inevitable consequence of transgression.

35. Here, there is an additional impact of not just financial hardship, but hardship in relation to a loss of the facility of the training aspects and the racing aspects which are used to assist the appellant's son. The appellant's 10-year-old son – or, he was at the relevant time – has ADHD. That has led to a requirement for the appellant to have substantial time with his son and the need to be available for him, and his son takes, it is apparent from the submissions, a great deal of benefit from associating with greyhounds, both at the home and at the racetrack. That is a strong subjective factor.

36. The appellant has lost his employment. With 2019 bushfires, the adjacent sawmill at which he was employed was destroyed. He has been without work since. That is an additional hardship factor over and above the loss of the privilege of a licence. He tells the Tribunal he has not taken up employment since, principally to enable him to look after his son and be available for him.

37. He still maintains some 10 greyhounds and prize money is his sole source of income.

38. The other substantial factor is what the Tribunal considers to be a combination of heartbreaking circumstances. They involve the fire, which effectively destroyed his kennels and his fences and his training facility, and Mr Tutt, for the respondent, today has kindly given emphasis to that factor in favour of the appellant.

39. The impact of that upon any person, as the Tribunal has said, cannot be lightly disregarded. The appellant attempted to pick himself up again, put his facilities back into order, and then he is devastated by the recent floods. There cannot be a combination which is more heartbreaking than that. It compounds this appellant's difficulties in life with loss of job, need to support his son and the like. It demonstrates a unique set of facts which call out for differentiation from other transgressors. In any protective order there must be a place for compassion.

40. The Tribunal turns from what it considers to be an appropriate protective order of suspension against this appellant to one of the imposition of a monetary penalty. It does so in certain understanding that it is extending a substantial hand of leniency to a trainer who should be suspended because of the facts of this matter when objectively viewed.

41. There is no clear and unambiguous precedent – there are few – in respect of monetary penalty. Here, the appellant indicated in his written submission, undated, that: "If I can continue racing, I can pay a fine without any dire impact on my family."

42. That is an invitation that the appellant has extended. It is one which the Tribunal adopts, for the reasons it has expressed and in acknowledgement of the undue leniency it is extending to this appellant.

43. Consistent with King, the Tribunal will impose a monetary penalty of $2000.

44. The severity appeal is upheld.

45. The Tribunal imposes a monetary penalty of $2000.

APPEAL DEPOSIT

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

47. This was a severity appeal. It has been upheld. In addition, the Tribunal notes financial matters to which reference was made in the decision.

48. The Tribunal orders the appeal deposit refunded.
