RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

MONDAY 24 OCTOBER 2022

APPELLANT CHLOE BILAL

RESPONDENT GWIC

GREYHOUNDS AUSTRALASIA RULE 83(2)(a)

DECISION:

1. **Appeal dismissed**
2. **Severity appeal upheld**
3. **Period of 6 weeks suspension imposed**
4. **Appeal deposit forfeited**

1. The appellant, licensed owner and trainer, Ms Chloe Bilal, appeals against the decision of the Integrity Hearing Panel of GWIC of 13 July 2022 to impose upon her a suspension of 7 weeks for a breach of the prohibited substance rule.

2. The charge was in the terms that the appellant has breached Rule 83(2)(a), which in relevant terms is that “the trainer of a greyhound nominated to compete in an event shall present the greyhound free of any prohibited substances.”

3. A summary of the particulars is that the appellant in charge of the greyhound Springview Chief presented the greyhound to compete in race 6 at Nowra on 17 January 2022 when there was later detected in a urine sample taken from the greyhound after the event lignocaine and 3-hydroxylignocaine, and that each of those two substances are prohibited substances under the rules.

4. The facts to establish the ingredients of each of those particulars are not in issue. In other words, the fact the appellant had the status she did, she presented the greyhound to the race and there was subsequently detected the subject substances and they are each prohibited.

5. The challenge advanced by the appellant has at all times been to the processes engaged in by the parties of the respondent in the sample collection process, such that it is that the evidence cannot be at a level where the Tribunal can be satisfied that the prohibited substances were in fact in the greyhound at the time of presentation.

6. The appellant pleaded not guilty before the hearing panel and has maintained a denial of a breach of the rule on appeal. It is noted there is a severity appeal as well.

7. The matter has proceeded before the Tribunal on the basis of written submissions and an admission of the brief of evidence for the respondent. This matter was to be dealt with on the basis of written submissions. No oral evidence or additional evidence has been taken.

8. The Tribunal identified a factual issue and emailed the parties, advising that it was seeking from the respondent facts in relation to the process undertaken by the sample collecting party. That material was provided and as a result of an objection to it, the matter listed for further submissions.

9. The Tribunal has not formally taken evidence in the matter and marked exhibits – it is not essential that it do so – but the key pieces of evidence that go to the issue in question, the remaining matters not having to be examined, relate to the execution of various required forms. Those forms

arise for consideration under the sampling process required to be undertaken by the sample collecting agents and the stewards on duty.

10. The rules require that the processes be in accordance with those that are established. The provisions for that are to be found in the guidelines published by Racing Analytical Services Ltd on 13 May 2016, adopted by and used by the respondent and said by the respondent, factually, with an exception, to have been complied with on this occasion.

11. Therefore, the key pieces of evidence are the sample collection documentation, the subsequent certificates of analysis and the guidelines just described and the appellant's submission in respect of those on a factual basis.

12. The case law which is relevant to the decision to be made has been established in each of the Australian jurisdictions in many, many cases. The key points in New South Wales, which are oft-quoted cases, all adopt what was stated by Brereton J in Young v Commissioner for Railways [1962] NSWR 647 at 651.

13. There it was said that there are two ways in which the certificates of analysis can be accepted as valid, and that relates to issues of chain of custody. The first way is to call every person involved in the handling of the sample to establish the validity of the chain of custody. But the second and critical way is by identifying and finding as facts that the physical characteristics identified that which was found was that which was analysed. Relevantly here, the urine in the bottle was that which was collected from the subject greyhound at the relevant time and it was that which was analysed.

14. That case has been adopted on many occasions. For example, Barron v Valdmanis (NSW SC unrep. 2 May 1978, Meares J), where, incidentally, there was an issue on continuity in the chain and he found that the chain could not be established and there was no evidence that identified clearly the matters which are set out above. Merely one example of many. And there are other cases in which Young v Commissioner for Railways has been confirmed, such as R v Reynolds (15 October 1990 NSW SC unrep.) where a circumstantial evidence case was sufficient to prove continuity.

15. It is not necessary to further examine the authorities as to what is required. The test the Tribunal is satisfied is the primary test is to be able to find to the Briginshaw standard that the urine in the two sample bottles which was tested by the two laboratories was the untampered-with evidence taken from the greyhound on the day in question and that is what was analysed and certified.

16. Some issues were identified in the detailed written submissions for the appellant in relation to a number of points which, if the Tribunal is satisfied that the primary test, as it has described it, is met do not require further analysis.

17. There were two key points. The first one related to the fact that there could not be a satisfaction of the appropriate prima facie evidence on the sample collection because of the failure of one of the officers in that chain to sign documentation. Rule 80 requires that the sample collection document itself be signed by the collector, and that was done. Rule 81 relates to the prima facie nature of the certificates in question. And the Tribunal is satisfied that an officer of each of the accredited laboratories signed the certificates.

18. The issues of Briginshaw have been identified and the Tribunal is more than aware of the necessity in a matter of this seriousness to have the appropriate comfortable level of satisfaction based upon evidence that a reasonable person could come to accept.

19. There is challenge because of the evidence of break in the chain of custody as described. And the submissions are it would be unreasonable to come to any conclusion of comfortable level of satisfaction when all of that evidence is not before the Tribunal.

20. The submissions turn upon circumstantial evidence and the issue of mistake of fact and the application of Jones & Dunkel, all being said to fall in favour of the appellant. The Tribunal accepts all those submissions are correct. But if the primary test is established, then those matters do not require analysis because they all touch upon the mistake of fact which is contained in the documentation.

21. The issue then becomes, as described, does the respondent establish by its processes that the sample collected was the sample tested? That requires an analysis of the facts and various seal numbers and the like. The process will only be briefly described.

22. There was a sample collecting person who took the sample. There was a steward who was involved in the certification of the documentation. There were various other people involved in the handling before the substances reached the laboratories, and on reaching the laboratories, and an instant where it is said that a receipt for that was not signed. And there was an instance where it is said that an officer of the respondent did not sign the receipt of the sample.

23. The Tribunal is satisfied in broad terms that what takes place is this: that the sample kit is opened and it is required to be in the presence of the person presenting the greyhound for sampling who, incidentally, is required

to observe and to certify by signing the appropriate sample collection form that the processes were followed.

24. There is no issue here about the actual collection of the urine and its placing in the bottles. That is, it goes to the use of the control sample to rinse the sample bottles and the collection pan and matters of that nature.

25. The evidence is that the urine was placed in each of bottles A and B and that each of those was then sealed with a cap and that over that cap a label V750878 was placed over that cap. The Tribunal will move ahead briefly. The evidence is that that seal is tamperproof. That if anything was done to it, it would be evidently identified and the seal could not be said to be intact.

26. The evidence establishes that each of the laboratories received those three sample bottles, each with the label V750878, intact. The laboratories both certified the words "seals intact". There has been no factual challenge to that evidence. There has been surmise that it is possible that there could otherwise have been interference by, for example, removal – and the Tribunal is satisfied that tamperproof prevents that – or somehow injecting into the sample bottle the prohibited substances.

27. That is surmise and speculative. The Tribunal is satisfied that the respondent does not have to produce evidence to establish that it is not possible to inject through a cap and through a seal over a cap in the terms that that speculation invites.

28. The three bottles, therefore, the A and B sample and control sample, are then placed in a bag. That bag itself was then sealed and it is said that it was given the security seal number 17566. The parties involved – the stewards, the sample collector and others – are required to sign what is called a Greyhound Sample Collection Operations Sheet and Chain of Custody. That is in evidence. That document refers to the subject sample number V750878.

29. It is in respect of the numbering of that document that an issue arises. It should have retained, as it is a sealed document with each of the three tubes inside it, the seal number 17566. It is that in certifying the documents, and it was cross-signed and countersigned by each of the relevant agents with a number 17568, a wrong statement of fact, it is submitted for the respondent. The appellant correctly seizes upon that to indicate that it opens for consideration whether there had been tampering.

30. The number that was received and opened at the laboratory was 17566. Evidence has been given as to what happened with 17568. There were two sample collection packets on the night: 17566 and 17568.

31. It is the submission for the respondent it should be assumed as an error. The agents responsible for the signatures on the document, and therefore that certification, were not called to give evidence and, of course, under Jones & Dunkel, alternative conclusions can be reached, namely, that they, having not been called and been available, would not have given evidence to support the respondent.

32. There was an issue about the availability of the steward and the sample collecting agent at the resumption of the inquiry. Those matters do not have to be examined.

33. The factual scenario, therefore, becomes that the respondent cannot do other than invite assumptions. It is that the appellant correctly identifies that when that evidence is not being given it would be unreasonable to readily assume such a fact because a reasonable person could not come to that conclusion. All of the issues of Jones & Dunkel, circumstantial evidence and the like would then require analysis.

34. But the Tribunal comes to a basic conclusion, and that conclusion is that the respondent satisfies the Tribunal that that which was collected and placed in the two critical sample bottles, A and B, and sealed with the cap V750878 was, regardless of what transpired between the moment of the sealing of that cap and its receipt at the two laboratories was a “seals intact” situation.

35. The respondent, as stated, satisfies the Tribunal that aspects of possible interference, therefore, would be evident, and there is no evidence of that, they were seals intact. And that, therefore, that which was collected is that which was tested. The fact that a document in the chain had an unexplained different number does not change that finding.

36. Therefore, the Tribunal is able, under the legal principles it has enunciated, to be satisfied that that which was tested produced the two prohibited substances identified in the particulars and that the respondent dispels the various factual scenarios identified for consideration by the appellant.

37. The Tribunal is satisfied, therefore, that the appellant has breached the rule as particularised and, accordingly, the appeal against that adverse finding made by the Integrity Hearing Panel is dismissed.

38. It is a matter of penalty, therefore.

SUBMISSIONS MADE IN RELATION TO PENALTY

39. The issue for determination is penalty. No specific penalty is provided in the rules for this particular breach. It is the general penalty provision. The

respondent has guidelines for matters such as this. It is not necessary, having regard to the totality of the submissions, for the Tribunal to examine the oft-stated case law that has fallen from it in respect of how such matters are to be addressed.

40. The guidelines for these particular substances are what are known in those guidelines as Category 3, with a proposed starting point of a two-month suspension. The effect of that is, for determination purposes by the Integrity Hearing Panel, that they felt that equated to, apparently, eight weeks.

41. The objective seriousness of this matter is that at the end of the day there is no explanation for the presence of the prohibited substances in the greyhound. The appellant was not present when the greyhound was presented. That, effectively, is the extent of knowledge in respect of the matter.

42. The issue for determination on this appeal was that the respondent had not properly adopted the chain of custody matter and none of those matters went to the actual objective seriousness of this offence.

43. This is a civil disciplinary proceeding. It is necessary to find a penalty which is protective and not punitive and which provides the protection of the public interest by an appropriate message of deterrence.

44. Objectively, this matter can be described as straightforward. There is nothing about it which is untoward or more serious than others. Parity provides some guidance in respect of not just whether the guideline provided here was appropriate for objective seriousness, but also for all the usual parity purposes.

45. The respondent relies upon two cases.

46. McNamara, a GWIC decision of 24 March 2021. Trainer of 37 years, no priors, suspension of six weeks after a plea of guilty and, in particular, a review of husbandry practices. Some distinctions can be made here. Length of time of training was seven months, not 37 years. Again, there were no prior issues. Plea of guilty compared to not guilty. No evidence of change in husbandry practices.

47. The second matter is Williams, which ended up before the Tribunal, where on appeal the Tribunal reduced the suspension to seven weeks. A trainer of four years, no priors and a plea of not guilty.

48. The appellant relied upon two cases, the GRNSW decision of Whitton, which was 20 September 2016. Unknown facts. Essentially, a fine of $1000 after an early guilty plea. The Tribunal notes the age of that matter.

49. The second was a GRV matter of Galea, 13 May 2019, where there was a plea of guilty, a fine of $1500, $500 suspended. The Tribunal respects the decision in Galea but notes that, as the Victorian authorities are inclined to say, and as this Tribunal has been inclined to say, as important as those decisions are, it is more important to have regard to more recent decisions in this jurisdiction than older ones or decisions in other jurisdictions. The facts are not always equivalent in the regulatory regime, although the rules are common.

50. The Tribunal is of the view that the objective seriousness of this case, supported by the issues of parity, indicate that a suspension is appropriate.

51. The appellant had some 26 working greyhounds and 18 puppies at the time of the Hearing Panel's decision. It was her sole source of income and she had had some 210 starts as a trainer. It is quite apparent she was subject to substantial swabbing in that short period of some seven months and 210 starts. In the period her greyhounds had been swabbed some 22 times. That is very frequent. She relies upon success she had in that short period of time and that she had otherwise in presentation complied with the rules.

52. The submissions made to the hearing panel touched upon the matters that have been found not established in her favour in relation to how the matter should have been determined. It is said that she has cooperated to the full extent possible. And, accordingly, it is submitted that a fine should be imposed.

53. The Tribunal does not find that her history in the industry, despite the frequency with which she has been swabbed, entitles her to call in aid a substantial period of time over which she has demonstrated compliance with the rules. The Tribunal accepts that short period of time in which she has complied with the rules.

54. If there had been a plea of guilty, then she would have been entitled to a 25 percent discount. There has been no plea, and the reasons for that have been canvassed at length. The Tribunal is satisfied that she was entitled to put the respondent to proof and that she was entitled to do so both before the hearing panel and before the Tribunal.

55. The ultimate conclusion has been against her for slightly different factual statements than fell from the hearing panel, but essentially the same reasons.

56. The failure which was identified by the appellant essentially remains unexplained. And that, to the Tribunal, is a substantial factor which entitles consideration to be given to a discount.

57. As the High Court has reiterated, simple application of known mathematical formulae in civil disciplinary matters should not be the sole way in which determinations are made, but that there be that overall appropriate synthesis in the decision-making process.

58. The Tribunal concludes there should be a discount given, based upon those factual matters. It is difficult to quantify in relation to the matter. Essentially, the proofs were not in issue, it has simply been a matter of addressing what is a self-engendered failure by the agents of the respondent to properly document the steps that they took, and those remain unexplained.

59. The Tribunal is of the opinion, therefore, that a greater discount is appropriate to the appellant, but it is difficult to determine.

60. Objective seriousness – the Tribunal sees no reason to move away from a suspension of some eight weeks and that there should be some form of discount given to her.

61. The respondent determined one week, which is one-eighth, which equates to about 12½ percent, roughly. The Tribunal thinks it should be slightly more and is conscious that imposing some 25 percent would in fact be greater than the facts should indicate. That would equate to only two weeks out of eight.

62. But, avoiding mathematical formulae, the Tribunal has determined that there be a two-week discount to that eight-week starting point.

63. It means, therefore, that the Tribunal is of the opinion a suspension is appropriate and a fine is not appropriate, having regard to the objective seriousness of what is, under the McDonough principles, an unexplained failure. It would be a Category 2 failure. And therefore the appropriate penalty will stand less a discount of two weeks.

64. The Tribunal imposes a period of suspension of 6 weeks.

65. That means that the severity appeal is upheld.

66. There being no application for a refund of the appeal deposit, it is ordered to be forfeited.