RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

RESERVED DECISION

24 JANUARY 2023

APPELLANT ANDREW BELL

RESPONDENT GWIC

GAR 83(2)(a)

PENALTY DECISION

DECISION:

1. **Severity appeal upheld**
2. **Penalty of six weeks disqualification suspended for two years on conditions.**
3. **Directions issued on appeal deposit.**

INTRODUCTION

1. This is the Tribunal's penalty determination following on from its determination of 1 December 2022 that the appellant had breached the presentation rule.

2. That decision comprised 23 pages and 189 paragraphs and all parts of it are taken into account in this determination. The Tribunal takes this opportunity to correct paragraph 36 of that determination by substituting the word "appellant" for the word "respondent" where it first appears in that paragraph.

3. To put the penalty determination in context, the Tribunal determined that the appellant had presented a greyhound to race with permanently banned prohibited substances amphetamine, 4-hydroxyamphetamine and methamphetamine in its system.

4. The grounds of appeal filed on behalf of the appellant stated that the penalty determined by the stewards was manifestly excessive having regard to: appellant's long history in the industry with no prior charge for like offence; number of greyhounds trained; high number of races; trace levels; probability of contamination; performance not affected; no moral culpability; adverse mental health ramifications; adverse financial ramifications; adverse welfare ramifications for greyhounds; adverse financial and other ramifications for connections. The grounds of appeal suggested three possible outcomes, namely, no further action, suspension for 16 months to be wholly suspended and, if a disqualification, residential exemption be permitted. The Tribunal notes these grounds of appeal were lodged prior to the breach determination of 1 December 2022.

5. The new evidence has comprised a statement of the appellant of 8 December 2022 and references by Dr Newell and Mr David Smith.

6. In an endeavour to try and finalise the matter, the Tribunal invited the parties to make submissions on penalty prior to the breach determination. The submissions for consideration, therefore, are the oral submissions made at the hearing on 18 November 2022 by the appellant and respondent, the appellant's written submissions of 9 December 2022, and the respondent's written submission of 12 December 2022.

7. The appellant was invited by the Tribunal to respond to a table of cases provided by the respondent, and the appellant did so. The respondent also provided comment at the Tribunal's request on some of the precedent cases. The Tribunal then requested the respondent advise in respect of a categorisation of a prior arsenic presentation by the appellant and the respondent did so.

8. The Tribunal then raised with the parties the issue that they each appeared to be operating upon the existing greyhound penalty guidelines and not those which the Tribunal believed were in operation at the time of the breach. The respondent submitted on 23 December 2022 and the appellant replied on 17 January 2023.

9. GWIC, upon its commencement, adopted the GRNSW penalty table in operation since October 2012. On 1 January 2022, GWIC adopted its now existing penalty guidelines. The breach occurred on 16 December 2021 and, accordingly, the now replaced penalty table is that which is applicable to this breach.

10. However, the Tribunal notes the determination the subject of the appeal of 16th December 2021 and the subsequent submissions of the parties prior to the Tribunal raising this issue were based upon the new penalty guidelines.

11. The new penalty guideline is significantly more beneficial to the appellant than the old penalty table, but GWIC had determined in its decision that the new table provided an appropriate starting point in this matter.

12. The old penalty table provided a starting point for a breach of 156 weeks to which would be added at least a period of six weeks for the prior arsenic breach by this appellant. There is in fact a sub-issue on that prior in that in fact under that penalty table, it should be a category 4 breach, which would provide a further 12 weeks be added and not six, because six relates to a category 5 breach. Out of fairness to the appellant, the respondent submits to the Tribunal that it should treat the arsenic as a category 5, as GWIC had done so, this being more favourable to the appellant, and that the additional six weeks would provide a starting point of 162 weeks. The Tribunal notes that the new penalty guidelines provide a starting point of two years. And that being the period adopted by GWIC in its determination as set out.

13. In the decision of Amanda Turnbull v Harness Racing NSW, RAT NSW, 30 September 2022, the Tribunal analysed in considerable detail the applicability of penalty guidelines to determinations by the Tribunal and also set out in considerable detail the principles to be applied in determining a civil disciplinary penalty for breach of racing rules. The Tribunal adopts its determination in Turnbull in this decision. In particular, paragraph 114 of that determination. It is not repeated. The Tribunal notes that it has applied this approach since that determination in Turnbull to greyhound racing matters. There have been no suggestions to the contrary by either party in this case.

14. Accordingly, the penalty in this matter will be approached on the basis of determination of objective seriousness giving consideration to the penalty

guidelines, and then a determination made whether any discount is appropriate for subjective circumstances.

15. Before turning to the objective seriousness issue directly in this case on its facts, the Tribunal has regard to the parity cases advanced by the parties.

PARITY CASES

16. The respondent advances six parity cases for amphetamine and its metabolite presentations.

17. The first is 19 October 2021, Paul Camilleri, amphetamine and metabolite, plea of guilty, registered 44 years, nil prior, remorse and good record, a 13 month disqualification.

18. The second is 18 May 2020, Craig Last, amphetamine and metabolites, plea of guilty, registered 31 years, no history, high level, review of husbandry practices, remorse and contributions to industry and further significant mitigating factors, a disqualification of 13 months.

19. The third is 5 May 2020, Ian Smith, amphetamine and its metabolites, plea of guilty, registered 4½ years, no history, low level, personal circumstances and changes to husbandry arrangements, a 7-month disqualification.

20. The fourth is 9 April 2020, Matthew Martin, amphetamine, plea of guilty, registered 19 months, no history, low level, review of husbandry practices and remorse, a 15-month disqualification.

21. The fifth is 13 December 2019 of Morgan Fenwick-Benjes, amphetamine, plea of not guilty, disciplinary history, registered 14 months, a 4 year disqualification.

22. The sixth is 28 February 2019, Dean Swain, amphetamine and its metabolites, plea of not guilty, registered 10 years, two priors in 2014 and 2016, good character, significant involvement in industry, significant financial impact, an 18-month disqualification.

23. In addition, the respondent provided three cocaine and its metabolite cases to provide indication in respect of dealing with permanently banned prohibited substances.

24. The first of those is 26 October 2021, Karina Britton, cocaine and its metabolites, plea of guilty, registered 18 years, no priors, low level, Group 1 race, a 12-month disqualification.

25. The second is 13 December 2019, Tracey Hand, metabolites of cocaine, plea of not guilty, registered eight months, no relevant history, low level, good character, personal circumstances and review of husbandry practices, a 2 year disqualification.

26. The third is 28 November 2019, Barry McGrath, metabolites of cocaine, plea of guilty, registered 26 years, no prior history, personal circumstances and remorse, an 18-month disqualification.

27. The Tribunal notes in those parity cases that in each matter there was a period of disqualification.

28. The lengthy registration matters provided 13-month disqualifications, but in each case they had no priors. They are also, relevantly, in most cases, pleas of guilty.

29. For reasons developed in more detail later, the Tribunal, other than noting disqualifications were imposed, determines that the facts and circumstances of this case are vastly different from those in the other cases, with the exception, of course, that they involve permanently banned prohibited substances.

30. The appellant provided the precedent case of 17 July 2014 of Syd Swain, with amphetamine and methamphetamine, with a plea of guilty, low level, two minor prior offences, professional trainer with no other source of income and high number of cleared samples and character references, where there was a 9-month disqualification, with the last three months suspended on condition.

APPELLANT'S EVIDENCE

31. In his statement of 8 December 2022, the appellant essentially repeated the evidence he had given in his statement of 13 May 2022 to GWIC.

32. The appellant describes his experience in the security employment he had prior to becoming a trainer and an understanding of the necessity to follow rules, policies and procedures. He says he has in place his own procedures. He describes he is the carer of 147 greyhounds and presents 10 to 12 dogs to race nearly every day and accordingly he has had over 7000 runners in four years. He describes the quality of his greyhounds and the fact it is a family business. It is a passion and he has a love for the greyhound. He describes a 10-year lease of his premises with a difficulty if he had to relocate.

33. He describes in detail his honesty, transparency and the following of the rules and how he always safeguards himself and those with whom he deals in ensuring proper care for the greyhound.

34. He describes how he has had nothing to do with amphetamines and nobody in his residence or attending his premises would have likewise been so associated.

35. He describes his plea of “not guilty” on the basis of legal advice of an arguable defence, particularly as he has no idea how the drug came to be in the greyhound’s system and he has spent a lot of time trying to find out how and why.

36. He apologises for the damage he has done to the industry by reason of this breach. He maintains that he always supports GWIC in its prohibited substance approach in dealing with cheats and bad eggs.

37. He describes what he has given to the industry, including mentoring. He has been on the race day injury review panel, which is a voluntary appointment. He describes how he has assisted injured greyhounds in their rehabilitation and including keeping of greyhounds which will not race at his property.

38. His earlier statement of 13 May 2022 refers in more detail to his training facility being purpose-built, whilst leased, and the size and professionalism of that operation.

39. He describes how he reacted to his previous positive for arsenic and putting in place at significant cost systems and procedures to reduce the risk of subsequent breaches.

40. He describes greyhound racing as his only source of income and that of his household and sets out, not repeated for confidentiality reasons, the expenses of the business and the income he receives from it.

41. He describes having entered some 7090 greyhounds with only that one positive. He describes his success as a trainer.

42. He describes his investment in breeding.

43. He sets out the stress that these proceedings have occasioned to him and how he suffers significantly from mental health and had, as of May, made an appointment to speak to his GP. He had spoken to GWIC to obtain references for mental health referral purposes. He had spoken to the provider of those facilities and was to commence that treatment.

44. He describes how owners were removing dogs from him because of the positive.

45. He attaches his training and race presentation statistics, including his success rate.

46. He calls in aid two references

47. The reference of Dr John Newell, veterinarian, of 5 December 2022 states that he has known the appellant for 35 years and done a substantial amount of work for him. He assesses him as a dedicated trainer with a passion for the sport and with substantial financial, emotional and physical investment in the industry. He says he would not jeopardise an investment or compromise his livelihood. He describes him as a person very conscious of the rules of racing and reluctant to allow treatment without appropriate assessment. He says he would not use performance-enhancing substances. He notes the appellant has a large team of greyhounds with numerous dogs that have been swabbed and therefore an excellent compliance record. He cannot imagine that the appellant deliberately engaged in the presentation with a positive. He refers to the enormous emotional and physical toll on the appellant.

48. The next reference is by licensed trainer David Smith, who has known the appellant for five years. The appellant has done various types of work for him in the industry. He says the appellant has a passion for the industry and the welfare of the greyhound. He has observed the appellant's care of his greyhounds at the highest level. Mr Smith would not give a reference because of his personal dislike of drugs in sport but does so here. The appellant's personal love of the greyhound and concern for proper compliance has caused him to give this reference. He describes the appellant as a selfless man struggling through tough times and has suffered physically and mentally as a result of this matter. He has no doubt about the integrity of the appellant. The appellant has told him he does not know how the positive occurred but accepts he has breached the rule. Mr Smith again emphasises the appellant's passion for the sport. He describes the appellant as a go-to guy for many in the industry.

SUBMISSIONS

49. In its **oral submissions** at the hearing, the **respondent** points to the prior arsenic matter. It is submitted that with the experience he has, he should have had a clearer knowledge of the rules.

50. It is accepted that there were only trace levels found, and on the evidence, that would not be performance-enhancing, but nevertheless it is still a permanently banned prohibited substance.

51. The respondent accepts that it cannot establish culpability, that is, deliberate conduct, in the appellant. Nevertheless, it is said under the McDonough principles it must be a category 2.

52. The respondent accepts that the effect of this matter upon the appellant would be stressful, as it is for everyone, but points out there is no medical evidence of a diagnosis or of medication being prescribed. The respondent says that this is no more than a normal situation for a person in this position and the aspects of mental health are based on self-diagnosis.

53. The respondent accepts there will be a financial impact upon the appellant.

54. The respondent does not accept there will be any adverse welfare impacts upon any of the appellant's greyhounds if his privileges were to be lost. That is because they can be re-homed. The respondent does not accept there can be any adverse ramifications for the connections.

55. The respondent then made submissions on the new penalty guideline. That is, a minimum starting point of two years' disqualification. However, the respondent accepted that the prior was not a category 1, therefore, the starting point did not jump, under the new guidelines, to four years.

56. The respondent submitted that the 16-month period of disqualification found appropriate by GWIC was the appropriate penalty on all the facts and circumstances here, being calculated on a two-year starting point less discounts.

57. The respondent points out that the appellant has made no admission of the breach. It is further said that the appellant has not cooperated by the way in which the proceedings have been conducted. That is because of the time taken to hear the matter before the hearing panel and the arguments advanced here which were not found successful.

58. It is said that there is no evidence of any husbandry practice changes to ensure that such conduct will not recur.

59. It was emphasised that no character evidence had been called, but the Tribunal notes that this has subsequently been addressed.

60. The respondent emphasises integrity as being paramount, particularly for a permanently banned prohibited substance.

61. Whilst there were no adverse betting matters, there was betting, and the respondent is concerned as to the optics on integrity from public scrutiny and therefore a substantial public interest in the matter.

62. The respondent submits there is no actual financial evidence to show that any loss of the privilege of a licence would lead to bankruptcy.

63. The respondent says that any suspension would be unduly lenient, let alone any suspension of such a suspension. It is pointed out the appellant has, and its continuation would not be opposed, a residential exemption.

64. Aspects of specific and general deterrence are emphasised. This deterrence is submitted to promote the public interest to ensure compliance and to avoid a perception of undue leniency.

65. In oral submissions to the Tribunal and made at a time when the appellant would have preferred to delay submissions until after the breach determination, the **appellant made oral submissions**.

66. It was pointed out that the decision must find an appropriate penalty, and, of course, this submission was made based upon the new penalty guidelines.

67. The appellant says there are no factors of aggregation and accepts that a 25 percent discount for the plea of guilty is not available. It is said that the appellant's conduct in the fact that a three-day hearing was required by the hearing panel is not an aggravating factor.

68. At this point, the appellant was not able to address on the McDonough principles, and the Tribunal accepts this.

69. The appellant accepts that he has the prior.

70. The appellant has now addressed the issue of character evidence, but says that its absence prior to its subsequent availability was not an aggregating factor.

71. In relation to wagering and the optics in the public eye, the appellant says this has not been particularised and no such optic would arise on the facts of this case.

72. Detailed submissions were made on the subjectives.

73. A 32-year participant and a trainer since 2015, with some 7663 starters and 147 greyhounds in the kennels. Therefore, there was a greater likelihood of the prospects of a breach. But despite that, there had only been one prior.

74. The fact that it was a trace element matter only is emphasised.

75. It is said that there is no moral culpability in the appellant.

76. It is particularly pointed out that the appellant had multiple greyhounds racing at that meeting and that he would have known that if the greyhound

won, it would have been tested. It was pointed out there would be no logical intent to present with a prohibited substance and it would have provided no benefit to the appellant if it had been.

77. The fact it was not performance-enhancing, a matter not in issue, was emphasised, as was, as stated, it was only in trace amounts.

78. Again, it is said it is a contamination case and, accordingly, any penalty should be suspended.

79. On further subjectives, it was pointed out that greyhound racing was his only source of income and he would suffer financial loss, and financial figures were given on the outstanding leasing liabilities.

80. It was pointed out that he has subsequently been the subject of inspections and no concerns have been identified. It was submitted he actively seeks compliance with the rules.

81. It was also pointed out that he would struggle in the future to find suitable dogs because of the adverse publicity associated with this matter and that would lead to an ongoing loss of income as well as the stigma that he would receive as a disqualified person.

82. In **oral submissions in reply, the respondent** accepted that many of the factors that had been raised by the respondent were not aggravating features. It was accepted that the appellant was entitled to put the respondent to its proofs.

83. It is said that the aspects of conjecture as to what happened remained. It was accepted that the appellant did not believe he had breached the rule.

84. On 9 December 2022, the **appellant made written submissions**.

85. Having set out the background of the matter and the facts associated with it, the fact that it was a “strict liability” offence, was noted, as was the starting point of a two-year disqualification under the new penalty guidelines. The Tribunal pauses to note that it is an absolute liability offence.

86. The facts around the breach itself were addressed on the basis that again it was stated the appellant had multiple dogs racing, the subject dog was the favourite and the appellant knew it would be likely to be subjected to a swab. With trace amounts only, it was noted it could not have been performance-enhancing.

87. It was emphasised that the Tribunal found that the substance was not present at the time the greyhound was originally kennelled. This was an

important factor in giving weight to his entitlement to not admit the breach of the rule, particularly coloured by his subsequent expressions of regret.

88. It was said that he has no moral culpability and therefore general deterrence is of very limited significance and that in fact this should be a McDonough category 3 finding. It was said to be an innocent contamination case.

89. It is submitted that Rule 95(3) should be applied and any penalty be suspended.

90. His personal circumstances were again emphasised, particularly his time in the industry with only one prior positive, and that he has put systems in place to reduce further substance charges.

91. His success as a trainer and the number of greyhounds in training was again pointed out.

92. Reliance was placed upon his standing in the industry from his two referees.

93. His only source of income and the financial resources required to operate the business and the ongoing costs and losses were emphasised.

94. Again, it was noted that inspectors have visited his property since this detection and there have been no concerns.

95. It is noted that before his stay he lost the ability to train for two weeks and that generally his income has been significantly impacted with the loss of many of his quality dogs.

96. Financial figures are given and are not set out for privacy purposes but are taken into account on financial impact.

97. It was submitted that he was subject to delay at the beginning of the hearing panel processes, particularly as wrong sample evidence material had been served. It is said that this delay has had a significant impact on his financial circumstances and mental health.

98. It was conceded that a disqualification was appropriate, but having regard to his lack of moral culpability, acceptance of guilt, taken steps to prevent future contamination, otherwise good record and previous participation in the industry, that that disqualification should be suspended.

99. On 12 December 2022, the **respondent filed written submissions**.

100. The appellant's acceptance that he is the person who kennels, cares for and trains all of the greyhounds in his kennels carries with it the obligation of controlling substances that enter the greyhound's system.

101. It is said that the appellant has not done all that he should have done to avoid the presence of the prohibited substance. This is particularly said to follow as it is unknown and cannot be determined when the drugs were in fact introduced into the greyhound's system. For example, it is said it could have been after kennelling but before racing.

102. Therefore, the third category of McDonough cannot be available because the appellant has failed to prove he is blameless. He led no positive evidence to explain how the substance came to be present.

103. The failure to admit the breach was noted to cause a loss of discounts.

104. The aspect of general deterrence was said to have a strong basis for the appropriate penalty in this matter. Particularly for a permanently banned prohibited substance being so serious.

105. On the issue of parity, it was noted that no penalty of less than 12 months' disqualification has been imposed by the respondent for a permanently banned prohibited substance offence, including for people who pleaded guilty. The parity table, summarised above, was called in aid.

106. On the issue of delay and the wrong material being provided to the first hearing panel matter, it was pointed out that the appellant had chosen to remain silent on his knowledge of this issue until that hearing commenced and cannot call that delay in aid.

107. The respondent notes that the appellant has had the benefit of a stay.

108. It is said that the appellant does not demonstrate lack of moral culpability. It is said that the appellant's acceptance of his guilt only arises after the Tribunal's dismissal of the appeal.

109. On subsequent steps to prevent recurrence, it is said that no evidence has been called as to what he actually has done.

110. The respondent accepts the financial impact of any disqualification, but this cannot enable the appellant alone to escape a disqualification.

111. It is said that a disqualification is a typical penalty for this type of contravention.

112. As noted above, **further submissions** were called in relation to penalty tables and parity matters.

113. The **respondent** accepts and invites the Tribunal to treat the previous arsenic breach as a category 5 matter, which under the old guidelines would lead to an increase in the appropriate starting point of 156 weeks by a further six weeks.

114. Nevertheless, the respondent submits that, as the hearing panel did, the Tribunal should adopt a starting point of two years, which is that reflected in the new guidelines the Tribunal noting the prior did not lead to a doubling of the penalty

115. This is particularly noted as being more lenient to the appellant.

116. Accordingly, it is said no further discounts to those considered appropriate by the hearing panel should be given, and the determination of the hearing panel of 16 months' disqualification is the appropriate penalty.

117. On 17 January 2023, the **appellant** made submissions on the penalty table.

118. The appellant accepts that the old penalty table is that which is applicable and it is less favourable to the appellant.

119. It is then submitted that as there is no moral culpability in the appellant, he should receive the greatest degree of leniency.

120. Having accepted a 162-week starting point as provided under the old table, the number of mitigating factors in favour of the appellant is set out.

121. It is said that he should receive a discount of 39 weeks for a low level, which here was mere trace levels. It is said that he should receive a number of 9.75 week discounts for personal circumstances, and there are multiple ones of those which have been set out already.

122. It is then said this would give the old penalty guideline starting point a reduction down to two years and two months. It was noted this approximated the starting point adopted by the hearing panel.

123. It is then said there are exceptional circumstances in which further discounts should be given.

124. In particular, it is emphasised that there was no possibility of the detection at the time of kennelling and that, in any event, there were a number of greyhounds presented to race with knowledge of likelihood of testing.

125. It is acknowledged that it is impossible to identify what the source of contamination was, but the facts of this case raise exceptional circumstances, with the appellant bearing no moral culpability and therefore not deserving of further punishment beyond that which he has already endured.

126. It is said that an appropriate penalty is to be selected, but what that is, is silent in the new table. That is, it does not say whether it should be a disqualification, suspension, warning off or fine.

127. The Tribunal's use of the guidelines was again noted.

128. Accordingly, it was submitted that an appropriate sanction under the guidelines would be no effective penalty.

129. Again, it was emphasised no moral blame, exceptional circumstances, and, accordingly, no additional punishment is appropriate.

DISCUSSION

130. It is necessary to determine objective seriousness, and this is much governed by the fact that the prohibited substance is a permanently banned prohibited substance. The most serious of categories.

131. The public interest in a message of deterrence is much governed by that fact. However, as the Tribunal has emphasised in prior decisions, objective seriousness must focus upon the actual conduct of the appellant. It is the facts and circumstances surrounding that conduct which must be the subject of the penalty.

132. The Tribunal finds that the parity cases to which reference has been made can be distinguished on the basis of the facts and circumstances of this case.

133. That arises because the Tribunal is satisfied that it is invariably the case when the source of contamination cannot be established that the whole of the husbandry practices of a trainer and the presentation facts must be the subject of scrutiny.

134. Here, that does not arise because there is no requirement to focus upon those practices prior to the time that the greyhound was kennelled. The Tribunal set out in the breach determination the facts to support that finding.

135. In addition, there is no evidence of any action by or on behalf of the appellant from the time of the kennelling of the greyhound until the sample

was taken which would go to moral culpability. The appellant was not present.

136. Of course, the respondent does not have to establish the how, when, why, or by what route the substance came to be present in the greyhound.

137. It is noted the respondent accepts that it cannot establish deliberate conduct in the appellant.

138. At the end of the day, the Tribunal simply does not know how the substance came to be present.

139. However, that focus is upon what might have happened after the greyhound was kennelled until the sample was taken. A narrow period of time in which the greyhound was at times under the supervision of the club's officers, but also, of course, at times, under the care of Mr Xuereb, the handler.

140. The appellant has failed to establish that he was blameless. He cannot establish there was no moral culpability, whatever that is in a case such as this, because he cannot establish what did or did not happen.

141. The objective seriousness message of deterrence is limited because of the narrow time focus post kennelling.

142. On specific deterrence, there is no individual fact upon which the Tribunal can seize to indicate what the appellant should or should not have done by way of husbandry practices or generally. Accordingly, it is difficult to give weight to the appellant's statement that he will change his practices to avoid repetition, because the appellant simply does not know, and the Tribunal simply does not know, what changes should be effected. He has in fact given no specific evidence of changes in husbandry practices.

143. The Tribunal sees no reason on the facts and circumstances of this case to find that a greater message of special deterrence is required because of the prior arsenic matter. That simply leads to a loss of reduction in discounts. In addition it is taken in to account under the starting point consideration, here an additional 6 weeks. There must not be double counting either way.

144. The Tribunal does not see that any specific deterrence message is required by reason of the way in which the appellant has had this case conducted or the way in which he has conducted it. He is entitled to put the respondent to its proofs and he has done so. As will be apparent from the Tribunal's breach decision, there were matters which were properly the subject of consideration touching upon the person in the kennelling area and the attendant handing a bottle of water to the handler. While these

matters were not found to exculpate the appellant from culpability, they nevertheless were litigable matters.

145. Likewise, those factors do not lead to any necessity in the message of general deterrence in the public interest.

146. It is accepted that the appellant knew there would be testing if the greyhound won. But this cannot help on this case because he was not there and it was a post kennelling issue.

147. Betting matters raise no relevant facts.

148. Essentially, the deterrence message of a specific and general nature falls down to the fact that there was an unknown contamination, or administration (which has not been identified), of a permanently banned prohibited substance to a greyhound at the races after kennelling by an unknown person and that the optics of that are unsatisfactory and integrity arises for consideration.

149. The appellant does not establish he is so blameless that there should not be a consequence of this presentation on a general deterrence basis. Conjecture only remains.

150. On the level of starting point on objective seriousness, the Tribunal has regard to what the parties have said to it on where it should find an appropriate starting point, which would be two years, as the parties ask it to consider that to be appropriate, as against the 162 weeks that the appropriate table would provide.

151. Having regard to precedent cases and the above analysis, a disqualification is an appropriate consideration. The precedent cases are distinguished on the facts and circumstances here, as set out above, on the issue of length of disqualification.

152. It is that length of disqualification that becomes the focus of further consideration.

153. In this case, the substance was not performance-enhancing and was at trace levels and the starting point should be reduced accordingly.

154. The Tribunal has given consideration to the old table and what should be an appropriate starting point. That table provides a starting point of 162 weeks, which the Tribunal considers appropriate to a more standard set of facts and circumstances which it does not find here for the reasons set out.

155. The Tribunal does not adopt a staring point of 2 years and considers half the guideline point to be appropriate.

156. Accordingly, the Tribunal's starting point is a disqualification of 81 weeks, noting that is compared to that adopted by the hearing panel of 104 weeks. 81 weeks is considered an appropriate period regardless of the table/guideline.

157. Again, from an objective seriousness point of view, the Tribunal notes that the table would allow a discount of 39 weeks for trace levels to which the Tribunal would add it was not performance-enhancing. That discount is applied. That reduces the period of disqualification to 42 weeks.

158. The Tribunal determines an appropriate public interest message of deterrence is a starting point of 42 weeks disqualification to which allowance must be made for the subjectives.

159. The objective facts are not so serious that discounts for mitigating facts should be disregarded.

160. There is to be no further discount for an admission of the breach of the rule, which would otherwise attract a discount of 25 percent. It is not necessary to consider other aspects of cooperation because a starting point for that 25 percent discount is the plea.

161. There is to be no further discount on his record by reason of the fact that there is a prior.

162. The Tribunal accepts that, as is usually the case, this appellant has suffered, in his own opinion, mental stress. The Tribunal expresses it in those terms, because there is no medical evidence to support his conclusion, but the Tribunal does accept that he suffers such stress, and that has been confirmed by his referees. He has given no evidence of following up the GP advice or consulting the respondent's suggested helpers.

163. The Tribunal accepts that in this case there will be a greater level of financial hardship than would be the case with trainers of lesser substance. The number of greyhounds and the financial commitments which have been referred to establish that fact. That enables a consideration of hardship on a professional trainer and the facts here distinguish the Tribunal's usual approach set out in Thomas in 2011 that hardship can be an inevitable consequence.

164. The Tribunal now accepts that he has referees and takes into account their positive assessment of him.

165. The Tribunal now takes into account the expression of remorse for the impact his conduct has had upon the profession.

166. As stated, there can be no further discount for changes in husbandry practices, because they simply have not been identified.

167. There is to be no further discount for delay, because on the facts and circumstances of this case, the Tribunal sees nothing which would entitle the appellant to further discounts for any time taken for the disposal of these proceedings.

168. The Tribunal notes the appellant's assistance to others in industry and he is entitled to credit for that.

169. The Tribunal accepts the appellant's passion for the industry and greyhounds generally, but does not find there is anything in this case that puts him in any different position than those greyhound trainers with whom the Tribunal has dealt over the years.

170. The appellant does not establish welfare issues for his greyhounds if he is disqualified.

171. Subsequent inspector visits disclosing no issues is accepted but is a minor point on subjectives and is in fact a neutral issue.

172. As recently expressed by the High Court, it is not necessary to engage in precise mathematical calculations, and the Tribunal does not do so here.

173. The Tribunal determines that there be further discounts for subjective factors of 36 weeks.

174. That means from the Tribunal's determination of a disqualification of 42 weeks there is to be a further discount of 36 weeks to provide for a disqualification period of six weeks.

175. The Tribunal imposes a disqualification of 6 weeks.

176. The Tribunal acknowledges that that is a vastly different determination than that which the hearing panel found to be appropriate and the respondent submits should have been imposed here.

177. However, the Tribunal again emphasises the vastly different set of circumstances that have arisen in respect of the fact that the focus has been upon the post-kennelling conduct and not more.

178. This does not establish a precedent for leniency in permanently banned prohibited substance presentations generally because of the different circumstances and notwithstanding the failure of the appellant to

demonstrate he was blameless. It could be said to fall between McDonough categories 2 and 3.

179. The Tribunal notes that a disqualification means the loss of the privilege of a licence and its immediate cessation and then a requirement to make further application for a licence and that there is a natural time factor involved in the assessment of that application and the issuing of a new licence.

180. The Tribunal considers that a six-week disqualification for a permanently banned prohibited substance matter falls into the category of a nominal penalty. The disruption to a business is usually an inevitable consequence of a disqualification but here because of the short period of six weeks it is considered a nuisance, excessive and unnecessary and not required on the facts and circumstances for a deterrence outcome.

181. The Tribunal takes in to account he was suspended for two weeks.

182. Whilst the appellant carried the onus of establishing category 3 for McDonough and did not do so, there nevertheless has been a finding on the facts and circumstances of this case that the appellant's wrongful conduct, if any, balanced by his subjective factors, is such that, pursuant to Rule 95(3),(as it applied at the time of this breach, or, as is provided under the current Rule 174(3), which provides that any part or portion of a penalty imposed may be suspended for a time and pursuant to conditions that a controlling body or the stewards think fit), is such that this being a short disqualification, and therefore a penalty, it is able to be suspended, and it should be, but on conditions.

DETERMINATION

183. Accordingly, the period of disqualification of six weeks is suspended on condition that the appellant be of good behaviour and not breach the prohibited substance rules for a period of two years from the date of this determination.

184. The severity appeal is upheld.

APPEAL DEPOSIT

185. The Tribunal is required to make an order for the forfeiture or repayment in full or in part of the appeal deposit.

186. No application has been invited or made in respect of the appeal deposit nor submissions in support of such an application.

187. The Tribunal noting that the breach appeal was dismissed but the severity appeal was upheld, it is open to the appellant to make application for a refund, in whole or in part, of the appeal deposit.

188. The appellant is allowed seven days from the date of receipt of this written penalty decision to make application with supporting reasons in respect of the appeal deposit, and if required, the respondent will be invited to reply.
