RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

MONDAY 24 JULY 2023

APPELLANT KERRY BARRASS

RESPONDENT GWIC

GREYHOUNDS AUSTRALASIA RULES 21(3) and 165(a)

SEVERITY APPEAL

DECISION:

1. **Appeal upheld**
2. **Penalties of 5 months disqualification on each charge, to be served concurrently, commencing 29 June 2023**
3. **50 percent of appeal deposit refunded**

1. The appellant, licensed trainer and breeder Kerry Lee Barrass, appeals against the decision of GWIC of 20 June 2023 to impose upon her two periods of disqualification of 6 months to be served concurrently.

2. The charges are, firstly, Charge 1 under Rule 21(3), which relevantly provides:

> "A person shall not cause or permit", .."any condition that is likely to be dangerous to the health, welfare or safety of the greyhound."

That was particularised, in summary terms, as being that the appellant parked her vehicle at 2pm with two greyhounds secured in the vehicle at a time when the temperature outside was in the vicinity of 28 degrees, that the windows were down 2 to 3 centimetres, one greyhound was muzzled with tape on the muzzle, the other just muzzled, and the taped muzzle restricted ability to drink water, caused the observations of distress and clearly panting in the greyhounds and she did not return until 3:20 pm.

Charge 2 is under Rule 165(a) which, relevantly, is;

> " that the appellant committed an act detrimental or prejudicial to the image of greyhound racing."

The particulars being the same but in addition, reference to insufficient ventilation, observation by members of the public to be in distress and contacted police, requirement for police to gain access to the vehicle, in areas accessible to the public. And it is said that the breach is the conveying of the impression that those involved in greyhounds do not appropriately care for their greyhounds.

3. The appellant was subject to a notice of proposed disciplinary action. She attended an inquiry on 22 May 2023. There were amended charges on 13 April 2023 in the terms read out. The inquiry resumed on 20 June 2023 and the determinations against which the appeal lies were made.

4. The appellant, up until the commencement of this hearing, had maintained a denial of the breach of each of those rules. At the commencement of today's hearing, pleas of guilty were entered to each charge. The evidence, therefore, need only be canvassed in less detail as it is now a severity appeal only.

5. The evidence has comprised the brief of 89 pages, which essentially contains correspondence, the transcript of the two days' hearing and the notice of proposed disciplinary action.

6. In addition to the evidence before GWIC, there has been produced a veterinary opinion of 10 July 2023 of Dr Hunter and a statement of Constable Brooks of 10 July 2023. In addition, the evidence comprised the body-worn

camera footage of Constable Brooks excluding, however, the oral parts of that recording which related to expressions of opinion by police officers which were those required to be of an expert such as a veterinarian. It might be said in passing that those opinions are not relied upon and the evidence of Dr Hunter is.

7. The facts are relatively brief. The appellant, a licensed trainer and breeder of some 23 years with no prior welfare or detrimental image-type matters in her past, being a person with eight dogs in work and two other dogs on her premises, engaged in the rehoming of greyhounds, and who works in a canteen at Taree Greyhound Racing Club, albeit on a paid basis, a person with a strong concern for the welfare of greyhounds, took the two subject greyhounds, which were to be rehomed, to a veterinarian for necessary treatment as part of the rehoming process.

8. She had with her a 16-year-old friend, Miss Oldham. Miss Oldham had an appointment at the local Taree Centrelink office, where she was to present herself with some material. The appellant was assisting Miss Oldham and did not leave the vehicle on a frolic of her own such as to go and shop, gamble, drink or engage in conduct other than that of assistance to a young person. That is relevant, in the Tribunal's opinion, to the objective seriousness so far as public perception is concerned.

9. The appellant parked her vehicle in the shade, wound the windows down some 2 to 3 centimetres, had provision in the vehicle, front and back, of water in buckets and some kibble. The back seat was down and the dogs able to lie down. The Tribunal notes in passing that the video images by the police officers at the time they interacted with the appellant showed that the shade had moved and there was sun on the vehicle. The extent to which that occurred is not known.

10. The appellant was absent for a period, it is said to be, of one hour and 10 minutes. The temperature outside was approximately 28 degrees. The temperature inside the vehicle is, by any nature, obviously greater than that. But the actual temperature inside not known. The Tribunal does not accept the statement by the appellant or Miss Oldham that they were able to observe the temperature inside the vehicle when it was subsequently turned on later to be 24 degrees as being a temperature, if in fact correct, which would have applied when the windows were in the position indicated and for the period of time in which the temperature in the vehicle would have built up.

11. Regardless of what the actual temperature was, there is clear and positive evidence of the impact upon the greyhounds of their presence in the vehicle as it was described.

12. Firstly, police received a message from members of the public – and it was said to be multiple messages – and a concern about the welfare of the

greyhounds. The police attended at 2:45, noting that the appellant returned at about 3:07, so there is a period of time after the appellant left to go to the Centrelink office and by the time the police arrived. It is not exactly known. There was some evidence about times at which the appellant went to the Centrelink office being after 2:30 because they were late, but that does not seem to correspond with the totality of the timings recorded by the police officers. One hour and 10 minutes is not the subject of demurrer in the submissions. Whether it was one hour 10 minutes or something less, it nevertheless was a sufficient period of time for the public to be concerned, for the police to be called and for protective action to be deemed necessary for the greyhounds.

13. The police officers observed a gap which they said was approximately one centimetre, although the evidence seems to indicate it might have been slightly greater. But, in any event, one dog was lying on the back seat, panting heavily and appeared to be suffering. The police officers noted the muzzling and that the second dog continued to lay down and stand up a number of times and appeared distressed. They were on a plastic tarp. And the police officer thought they did not appear to have access to water, but of course, there was water, as the evidence establishes, in the vehicles.

14, Regardless of those matters, therefore secondly, the police officers formed the opinion that it was necessary to take protective action. They attempted to contact the owner. They attempted to get the NRMA to attend. And after 20 minutes of those attempts, they broke the right-hand side window of the car. The precise time at which they did that is not known. The dogs were not removed from the car and the camera footage just shows their removal when Ms Barrass and Miss Oldham returned to the vehicle.

15. The camera footage has enabled Dr Hunter, who is a full-time veterinarian with the respondent GWIC, to form certain observations and certain conclusions. Her observations of the film were that the two dogs were each experiencing the effects of heat-related stress at the time they were removed from the vehicle and they could each be seen and heard to be panting heavily with their mouths open, have a rapid respiration rate, a noisy respiration, all of which indicated heat-related stress. And the concern of Dr Hunter was that the impact of an increased respiratory rate, increased heart rate, increased salivation, increase in core body temperature, lethargy and disorientation would follow.

16. She described the wearing of the plastic basket muzzles as being of concern because they caused the greyhounds to be unable to sufficiently open their mouths, and therefore their jaws, so as to prevent the tongue from protruding and creating a spade shape, and because they could not open their mouths properly to pant, they had reduced ability to transfer heat and maintain their core body temperature.

17. Having confirmed heat-related stress, and having described the impact of possible heat-related stress in considerable detail, which has not been challenged and need not require further analysis, there was a likelihood of increased risk of heatstroke potentially developing, further impeded by the presence of the tape on the muzzle.

18. The conclusion of Dr Hunter is that they were placed in a position where their health, welfare and safety was at significant risk, with the potential for serious injury or health complications, such as heat-related tissue or organ damage, or even death due to heatstroke being a real possibility. And her final conclusion was that their removal from the vehicle removed the serious consequence of that heat-related stress from occurring.

19. The appellant expressed to the police officers her regret. She expressed at the inquiry her regret and has expressed to the Tribunal her remorse for her failure.

20. The police issued the appellant with an infringement notice, which she did not read but immediately paid. That is said to work two ways. Firstly, to be an indication of her acceptance of her wrongdoing. But also said to be a reflection of her remorse for her conduct. The Tribunal does not find it necessary to focus upon the payment of that infringement notice because there is a plea in relation to each matter before it.

21. It is necessary, therefore, to determine objective seriousness and a likely penalty outcome. At the outset, there is no penalty guideline which applies to these matters. They are to be assessed under the general penalty provisions. However, the Tribunal does see some utility in looking at animal welfare matters generally as to penalty provisions considered appropriate by the regulator in providing some guidance as to where there should be a starting point of penalty in this matter.

22. Rules 21(1) and (2) mandate a necessity to ensure that the greyhounds are properly looked after. Under (1), such as food, drink and the like, and also under (2), to prevent unnecessary pain or suffering and the like. Sub rule (3) of the subject rule prevents danger to health, welfare or safety. It would seem to the Tribunal that (3) in fact might even be more serious than (1) and (2) because it talks of danger to health and welfare and the others merely talk about provisions for assistance of care and the avoidance of unnecessary pain and suffering. Unnecessary pain and suffering would seem to the Tribunal to be potentially less serious than danger to health, welfare or safety. But that does not require analysis.

23. The regulator has determined to have no penalty guideline for these breaches and does not suggest in its submissions today that the Tribunal's starting point should be 3 years or greater (which is the guideline for 21(1) and (2)) but it is noted by the Tribunal and relied upon in submissions today

that the regulator itself, when determining a starting point in this matter, considered 9 months' disqualification to be appropriate.

24. Firstly, in this matter, there is no suggestion that other than a disqualification is an appropriate outcome, so that the lesser penalties will not be analysed and nor does the Tribunal in any event consider those to be appropriate on the facts and circumstances of this case.

25. And the second point is that nevertheless it is appropriate to determine what is the objective seriousness of this case and not necessarily those of others – and it is said that there are no other parity cases, in any event – but to look to the facts here and see where the necessary protective order lies.

26. That requires a consideration, according to the High Court, of deterrence in the public interest. Deterrence has its two limbs.

27. The Tribunal is satisfied that the necessity for specific deterrence of this appellant is much reduced. It does so because of her long and satisfactory history, her concern for welfare of greyhounds, her failure on this occasion being one which was not outrageous and for which the Tribunal is satisfied there is not going to be a repetition of it. It does so by reason of her past history, her regret for her conduct and her indication generally that it will not occur again.

28. But that leaves very much alive general deterrence. General deterrence in this case is much driven by s 11 of the Greyhound Racing Act imposing an obligation on the regulator to ensure the welfare of greyhounds and, therefore, upon all people with the privilege of a licence that the welfare of a greyhound is paramount. That is reflected in the rules, not the least of which is Rule 21, to which reference has been made.

29. Here, the Tribunal is of the opinion that the conduct of the appellant was in fact so bad that there must be a clear and positive message of a general deterrent nature. That is, an indication to other privileged licensed persons in the industry, the gaming and wagering members of the public, and the public who have such an interest in this industry in two ways, one is in favour of it, and, secondly, those who are patently and publicly known to be against it, that those who infringe for the welfare of the greyhound will expect to lose the privilege of a licence.

30. That message is clear and loud on the facts of this case. But it is necessary to have regard to the fact that this was not a blatant disregard of the welfare of the greyhounds because the vehicle was in the shade, the windows were partially down and there was water available to them, albeit much limited by an incapacity to consume that water, which was not appreciated, but which nevertheless was intended to provide for their welfare.

And, as described by the Tribunal, both on charges 1 and 2, the fact that the appellant was not on a frolic of her own when this occurred.

31. The second matter of charge 2, and therefore this public image, as it might be summarised, issue is much enlivened in this case by the fact that members of the public observed these greyhounds to be in such a condition and their welfare of such concern that a number of them called the police.

32. The second aspect of public image is that the police in fact attended, and were required to attend, and did so and acted on a welfare basis. That very much impacts upon the prejudicial impact of the appellant's conduct upon the image of racing in a very negative way.

33. Again, charge 2 has no parity cases. The Tribunal views the welfare issue in this day and age much enlivened on these facts when considered for an image of racing, an image of greyhound racing in particular, to be a serious breach.

34. Subjectively, the appellant has, as described, a long and satisfactory history in the industry, a very strong fact to be taken into account. There are no prior matters, a further strong factor. But, quite extraordinarily here, there is that additional factor that the appellant has self-reported this matter to the regulator. It must be assumed that the police did not report it to the regulator, or had not got round to doing so, it is not known, but it came by reason of self-reporting.

35. Those matters motivated GWIC in its determination to give a 33⅓ percent discount. There is no suggestion to the contrary here. The Tribunal is of the opinion that the two key factors there are 23 years of clear history and self-reporting, and 33⅓ percent is a fair reflection of those matters on subjective facts.

36. The other subjective factor is the late plea. The GWIC officers were not obliged to consider a discount of 25 percent for an early admission of the breach before them, notwithstanding the fact that they considered, in any event, as submitted here today, a very strong case against the appellant and, therefore, the aspects of utility of plea were there going to be much reduced, anyway, and it is suggested the case here was so strong that the utility in the plea is nevertheless reduced.

37. It is, however, conceded in submissions for the respondent that there is some utility in that the Tribunal has not been required to determine guilt for itself. The Tribunal agrees. The Tribunal has dealt with these type of facts on many occasions in the past and said that there is a utilitarian value in a plea before the Tribunal, whether late or otherwise – and here it was late because the hearing was starting, it was not before the hearing started today – and the Tribunal has said on prior occasions – and the facts and circumstances, of

course, differ marginally from case to case – that that would warrant something like a 10 percent discount as compared to a 25 percent discount. The Tribunal is of the opinion that something in that nature is appropriate.

38. Returning then to objective seriousness and a starting point and then applying reductions.

39. A starting point of 9 months was seen by the regulator to be appropriate. The Tribunal does not have the benefit of parity cases and has analysed objective seriousness in detail. The Tribunal does not consider that the starting point of 9 months considered appropriate by the regulator is not appropriate to these facts and circumstances. There is, as described, a necessity to have regard to welfare and the integrity of the industry – two charges – very much enlivened here.

40. It is, therefore, a disqualification being appropriate, that the Tribunal determines for itself that a 9-month disqualification is not out of the appropriate range. It is not necessary to canvass in great detail whether something else might have informed the Tribunal to start at 6 months, 8 months or 12 months. It is guided by what the regulator considered to be appropriate, and which the Tribunal does not find inappropriate.

41. There is, therefore, a starting point in each matter of a disqualification of 9 months.

42. The Tribunal has then said there is a 33⅓ percent discount, which GWIC adopted, which gives a 3-month discount. There is then a 10 percent discount, approximately. The Tribunal does not propose to move in weeks and days and hours and minutes, it simply will allow generally for the plea matter a further discount of 1 month. That means discounts of 4 months. Four months from 9 months means in each matter a disqualification of 5 months.

43. GWIC determined that those matters be served concurrently. There is no suggestion to the contrary. The facts and circumstances arise out of one set of conduct and therefore the Tribunal is of the opinion, absent any arguments to the contrary, consistent with the determination below, that these penalties should be served concurrently from 29 June 2023.

44. The order is that for each of charges 1 and 2 there be a disqualification of 5 months and each penalty to be served concurrently and start on 29 June 2023.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

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

46. The appeal was a defended appeal, it became a severity appeal only. That change occurred at the commencement of the hearing, not earlier. The severity appeal has been successful in that the penalty was reduced. It was reduced based upon the late plea which led to a further discount of 1 month to that which was considered appropriate below.

47. In those circumstances, the Tribunal is of the opinion that 50 percent of the appeal deposit should be refunded and orders accordingly.