RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

RESERVED DECISION

5 SEPTEMBER 2023

APPELLANT ANTHONY DUGGAN

RESPONDENT GWIC

GRR 141(1)(a) X 2

DECISION:

1. **Appeal against breaches dismissed.**
2. **Severity appeal upheld**
3. **In each matter a suspension of 8 weeks, concurrent, to commence 29 August 2023.**
4. **Appeal deposit refunded**

INTRODUCTION

1. The appellant, Anthony Duggan ('the appellant"), licensed public trainer, appeals against the decision of GWIC ("the respondent") of 30 May 2023 to impose upon him two periods of 10-week suspension for two breaches found established against GRR 141(1)(a).

2. That rule was specified as follows:

> "141(1) The owner, trainer or other person in charge of a greyhound:
>
> > (a) nominated to compete in an Event;
>
> must present the greyhound free of any prohibited substance."
>
> GWIC particularised the charges as follows:
>
> "Charge 1
>
> That you as a registered public trainer (amended at the appeal hearing), while in charge of the greyhound Caen, presented the greyhound for the purpose of competing in race 3 at the Gosford meeting on 11 October 2022 in circumstances where the greyhound was not free of any prohibited substance.
>
> 2. The prohibited substance detected in the sample of urine taken from the greyhound following the event was cobalt at or in excess of the threshold of 100 nanograms per millilitre; and
>
> 3. Cobalt at or in excess of the threshold of 100 nanograms per millilitre is a prohibited substance under Rule 137 of the rules.
>
> Charge 2
>
> That you as a registered public trainer (amended at the appeal hearing), while in charge of the greyhound Caen, presented the greyhound for the purpose of competing in race 2 at The Gardens meeting on 2 December 2022 in circumstances where the greyhound was not free of any prohibited substance.
>
> 2. The prohibited substance detected in the sample of urine taken from the greyhound following the event was cobalt at or in excess of the threshold of 100 nanograms per millilitre; and
>
> 3. Cobalt at or in excess of the threshold of 100 nanograms per millilitre is a prohibited substance under Rule 137 of the rules.

3. At the GWIC's stewards inquiry of 30 May 2023, the appellant entered a plea of not guilty to each of the two charges and has maintained that denial of the breaches of the rule on appeal.

4. The Tribunal notes that at a directions hearing on 22 August 2023 and at the appeal hearing on 28 August 2023, the Tribunal advised, and the appellant understood, that by maintaining his pleas of not guilty, he would probably disentitle himself to any discount, such as a discount of 25 percent, for a plea of guilty and cooperation.

5. The evidence before the Tribunal has comprised a brief of evidence of 281 pages, which contains the usual formal parts and correspondence but importantly: a number of results of urine and blood testing of various dogs; a number of results of testing of soil samples taken from the appellant's property; references; a report from Lake Macquarie City Council; the transcript of the stewards' inquiry; the stewards' decision; four reports of Dr Major; one report of Dr Karamatic; the various submissions by email made by the appellant.

6. In addition, oral evidence was given by Dr Karamatic and Dr Major. The appellant did not give evidence before the Tribunal.

7. After objection was taken to parts of the contents of Dr Major's report, a number of redactions were made to those reports.

8. The Tribunal particularly notes that the appellant was not represented, despite the complexities of the issues identified by Dr Major and Dr Karamatic. It has to be said, therefore, that the Tribunal was not assisted by submissions from the appellant which carefully analysed the conflicting expert evidence and the conclusions that should be drawn by the Tribunal.

ISSUES

9. The first issue to be determined is whether cobalt is a prohibited substance under the GRR.

10. The second issue is, if the first issue is found in favour of the respondent, whether the appellant demonstrates under the McDonough principles that he was blameless.

11. The third key issue for determination is, if the appellant fails to succeed in respect of the first issue, the usual matters that go to penalty.

NSW GREYHOUND RACING RULES

12. **GRR 9 Definitions**

prohibited substance means a substance as defined by rule 137 of these Rules. It includes a permanently banned prohibited substance.

permanently banned prohibited substance means a substance defined in rule 139(1) of these Rules.

137 Meaning of prohibited substance

The substances set out below at rule 137(a) to 137(f) are prohibited substances unless they are an exempted substance.

(a) Substances capable at any time of causing either directly or indirectly an action or effect, or both an action and effect, within one or more of the following mammalian body systems:

ii. the cardiovascular system
iii. the respiratory system
iv. the digestive system
vi. the endocrine system
viii. the reproductive system
ix. the blood system

(b) Substances falling within, but not limited to, the following categories:

xlii. haematopoietic agents
lxii. vitamins administered by injection.

(d) any substance specified in Schedules 1 to 9 inclusive of the Standard for the Uniform Scheduling of Medicines and Poisons contained in the Australian Poisons Standard (Cth) as amended from time to time:

(e) unusual or abnormal amounts of an endogenous, environmental, dietary, or otherwise naturally present, substance;

139 Permanently banned prohibited substances, and certain offences in relation to them

(1) The following prohibited substances, or any metabolite, isomer or artefact of any of them are deemed to be permanently banned prohibited substances:

(n) hypoxia inducible factor (HIF)-1 stabilisers, including but not limited to cobalt and … and hypoxia inducible factor (HIF) activators …

140 Prohibited Substances subject to a threshold

In addition to the exempted substances, a substance is not a prohibited substance for certain offences identified in these Rules if detected at or below the following thresholds in a sample of the specified sample type:

(f) cobalt at or below a mass concentration of 100 nanograms per millilitre in a sample of urine taken from a greyhound.

154 Testing procedures, and the evidentiary value of certificates of analysis

(5) A certificate of analysis signed by a person at an approved laboratory who is authorised to and purports to have analysed a sample (“A” portion) is, with or

without proof of that person's signature, prima facie evidence of the matters contained in it in relation to the presence of a prohibited substance for the purpose of any proceeding pursuant to the Rules.

(6) A second certificate of analysis signed by a person at an approved laboratory who is authorised to and purports to have analysed another portion of a sample (the reserve ("B") portion) which confirms that the prohibited substance detected in the reserve ("B") portion and identified in the second certificate of analysis is the same as the prohibited substance detected in the "A" portion and identified in the first certificate of analysis constitutes, with or without proof of that person's signature and subject to subrule (8) below, together with the first certificate of analysis, conclusive evidence of the presence of a prohibited substance.

FACTS

13. The appellant is a 76-year-old Vietnam veteran who has worked in various fields but is now on a service disability pension.

14. In 2001 when he first started on that pension, he purchased the present property where he has bred and trained greyhounds. He was first licensed in 1988.

15. He has no prior prohibited substance presentations.

16. The number of starters that he has presented is not known, but he says he has had some 200 winners and his greyhounds have been swabbed on numerous occasions.

17. The appellant described in his submission to the stewards that he is a responsible trainer, always careful of food, supplements and medications being administered in the knowledge of positive cobalt swabs for other trainers. He also keeps himself abreast on the Internet and from other advisories from the regulator. He has always been quick to scratch a dog if he has concerns about its condition or treatment.

18. In his submission to the stewards he advised that a new driveway had been erected on his property with the necessity for excavation of earthworks. Heavy rainfall fell while this work was being done, causing groundwater and mud to go past the kennels and through the yards where the greyhounds are kept.

19. The appellant in that submission described the fact that the neighbour had installed a sewage treatment system which enabled the pumping out of greywater onto their property. That property was uphill from his property and when groundwater ran on that property it went directly through to his property, past the kennels and through the same yards. While the Tribunal will turn to it in more detail, the appellant in that submission set out the fact that the subject dog had been seen eating grass and dirt when in the day yard.

20. The appellant says his two dogs in training, being the subject dog and Too Sassy, all had the same diet and there was no change in their diet or treatment leading up to these events.

21. The appellant put before the stewards a report of Dr P. Yore, veterinarian, of 21 December 2022 where Dr Yore described the appellant as an extremely caring and conscientious participant who is very sensible, honest and punctual and with the highest possible rating as an individual and a trainer.

22. Likewise, a reference of 21 December 2022 of Dr John Newell, veterinarian, was also put in evidence and he had known the appellant for some 30 years and was used regularly by him and found him to be a dedicated greyhound trainer with a passion for the sport who is very conscious of the rules and always careful to comply in every aspect with medication and supplementations and who was not an individual who would consciously jeopardise his passion and life's interest and investment. He described him as a person even reluctant to give an injection for fear of incurring a positive swab.

23. The Tribunal also notes the evidence of the appellant that upon the recommendation of veterinarian Dr Newell he administered one injection of VAM 12 days prior to the race on 11 October 2022, being a time the appellant stated was outside the minimum withholding period for that substance.

24. On 10 June 2022, Caen raced at Gosford and produced a cobalt reading of 79 and, accordingly, a caution letter was sent to him on 1 July 2022. That advised of a sample exceeding a threshold and advising that the appellant should take appropriate measures to address this rising level, such as reviewing animal husbandry practices, checking cobalt levels present in the food given, and adjusting his supplement and medication practices.

25. The greyhound was presented to race at Gosford on 11 October 2022 and produced cobalt readings of 112 and 118 (Charge 1).

26. The greyhound had an out of competition test on 11 November 2022 and produced a cobalt reading of 36.

27. The greyhound raced at The Gardens on 2 December 2022 and produced cobalt readings of 123 and 133 (Charge 2).

28. The greyhound was subject to an out of competition test on 16 January 2023 and produced a cobalt reading in excess of 200.

29. The other greyhound, Too Sassy, was tested from Gosford on 31 May 2022 and had a cobalt reading of 26, and at Maitland on 28 November 2022, and had a cobalt reading of 69.

30. In an undated submission to the stewards, the appellant set out that upon receipt of the early warning letter of 1 July 2022, and prior to the positive swab notification, he withheld Ranvet Foliphos, which he described as organic phosphorous, folic acid and vitamin B12, from the greyhound, which he had usually administered post-race. He described how no other changes had been made to the dog's diet or regimen.

31. In January 2023, the appellant determined to have soil samples at his property tested and, converting the test result figures to those adopted by Dr Major, the following readings were ascertained:

> “behind the house 720 micrograms per kilogram
> upper fence line 1200 micrograms per kilogram
> yards 1600 micrograms per kilogram
> yards 11 kennel 1200 micrograms per kilogram”.

32. In March 2023, the respondent’s officers took soil samples from the appellant’s property and on 12 May 2023, the results reported were:

> top fence boundary 640 micrograms per kilogram
> in empty yards used by greyhounds that tested positive 920 micrograms per kilogram
> backyard behind house less than 500 micrograms per kilogram.

33. On 14 April 2023, the Environmental Health Officer for Lake Macquarie City Council reported to the appellant that he had conducted an inspection of the septic system on the neighbour up the hill and found it not to be operating in a satisfactory manner, with various breakages in irrigation lines resulting in pooling of waste water. Leaks were detected in the flush valve location which may have resulted in waste water evacuating the flush valve. While it was not able to be confirmed, it was stated there is a likelihood that waste water from the subject property could have entered the appellant’s property either at a subsurface or surface level.

34. Dr Wenzel carried out tests at the request of Dr Major on blood and urine from a number of greyhounds of the appellant. Blood leverls rangerd from 3.5 to 4.5 and urine levels from 8.7 to 18

GROUNDS OF APPEAL

35. The appellant’s final grounds of appeal were lodged on 22 June 2023 after several other statements with the equivalent nature of grounds of appeal.

36. Those grounds state that on the advice of Dr Major, the rules making cobalt a prohibited substance have insufficient scientific basis. Further, that the results in the subject greyhound were a result of environmental contamination and tests show that the dog was not doped. It is then stated that as cobalt is a naturally occurring substance, it is wrong to penalise for a presentation without there being means to test for the substance.

IS COBALT A PROHIBITED SUBSTANCE UNDER THE GRR?

37. The respondent relies upon an interpretation of Rule 140 to support its argument that that rule can be interpreted to demonstrate that cobalt is a prohibited substance under the rules.

38. That argument is that, as the rule states that cobalt under a threshold of 100 is not a prohibited substance, therefore the corollary is that if it is over 100, then it must be a prohibited substance.

39. The Tribunal does not agree with that proposition. To say something is not a prohibited substance because it is found at a certain level does not make it a prohibited substance by those words alone if it is greater than that level. That is, the Tribunal is of the opinion that it is first necessary to establish whether it is a prohibited substance as defined in Rule 137. If it is not within any of the provisions of Rule 137, then a level makes no difference. Further, Rule 137 does not deal with levels of substances.

40. Therefore, the Tribunal, applying a purposive interpretation to the Rules, finds that Rule 140 has no role to play until Rule 137 is satisfied.

41. The next interpretation issue advanced by the respondent was the use to be made of Rule 154(6).

42. As the Tribunal understands the respondent's submissions, the existence of two approved laboratory certificates of analysis to the effect that there is confirmation a prohibited substance is detected is sufficient to make that named prohibited substance, here cobalt, a prohibited substance.

43. If that is the correct interpretation of the argument, the Tribunal does not agree with it.

44. A laboratory is invited to carry out an analysis and determine whether a particular substance is detected. The Tribunal is satisfied that the laboratory cannot stand in the shoes of the rules. That is, that a substance must first be determined to be a prohibited substance under Rule 137 before a laboratory can certify it to be a prohibited substance and not vice versa.

45. As the Tribunal understands from previous hearings, the way in which the laboratory works is that it is given a list of substances and it carries out an analysis of the sample to determine if a named substance is found. That is, the status of cobalt as a prohibited substance is identified by the regulator and then the laboratory is asked to test for that substance and therefore the certificate stating it is a prohibited substance does no more than identify that named substance.

46. Therefore, the Tribunal has to find whether cobalt falls within Rule 137 as relied upon by Dr Karamatic in these proceedings.

47. The above summary of Rule 137 is adopted from Dr Karamatic's report in these proceedings. Accordingly, the remaining provisions of Rule 137 are not considered.

48. It is the respondent's position, based upon Dr Karamatic's evidence set out in his report, that each of the particular provisions of Rule 137 set out above are satisfied to make cobalt a prohibited substance. Of course, it is only necessary to find one of those, and not all of them, to meet that test.

Rule 137(a) – Substances capable

49. The particular subparts of subrule (a) relied upon by Dr Karamatic are set out above.

50. The main focus has been upon 137(a)(ii) – cardiovascular system, although passing reference was made to some of the others.

51. Dr Major in his report of 20 June 2023 said that the effect on the cardiovascular system has never found much air.

52. Dr Major defined the cardiovascular system as one relating to the heart and blood vessels and that the heart is connected to the closed circulatory system of blood vessels.

53. Dr Major says this issue has not been previously considered and there is no research work directed to this proposition. Accordingly, there is no published literature.

54. He stated that cobalt does not have a specific pharmacologic effect on any body system. He said its only therapeutic use is in the prevention of pernicious anaemia. He described other substances which have an effect on the cardiovascular system, but these do not need examination.

55. Dr Major then referred to a report of Burns and others titled “Effect of Intravenous Administration of Cobalt Chloride to Horses on Clinical and Hemodynamic Variables”, Journal of Veterinary Internal Medicine 2018. 32(1): page 441-449. In that trial, 2000 milligrams of cobalt was intravenously administered to horses and that produced transient cardiovascular effects. Those abnormalities resolved within 20 minutes and back to normal within two hours. Dr Major noted that those 2000 milligrams are 4000 times the recommended oral intake.

56. Dr Major then went on to note that tap water, cobalt and fluoride will all affect the cardiovascular system to the point of causing death, in extreme dosage.

57. In answer to a question from the Tribunal during oral evidence, Dr Major expanded upon those last two remarks to indicate that there would only be a cardiovascular effect when toxic-type doses were administered.

58. In his report of 24 July 2023, Dr Karamatic noted that acute toxicity in larger doses causes cell death. He quoted reports that indicate that cobalt has been associated with a number of these toxic effects, including to the cardiovascular, respiratory, reproductive, gastrointestinal, endocrine and urological systems. He relied upon the report of Ho, which is “Controlling the misuse of cobalt in horses”, Drug Testing and Analysis 2015 John Wiley & Sons Ltd (7) 21-30, 2015.

59. Dr Karamatic replied to Dr Major’s report stating the definition of a cardiovascular system is one that includes the heart, blood and blood vessels. He referred to the several parts of the definition making cobalt a prohibited substance and not just through it being capable of affecting the cardiovascular system. He particularly noted

toxic effects of cobalt in most body systems including the cardiovascular, respiratory, genitourinary system, and therefore it is a prohibited substance.

60. In cross-examination, Dr Karamatic agreed that the levels in the subject dog were trace levels and therefore not toxic. His further answer was that cobalt had the potential to be toxic.

61. The conclusion the Tribunal reaches is that the evidence establishes that at a toxic dose there can be an effect on the cardiovascular system and, indeed, the other listed systems.

62. It is possible that at non-toxic doses such an effect may take place but it is not necessary to determine that and the evidence here would seem to indicate the necessary capability but has not been sufficiently examined.

63. It is important to recognise that the 137(1)(a) test only requires establishment of a capacity to do something. That is, to have the potential to do something. The rest of the words are also critical and they deal with “at any time”, as well as a direct or indirect “action or effect”. Those are very broad terms.

64. The Tribunal is satisfied that cobalt has the capacity at any time to directly effect and has an action upon the cardiovascular system and in all probability the other systems listed by Dr Karamatic.

65. Accordingly, cobalt falls within the meaning of a prohibited substance under rule 137(a).

Haematopoietic agent under 137(b)

66. This issue has not been examined to the same extent in these proceedings as in harness racing appeals.

67. Dr Major referred to the Tribunal’s finding in Hughes v HRNSW 2018 where the Tribunal stated at 94:

> “It must be concluded, in the absence of direct evidence, that cobalt is not a haematopoietic in a horse.”

68. However, Dr Major did not go on to state what the Tribunal said in paragraph 93:

> “Dr Wainscott in his report in reply agreed that cobalt is not a haematopoietic in a horse but said studies show it is in other mammals. … able to exert a haematopoietic … in the horse because it has in other mammals.”

69. In other words, whilst it may not be a hematopoietic in a horse, it can be in other mammals such as a dog.

70. Accordingly, it is necessary to examine whether cobalt is a hematopoietic in a greyhound.

71. Dr Major in his report of 20 June 2023 noted the contentions that cobalt is a haematopoietic. He noted it was also contended to be an erythropoietic agent because it induces excessive production of red blood cells. He referred to various definitions such as it being correctly a haematinic, which are nutrients.

72. He then noted that the human red cell has a lifespan of approximately 120 days and haematopoiesis occurs in bone marrow and it is believed that greyhounds manufacturing red cells in the bone marrow may take a lesser period of time.

73. Therefore, he opined that it would be incongruous to administer close to race to be beneficial.

74. He then referred to old and what he said was discredited research on the subject, particularly a 1937 report by Davis and a 1937 report by Brewer. Without examining the treatise set out in respect of those old reports, he concluded that more recently published reports show that in horses, extremely high levels of cobalt administration have no significant detectable effect on physiology.

75. He therefore concluded that there is no evidence that cobalt is a haematopoietic or an erythropoietic in a dog as it does not affect the haematopoietic system and therefore is not a substance capable of affecting the hematopoietic system.

76. Dr Karamatic in his report of 24 July 2023 referred to postulation that cobalt does enhance erythropoiesis. Therefore, he said, it has the potential to improve performance by raising the blood oxygen-carrying capacity. He said cobalt is an EPO in the greyhound and relied upon reports of Fisher "The Influence of Hypoxemia and Cobalt on Erythropoietin Production in the Isolated Perfused Dog Kidney" Blood (1967) 29 (1): 114-125 and Fisher "Influence of Alkylating Agents on Kidney Erythropoietin Production", Cancer Res (1964) 24 (6_Part_1): 983-988.

77. Therefore, he concluded cobalt is capable of inducing hypoxia-like responses which are capable of inducing gene modulation at the hypoxia inducible factor pathway to increase erythropoietin expression and therefore its potential abuse as a blood doping agent in racing.

78. He noted it was particularly effective in the treatment of anaemia. He then referred to acute toxicity to which reference has been made earlier.

79. In response to Dr Major's report, he particularly stated the capacity to affect a greyhound's condition or performance is more likely to be positive unless toxic doses are administered. He says there does not need to be a proven effect on performance or condition. He also noted the difficulty of proving the absence of something rather than its presence.

80. In his report in reply of 28 July 2023, Dr Major criticised reliance upon the reports of Fisher on the basis of their age and the fact that the research was not conducted on a dog but on a kidney removed from a dead dog and hung on a stand. Dr Major referred to later reports of Finley "Dose-response relationships for blood cobalt concentrations

and health effects: a review of the literature and application of a biokinetic model" J Toxicol Environ Health B Crit Rev. 2012;15(8):493-523 where the author reviewed 500 research papers relating to cobalt in a range of species and found no research reported any effect, either physiological or toxicological, at a blood level of under 300 nanograms per millilitre. He then noted that Caen, the subject greyhound, had a blood cobalt level of 4.5 ng/mL, which is only a trace level of a trace element.

81. Based upon this limited evidence in these proceedings, the Tribunal finds the resolution of this issue a difficult one. No submissions from the appellant does not assist

82. Certainly, some of the research relied upon is relatively old, but that is the research that is available. Subsequent analysis of other research is not the same as research of a direct nature itself.

83. The Tribunal has to be satisfied to a comfortable level of satisfaction that the respondent has established that cobalt is a haematopoietic.

84. The absence of direct research is troubling.

85. On balance and at a comfortable level of satisfaction, in respect of the greyhound, the respondent satisfies the Tribunal that cobalt can have effect on the growth and maturation of blood cells. It is not necessary to establish the levels of cobalt needed to effect that, nor whether there has to be a significant detectable effect.

86. The other determinations that cobalt is a prohibited substance under the rules mean that this determination is not in fact critical to the determinations required in these proceedings. This determination is made upon an analysis of the limited evidence available to the Tribunal in this case.

87. Cobalt falls within 137(b) as an haematoepoietic agent

Vitamins administered by injection – GRR 137(b)(lxii)

88. Dr Karamatic states that vitamin B12 contains cobalt and there is no doubt from Dr Major's reports in other proceedings that that is in fact correct. There is no issue that vitamin B12 can be administered by injection.

89. As broad as this rule is, that unchallenged evidence establishes that vitamin B12 containing cobalt makes cobalt a vitamin administered by injection.

90. It is also noted in these proceedings that vitamin B12 plays no part as it was not used at any relevant time by the appellant.

91. That determination makes cobalt a prohibited substance under 137(b)(lxii).

Substance specified in Schedules 1 to 9 of the Australian Poisons Standard – GRR 137(d)

92. Dr Karamatic states that Schedule 4, which the Tribunal notes is titled “Prescription Only Medicine” and “Prescription Animal Remedy” makes reference to “Cobalt for human therapeutic use”.

93. Accordingly, without further examination, cobalt for human therapeutic use, being identified in Schedule 4, makes cobalt a substance under 137(d).

94. Many hundreds of such items are specified and this, therefore, becomes an exceptionally broad rule for capturing a substance as a prohibited substance under the GRR.

95. However, that is the way the rule is worded.

96. The fact that it has to be cobalt for human therapeutic use does not mean that it is not captured in some way under the Schedule because it is not a prescribed animal remedy. The wording of the rule is too broad to enable that to be an avoidance mechanism.

97. The Tribunal notes the appellant did not raise any evidence or submissions on this issue.

98. That makes cobalt a substance specified in the Schedule under137(d).

Abnormal endogenous substances – GRR 137(e)

99. Other than Dr Major’s evidence in response to the Tribunal questions that this sub-rule does not specify high or low or define abnormal, the appellant took no issue in respect of this category.

100. Dr Karamatic’s evidence establishes that various studies have demonstrated that a cobalt reading less than 9 is found in 95 percent of 85,000 samples and gives what might be described as a normal reading.

101. That and previous population studies were substantial.

102. They are sufficiently broad-based to satisfy the Tribunal that a reading of less than 9 is normal.

103. Abnormal means not normal. A closer analysis of the meaning of the word is not necessary.

104. Cobalt is endogenous.

105. Accordingly, the Tribunal is satisfied that cobalt, if it is found in abnormal amounts which are greater than 9, and it can be, is sufficient to establish that in that particular case cobalt is a prohibited substance.

106. That definition does not require analysis of whether the test is that if a substance is capable of being in an abnormal amount, then every substance would normally be

a prohibited substance if it is endogenous. A purposive interpretation would not mandate that approach.

107. Cobalt can be found in abnormal amounts compared to the normal population.

108. The respondent satisfies the Tribunal that 137(e) is met.

Permanently banned prohibited substance – 139(1)(n)

109. Noting that the respondent does not suggest that the principles relating to a permanently banned prohibited substance are activated, nevertheless, the respondent relies upon the definitions set out above.

110. That is, a prohibited substance includes a permanently banned prohibited substance. In other words, if it is found in fact that cobalt is a permanently banned prohibited substance, then it is a prohibited substance.

111. The issue whether cobalt is a hypoxia inducible factor (HIF-1) stabiliser does not have to be determined on the basis that the respondent establishes it is.

112. That brief comment arises because the rule is written on the basis that cobalt is an HIF-1. That arises because the rule says, "including but not limited to cobalt".

113. Accordingly, whether it is an HIF-1 stabiliser or not, in fact, the rule makes it one by including it as such.

114. It is not necessary to determine whether the use of the word "including" rather than the word "deemed" means that the Tribunal has to see whether the appellant has rebutted the inclusion of cobalt as an HIF-1 or not.

115. Accordingly, the Tribunal merely notes the arguments, which do not have to be resolved.

116. Essentially, those arguments are the same as those advanced in respect of haematopoietic.

117. Dr Karamatic essentially did not examine this because he considers there has to be levels greater than 1000 for cobalt before it could be a permanently banned prohibited substance for prosecution.

118. Cobalt is a permanently banned prohibited substance under 139(1)(n).

Conclusion on Prohibited Substance

119. The respondent satisfies the Tribunal that cobalt is a prohibited substance under the rules.

120. That element of the appellant's case is dismissed.

BREACH OF THE RULE

121. The appellant does not contest that he presented the greyhound to race on the two occasions set out in the particulars. The appellant does not contest that the readings of the samples taken in each of those two tests exceeded the threshold of 100.

122. The appellant does not contest that under Rule 154(6) the Tribunal now has conclusive evidence of the presence of the prohibited substance, now found to be cobalt, in the greyhound on each of those two occasions.

123. Those are the ingredients of the charges which the respondent has to establish, and in each case the respondent establishes each of the particulars pleaded.

124. The Tribunal therefore finds that the appellant has breached the rule on each of the two occasions charged.

125. That part of the appeal against a finding of the breach of the rules is dismissed.

126. The Tribunal now has to determine penalty.

PENALTY

127. The appellant does not raise any issues on the principles to be applied on penalty.

128. Accordingly, the Tribunal will not set out a detailed statement of principles to be applied.

129. In essence, the Tribunal has to find a civil disciplinary penalty which contains a message of deterrence in the public interest for the protection of the industry. That penalty must be based on the actual facts and circumstances of this case and the conduct of the appellant. No greater penalty than those facts and circumstances warrant should be applied, otherwise it would be oppressive.

130. In determining that penalty, the Tribunal has to have regard not only to the facts and circumstances of the case, but issues of specific and general deterrence, parity, and find, based upon that objective seriousness, a starting point of penalty.

131. There is then to be discounted, if appropriate to the facts and circumstances of the case, a discount for the personal circumstances of the appellant.

132. The Tribunal will apply the principles in McDonough and that, on the facts of this case, will necessitate a determination whether the appellant was blameless or could not have done anything else to avoid a commission of the breach, in which case he is to be dealt with leniently with the possibility of no action or a small fine under category 3. Alternatively, if he cannot establish, and the onus is upon him, those matters, then he is to be dealt with under McDonough category 2.

133. The Tribunal has no evidence upon which it could find a McDonough category 1, which would necessitate a finding of the fault in the appellant by the administration of the drug or the failure to prevent its administration.

CAUSE OF THESE POSITIVES

134. The primary position in cases such as this is that the respondent does not have to prove how, when, where, or by what route cobalt came to be present in the greyhound on the two occasions.

135. Precedent establishes that the burden is upon the appellant to establish that he was a McDonough category 3, that is, blameless or could not have done anything to avoid the commission of the offences.

136. The appellant advances various theories and the respondent has answered those.

137. The appellant relies upon Dr Major's various statements.

138. The Tribunal is satisfied that the prohibited substance test focuses upon total cobalt.

139. Accordingly, Dr. Major's oft-repeated theory that urine is not an appropriate test for total cobalt exposure does not have to be determined in this case. His preference for testing plasma does not have to be examined.

140. The rule is written on the basis that the cobalt is to be tested in urine. Accordingly, plasma is not relevant to that test. Plasma may be relevant to provide corroborative evidence of other facts.

141. The readings do not have to be adjusted for urine concentration and/or dehydration. The Tribunal is satisfied that the number of greyhounds tested to provide a normal range of less than 9 is such that all of those types of variables are taken into account.

142. The Tribunal does not accept Dr Major's thesis that the variables are not ironed out by those numbers of samples. The statistics are not disregarded because those sampled had no known cobalt administration status.

143. Accordingly, that part of Dr Major's theory that the positives here were caused by a combination of a concentrated urine sample and the ingestion of soil from the run are reduced to a consideration of the issue relating to soil.

144. Vitamin B12 has no part to play in these proceedings and a necessity to differentiate the inorganic cobalt salts from vitamin B12 as against the organic cobalt does not have to be determined.

145. The Tribunal notes the evidence of the appellant, established through his various submissions, at the stewards' inquiry and through the reports of Dr Major, that he is not able to focus upon other possible causes.

146. There is no evidence of any of the feed being used by the appellant having excessive quantities of cobalt to that expected or explained on the labels on those products that has arisen for consideration. There is simply no evidence.

147. The Tribunal accepts that there is a cumulation of cobalt in a greyhound from consumption of feed.

148. Considered alone, however, there is no evidence in this case to provide that feed has contributed to the reading here in any material way. The numerous studies establish that a normal dietary regime will not lead to excessive cobalt readings or alone be part of the cumulation that would cause them.

149. There is no other evidence of other supplements which, other than VAM, require consideration.

150. The Tribunal notes that VAM was administered to this greyhound some 12 days before its first presentation, but there is no such reference in respect of the second presentation.

151. The evidence of Dr Karamatic satisfies the Tribunal that that injection of VAM would have been eliminated from the greyhound's system within 48 hours, or, with a second dose, 72 hours. Some small cumulative effect will have occurred, but the Tribunal notes that that would still have been some 9 days before the first presentation and there is no relevance to the second presentation. Noting a withholding period of 96 hours was recommended with VAM injection studies, there is still a period long before this presentation, and it was only the first presentation, that needs to be even slightly considered.

152. VAM plays no part when considered in isolation or on any cumulation basis.

153. The Tribunal notes that it is Dr Karamatic's theory that there is a dietary cause, including supplementation, to account for these readings.

154. The Tribunal notes the evidence of Dr Karamatic summarised in his report in relation to the national population surveys.

155. The expert evidence on population studies from Prof Hibbert is that the chances of a greyhound exceeding the threshold without administration of cobalt is essentially zero. Those studies have not been examined in any detail here and that simple conclusion, together with the earlier stated normal levels of today being less than 9, are all that needs to be set out.

156. Dr Karamatic does accept there can be individual variability in excretion and detection times based upon things such as general health, dose rate, treatment duration and frequency, route of administration and pharmaceutical preparation.

157. However, the evidence in these proceedings does not elevate any of those matters to a level where they can be, when considered individually or collectively or together with any other possible contributor, as playing any part in these positive readings.

158. The Tribunal notes that after the warning letter, the appellant ceased the use of certain supplements for the greyhounds. The Tribunal notes that each of the readings for both Caen and Too Sassy from their pre-race, post-race and out of competition testing all returned abnormal levels. That is, levels above not less than 9. Other than the subject presentations, each of the readings is, however, below the threshold, with the exception of the out of competition test of greater than 200 on 16 January 2023.

159. Dr Major in his report of 1 March 2023 opined that these cobalt levels were caused by feed, water, supplements and environmental issues.

160. He says that the results in relation to four greyhounds of the appellant tested by Dr Wenzel all proved that there was no doping because the urine cobalt levels ranged from 8.7 to 18. He also opined that none of the greyhounds had received excessive cobalt in supplements or diet.

161. That would seem to eliminate two of the four factors upon which Dr Major expressed his opinion, leaving water and the environment.

162. Essentially, water, as it is advanced by Dr Major, turns upon dehydration, or hydration, status. As stated previously, the Tribunal is satisfied that those factors can be disregarded because of the national population studies taking those matters into account.

163. It would be useful at this stage to acknowledge that there is no scientific evidence to establish in fact that cobalt in a greyhound is performance-enhancing. That is only relevant on an issue of motive.

164. It is also useful to dispose of the issue whether there are welfare considerations or toxicity considerations on the facts of this case. Neither of those matters arise relevant to why the readings occurred or on the issue of penalty.

165. It might also be noted that at the stewards' inquiry, Dr Major conceded that there was no evidence of a high concentration of cobalt in the feed. It is also noted that that there has been no research on a longer exposure time to cobalt causing increases in red blood cells. ** Dr Karamatic conceded in oral evidence that kibble could be a source of cobalt, as it had been in another case in Victoria. The Tribunal notes, however, that there is no evidence in relation to any samples of the appellant which might account for food being the cause or a cumulating part of the positive readings here.

Soil

166. It is apparent that the appellant is very strongly of the opinion that contaminated soil has been the cause.

167. The Tribunal eliminates any contribution from the seepage caused by the defective septic system on the neighbour's property.

168. It does so because whilst it accepts that there has been seepage from that property, there is no evidence of any testing of the system to indicate that it contains cobalt at any level sufficient after seepage to have contaminated the soil or contaminated the soil to a level where it indicates that the detected levels of cobalt in the soil are attributable to the septic system. The contribution from that source is simply unknown and not proven by the appellant.

169. The soil sample collection undertaken and subsequent analysis of those soil sample collections on behalf of the respondent and by the Department of Primary Industries are set out earlier.

170. The evidence for the appellant on the consumption of soil by Caen is not persuasive. At the stewards' inquiry, the following evidence was give:

> "Question: … Have you observed it to – eat soil or ingest soil …
>
> Answer: There's a certain period of time where, not only her but several others, and we really don't know why – why they're doing it.
>
> Question: … can you recall when this occurred and for how long had it occurred?
>
> Answer: Well, actually, it's an on and off thing. I've – I've got one or two now that I'm very concerned about, they're doing exactly the same thing. …
>
> Question: And you physically observed Caen?
>
> Answer: Yes.
>
> Question: … or was there signs in the yard that it had been ingesting soil?
>
> Answer: Both. Both, yes."
>
> And later:
>
> "Answer: You can see around the – the gate where the yards are, where it's actually grass where they've been digging and eating.
>
> Question: All right. And, did you observe this or see signs of this in – in the lead up to both these races in question on the, you know, on 11 October and 2 December?

> Answer: Yes. It's – it's an ongoing thing. We're continually filling these holes where they're digging and eating."

171. That evidence establishes that at or about the time of each of the subject races Caen was observed to be ingesting soil, but that evidence was based on it being an ongoing thing and the necessity to continue to fill the holes where they had been digging and eating. It establishes that the appellant had physically observed Caen ingesting soil.

172. On the other hand, the quantity of soil consumed on any occasion or over any period of time is simply not given. The precise frequency, for example, on a daily basis, is not given. At its highest, it was an on and off thing. It is noted that other greyhounds were doing the same thing.

173. Accordingly, the Tribunal can only be satisfied that from time to time Caen ingested unknown quantities of soil but did so on an ongoing basis.

174. It is open to conclude that Too Sassy is included amongst the other dogs that were doing it.

175. However, the frequency with which Too Sassy was doing it and the relationship of that greyhound's consumption to the dates of its testing are not known.

176. The appellant's submission to the stewards stated that Caen had been seen eating grass and dirt in the day yard but Too Sassy had not been witnessed doing this.

177. The Tribunal notes that the DPI reading of the yards indicates 1600 micrograms per kilogram. The RASL readings on behalf of the respondent indicated the empty yards used by the greyhounds had tested positive, a reading of 920 micrograms per kilogram.

178. The Tribunal notes in assessing the impact of cobalt in the soil that the appellant has been at this property for some 21 years and using it for breeding and training of greyhounds and that in that time, whilst he has had an unknown number of starters, he has had 200 winners and, the Tribunal accepts, a considerable number of swabs. None of those other swabs have produced positive readings to which there can be some suggestion that the soil has been contaminated with cobalt to a level where it has contributed to positive readings or presentations.

179. There is nothing about the evidence that specifically distinguishes the conduct of greyhounds over those 21 years as against the eating habits of Caen and Too Sassy. The evidence that they have all been doing it seems to have a current connotation attached to it.

180. Even if the septic system run off was relevant in time here that has been eliminated as a contributor.

181. That leaves unexplained why, if this property is contaminated with such high levels of cobalt in the soil, there have not been other presentations of a positive nature over the years.

182. Dr Major in his report of 1 March 2023 noted that research conducted by NSW Greyhound Racing Authority indicated when a dog received 300 micrograms of cobalt by mouth on a single occasion, it produced a urine sample greater than 100 micrograms per litre. (Maximum recorded level 317 micrograms per litre).

183. Dr Major then equated VAM paste and its contents of cobalt with that same maximum reading of 317 to be above the threshold for up to six hours and return to resting levels at 24 hours, but there was a possible cumulative effect identified. He said this trial indicated a 30-kilogram dog would have received 300 micrograms of cobalt by mouth as a single dose.

184. Dr Major therefore opined that if the appellant's dogs consumed significant amounts of this soil, it would make a measurable effect on race day urine cobalt levels.

185. Dr Major in his report of 20 June 2023, having noted the soil samples with up to 1600 micrograms per kilogram, which soil the subject greyhound was seen to ingest, would lead to conclusions, because different greyhounds can produce different results, that having eliminated the statistics from population studies, he concluded that there was a combination of concentrated urine sample and ingestion of soil from the run. That was not further expanded upon.

186. That evidence does not enable the Tribunal to be comfortably satisfied in respect of the contribution of soil because of the absence of an analysis of the facts other than the amount of cobalt in the soil.

187. Dr Karamatic analysed in his report of 24 July 2023 the various readings for Caen and Too Sassy which have been set out above. These readings he said confirmed the exposure of the greyhounds to more cobalt than is normal prior to the samples being collected. He said they had abnormal amounts of cobalt. He said these results do not reflect normal cobalt concentration.

188. He therefore opined the more likely explanation to be a dietary cause, including supplementation, but there was limited information in the materials provided to assist him in identifying a cause.

189. Dr Karamatic then, as set out above, reflected upon the chance of a greyhound exceeding the threshold without administration of cobalt is essentially zero. He then said there would have to be an administration of cobalt in some form to the greyhound for it to exceed the threshold.

190. Dr Karamatic, then having eliminated Dr Major's opinion that there should be a normalisation for urine concentration as set out earlier, then examined the theory about the ingestion of soil.

191. Dr Karamatic did not agree that it was highly likely that the ingestion of soil has been the cause. He also said it would not have been the cause of the six abnormal cobalt readings just summarised, particularly as there were different conditions, being pre-race, post-race and out of competition, and those over a period of seven months.

192. He therefore concluded the results here are more consistent with a dietary cause such as supplementation with a product containing cobalt.

193. Further on the issue of soil, noting the test results of up to 920 micrograms per kilogram or 1.6 micrograms per kilogram, that there would be an equivalence of up to 3 mls of VAM in a greyhound consuming around 0.2 to 0.3 kilograms of the highest concentrated soil. He said it would be unusual for a greyhound to regularly consume this much soil.

194. He was reinforced in that conclusion that Too Sassy's result of 28 November 2022 also identified an abnormal amount of cobalt but that only Caen was suggested to be eating the soil. The Tribunal notes that Too Sassy, on the evidence above, may have been consuming soil but at an entirely unknown quantity.

195. The Tribunal notes that Dr Karamatic refers to the consumption of 0.2 to 0.3 kilograms, and that appears to be on a daily intake rather than over a substantial period of time, and in addition, that it would have to be taken from the highest concentrated soil.

196. Dr Major in his final report of 16 May 2023 did not directly address those submissions but had stated in his report at its introduction that he was "in agreement with most of his report" and confined his reply to issues he considered relevant. None of that reply issue directly dealt with the precise amount and consumption of highly concentrated soil and the possibility it might have contributed.

197. Dr Major gave evidence at the stewards' inquiry on 30 May 2023.

198. In that evidence, Dr Major stated there was a combination of exposure through soil, as all dogs eat a certain amount of soil, plus the other contributors, such as concentrated samples and normal dietary intake to be considered. There he opined about the combination of food, supplements, environment and the water.

199. It is noted he had referred to another case where the trainer Amanda Brunton had had tests carried out where a greyhound was kept in a kennel and its levels went down and put out in the yard where it ate dirt and the levels went up.

200. He therefore opined that a dog that eats soil could, in the right circumstances, exceed the threshold.

201. He opined that it was possible, quite likely, that soil would have contributed to the high readings. He said that if you give 300 milligrams orally to a dog you are going to exceed the threshold. He then noted that the higher levels appeared to be where the effluent was from the next door neighbour's property, but he did not know what was in

the neighbour's septic tank. He could only put that as a contributor as possible. The Tribunal dealt with that earlier.

202. Again, he equated one shot of VAM to being 300 micrograms of cobalt in soil. On questioning by the stewards, Dr Major stated that a questioner was right when it was put that if the dog ate one kilo of dirt, that would equate to 1.6 milligrams of cobalt. That would then produce a reading around 310 on equivalency with VAM.

203. Dr Major also said he did not know exactly how soil was processed by way of ingestion on a daily basis.

204. At the Tribunal hearing, Dr Karamatic said in relation to the issue of soil it would depend on the amount consumed and how it was absorbed.

205. Dr Karamatic was of the opinion that the readings of the cobalt in the subject soil were not unusual. That is, cobalt in soil is normal, but it all depends on how it would be eaten and digested. He felt it would be difficult to digest and cause a slower absorption.

206. He was of the opinion that a greyhound would not regularly consume 0.2 to 0.3 kilograms of cobalt on a regular basis, but might do it on a one-off basis. That it was difficult to believe that a greyhound would consume every day, not just the day of the sample, and that then, relevant to the various testings here, over a period of 7 months with multiple dogs, producing a result to cobalt from soil, whereas he was of the opinion it was dietarily based.

207. He reinforced his evidence that a greyhound would not consume 200 to 300 grams of soil on a daily basis.

208. He saw nothing unusual in the different readings of Caen because levels rise and fall.

209. Dr Karamatic conceded that no studies had been carried out on the consumption of soil by greyhounds and its impact.

210. Dr Major conceded at the Tribunal hearing that it was not known how much this greyhound consumed. He opined that half a cupful would equate to 200 grams. He remained of the opinion, however, that soil could be the most likely cause.

211. In submissions, the respondent said it was not possible to correlate the soil-testing results to the presentations in question here because the readings in June and November did not exceed the threshold.

212. The respondent fairly conceded the attempts by the appellant to genuinely establish his belief that the soil contributed.

213. In submissions, the appellant maintained his belief that the soil was the major contributor to the positives.

214. The Tribunal is satisfied that the various abnormal readings which have been listed and the blood testing carried out by Dr Wenzel indicate that there are readings above the norm on a number of occasions for a number of these greyhounds.

215. However, the paucity of evidence in relation to the actual consumption by Caen of a sufficient amount of soil to cause on a cumulation basis the readings as high as they are here is such that the soil theory is not accepted.

216. There is no doubt that the soil ingestion may have caused some form of cumulation.

217. However, there is not evidence of a sufficient amount of soil being consumed over a sufficient period of time to establish that the level in Caen was attributable to soil ingestion.

218. The appellant establishes that Caen did from time to time ingest soil, and it may have been on occasions up to 200 grams on any one occasion. But not 200 or 300 grams of sufficient frequency to cause that cumulation.

219. With its equivalent on the evidence to VAM consumption, it is apparent that one-off ingestions of soil, although more slowly absorbed than other means of ingestion of cobalt or cobalt-containing substances, would nevertheless have been eliminated in sufficient amounts to not cause cumulation to the level which would account for these readings.

220. As stated, the contamination of the soil, if any, from the septic system is not established as a fact going to why this soil was contaminated or otherwise add to the possibility by way of cumulation of cobalt in Caen’s system.

221. In other words, the Tribunal prefers the assessment of the evidence by Dr Karamatic over the assessment of Dr Major on the relevance of soil.

222. The conclusion the Tribunal reaches, therefore, on the cause here is that the appellant fails to demonstrate he was blameless, or there was nothing else he could have done.

223. That means the Tribunal concludes that the appellant advances no explanation that the Tribunal accepts for the positive readings on these two occasions.

224. Under the McDonough principles, therefore, he is to be assessed at category 2 and a penalty appropriate to the facts and circumstances applied. That means that the last two of the four elements advanced by Dr Major of soil and water do not arise either individually or collectively.

225. The four factors advanced by Dr Major of feed, supplement, water and soil are not established by the appellant as to being the cause of these high readings.

226. That can only leave for consideration Dr Karamatic’s theory that there was a dietary or other supplementation cause and that other supplementation cause is not

known. The actual dietary cause is also not established, but the respondent does not have to establish that.

STARTING POINT FOR PENALTY- OBJECTIVE SERIOUSNESS

227. The Tribunal's first function is to determine objective seriousness on the tests outlined earlier.

228. Here the readings were not high, being 112/118 and 123/133. They exceed the threshold but not at a high level.

229. There is no betting or untoward activity relevant to this race.

230. The evidence does not establish that in a greyhound it is performance-enhancing to the extent that that is an objectively serious factor.

231. On the issue of specific deterrence, the Tribunal notes the steps taken by the appellant at various stages to eliminate possible sources of a positive to cobalt. However, as the high readings here remained unexplained, the appellant is not able to establish any other husbandry changes he should effect to prevent a repetition.

232. That would normally lead to a conclusion that a strong subjective message is required for this appellant. However, having regard to his character, his time in the industry, the fact that he has no priors, that he has made every effort that he can to try and find a cause, and therefore eliminate a possible cause, in circumstances where he has effectively rid himself of his racing greyhounds to prevent further positives because of his belief in contamination, that that subjective message is much diminished.

233. The Tribunal does not consider that a subjective message is warranted on the issue of objective seriousness.

234. On objective seriousness, where there is an unexplained positive on two occasions, there is a necessity for consideration of issues in the public mind of a level playing field, and in particular so far as other trainers are concerned, who may need to consider their practices when there is an unexplained reading, and also in the mind of the betting and other public that there is an unexplained reading, require that there be a general message of deterrence.

235. Those messages of deterrence, limited essentially to general deterrence, are not reduced because of a finding that the appellant is blameless.

236. A starting point is to be found by considering the respondent's penalty guidelines.

237. Those penalty guidelines provide for a first breach, as this is, being a category 2 first breach of a four-month suspension. The Tribunal is otherwise satisfied that the starting point is a four-month suspension.

238. The Tribunal has also been given four parity cases for consideration.

239. A GWIC decision of 5 May 2023 in the matter of Steven Kemp. After a plea of guilty, received a 10-week suspension, allowing for a 25 percent discount for the plea, his record and registration history and cooperation, but he did have one prior matter.

240. 16 January 2023, GWIC, in the matter of John Jackson, who was suspended for a period of 10 weeks, with a 25 percent reduction for a plea of guilty, his registration history – it was a first offence – and his personal circumstances. No probable cause was able to be established.

241. 16 June 2022. GWIC. Barry Yates received a 10-week suspension, with a discount for a plea of guilty, and 41 years in the industry with no like matters and that early plea and matters in explanation, including the source of the positive result, changes to husbandry practices and his personal circumstances.

242. 9 November 2022, GWIC, Scott Eaton, with a plea of guilty, a good record and a first breach, received a 10-week suspension.

243. In broad terms here as against those parity cases, this appellant has a licence history of 35 years with no prior matters, has not pleaded guilty, has substantial industry contributions for which no reference was made for the others, is not able to further change husbandry practices but did change a number of his husbandry practices, is such that those cases provide general guidance. A general aspect of guidance might indicate that, with the exception of Kemp who had a prior matter and seemed to have been dealt with more leniently than the others, a reduction of a starting point of four months' suspension to a 10-week suspension is consistent with parity.

245. In addition to the above matters on objective seriousness, it would normally be necessary to consider a subjective message of a greater need was required for this appellant because he had a warning letter on 1 July prior to his first presentation on 11 October. On the other hand, the appellant immediately took steps on that warning letter to address his husbandry practices as set out above. He did not ignore that warning letter. That warning letter does not require, on a deterrence basis, a heavier starting point.

246. The respondent therefore submits that the starting point be a four-month suspension.

247. The Tribunal concludes that, consistent with parity and the guidelines and on the facts and circumstances of this case, the starting point for penalty be a four-month suspension. That is particularly appropriate on McDonough category 2 that the readings are unexplained.

248. No suggestion of a disqualification was raised.

SUBJECTIVES

249. The appellant fully understands that he is not entitled to a discount of 25 percent for a plea of guilty.

250. On the other hand, the appellant is entitled to strong recognition for his cooperation with the respondent.

251. The appellant has been at pains in his submissions to the stewards' inquiry and to the Tribunal to emphasise he is dissatisfied with the way in which he has been dealt with by the respondent on a number of occasions and the stress that that has occasioned to him. The Tribunal is not of the opinion that those matters become subjective factors which entitle him to a further discount and they have not essentially been the subject of response, facts or submissions by the respondent. However, those are matters for others in relation to the way in which the regulator does or does not deal with its licensed persons.

252. The Tribunal has noted the subjective factors of a person licensed since 1998 with no prior matters and 200 winners with a number of swabs and nothing prior. On subjectives, the Tribunal accepts the impact that these proceedings have had upon this appellant, both financial and personal, and accepts the evidence that he has been under medical treatment in respect of various conditions, which he says have been exacerbated as a result of these proceedings.

253. The Tribunal notes the report of Dr Saker of 19 April 2023 as to the impact upon the appellant, and the appellant has waived at the hearing privacy issues about his conditions.

254. Dr Saker refers to the fact that he is not sleeping, he is pulling his hair out, he is now flat of mood and formal thought disorder and has had his judgment and insight considered.

255. The Tribunal notes that the appellant stated in his submissions to the stewards that he was under the care of a psychologist, Laura Frankle. No report from that psychologist has been given.

256. As to the issues of financial hardship, the Tribunal notes the Thomas principles of 2011 that if hardship is the necessary outcome of an appropriate penalty, then that is a consequence that a licensed person must accept.

257. The Tribunal accepts on a subjective basis that the appellant has served his country on active service and is entitled to have that taken into account.

258. The Tribunal accepts the appellant's contributions to the industry with GBOTA, and as chairman of the Gosford branch of that organisation, and also his service on the managing committee at Gosford racetrack.

259. The Tribunal notes the references of Dr Yore and Newell set out earlier.

260. Unusually Dr Major gave oral character evidence.

261. He referred to the seriousness with which the appellant took these matters and that he had done all possible to discover and prevent. He said he is a person of the highest character.

262. The appellant is accepted as a person of good character.

263. The Tribunal notes that the stewards determined that there be a six-week deduction for subjective circumstances, and that, of course, was substantially generous.

264. The Tribunal reflects upon the lack of a discount for a plea of guilty on the facts and circumstances of this case.

265. The Tribunal is satisfied that the appellant has genuinely and properly put the respondent to tests in respect of the two substantial issues litigated, that is, not a prohibited substance and causation.

266. This case was not a frolic by the appellant to avoid the consequences of wrong conduct.

267. The issues here have necessitated the Tribunal considering at length both issues raised by the appellant. While both were found against him, nevertheless, they were properly put.

268. The Tribunal therefore determines that, contrary to usual precedent, there will be a further discount to that period that the subjectives would otherwise attract by reason of the way in which these proceedings were conducted by the appellant and on the issues identified.

269. The Tribunal avoids pure mathematical calculations.

270. The Tribunal considers that the straight subjective discount allowed by the stewards at six weeks is that which it also adopts in respect of his pure subjectives.

271. To that, however, the Tribunal adds a further period of two weeks on the plea issue.

272. That means the Tribunal determines total discounts of eight weeks from its starting point.

DETERMINATION

273. The Tribunal determined a starting point of four months and equates that to 16 weeks, and from that period of time it deducts a subjective discount of eight weeks.

274. That means that the Tribunal determines a suspension is appropriate and that that suspension be for a period of eight weeks.

275. The Tribunal considers that that penalty is appropriate for both matters, notwithstanding the fact that at the time of the second breach there had been the existence of the warning letter and notification of the first A sample positive.

276. However, there is such a commonality of facts to each matter that the Tribunal determines the same penalty is appropriate for each, notwithstanding the fact that there were two breaches.

277. The total facts and circumstances satisfy the Tribunal that it should distinguish its recently imposed determinations that if there are two breaches, a person should not expect the same penalty as a person who only commits one breach.

278. The other issue is the question of whether any penalties for two breaches should be concurrent or cumulative.

279. The stewards treated the matters as concurrent and the submission for the respondent before the Tribunal is that the penalties be concurrent.

280. The Tribunal does not examine that issue any further.

281. The two periods of suspension are to be served concurrently.

282. There is no requirement to defer this penalty to enable the appellant to dispose of dogs as he has already done so.

283. The appellant was suspended on 30 May 2023 and the Tribunal granted a stay of that order on 6 June 2023. That is, the appellant was suspended for a period of seven days. He is entitled to have the starting date for this suspension take that fact into account.

284. The Tribunal therefore backdates the commencement of this suspension to take into account those seven days to 29 August 2023.

285. The severity appeal is upheld.

ORDER

286. In each of the two charges, the Tribunal orders that the appellant be suspended for a period of eight weeks to be served concurrently and to commence on 29 August 2023.

APPEAL DEPOSIT

287. At the hearing the parties agreed that the issue of a refund or otherwise of the appeal deposit be left in the discretion of the Tribunal having regard to its determination.

288. This was an appeal against breach and that has been unsuccessful. It was also an appeal against severity of penalty and that has been successful.

289. The Tribunal notes that it would normally order 50 percent of the appeal deposit refunded on those facts.

290. However, there are two matters that cause the Tribunal to come to a different conclusion. The first is that the appellant is on a veterans war pension and that is his sole source of income and the second is that the issues raised by the appellant and requiring such a lengthy decision by the Tribunal were fairly raised by him.

291. Accordingly, the Tribunal orders that the appeal deposit be refunded.