RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

FRIDAY 29 SEPTEMBER 2023

APPELLANT PETER PARKER

RESPONDENT GWIC

GREYHOUNDS AUSTRALASIA RULE 141(1)(a)

SEVERITY APPEAL

DECISION:

1. **Appeal dismissed**
2. **Penalty of 3 months suspension of licence imposed; commencement deferred until 2 October 2023**
3. **Appeal deposit forfeited**

1. The appellant, Peter Parker, a licensed trainer, appeals against the decision of the Internal Review Officer of GWIC, the respondent, of 3 July 2023 to impose upon him a period of suspension of his licence for 10 weeks.

2. That internal review decision followed upon a decision of the stewards of GWIC of 31 May 2023 to impose upon him a suspension of his licence for a period of 10 weeks.

3. The charge specified to the appellant in the notice of disciplinary action of 31 May 2023 states that contrary to rule 141(1)(a) of the Greyhound Racing Rules, the appellant, as a registered owner trainer, while in charge of the greyhound Cahya, presented the greyhound for the purpose of competing in Race 11 at the Temora meeting on 7 March 2023 in circumstances where the greyhound was not free of a prohibited substance, that being theobromine.

4. The appellant, when confronted with that charge, before the stewards pleaded guilty, maintained that plea of guilty before the internal review and has maintained that admission of the breach of the rule on appeal. This, therefore, is a severity appeal only.

5. The evidence has comprised the respondent's brief of some 130 pages, which contains formal parts, together with the various documents that were before the stewards and the internal review panel. Particularly, they include references of Fisher and Adams, to which the Tribunal will return, some photographs, some prior decisions, the appellant's disciplinary history and various parts of email correspondence. In addition, the evidence has comprised a theobromine set of decisions from 1 November 2019 to 31 August 2023. The appellant gave oral evidence and was cross-examined.

6. The necessity to examine the evidence in greater detail falls away because it is a severity appeal only.

7. The appellant had made written submissions on stay applications and to the internal review, and the appellant has made a detailed written submission to the Tribunal on appeal. Oral submissions were made by both parties at the appeal hearing.

8. In very brief terms, the appellant is some 39 years of age and was brought up in a greyhound racing family with both his father and grandfather being involved with greyhounds. He, himself, has been registered under his current registration as a trainer for some five years, and had previously been registered as an owner, and as an owner trainer. In total, he has some eight years as a registered trainer.

9. He works part-time as a glazier and aluminium fixer, some two days per week, unable to work more because of a back injury. He has turned from part-time training to full-time training and at the present time has eight dogs in

training. He, therefore, is seeking to move, because of the improved prize money available in the industry, to full-time training.

10. The income he earns from training and prize money provides substantial assistance to the combined family income. His wife works. He has two young children. They have usual commitments of a family. There is no doubt from the appellant's evidence that certain things have fallen from this presentation breach, namely, an increase in family tension within the home caused by reductions in income and also a loss of benefits of income that they previously enjoyed.

11. The appellant has given financial estimates that just to maintain his greyhounds in feed is $500 a week, and that overall he has probably lost some $20,000. The Tribunal notes in passing this greyhound ran third in the subject race and the prize money was $450.

12. There is no doubt that these proceedings have caused for the appellant a high degree of anxiety flowing from the shock of this presentation. But he does, however, give evidence that it has not caused him to fall into a state of anxiety and depression.

13. The appellant has given substantial evidence of the disadvantage that flowed to him from the fact that the internal review decision was published and served upon him without notice. He says that that caused him to incur certain financial losses, such as daycare expenses, prepaid, wife's loss of a day's pay, et cetera, whilst they were preparing a number of greyhounds to race imminently when that decision was issued. The appellant says that that is an extra-curial punishment which he is entitled to have taken into account under his subjective circumstances. That submission, and the facts to support it not being in issue, is opposed.

14. The facts are that the appellant is entirely unable to explain how this positive to theobromine came to be there. He says he had not changed any of his practices at the time of the presentation. He had, however, and the Tribunal will return to it, changed numerous of his practices prior to that occurring and had taken a number of measures to ensure this type of thing did not happen.

15. It is common knowledge that two often known sources from positive to caffeine and its metabolites, one of which is theobromine, can flow from a consumption of both chocolate and coffee, neither of which have any adverse connotations so far as welfare of the industry is concerned, but when they are in a greyhound presented to race, there are concerns on matters such as level playing field and the potential for those matters to have both an adverse and, of course, with chocolate in a dog, welfare concerns. Those matters are not raised by the respondent in this case as providing, on an objective serious nature basis, the necessity for a more severe deterrent message.

16. The changes the appellant has effected, and are supported by photographs in the evidence, can be summarised as follows: setting up a laundry tub, cleansing, banning of the drinking of coffee and eating of chocolate anywhere near greyhounds, cleaning and scrubbing of surfaces, erection of signs reminding everyone of the necessity as to how they should conduct themselves, new regimes into washing pans, bowls and other materials, a possibility of the installation of cameras, about which there is no further evidence, and his ensuring he keeps up to date.

17. The appellant in his oral evidence made it very clear that post the 2017 matters, to which the Tribunal will return, he has changed his practices in many ways.

18. Firstly, he has now put in process methods for ensuring he keeps up to date immediately on the publication of any notices by the regulator, and that he had, post the 2017 matters, abandoned practices that he had learned from his father and grandfather, which were matters which led to the first presentations, and were simply a following of a familial practice, now known to be wrong. In essence, those changes have been as generally just described, but also the removal of coffee from the dogs' dinner on a daily basis, the aspect he concedes which led to the presentation matters earlier.

19. Just dealing with those priors. In 2017 the appellant, not having been licensed for very long, was found on five occasions between 27 June 2017 and 31 July 2017 to have presented three different greyhounds at different times to races where there was present in them caffeine and its metabolites theophylline, paraxanthine and theobromine. The Tribunal pauses to note that was more serious then because it was both caffeine, theophylline and paraxanthine which were detected other than just theobromine here. The appellant pleaded guilty to those five charges and was subject to a penalty in each matter of 36 weeks' suspension, to be served concurrently. The appellant there, as he is today, was contrite and remorseful for his conduct and stated how he has learned from his failures.

20. On the same day, the appellant was dealt with for two other breaches of the rules, being then 86(p) and 86(h), summarised as being disobeying or failure to comply with a lawful order of a steward and preventing the carrying out of a test. He pleaded guilty to those matters. Essentially, it was that he was directed to present his greyhounds for swabbing and he took them away from the track. He did not understand the swabbing requirement at that time, which for a licensed person, on reflection, the Tribunal has to say, some six years later, is rather a surprising state of affairs at that time. But that is what occurred. There were, of course, at the time of each of those 2017 matters, no priors. He then received a 20-month disqualification.

21. Those then are the key facts.

22. The Tribunal's function is to first determine objective seriousness, and then determine what, if any, subjective discount should be applied. The Tribunal opens those preliminary remarks by noting that it is a long-established principle that in certain circumstances discounts for subjective circumstances may not be warranted if the objective circumstances are so serious that any further discount is not to be appropriate.

23. The issue here is not one of punishment, but a protective order, which is one which requires the Tribunal to impose a penalty which provides a message of subjective and general deterrence in the public interest for the welfare of the industry. No more than the penalty necessary on the particular facts and circumstances of this case is to be imposed, otherwise it would be oppressive.

24. The bald objective facts are that the greyhound was presented to race in circumstances where the presence of the prohibited substance is entirely unable to be explained. There is simply no factual matter which the appellant can seize upon, on the submissions made today, which would state why.

25. The Tribunal has, supported by superior court decisions and driven by the Victorian decision of Kavanagh, applied the McDonough principles in recent years. Simply put, the three categories are well known, and here it is suggested that the appellant should somehow fall between categories 2 and 3.

26. Category 2 exists where the Tribunal does not accept the explanation advanced by the appellant or is unable to ascertain the reason for the positive presentation.

27. Category 3 exists where the appellant himself establishes, the onus being upon him and not the respondent, that he was blameless or there was nothing else he could have done to have prevented the positive presentation.

28. Simply put here, there has been no guesswork about a possible explanation. It is entirely unexplained. It cannot equate to anything like a blameless determination, nor anything that would equate to a suggestion that there were not things the appellant could have done to have prevented this. It falls squarely and unambiguously within category 2. It is unexplained. There has been no explanation which the Tribunal accepts.

29. Contrary to some more recent decisions where the Tribunal has opined that the facts and circumstances of those individual cases might have meant some consideration between categories 2 and 3, on the facts and circumstances of this case, the Tribunal comes to no such conclusion.

30. What then is to be made of that objective seriousness? It means that under McDonough category 2 the penalty appropriate to the facts and circumstances is to be imposed and is not to be reduced to something nominal like a fine or some other lesser penalty which would apply with a McDonough category 3.

31. The Tribunal is guided by two principal areas. The first is the penalty guidelines, which the regulator has adopted, and the second is parity cases, either informed or not informed by those penalty guidelines.

32. Dealing with the first. In July 2022, the regulator changed its penalty guidelines. It made them dramatically less severe than they were prior to that. The prior provision was that this subject drug would be then a category 2, and as the starting point then provided was some 156 weeks, there is a clear delineation from the current category 2 starting point of a period of loss of licence of 4 months' suspension. There is a vast difference between a disqualification of 156 weeks and a suspension of 4 months.

33. The Tribunal only pauses to note this in respect of that old table, which it is not applying and merely reflecting because it is relevant to the 2017 penalties, that on the theobromine list of penalties put before the Tribunal, and which has been summarised, there was not one disqualification. The Tribunal knows from its experience in numerous appeals that it was rare for a disqualification to be imposed for category substances equivalent to theobromine in category 2 such as this, and invariably it was a suspension.

34. The Tribunal pauses to state this, therefore, based upon both parity and penalty guidelines, that it puts out of its mind consideration of a disqualification. It does so for a number of reasons.

35. Firstly, the guidelines have been amended to make it a starting point of a suspension, unless certain other facts to which the Tribunal will return are activated.

36. Secondly, on a parity basis, no one has been disqualified. And, critically and more importantly, it was not the opinion of the stewards, nor of the internal review, nor on the submissions made on this appeal, that a disqualification be considered. It has at all times been a starting point of a suspension and the Tribunal therefore will not go beyond that. It can, of course, go less than that.

37. The other aspect of the penalty guidelines is this, that these are not the appellant's first breaches. As stated, he had five prohibited substance matters in 2017 and two disciplinary matters in 2017. He has seven priors. This could otherwise be summarised as the second occasion on which he has come under notice for presentation matters, if one were to group the first five, but noting also that it was for the same drug, in part, as to 2017. Here, there was

theobromine, there, there was theobromine, or, as the Tribunal has reflected, in 2017, there were the other substances to which reference has been made.

38. Interestingly, the old GRNSW penalty guideline, which was adopted by GWIC, would have then added for those prior matters a further 39 weeks of disqualification.

39. The current penalty guidelines express that – and it is very generous, in the Tribunal's opinion – if there is one category 2 substance rule breach in the previous three years, there will be an 8-month suspension rather than the starting point adopted here for a first offence of a 4-month suspension.

40. Two things about that. Firstly, it makes no reference to whether these breaches might have occasioned category 1 or category 3 matters in the past. And, secondly, it adopts a period of three years. There is then, however, a substantial acceleration. If there is a second or subsequent category 2 – again, noting it only refers to category 2 and not 1 and 3 – in the previous five years, it jumps to an 18-month disqualification.

41. As pointed out here, the prior matters were more than five years ago. Therefore, it has been adopted at the stewards' level and at the internal review level, and consistent with the submissions made on appeal, that this be treated as a first offence.

42. It would be wrong, in the Tribunal's opinion, in assessing for itself objective seriousness, to disregard those facts and findings. The Tribunal considers them to be exceedingly generous, but that is the way the regulator wishes to approach it, both in its penalty guidelines and in its determination in this subject matter.

43. The second matter on objective seriousness is parity. A number of parity cases have been referred to. The Tribunal has, as stated, the theobromine penalty matters. Prior to the commencement of the subject table, between 1 November 2019, the first date given, and 16 June 2022, the penalties imposed for the subject drug were between an 8-week and 18-week suspension.

44. The Tribunal focuses upon more recent matters under the penalty guidelines, and there the range has been between a 6-month suspension and suspensions as low as 4 weeks.

45. The Tribunal has been given four precedent cases.

46. The matter of Spiteri, which admittedly is a 16 June 2022 matter, where that person was licensed for 45 years with no priors, a plea of guilty, extensive association with the industry in general, and remorse. He received a $2000 fine and a 10 week suspension, wholly suspended.

47. The second matter is Bray, 29 July 2022. 54 years in the industry, no priors, an explanation for the positive source was given, a plea of guilty, personal financial circumstances and contribution to the industry over a significant period led to a 10-week suspension, 6 weeks of which was conditionally suspended.

48. The next matter is Cartwright, a registration history of 10 years, a plea of guilty, no priors, and a 2-month suspension.

49. The matter of Coles, which is the subject of an appeal before the Tribunal today, was put forward by the appellant and identified by the Tribunal. The Tribunal indicated that because Coles was on appeal, it would not take that into account as a parity case.

50. Parity indicates, therefore, firstly, a suspension, to which the Tribunal has made reference, and then a very strong consideration of length of suspension in periods of, as stated, 4 weeks through to 6 months.

51. The key decisions to which the Tribunal turns where substantial leniency was extended by way of suspended penalty are both Bray and Spiteri. Here, the appellant has eight years. He cannot equate himself, regardless of any other subjective facts, to those of Bray and Spiteri, and, indeed, he has priors.

52. Therefore, the approach of any period of penalty the Tribunal considers appropriate being itself suspended does not arise on those facts and circumstances and objective seriousness for consideration. The other facts and circumstances are of substantial variation.

53. The stewards and the internal review, and on submissions today, provide for a starting point a 4 months' suspension. That is a penalty guideline suspension. It is not inconsistent with parity. It is that which the Tribunal is asked to adopt by both parties.

54. The Tribunal, therefore, will not move away from that. It adopts a starting point on objective seriousness of 4 months. It does so specifically noting its earlier remarks that it considers the table to be generous in respect of how prior matters are to be dealt with. The Tribunal has already expressed its position that subjectives can be disregarded in certain facts and circumstances.

55. The Supreme Court has recently delivered its decision in the matter GWIC v Bell, a decision of 22 September 2023, entitled [2023] NSWSC 1150. The Tribunal was taken, it having been shown that decision only this morning – it had not been aware of it – to paragraphs 93 and 96 of that decision, which essentially indicate that the Tribunal can extend leniency for subjective circumstances, which seem to the Tribunal to be, with respect, a non-

controversial statement, and that that can be a dramatic reduction if the circumstances are appropriate, and that there is a consideration that any penalty must be just:

> "96. The Commission has not established that the penalty imposed on Mr Bell was plainly unjust."

57. The appellant's subjectives are very strong. They have been set out. The Tribunal accepts that he is a person of good character. In that regard, he is supported by two referees.

58. Greg Fisher, undated, known him for five years, a friend. Knows him as polite, friendly, and down-to-earth, willing to lend a hand to anybody, a great excitement and enthusiasm for the sport, aware of his current circumstances and a belief that he will uphold himself and his commitment to the industry. He describes him as a family person.

59. Second is by Kurt Adams, undated, known him for three years as a polite, courteous and professional man and well-known at the local bowling club and a participant in community events. Critically, he states, "was first on hand to help during the flood crisis that ravaged our local community earlier this year". He goes on to describe him as an asset to the industry.

60. The Tribunal accepts the appellant is a person of good character. The Tribunal accepts the financial and personal impact to which he has been subjected.

61. The simple fact of the matter is, as the Tribunal has stated as long ago as Thomas in 2011, that in certain facts and circumstances of cases, financial hardship is an inevitable consequence of wrongful conduct and in appropriate facts and circumstances, that conduct may be such that there is to be no discount for the financial circumstances that have flown from wrongful conduct. It is, in essence, therefore, an essential outcome in appropriate cases.

62. The Tribunal gives substantial weight to the changes he has effected in his husbandry practices post the 2017 positive and about the time of these matters. The Tribunal is satisfied that his husbandry practices have been changed, both in respect of the operation, as summarised, and in respect of his self-education.

63. The aspect of general and specific deterrence was not more closely analysed by the Tribunal in objective seriousness because of the starting point reasons it adopted. It is necessary to reflect upon those matters, however. Subjectively, the message to this appellant is reduced by the character assessment of him and the changes in his husbandry practices. Nevertheless, there is the issue of his priors.

64. The general message of deterrence is one which is to be viewed from a level playing field perspective of other participants in the industry and those who are observers of this industry under challenge. The level playing field is critical. There is no performance-enhancing issue here. There is no welfare issue specifically identified here. The level of the substance is not before the Tribunal as to high, low, etc. That is not important.

65. Simply put, the message must be given that a person who has previously been the subject of so many prior matters, being five presentations and two disciplinary breaches, not accepting that he will be dealt with as leniently as people with, say, 54 years in the industry and no priors, that the message of general deterrence must be an accelerated one.

66. That then brings the Tribunal back to what does it do having regard to that necessity of deterrence in the public interest for the welfare of the industry with respect to further discounts to that objective start.

67. The first discount is 25 percent for the plea of guilty given by the stewards, given by the review panel, not opposed, and supported, on this appeal, consistent with Tribunal decisions over the last 12 years, and it is given to him. That is a 1-month discount on the starting point.

68. Is he therefore entitled to other discounts? It has been argued, it might be said, with respect, exhaustively, up hill and down dale, and thoroughly, as to all of the matters which should lead to further discounts being given to him, and it was quite wrong, it is submitted, for the two previous decision-makers to not do so. The Tribunal has the power to do so, not by reason of its own approach to the matter but consistent with what has recently been said in Bell in the Supreme Court, that it is appropriate in certain circumstances to give a discount which can be dramatic.

69. It is a discretion. That discretion, in the Tribunal's opinion, would miscarry dramatically, to adopt a word, if those external to this appellant in the industry were to perceive that a person with seven prior matters should receive greater discounts to those that are applicable to a person with no priors. The Tribunal is of the opinion he should not.

70. The Tribunal examined the evolution of the guidelines, the evolution of objective seriousness, earlier and is of the opinion that the necessary message of deterrence in the public interest would be entirely downgraded to the detriment of the industry if an appellant with this past history was entitled to receive greater discounts than others.

71. It is on that principle, therefore, that the Tribunal determines, despite the strength of the arguments and despite the strength of the submissions made,

that there should be a greater discount to reduce the penalty to any substantial extent.

72. The Tribunal comes to its own conclusion, independently of the thinking of the stewards and the review panel, of which it has no criticism, that the discount for the plea of guilty is the discount to be given, and it does so because there would otherwise not be a reflection of the gravity of the past matters, despite the lessening of the seriousness of them on the evidence of the appellant today.

73. The Tribunal declines to increase the discount for subjective purposes beyond the 25 percent for the plea of guilty.

74. That means, therefore, that the severity appeal is dismissed.

75. The Tribunal orders that there be a period of suspension of 3 months.

SUBMISSIONS MADE IN RELATION TO DEFERRAL OF COMMENCEMENT OF SUSPENSION

76. Application is made for a deferral of the commencement of the Tribunal's order for a period of 9 days. That is the permissible maximum period under the rules. The Tribunal has previously determined it was capable of exercising that function vested in the Controlling Body.

77. The appellant has been on notice of this determination possibility for some time. The appellant was at pains to point out the disadvantage he suffered without notice on the internal review decision. He cannot raise that as an issue here.

78. He has nominated for Temora. He took that chance. Temora is on Monday. The only reason the Tribunal would defer the commencement is because of the interests of the betting public.

79. In the circumstances, the Tribunal will defer the commencement of the period of suspension it has imposed until midnight on 2 October 2023.

ORDER

80. The order of the Tribunal, therefore, is that there be a period of suspension of 3 months of which account eight days is time served and that that commence at midnight on 2 October 2023.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

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

82. The Tribunal's function is to determine whether it should be refunded in whole or in part or forfeited.

83. This was a severity appeal. The appellant has established some new facts which were found in his favour. But in essence, the severity appeal has been entirely unsuccessful and there has been no reduction in penalty.

84. The Tribunal notes the appellant's financial hardship. That is a strong factor. But at the end of the day, the appeal has been unsuccessful.

85. It is not contrary to precedent.

86. The Tribunal orders the appeal deposit forfeited.
