RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

WEDNESDAY 22 NOVEMBER 2023

APPELLANT SHANNON BURGIN

RESPONDENT GWIC

GREYHOUNDS AUSTRALASIA RULE 141(1)(a)

DECISION:

1. **Appeal against breach of rule dismissed**
2. **Appeal against severity of penalty dismissed**
3. **Disqualification of 12 months imposed**
4. **Appeal deposit forfeited**

1. The appellant, licensed owner and trainer Shannon Burgin, appeals against the decision of GWIC, the respondent, of 21 August 2023 to impose upon him a period of disqualification of 12 months for a breach of Rule 141(1)(a).

2. That rule relevantly provides as follows:

> "(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."

3. The particulars of the charge were that the appellant presented the greyhound Fernando Belle for the purpose of competing in race 1 at the Gosford meeting on 10 January 2023 when it was not free of any prohibited substance. The particulars are detailed in relation to the substances present and it is necessary to specify that they form two separate and distinct substance issues and they are 5ß Androstane-3α, 17ß-Diol, at a mass concentration greater than 20ng/mL, Nandrolone, 5α-estrene-3β, 17α-diol and 5α-estrene-3β, 17β-diol and, secondly, 5ß Androstane-3α, 17ß-Diol, at a mass concentration greater than 20ng/mL, and that those substances are permanently banned prohibited substances.

4. The appellant, when confronted with that charge, elected to have a hearing and pleaded not guilty before the stewards who subsequently found the breach established, took penalty submissions and imposed the penalty outlined. The appellant has maintained his plea of not guilty on appeal and understands that by doing so he is possibly forfeiting aspects of a discount for an early plea of guilty.

5. The evidence has comprised a brief of 104 pages and the oral evidence of the appellant.

6. The key parts of the brief are those which go to the formal proofs required to be established to support the charge. They, of course, involve laboratory certificates from two separate laboratories. The appellant has set out in his material to the stewards, contained in the brief, a number of matters, including extracts of Internet material relating to split oestrus and matters relating to the eating of pork, which it is stated can provide a false positive for nandrolone.

7. The brief also contains the submissions that the appellant made to the stewards and his submissions he made on the appeal, which involve two stages. Firstly, there was an appeal against the decision made, and the Tribunal determined that that appeal against the order should not be

supported by a stay, and then repeated the submissions that he has made in a document which might be described as grounds of appeal.

8. The appellant's oral evidence today essentially has canvassed in detail each of the points he made in those written submissions and it is not necessary to further summarise them.

9. The determination is made on the basis of the long-stated fact before the Tribunal as presently constituted and before racing Tribunals for decades that in cases such as this, the regulator does not have to prove the how, when, why or by what route the prohibited substance came to be present in the racing animal, in this case, the greyhound.

10. That has been the case because it is inevitably impossible for a regulator, isolated from the operation of the presenting person, usually a trainer, to know what took place at any stage leading up to the taking of the sample.

11. Thus, the rules have been written. They are described as draconian. The Tribunal remains of the opinion that they are draconian, but they are there for the integrity of the racing and, as the appellant said here, and he agrees with it, the necessity for drug testing and the necessity for a drug-free industry and the necessity for a perception of a level playing field.

12. The greyhound racing rules are written, so far as the subject charge is concerned, requiring proof of two ingredients in this matter. Firstly, that the appellant as a trainer – and that is not in issue – presented the greyhound to race – and that is not in issue – and that there was the second indicia of the presence of a prohibited substance. In this case it is permanently banned prohibited substances as provided for in the rules.

13. The first of those matters not being in issue, they need not be examined.

14. The second, essentially, is not challenged by the appellant. He does not dispute that the processes by which the sample was taken and the processes in which the laboratories engaged were not proper processes. He does not contest the fact that each of the named drugs was present in the greyhound's sample of urine taken immediately post-race.

15. The rules provide that where, as is the case here, two approved laboratories provide certificates to the effect of the presence of the prohibited and in this case permanently banned prohibited substances, that is conclusive evidence of their presence. That, in essence, is all that the respondent, the regulator, has to prove to establish a breach of this rule.

16. What then of the case for the appellant? Can he have a favourable determination made that that conclusive evidence is to be set aside?

17. He raises a number of matters, principally which are relevant to the issue of penalty and not to the issue of whether the rule is breached. He has very strong and forceful and understandable opinions about the way in which he believes the regulator has discriminated against him – a summary word of the Tribunal, not one which fell from the appellant.

18. The appellant says he was treated completely differently to other trainers and he has not been listened to and he is concerned about fraud in a steward, but they are matters which do not go to the issue of breach.

19. It is a perception of fairness or unfairness, but there is no obligation upon the regulator, under the rules, to prosecute every detected prohibited substance. There are many reasons why such a prosecution may not take place. They do not need to be examined. One in particular has been identified here and the Tribunal will return to it.

20. The Tribunal acknowledges it is the appellant's case that he has, with the exception of worming products, never injected a greyhound, that he runs a clean premises, that he is a trainer of standing and that he appreciates the nature of the industry and the necessity for the level playing field, as summarised.

21. He is of the view that he represents the industry today. That is an opinion he is entitled to express but it does not go to the issue of whether he has breached the rule or not.

22. He expresses concerns that the stewards did not give him a fair hearing. An appeal, being a hearing starting afresh, as it is described at law, de novo, enables a curing of any unfairness detectable in the transcript of the conduct of the hearing by the stewards. The appellant has formed the opinion that he was treated differently and not fairly and he was not listened to. He did not like the way in which the stewards addressed him.

23. Those matters are all cured on appeal, to the extent that they may have existed. The Tribunal has read the transcript. It is of the opinion that he was given a fair hearing, he was not treated differently, he was listened to and whilst the stewards might have been firm with him, they were not unfair to him. Regardless of any of those matters, they are put out of the Tribunal's mind, as a de novo hearing enables those to be cured.

24. He advances two possible reasons, he being not able to explain at all why this range of substances was present: firstly, a split oestrus and, secondly, the feeding of pork and the extracted research that he has put forward that indicates a possibility that a false positive for nandrolone might arise from the giving of pork. It might be implied he is also saying a false positive might arise from the metabolites of nandrolone.

25. Before the stewards, Dr Cawley, of Racing Analytical Services Ltd, gave expert evidence. The appellant has not called any expert evidence, or scientific studies or other reports, other than the extracts to which reference has been made, to support either of his contentions.

26. The respondent, not having to prove the how, when, why or wherefore, does not in fact have to answer, therefore, the two matters raised on the issue of whether the rule was breached. Those matters may be relevant to penalty but the Tribunal notes at this point there is no expert evidence to support the contentions advanced, and the Tribunal is not persuaded by the two separate extracts, to which reference has been made, that they establish an exculpation on liability or a diminution of conduct.

27. The appellant has been at pains to point out on the issue of guilt that he has been treated differently in relation to, in particular, the matter of Frankland-Shambler, which is not the subject of a decision because that trainer was not proceeded against. It appears that there can be extracted from the material that is before the Tribunal that there was a positive for nandrolone but no metabolites, and a hair sample was taken and it established the presence of the nandrolone.

28. But as Dr Cawley pointed out, that case can be distinguished on the basis that the metabolites indicate, in this case, in vivo metabolism and it was not available in the Frankland-Shambler case, and that distinguishes that case. In any event, the reasons why the stewards may or may not have elected to prosecute that trainer do not exculpate the appellant from the two basic facts which are identified here.

29. The remaining matters are matters for penalty.

30. The respondent satisfies the Tribunal that each of the two ingredients it has to prove in respect of the breach of this rule have been established. The Tribunal comes to that on the Briginshaw standard of comfortable satisfaction.

31. The Tribunal finds that the appellant has breached the rule.

32. That part of the appeal which relates to the breach of the rule is dismissed.

SUBMISSIONS MADE IN RELATION TO PENALTY

33. The issue for determination is penalty on a breach of Rule141(1)(a), the Tribunal having just expressed reasons.

34. The Tribunal has to find a protective order, not by way of punishment, which provides the appropriate level of specific and general deterrence in the public interest of greyhound racing.

35. The facts have been canvassed in the decision and are not repeated.

36. The principal issue is the objective seriousness and its starting point. On objective seriousness, the Tribunal noting that the regulator has determined under its July 2022 penalty guidelines that a breach such as this for permanently banned prohibited substances should be a minimum starting point of a 2-year disqualification.

37. The Tribunal notes, as it stated in its reasons earlier, that the starting point is double that which was found under the old GRNSW penalty table, which GWIC adopted until it could write its own penalty guidelines, which started in July 2022. That provided for what was, under those penalty tables, a starting point for a Category 3 prohibited substance, which nandrolone and its metabolites and associated anabolic steroid-related matters such as testosterone and its metabolites are, would have a 52-week, that is, a 1-year starting point.

38. Those old guidelines provided for increases and decreases based on priors, high levels and other subjective discounts. That does not need to be examined. Suffice it to say the Tribunal will return to examine the cases which have been put before it on parity on the basis that they were all dealt with prior to July 2022.

39. The appellant is unable to explain the how, when, why or wherefore. He has absolutely no explanation for the presence of these prohibited substances. He says he runs a clean kennel. As described earlier, he says he does not inject, except for wormers, and he has made many and genuine inquiries to try and find some reason why this occurred in his kennels or elsewhere. He is not able to provide an explanation.

40. The oft-stated principles of McDonough, therefore, are that this is a category 2 matter under McDonough, the appellant not being able to establish he was blameless, where a lesser penalty such as a fine or no action may be appropriate. He falls under category 2, where at the end of the day, the Tribunal is simply unable to determine the cause of the positive readings. Therefore, the penalty that is appropriate on the facts and circumstances is to be imposed.

41. Permanently banned prohibited substances have a marked impact on the integrity of racing and in the perception of outsiders upon the level playing field. They are, therefore, drugs of a serious consequence, requiring a substantial protective order.

42. The Tribunal is of the opinion that the facts and circumstances of this case, consistent with parity, to which it will return, indicate that the starting

point in this matter of 2 years as provided for under the penalty guidelines is in fact appropriate on the facts and circumstances.

43. However, the Tribunal is invited in writing, in the submissions, and orally in the submissions, to adopt a starting point of 14 months.

44. The Tribunal, noting that the case has been run on that basis, that the regulator itself does not consider the protective order requires more than that, although the reasons for it are lost on the Tribunal, the stewards having stated no reasons why they determined that, they set it out in their notice to him and invited his submissions, will adopt that 14-month starting point.

45. The matter, in the Tribunal's opinion, may well be seen to create a favourable starting point, because no reasons are expressed for it, in favour of any subsequent people with whom the Tribunal deals. That is a matter for the regulator.

46. The next point is this, no submission has been made that a disqualification is not appropriate. It is more the fact that, on the appellant's behalf, he submits 12 months is too harsh.

47. The Tribunal then turns to look at discounts.

48. The appellant is 34 years of age, he having, prior to entering this industry, been a professional football player. He has been associated with the industry for some 10 years, eight years on a full-time basis and five years as a public trainer and breeder. His intention is to be in the industry on the long-term. The regrettable consequence for him in this matter is that he has in fact sold his greyhounds. He wishes to return to the industry and do it on a full-time, long-term basis.

49. He at the moment is struggling to obtain full-time work, although that aspect of hardship is not one which persuades the Tribunal that the appropriate penalty should otherwise be discounted.

50. The Tribunal does also have regard to the fact that the appellant has two priors. Those priors each occurred in 2017 and they involve caffeine and its metabolites, for which a 14-month suspension was imposed, and heptaminol, for which a $1000 fine was imposed.

51. The submissions for the respondent today are that they are aged matters, they should not lead to any aggravation of penalty. That part of the submission the Tribunal accepts. But it is also submitted they should not, in essence, cause any loss of discount.

52. The Tribunal has expressed, ad nauseum, for many years that those who are in the industry for a lengthy period of time and have no prior matters

should expect that the discounts given to them on a subjective basis are greater than those that are given to people either of a lesser time in the industry or who have prior matters. The Tribunal remains of that opinion.

53. In assessing those priors, the Tribunal does note that they are for different substances and that they were six years ago and that they therefore do not lead to any substantial loss of discount, but they will not be disregarded and mean that other matters which stand in the appellant's favour are to be given less weight.

54. The other aspect of consideration on these matters is parity.

55. The appellant has called in aid the case of Frankland-Shambler, where, as analysed earlier, no action was taken. The appellant continues to press that case on the basis he has been dealt with unfairly and too harshly. The Tribunal again rejects that submission. It is a misconception he must put out of his mind. He is simply wrong factually and at law as to what happened in that matter, as to why that trainer was dealt with differently to him.

56. The simple fact of the matter is that trainer had expert veterinary evidence which established the existence of a reading at an endogenous level, which could not be discounted by the respondent, and therefore action was not taken. It was not simply the fact that a hair sample was taken there and not here, that he should be able to argue he has been dealt with differently.

57. In any event, as expressed before and repeated again, it is entirely within the discretion of the regulator and it must bear any opprobrium that it receives because it deals with people apparently unharshly.

58. But in this case, this appellant has not been dealt with more harshly than that trainer. The limited facts available to the Tribunal satisfy it, as the stewards were satisfied on the evidence of Dr Cawley, and in any event, the case could be distinguished because there, there was all probability, and an absence of in vivo metabolism, that that case could be distinguished, in any event.

59. As to the other cases relied upon by the appellant, such as the matter of Arletos, where in December 2018, there were the subject drugs, there was a positive result from the hair sample, there was a decision based upon a guilty plea, not given here, therefore, there would be a greater discount, in any event. Thirty-one years in the industry, as compared to a maximum of 10 here, and led to a 10-month disqualification.

60. It is quite apparent that that trainer was entitled to expect that he would receive less than this appellant, based upon those two key factors: plea of guilty and 31 years in the industry. And, in addition, no relevant prior

disciplinary history. Three facts which quite clearly distinguish Arletos. It does not assist this appellant on a parity basis.

61. The other matter is Staines. Staines is July 2018, similar drugs. Here, there is a clear distinguishing. Plea of guilty, 43 years in the industry and no relevant disciplinary history, supported by good character, reputation and involvement.

62. Here, the Tribunal notes that the appellant has not put in evidence any references by anybody, let alone licensed people in his support, to indicate how his character is assessed, nor of his contributions to the industry over and above that which was consistent with him operating his business as a trainer and breeder. No involvement in the community as such and no voluntary work, such as a director of a racing club or matters of that nature.

63. Therefore, he can clearly be distinguished from Staines on the basis that Staines also pleaded guilty, had 43 years and no relevant disciplinary history, and therefore, that 24-week disqualification is quite consistent with those facts and with parity with other cases.

64. The respondent also puts in aid other cases.

65. Norman, November, 2021, a plea of guilty, 31 years in the industry, although there was one prior, there an 8-month disqualification was given, perhaps slightly more generous in view of the fact that there was a prior positive. The facts about that prior positive are not set out in detail.

66. The next matter is Scott, November 2020. Again, a guilty plea, review of husbandry practices, had no prior matters and 9 months' disqualification, quite consistent with the matters of Arletos and Staines.

67. The next matter is Comito, November 2019, again, a plea of guilty, 11 years, corresponds with that of the appellant here, no prior disciplinary history, as distinct from the appellant here, and received a 9-month disqualification. That is not inconsistent with those other cases and within a permissible range having regard to the plea matter. And also noting it was, in all probability, a 25 percent discount from a starting point of 12 months, in any event, consistent with a plea of guilty.

68. Therefore, the discounts here, which were considered appropriate by the stewards of 2 months, are based purely upon personal circumstances, not a lengthy time in the industry, although he does have 10 years. Further not reduced by the fact that he has two prior matters, there was no plea of guilty and no references. No indication of change in husbandry practices, which can be understood as he cannot explain it, and that is not a criticism when it comes to penalty.

69. The Tribunal is satisfied that the facts and circumstances alone would not warrant more than a 2-month discount from the starting point of 14 months.

70. The parity cases more than reinforce in the Tribunal that an outcome of a 12-month disqualification is consistent with those parity cases and the facts and circumstances of this case.

71. Indeed, the Tribunal, as quite clearly indicated, considers that a 12-month outcome is more than favourable to this appellant. It is not out of range, it is not out of parity considerations and, for the permanently banned unexplained prohibited substances, in the Tribunal's opinion, is at the bottom end of the range for the reasons it otherwise expressed.

72. The Tribunal determines that there be a period of disqualification of 12 months. That will commence on the date of his original interim suspension.

73. Accordingly, the appeal against severity is dismissed.

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