

# RACING APPEALS TRIBUNAL

**CHLOE MARIE BILAL**

Appellant

**GREYHOUND WELFARE AND INTEGRITY COMMISSION**

Respondent

## DETERMINATION

**In the matter of a Stay Application  
13 November 2023**

### Introduction

1. The Appellant, Chloe Marie Bilal (**Ms Sams**) was, as at 18 October 2023, a licensed owner and trainer having first been registered in June 2021.
2. Ms Bilal is the owner and trainer of greyhounds “Joshua Keeping” and “Rampage Soldier”.
3. On 23 January 2023, “Joshua Keeping” competed in Race 5 at a meeting at Nowra.
4. On 24 February 2023, “Rampage Soldier” competed in Race 1 at the Goulburn Racing Club.
5. After the races, a urine sample was taken from each of “Joshua Keeping” and “Rampage Soldier”. Those samples were analysed by Racing Analytical Services Limited (**Laboratory**) which detected the presence of cobalt in each sample in concentrations in excess of the threshold of 100 nanograms per millilitre as prescribed by Rule 140(f).
6. On 18 May 2023, Ms Bilal was issued with a notice of charge and proposed disciplinary action (**Notice**) by the Respondent (**GWIC**) in which she was charged with two breaches of Rule 141(a) in respect of each of Joshua Keeping and Rampage Soldier for failing to present them free of any prohibited substance. The Notice proposed a penalty of a 12 month suspension in respect of each charge with the penalties to run concurrently. Ms Bilal was afforded an opportunity to respond to each of the charges and to attend a hearing.
7. On 11 October 2023, written submissions on behalf of Ms Bilal were provided by her solicitors to the GWIC. In those submissions, Ms Bilal confirmed “...a plea of guilty to the charges, meaning that the substance was detected at the pre-race swabs...” but contended for the reasons there outlined that she should not receive any penalty at all for the detection.

8. On 18 October 2023, the GWIC found the charges to have been established and imposed an 11 month suspension in respect of each charge with the suspension to be served concurrently. In reaching its decision, the GWIC considered all the evidence, including Ms Bilal's guilty pleas, her relatively short registration history, the fact that she had had two prior prohibited substance breaches in January and April 2022, the GWIC's Penalty Guidelines and submissions made in respect of Ms Bilal's personal and professional circumstances. The GWIC also batch-tested a sample of the kibble ingested by the greyhounds which Ms Bilal contended was the source of the cobalt and determined that the level of cobalt detected would not have given rise to the threshold being exceeded in each of the samples taken from the greyhounds. The GWIC was unable to determine the cause for the cobalt detected in the urine samples (**Decision**).
9. By notice of appeal dated 24 October 2023 (**Notice of Appeal**), Ms Bilal appeals the Decision. The appeal is not as to conviction or guilt. It is limited to penalty only.
10. The Notice of Appeal is accompanied by an application for an order suspending the Decision pursuant to Regulation 14 of the *Racing Appeals Tribunal Regulation* (**Regulation**) (**Application**). The Application is opposed by the GWIC.
11. Ms Bilal provided the Tribunal with written submissions in support of the Application with her Notice of Appeal (**AS**), dated 24 October 2023. Those submissions included a reference to and a copy of an expert report from Dr Derek Major, veterinarian, dated 9 October 2023.
14. On 1 November 2023, the GWIC provided the Tribunal with written submissions in opposition to the Application (**RS**).
15. On 6 November 2023, Ms Bilal provided the Tribunal with written submissions in reply to the GWIC's submissions in opposition to the Application (**ARS**). The ARS included a reference to and a copy of a further expert report from Dr Major, dated 5 November 2023.
16. The parties have consented to the Application being heard on the papers, that is, without the need for a hearing and after each had been afforded the opportunity to provide the Tribunal with documentary material upon which they proposed to rely together with written submissions.

### **Principles applicable to a stay**

17. Regulation 14 provides, inter alia, that the Tribunal may, on written application by an appellant, order that the decision appealed against is not to be carried into effect, or is to be carried into effect only to the extent specified in the order pending the determination of the appeal. The Regulation is silent as to the test to be applied when determining such applications.
18. The manner in which the Tribunal should exercise its discretion to order a stay has been the subject of prior determinations by the Tribunal and is derived from well-established authorities. Those principles may be conveniently summarised as follows:
  - (a) it is not necessary to make out special or exceptional circumstances for a stay: *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 694-5;
  - (b) an applicant must show that the appeal raises serious issues for determination and that there is a real risk that they will suffer damage or prejudice if a stay is not granted and

will not be redressed by a successful appeal: *Kalifair Pty Ltd v Digi- Tech (Australia) Ltd* (2002) 55 NSWLR 737 at [17]-[20];

- (c) consideration should be given first, as to whether the appeal raises a serious question to be tried, in the sense of arguable grounds, and if so, where the balance of convenience lies: *Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 694; *Kalifair Pty Ltd v Digi-Tech (Australia) Ltd* (2002) 55 NSWLR 737 at [18]; *Brown v AEP Belgium SA* [2004] VSC 255; *Vaughan v Dawson* [2008] NSWCA 169 at [17]; *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 and *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57);
- (d) the applicant must demonstrate a proper basis for a stay which will be fair as between the respective interests of the parties (*Alexander v Cambridge Credit Corp Ltd* (1985) 2 NSWLR 685 at 694; *Adeels Palace Pty Ltd v Moubarak* [2009] NSWCA 130 at [5]; *Bar Association of NSW v Stevens* [2003] NSWCA 95 at [83]);
- (e) whether an appeal, if successful, will be rendered nugatory if a stay is not granted (*TCN Channel 9 Pty Ltd v Antoniadis [No. 2]* (1999) 48 NSWLR 381; *Newcrest Mining v Industrial Relations Commission* [2005] NSWCA 91; *Maund v Racing Victoria Limited & Anor* [2015] VSCA 276 at [33]); and
- (f) the mere filing of an appeal does not demonstrate an appropriate case or discharge the onus.

19. In determining whether there is a “serious question to be tried” a tribunal is to consider whether an applicant for relief has “made out a prima facie case, in the sense that if the evidence remains as it is, there is a probability that at the trial of the action [the applicant] will be held entitled to relief...How strong the probability needs to be depends, no doubt, upon the nature of the rights he asserts, and the practical consequences likely to flow from the order he seeks” (*Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at [4]).
20. Similarly, in *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57, the High Court, commenting on *Beecham*, noted that by using the phrase “prima facie case”, the Court “did not mean that [an applicant] must show that it is more probable than not that at the trial [he] will succeed; it is sufficient that the [applicant] show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial (per Gummow and Hayne JJ at pp 81-82).

### **Ms Bilal’s Submissions in Chief**

21. Ms Bilal submitted, in summary, that:
  - (a) the GWIC is unable to point to any actual conduct that establishes “wrongfulness or a guilty conscience”;
  - (b) the report of Dr Major (dated 9 October 2023) opines, inter-alia, that the level of cobalt detected in the greyhounds is “highly likely” from a combination of the compounding effects of urine concentration on the dogs’ cobalt intake from feed, water supplements and the environment rather than having been deliberately administered, it is highly unlikely that the batch of kibble tested was that consumed by the greyhounds at the time

of racing and that cobalt is not a “prohibited substance” because it is not, in fact, performance enhancing;

- (c) the source of the cobalt appears to be kibble consumed by the greyhounds;
- (d) “...the length of time without any additional charges, the lack of any further serious charges and the [GWIC’s] tolerance of Ms Bilal continuing to practice training unimpeded for a significant period tend to assist her with a stay”; and
- (e) hers is not a case “...where an immediate preventative action appears to be warranted less the integrity of the industry is threatened. The amount of the substance detected does not suggest an administration, there is no ancillary evidence as to tampering or an entanglement with anything adverse or untoward”;

22. Relevant to the balance of convenience, Ms Bilal submitted, in summary, that:

- (a) she has invested heavily in her premises and has employees who will be laid off if she remains suspended;
- (b) she is on an average income, has only modest savings and relies wholly on her licence to support herself. She will suffer a disproportionate and considerable financial loss;
- (c) she has model greyhound premises, has a very good record in competition, and is well liked and highly regarded in the industry;
- (d) without a ready income to support her greyhounds, Ms Bilal will need to transfer or remove the 50 dogs, either in training or otherwise in her care, all of which have prospered; and
- (e) without a stay, there is a real risk that the appeal itself will prove abortive given the upcoming Christmas break and the delay that it may have on the finalisation of the appeal.

23. The Tribunal has also had regard to the written submissions made on behalf of Ms Bilal to the GWIC on 11 October 2023. In those submissions, Ms Bilal made many of the submissions which are repeated in the submissions of 1 November 2023 to the Tribunal. An additional matter addressed in the earlier submissions is the contention that her circumstances fall under what is described as the “third limb” of *McDonaugh (HAR) - App 04 2008* [2008] VRAT (24 June 2008) (**McDonaugh**); that is, that she has little or no culpability and that such a finding would warrant the imposition of no penalty.

### **GWIC’s Submissions**

24. In its RS, the GWIC submitted, in summary, that:

- (a) Ms Bilal does not have an arguable case on appeal;
- (b) a breach of Rule 141(a) is an offence of absolute liability and the GWIC is not accordingly required to prove that the substance was administered, deliberately or otherwise;

- (c) Ms Bilal's contention that the breaches of Rule 141(a) were result of contamination is therefore relevant only to the issue of penalty and not to the substantive charges to which Ms Bilal pleaded guilty;
- (d) a sample of the kibble used by Ms Bilal was tested by the Laboratory and the level of cobalt detected in it was not sufficient to account for the level detected in the greyhounds; therefore, the submission that the prohibited substance was attributable to the ingestion of kibble is rejected. The decision-makers were unable to determine the source of cobalt detected in the greyhounds;
- (e) the source of the cobalt has not been determined and administration may indeed have been inadvertent. However, that does not mean that its presence in the greyhounds could not have been prevented. As an Owner Trainer, Ms Bilal should have been aware of the risk of inadvertently providing a prohibited substance to a greyhound and taken preventative measures;
- (f) Ms Bilal's circumstances do not fall under what is described as the "third limb" of *McDonough*, that is, where there is little or no culpability by Ms Bilal. Instead, it is submitted that the circumstances properly fall under the "second limb" of *McDonough*, that is, where a decision maker is unable to determine how the contamination occurred;
- (g) in determining penalty, the GWIC had regard to two prior breaches of Rule 83(2)(a) (now Rule 141(1)(a)) on 17 January 2022 and 23 January 2022 in respect of which Ms Bilal was suspended for a period of 7 weeks for the first breach and for a period of 18 weeks in respect of the second breach. The substances involved in each of these breaches were Category 3 substances. Those suspensions were reduced on appeal to 6 weeks each with the latter suspension to be served partially concurrent with the former;
- (h) the Penalty Guidelines provide for a minimum starting point of a four-month suspension for a first prohibited substance offence where the prohibited substance is a Category 2 substance such as cobalt. However, where a participant has incurred a penalty as a result of a Category 2 prohibited substance in the previous three years, the starting point becomes an 8 month suspension and where the participant has incurred two or more prohibited substance penalties in the previous five years, an 18 month disqualification is the starting point for further breaches;
- (i) given Ms Bilal's multiple breaches of the Rules relating to prohibited substances across Categories 2 and 3 within a relatively short period of 13 months, the GWIC considered that the principle of specific deterrence was an important consideration relevant to its decision; and
- (j) the outcome of any appeal is likely to involve a period of suspension being imposed on Ms Bilal and that the exercise of the Tribunal's discretion to grant a stay is likely only to delay this outcome. The Commission is in a position to have the matter heard as soon as the Tribunal requires it. The determination by the Tribunal to refuse to exercise the discretion to grant a stay would, therefore, inconvenience Ms Bilal no more than the expeditious conduct of any appeal.

### **Ms Bilal's Submissions in Reply**

25. In her ARS, Ms Bilal reiterated points made by her in chief and further submitted, in summary, that:

- (a) the case "...has contests that encompass and include expert and related evidence" and that, in addition to Dr Major, Ms Bilal is in dialogue with a Professor Cindy Cole in the USA;
- (b) the Tribunal decision in *Bell v GWIC* (23 January 2023) which was upheld on appeal in *GWIC v Bell* [2-23] NSWSC 2023, supports the proposition that a significant and meaningful reduction of penalty is available to the Tribunal regardless of the GWIC's initial position;
- (c) in his further report, dated 5 November 2023, Dr Major expresses opinions consistent with those in his earlier report but with some additional analysis and which, according to Ms Bilal contain "important challenges to scientific assumptions and methodology";
- (d) her antecedence has no relevance as to whether a stay should be granted; and
- (e) there is no "likelihood of a suspension" as the GWIC submits. Whether Ms Bilal will receive a suspension depends on the findings of the Tribunal and its decision.

### **Consideration**

- 26. In the consideration that follows, the Tribunal has had regard to all of the submissions made by the parties and summarised in these reasons. However, the Tribunal proposes to refer only to such of those submissions which are necessary to explain its reasoning.
- 27. The question raised by the Application is whether the Decision should be stayed pending the hearing of the appeal having regard to the principles summarised in paragraphs 18 to 20 of these reasons.
- 28. Accordingly, the Application gives rise to two essential issues. First, whether the appeal raises a serious question to be tried, in the sense of arguable grounds, and secondly, whether the balance of convenience favours the granting of the relief.

#### *As to whether there are arguable grounds*

- 29. In accordance with s 16 of the *Racing Appeals Tribunal Act, 1983 (NSW) (RATA)*, an appeal to the Tribunal is to be by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence on which the decision appealed against was made, may be given on the appeal.
- 30. Accordingly, in a case such as the present where only sanction is in issue, it will be for the Tribunal to determine the appropriate sanction, if any, having regard to all the facts and circumstances of the case and informed by the Penalty Guidelines which identify a number of important considerations that a decision maker is to take into account when imposing a penalty. As the Tribunal has said on many occasions, notwithstanding the existence of guidelines, penalty is to be determined on the merits of each particular set of circumstances (see, for example, *Donovan v Harness Racing New South Wales*, 9 September 2022).
- 31. The tribunal in *McDonaugh* identified that prohibited substance cases generally fall into one of three categories:

“First, where through investigation, admission or other direct evidence the Authority...can establish before the Tribunal a positive culpability on the part of the person responsible...

Secondly, where at the conclusion of any evidence and plea, the Tribunal is left in the position of having no real idea as to how the prohibited substance came to get into the horse. This may be with the trainer giving some explanations which the Tribunal is not prepared to accept or the trainer may simply concede that he has no explanation...

Thirdly, the trainer...may provide an explanation which the Tribunal accepts and which demonstrates that the trainer has no culpability at all...there could be other factual scenarios where the horse could somehow be the subject of the administration or ingestion of a prohibited substance without any culpability either directly or indirectly on the part of the trainer. This category represents cases where the trainer does establish to the Tribunal's satisfaction, the onus being on him, that he is free of blame, that he himself was not instrumental in the administration of the prohibited substance, and that he has done all he could be expected to do to prevent same....

As to the third category where there is little or no culpability, one would expect any penalty to reflect the absence of culpability or its low level. Within this category of cases there may, in appropriate situations be instances where it is deemed not to be appropriate that the sentence express denunciation or general deterrence at all and, indeed, where it is appropriate to impose no penalty at all.”

32. Ms Bilal contends, in summary and for the reasons articulated by her and summarised in paragraphs 22, 24 and 25 of this determination, that the circumstances fall within the third limb of *McDonough* that is, where there is little or no culpability or blameworthiness that would warrant the imposition of no penalty.
33. Central to Ms Bilal's contentions is that she did not intentionally administer the cobalt, that the ingestion of cobalt by her dogs was more probable than not from kibble which contained trace elements of the substance and that there was nothing that she could have done to have prevented the incidents. Those are matters in respect of which Ms Bilal ultimately bears the onus.
34. In support of those contentions, Ms Bilal relies on the opinions expressed by Dr Major in reports dated 9 October 2023 and 5 November 2023 to the effect that that the level of cobalt detected in the greyhounds is “highly likely” from a combination of the compounding effects of urine concentration on the dogs' cobalt intake from feed, water supplements and the environment rather than having been deliberately administered, it is highly unlikely that the batch of kibble tested was that consumed by the greyhounds at the time of racing and that cobalt is not a “prohibited substance” because it is not, in fact, performance enhancing.
35. Whilst the last of Dr Major's opinions do not appear to have any particular relevance to the issues the subject of either the stay or the appeal, in particular, because guilt or breach is not in issue and, as the GWIC correctly submits, Rule 141(1) is in the nature of a strict liability offence (cf *Turnbull v HRNSW*, 30 September 2022 [53]), the balance of the opinions provide some prima facie support relating to the source of the cobalt which, if substantiated, can affect the issue of Ms Bilal's culpability or blameworthiness for the purposes of determining the objective seriousness of the offending and thus the appropriate penalty, if any. That, in turn, may impact other considerations relevant to penalty including, for example, matters of specific and general deterrence (see, for example, *Kavanagh v Racing New South Wales* [2019] NSWSC 40 at [67]).

36. The GWIC disputes Ms Bilal's characterisation of the facts and contends that the circumstances fall within the second limb of *McDonagh*, that is, where a decision maker is unable to determine how the contamination occurred. On the basis of the evidence adduced to it at the time that it considered the Decision, including batch testing undertaken of kibble used by Ms Bilal, the GWIC was unable to determine the source of the cobalt. It accepts that administration may have been inadvertent but nevertheless contends that its presence in the greyhounds could have been prevented including by following advice routinely provided by the Commission to trainers to be vigilant in what they feed their greyhounds.
37. It is not for the Tribunal on the hearing of a stay application to resolve what appears to be a contest between the parties as to both the relevant facts themselves and how they are to be characterised as to their objective seriousness. Those are matters that the Tribunal will be required to determine on the evidence as adduced at the hearing and, if it considers that a sanction is warranted, may also inform its decision as to the propriety and proportionality of that sanction.
38. In summary, the parties' submissions provide articulate and cogent reasons in support of the competing contentions. They also make plain that there is a clearly arguable case as to the appropriate penalty, if any, and as to the circumstances that could inform that decision.
39. The Tribunal is accordingly satisfied that the appeal raises a serious question to be tried.

*As to the balance of convenience*

40. In considering the balance of convenience the Tribunal is acutely aware that prohibited substance offences strike at the heart of integrity for the sport and that there is a public interest in ensuring that persons convicted of such offences are not permitted to be involved in the industry. The Tribunal is particularly concerned that the charges to which Ms Bilal pleaded guilty are not her first prohibited substance offences; she pleaded guilty to two Category 3 prohibited substance offences in January 2022 for which she has served a 6 week suspension.
41. The Tribunal notes that Ms Bilal may suffer financial hardship and inconvenience including having to make arrangements for her greyhounds as a consequence of the Decision the subject of the appeal if a stay is not granted. That is a necessary consequence of the prohibited substance offence. It is not a matter upon which the Tribunal places any weight.
42. The Tribunal accepts that there is a prospect, as the GWIC contends, that Ms Bilal will be required to serve a period of suspension and that the exercise of the Tribunal's discretion to grant a stay is likely only to delay the outcome. The ultimate issue for the Tribunal is whether a suspension is warranted and, if so, what period is appropriate. That is not a matter upon which the Tribunal can express an opinion on this application.
43. The Tribunal is, however, concerned that given the factual contest between the parties, the forensic exercise required to prepare the appeal for hearing and the impending summer recess, there is a real prospect that the appeal may be rendered nugatory and that Ms Bilal will thus suffer damage or prejudice that will not be redressed by a successful appeal (see *Kalifair Pty Ltd v Digi-Tech (Australia) Ltd* (2002) 55 NSWLR 737 at [17]-[20]) unless an order is made staying the effect of the Decision pending the determination of the appeal.
44. Accordingly, and whilst finely balanced, the Tribunal is of the view that the balance of convenience favours the granting of the relief sought by Ms Bilal.



**Determination**

45. The application for a stay is granted.

**Orders**

46. Pursuant to Regulation 14, the Tribunal orders that the Decision not be carried into effect pending the determination of the appeal or other order on condition that Ms Bilal prosecutes the appeal with expedition.
47. The parties are to confer with a view to agreeing short minutes of order to expedite the hearing of the appeal. Those orders are to be provided to the Tribunal by no later than 4 pm, 15 November 2023.
48. If orders cannot be agreed by this time, the parties are to provide to the Tribunal short minutes of order for which they each contend together with written submissions limited to one page. The Tribunal will, if it is sufficiently informed on the basis of the submissions to do so, proceed to consider the competing short minutes in chambers. If not, or if otherwise requested by the parties to do so, a directions hearing will be convened by Zoom.

A.P. Lo Surdo SC  
Racing Appeals Tribunal