RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

WEDNESDAY 6 SEPTEMBER 2023

APPELLANT PETER JOHNSTON

RESPONDENT GWIC

LR 21(a) and GRR 151

SEVERITY APPEAL

DECISION:

1. **Appeal upheld**
2. **Charge 1 – Penalty of 15 weeks disqualification imposed to commence 26 July 2023**
3. **Charge 2 – Penalty of $120 fine imposed**
4. **50 percent of appeal deposit refunded**

The appellant, licensed public trainer and breeder, Mr Peter Johnston, appeals against the decision of GWIC ("the respondent") of 21 July 2023 to impose upon him in respect of Charge 1 a period of disqualification of 6 months, and in respect of Charge 2, a fine of $500.

Charge 1 related to a breach of Local Rule 21(a), which relevantly provides that the appellant, being a registered trainer, did a thing which in the opinion of the Controlling Body constitutes an offence, where the particulars of that charge were set out:

> " … that on Monday, 29 May 2023, your kennels were attended by representatives of the Controlling Body for the purpose of conducting an inspection. During the course of the inspection you were observed striking the greyhound Stir The Pot in the face with an open palm. When directed by GWIC inspectors to desist from striking the animal you stated, 'If it shuts him up, I will, and it won't hurt him.'"

Charge 2 was a breach of Rule 151, which relevantly provides that the appellant, registered as a public trainer and breeder:

> "did a thing which in the opinion of the Controlling Body constitutes an offence in circumstances where you were directed by a representative of the Controlling Body to provide copies of your treatment records on Monday, 29 May 2023, and these were found to be incomplete."

The appellant attended a stewards' inquiry on 20 July 2023 and pleaded not guilty to those two matters. The Tribunal notes in passing there was a third charge, which has been withdrawn.

By his appeal, the appellant entered a plea of guilty to Charge 1 and maintained a plea of not guilty to Charge 2. At the commencement of this appeal hearing, after certain matters were stated by the Tribunal, the appellant changed his plea on Charge 2 to guilty.

The evidence before the Tribunal has comprised the respondent's brief of evidence, which, critically, contains not only formal parts, but in addition, a photograph of the subject greyhound, a complete extract of the greyhound's health record, various documents, which are now not relevant, relating to Charge 3, a transcript of the stewards' inquiry, and, critically, a USB of the inspectors' attendance at the appellant's property.

The appellant has put in evidence a statutory declaration by way of reference of Robert Kimber of 31 July 2023 and a letter of Ms Jan Sutherland of 20 July 2023.

The appellant's evidence essentially has comprised that which was set out on his behalf in a seven-page document which has been admitted as an

undated submission. The appellant did not give evidence before the Tribunal. The matter has proceeded on the basis of submissions.

This is a severity appeal in respect of both matters only and, accordingly, the necessity to examine the evidence in greater detail falls away.

The Tribunal's first function is to determine the facts, and from those facts, determine issues of subjective seriousness, and then, if it is appropriate, reduce any starting point for objective seriousness by subjective matters that stand in favour of the appellant. The Tribunal's duty is to find in the public interest a message of deterrence to the industry generally. No greater penalty than that which the facts dictate is appropriate, otherwise it would be oppressive. Focus must be upon two parts of deterrence, and they are specific deterrence to this appellant and general deterrence to other industry participants and the public at large.

The facts essentially are brief. The appellant has been a licensed person for some 34 years. The industry is, subject to his income from a disability pension, his life. The appellant quite openly admits and does not hide behind the fact that he is a recovered alcoholic. The appellant does not hide from the fact that as a result of his lack of schooling and as a result of his period of time suffering from the effects of alcohol, he is both illiterate and struggles with understanding concepts.

The appellant, having been in the industry for so long, has relied upon a background understanding, what might be described as an old-school understanding, as submitted by the respondent, on how greyhounds are to be handled.

The appellant was visited by inspectors in relation to an unrelated matter. The Tribunal has viewed the video recorded images and whilst they could be analysed in great detail, that will not be done, but it is noted that the appellant did become agitated. He felt that the inspectors were either not understanding him or not listening to him. He did, of course, on a number of occasions repeat matters. It is apparent that, whilst there was no medical evidence of it, he was not particularly happy with what was happening.

The stewards determined to conduct a kennel inspection. They did so. The appellant has grievances about their visit on the basis it was not announced. It was not made clear to him, he says, that what was being said was being recorded. And that he was not being listened to. The Tribunal has had the benefit of observing that recording.

The Tribunal is of the opinion that the rules, when read as a whole, the powers of the inspectors as specified, specifically empowered them to do that which they were doing, and it was within their remit to do so, and in the fashion they were required to do so. The appellant apparently has a hearing difficulty, but

his ability not to hear what the inspectors were saying to him is difficult to accept by reason of his immediate responses to their various statements. It is, therefore, that the Tribunal is satisfied he knew what was happening was that which the inspectors embarked upon.

They went to the appellant's kennel area. The subject greyhound was in a kennel and was pacing about, possibly agitated by the activities that were going on about it.

The greyhound was removed from its cage. The appellant stood holding the greyhound and the greyhound appeared to become slightly vocalised and to be moving about. The appellant is observed with an open hand to strike in an upwards direction the muzzle area of the greyhound, causing its head to go upwards and saying at the same time, "Stand up." There was a slight backward movement of the greyhound. It did not appear to have any other reaction to the strike inflicted.

It is emphasised that it was an open strike. The greyhound was muzzled. That muzzle itself was heavily taped. The striking was to the muzzle and not the physical body of the greyhound, although because the greyhound was wearing the muzzle, of course, that would have impacted through the greyhound's head.

The inspectors, who were immediately in the vicinity, informed the appellant on three occasions that striking in that fashion was not allowed and should not be done again. The appellant replied, "If it shuts him up, I will," and then on the second warning, "Won't hurt him," and then on the third warning, when asked if he understood what was being said to him, he said, "Yeah, all right."

The appellant says that it has been his upbringing with greyhounds over those 34 years to use a clipping motion to a greyhound as a means of training it and controlling behaviour. He says that when he effected this striking, he had no intention of hurting the greyhound and it was done purely as a training and disciplinary measure.

The appellant has made submissions in respect of this charge and did not understand that what he did the moment he did it was not permissible, for the reasons he has outlined. He now says that he accepts it was wrong conduct and he will not do it again.

He expresses remorse for his actions, both in his evidence submission and to his referee, Mr Kimber.

It is emphasised by the appellant that what he did was not with any intention to cause harm, but purely a belief it was a proper disciplinary measure.

In respect of the second matter, the rule requires a book to be kept. The appellant had such a book. The rule requires that certain matters be written down. Three pages are before the Tribunal and in relation to one of those pages, it sets out the substance Panacur and gives the date it was administered. It does not set out the time of administration, the route of administration, the amount given, nor the name and signature of the person administering it.

There is then another page with a list of supplements given. There are nine. That contains only the name of the substance and does not have date and time, route, amount given, name and signature.

There is then a third page which lists worming and flea treatments. In respect of that, the date of administration and the name of the substance is given, the time of administration is not given, the route of administration is not given, the amount given, and a name and signature is not given. It might be said with flea and worming tablets that the necessity to state the route of administration is somewhat unnecessary, but that is what the rule provides.

The appellant says, in respect of that matter, he is illiterate with poor literacy skills and an inability to read, write, comprehend and spell. He did not intend to ignore his responsibilities, but that has happened because of his ignorance of the rules and the fact that he did not know he had to do it. He has corrected that; he now does it.

Miss Sutherland, whose document of 20 July is in evidence, says she is his partner and she shall be able to assist him in filling out his greyhound treatment records. That then indicates that the necessity to comply with that rule in the future appears to be one which will occur.

The appellant is at pains to point out that these proceedings have had an effect upon him and the Tribunal will return to that.

That then is essentially the evidence in respect of the matter.

It is necessary then, in turning to determine penalty, to find out what is the objective seriousness of each breach.

In respect of the striking, it is the respondent's position that, it being driven by s 11 of the Greyhound Racing Act to mandate matters to do with welfare of greyhounds, having introduced a specific Local Rule 21 to forbid the striking of a greyhound, has clearly demonstrated, it submits, that a substantial penalty is appropriate.

The gravamen of the submission is that the appellant cannot hide behind his ignorance of the rule prohibiting it, and cannot rely upon an old-school approach to welfare.

The changes to the requirements of welfare in this industry since the new Act in 2007 have been clearly publicised by the regulator and brought home to the attention of trainers and, indeed, where possible, to the public at large of the necessity for welfare to be paramount. The Tribunal agrees. There can be no place in this industry, based upon old-school beliefs, for the striking of a greyhound.

The welfare provisions set out in the respondent's penalty guidelines introduced in July 2022 provide for welfare-related matters a minimum period of penalty for a first offence of three years. Local Rule 21(a) has no mandated starting point in the guidelines. It is necessary, therefore, on objective seriousness, in looking for what is the appropriate subjective and general deterrent message, to look to the issues of parity.

There are two cases to which the Tribunal turns. The first of which was set out in the decision of Gatt, a decision of the Tribunal on 28 October 2022, where it referred to a matter of Roberts of 31 March 2022, which was the striking of a greyhound, but that was done in self-protection of a greyhound in the catching area after a race, because there Mr Roberts believed that another greyhound was about to attack his greyhound – that had happened to him before – so he struck the greyhound to prevent it doing so. He received a $1000 fine, $500 of which was suspended.

The matter of Gatt, a decision, as said, of 28 October 2022 of the Tribunal, involved an appellant with a mental disability, which was extant at the time of his actions, in the weighing area on race day, visible to other participants and the public, who, when a greyhound threw its head up and may or may not have made contact with his head, withdrew his fist some 30 to 40 centimetres, paused, and struck the greyhound with his closed fist to its head, causing the greyhound to drop down on its haunches.

The appellant there had no prior matters. He had had a reasonable length of time in the industry. He was suffering from a mental illness which was accepted as contributing to his behaviour.

The Tribunal determined a starting point for such an action of a disqualification, firstly, and, secondly, of nine months was appropriate. That is, on all of those welfare and other considerations to which the Tribunal just made reference here, a disqualification was seen to be appropriate and no other outcome of a lesser penalty was seen to be appropriate.

That nine-month starting point was then reduced by the Tribunal on objective seriousness on the basis of the appellant's mental state at the time of the action, and a starting point of six months was considered to be appropriate.

That then indicates to the Tribunal that it has to assess the actual conduct to see how serious it was and then decide if Gatt provides a precedent. The Tribunal distinguishes Gatt for two reasons. Firstly, the striking here was less serious, although still a striking, and that can never be condoned. Secondly, this appellant does not have a mental health issue which would entitle him to a lesser starting point.

The Tribunal is satisfied that the appellant now understands that it is not appropriate to strike a greyhound, and that has a strong subjective lessening of gravity to it. Subjectively, however, it is necessary to convey a message by way of deterrence to this appellant to indicate quite clearly to him that his conduct was unacceptable. It is slightly less serious than Gatt because it took place in front of inspectors at the appellant's own kennel premises and not in a public area as described a moment ago.

The general message of deterrence on this striking must be substantial. It is essential that those welfare requirements of the regulator be clearly conveyed in penalties on matters such as this. It must be made quite clear to other trainers, and it had not been to this appellant, because he engaged in this conduct notwithstanding penalties in Gatt and in Roberts earlier, that he would still consider, uninformed as he apparently was, that he could still do this sort of thing. That is why the general message of deterrence here must be a strong one.

And, critically, it is essential for the maintenance of this industry that it be seen by the public at large that this type of conduct, this welfare concern with greyhounds, be strongly reinforced. To the extent that it was not intended to harm, that merely is noted. It did harm. It was wrong.

The Tribunal has determined that in that matter, there be a starting point of a disqualification. The Tribunal considers, for the reasons outlined, anything less than a disqualification is entirely out of the question. That is not to fetter the Tribunal's discretion, but to be a reflection of the seriousness with which striking a greyhound, for welfare reasons, must be addressed.

The starting point for that disqualification for this appellant is six months.

With respect to the second matter, the objective seriousness of that is slightly reduced because the appellant did have the appropriate record and had made certain entries in it. The gravamen of the particulars against him is they were incomplete. The Tribunal has set out, though, how they were incomplete.

The appellant did not know that he was required to do better than he did. He relies upon his illiteracy, and that is understood and recognised. But the rule is the rule. The privilege of a licence carries with it a necessity to comply with the rules. That rule is clear and unambiguous. It is easy of compliance, although, of course, made more so by the appellant's disabilities.

The general aspects of deterrence are only in relation to the general requirement to comply with the rules such that inspectors and the regulator generally can be satisfied that greyhounds are being properly looked after. It has a welfare connotation as well as a disciplinary connotation about it.

As to specific deterrence, the Tribunal accepts the disability of the appellant and accepts that that entitles him to a lesser penalty than would otherwise be the case, although it cannot excuse his failure to comply with the rule. He has now an understanding of the rule. He now has his partner, Ms Sutherland, available to do the writing up for him. Subjectively, therefore, the message diminishes.

Having regard to that reduced deterrent issue in the public interest for the protection of the industry, it is necessary to have regard to parity. In that regard, a number of parity cases are advanced.

Azzopardi, GWIC, 5 December 2022, a plea of guilty, fined $200, licensed for two years.

Jason Mackay, GWIC, 10 November 2022, plea of guilty, two fines of $375, licensed for 35 years, had prior disciplinary matters.

The matter of Verhagen, undated. Pleaded guilty, fined $225, 20 years and nothing similar.

McDonald, undated. Medical records missing. Plea of guilty, fine of $150, 26 years and nothing prior.

Sarkis, undated, not keeping medical records again, plea of guilty, fine of $150, 43 years' registration and no like matters.

This matter is subject to a penalty guideline by the regulator, and that provides for a first breach of the subject rule a starting point penalty of $200.

The stewards in their notice to the appellant proposed a $500 fine, and at the end of the day, imposed that $500 fine, finding no reason to reduce it for subject matters. It is not submitted to the Tribunal that that is an appropriate starting point, nor would the Tribunal find it such an appropriate starting point, either on the basis of those penalty guidelines or parity. None of those cases, and two of them certainly post-date the introduction of the July 2022 penalty guidelines, had a penalty greater than $375. And why Mackay was considered to be appropriate at $375 when he had no prior similar matter is not set out in the submissions made.

The Tribunal determines that, having regard to those parity cases and the penalty guideline, there be a starting point of a fine of $200.

It is then a question of what subjective discounts should be given in respect to both of those starting points for this appellant. A number of those facts have been set out already. The key one is that this appellant, with some 34 years in the industry, has no prior matters on his record. That is not exceptional, because the Tribunal has referred to certain other trainers just a moment ago who have had similar or longer periods, such as Sarkis, and not dissimilar in McDonald and Verhagen and Mackay.

The Tribunal takes into account, as a matter of credit for this appellant and a reflection of his character, that he has overcome his difficulty with alcohol and has done so for a great number of years. The unfortunate consequences that have befallen him as a result of that addiction have been referred to.

He describes that these proceedings have had a substantial impact upon him and has advised his referee Mr Kimber of those matters, and Mr Kimber refers to his remorse and how sensitive a person he is. He accepts responsibility, Mr Kimber says, for his actions, and the Tribunal accepts that he also expressed that in his written submission to the Tribunal.

It is trite to say that having no prior matters, there are no matters either of a welfare nature nor of a records nature which are on his record.

The Tribunal has determined that in each matter, those general subjectives, particularly the length of time in the industry with nothing prior, entitle him to a 20 percent discount.

The appellant also is entitled to a discount for his late pleas of guilty. Neither matter had a plea of guilty to the stewards, although he cooperated with them and the Tribunal is of the opinion that there is nothing to indicate that that plea of not guilty was justified before the stewards. Therefore, he does not enjoy, on those facts, a starting point in each matter of a discount further of 25 percent.

On appeal, he entered a plea of guilty to the striking charge. That was an early plea before the Tribunal. It was late as against the stewards. He is entitled to a 15 percent discount in respect of that.

In respect of the second charge, his plea of guilty was only entered after the commencement of this hearing, it has less utilitarian value, he is entitled to a 10 percent discount.

Mathematical formulae are now, according to the New South Wales Court of Appeal, to be avoided if at all possible. The Tribunal, therefore, avoids precise mathematics. It notes a starting point of six months' disqualification in respect of the striking charge, with two periods of discount of 40 per cent. That would

generally equate to something like 11 weeks and leaves a period of 15 weeks, avoiding mathematical calculations.

The Tribunal, therefore, reduces the starting point of six months, or 26 weeks, as a disqualification to 15 weeks' qualification.

In respect of the second matter, if those 35 percent discounts are taken into account, avoiding mathematical calculations, that is roughly one-third, that is roughly between $60 and $70, the Tribunal imposes a fine of $120.

In respect of Charge 1, there will be a disqualification of 15 weeks to commence on 26 July 2023.

SUBMISSIONS MADE IN RELATION TO APPEAL DEPOSIT

The Tribunal orders 50 percent of the appeal deposit refunded.
