IN THE RACING APPEALS TRIBUNAL

ASHLEY JADE MARSHALL
Appellant

v

GREYHOUND WELFARE AND INTEGRITY COMMISSION
Respondent

REASONS FOR DETERMINATION OF APPLICATION FOR AN ORDER UNDER CLAUSE 14 OF THE *RACING APPEALS TRIBUNAL REGULATION 2015*

FACTUAL BACKGROUND

1. In setting out the factual background, it is necessary for me to make clear at the outset that the material with which I have been provided for the purposes of determining the present application is limited to:

   (i) the Notice of Appeal;
   (ii) the Application for a Stay;
   (iii) the submissions of the Appellant, and a selection of documents annexed thereto;
   (iv) the report of Dr Major; and
   (v) the submissions of the Respondent.

2. It is apparent that I have not been provided with the entirety of the correspondence which passed between the parties in the course of the proceedings which are said by the Appellant to have been procedurally unfair. Further, a number of the submissions advanced on behalf of the Appellant as to what is said to have occurred on various occasions during the process are unsupported by any evidence.

3. In a case in which procedural unfairness is alleged, it is fundamental that the Tribunal be provided with a comprehensive summary of the procedure, including the entirety of the correspondence which has passed between the parties. That is particularly so in circumstances where the Appellant bears the onus of establishing that a stay is appropriate, and where directions were previously made by the Tribunal which provided the parties with the opportunity to file any evidence upon which they sought to rely. Needless to say, the Tribunal is not a Court, and is not bound by the rules of admissibility evidence. However, it remains the case that the Tribunal should be provided with any necessary material which is relied upon to support any facts that the Tribunal is asked to find.

4. In all of these circumstances, I have done my best to piece together the following Chronology of events.

5. On 2 July 2023 the Appellant presented the greyhound "Zipping Osman" for competition in a race at the Richmond Race Club. A blood sample was taken from the greyhound following the race.

6. On 21 August 2023, an "A" sample returned a positive result for Recombinant Human Erthyropoietin (EPO), which is a banned prohibited substance. That result was confirmed by the "B" sample on 3 November 2023.

7. On 7 November 2023, the Respondent informed the Appellant that it was proposing to take disciplinary action against her, in the form of the imposition of an interim suspension. The notice informing the Appellant of that intention specified a hearing date of 10 November 2023. That notice was sent directly to the Appellant, in circumstances where officers of the Respondent had, seemingly for some time, been engaging with the Appellant's solicitor in relation to the matter. Why, in those circumstances, the Respondent did not send the notice, or at least a copy of it, to the Appellant's solicitor, is not explained.

8. When the Appellant's solicitor sought an adjournment of the hearing on account of his unavailability to attend, the Respondent replied by advising that such

application was "denied", and that the hearing would proceed on 10 November. The Appellant was directed to attend.

9. The Appellant attended the hearing in person on 10 November and sought an adjournment. Whilst that adjournment was granted, the Respondent imposed an interim suspension on the Appellant, pending the finalisation of the relevant enquiry.

10. On 26 November, the Appellant's solicitor filed written submissions with the Respondent.

11. On 27 November, the Respondent contacted the Appellant's solicitor in an effort to ascertain whether the Appellant wished to attend the hearing, or whether she was content to have the matter determined on the papers. No response was received, and the matter was determined in the Appellant's absence.

12. On 28 November 2023 the Respondent advised the Appellant's solicitor that an interim suspension of the Appellant's registration had been imposed.

13. By Notice dated 4 December 2023, the Appellant has appealed against the determination to impose an interim suspension.

14. The Appellant now seeks a stay of that determination. That application is opposed by the Respondent.

PROVISIONS GOVERNING THE PRESENT APPLICATION

15. Clause 14 of the *Racing Appeals Tribunal Regulation 2015* (the Regulation) confers a discretionary power on the Tribunal to grant a stay. That discretionary power is in the following terms:

> ***14 Suspension or variation of decision pending determination***
>
> *(1) The Tribunal may, on written application by an appellant being lodged with the Secretary, order that the decision appealed against-*
> *(a) is not to be carried into effect, or*
> *(b) is to be carried into effect to the extent specified in the order, pending the determination of the appeal.*

(2) The Tribunal may, in making any such order, impose conditions. The order is taken not to be in force for any period during which any such condition is not complied with.

(3) An order remains in force until it is revoked by further order by the Tribunal or the appeal to which it relates is dismissed, determined or withdrawn (whichever happens first).

16. Cl 14 is silent on the factors which are to be taken into account in the exercise of the discretion. Accordingly, the discretion falls to be exercised by reference to well-established common law principles which may be summarised as follows:

(i) the mere fact of bringing an appeal does not, of itself, lead to the conclusion that a stay should be granted;

(ii) the discretion to grant a stay is a wide one, free of rigidity, in the exercise of which the individual circumstances of the case are to be taken into account: *Maund v Racing Victoria Limited* [2015] VSCA 276 at [33] citing *Cellante v G Kallis Industries Pty Limited* [1991] 2 VR 653 at 657; *Patrick Stevedores Operations No. 2 Pty Limited v Maritime Union of Australia (No. 3)* (1998) 72 ALJR 869; [1998] HCA 32 at [2] and following;

(iii) as a general proposition, an application for a stay (permanent or otherwise) should be brought promptly. In some circumstances, delay in bringing an application may jeopardise an appellant's prospects of success on the application: *Moubarak by his Tutor Coorey v Holt (No. 2)* [2019] NSWCA 188 per Bell P (as his Honour then was) at [13] – [15] citing *Devenish v Jewel Food Stores Pty Limited* [1990] HCA 35; (1990) 64 ALJR 533 at 534 per Mason CJ;

(iv) an applicant for a stay does not have to demonstrate special or exceptional circumstances: *Alexander v Cambridge Credit Corporation Limited* (1985) 2 NSWLR 685 at 694-695 (*Alexander)*;

(v) an applicant must demonstrate that the appeal raises serious issues for determination, and that there is a real risk that he or she will suffer damage or prejudice if a stay is not granted which will not be redressed by a successful appeal: *Kalifair Pty Limited v Digi-Tech (Australia) Limited* (2002) 55 NSWLR 737; [2002] NSWCA 383 at [17]-[20] (*Kalifair)*;

(vi) an application for a stay involves two broad considerations. The first is whether the proposed appeal raises a serious question to be tried (in the sense of arguable grounds), and the second (assuming the first is made out) is where the balance of convenience lies: *Alexander* at 694; *Kalifair* at [18]; *Brown v AEP Belgium SA* [2004] VSC 255; *Vaughan v Dawson* [2008] NSWCA 169 at [17]; *Beecham Group Limited v Bristol Laboratories Pty Limited* (1968) 118 CLR 618; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57; [2006] HCA 46;

(vii) the applicant must demonstrate a proper basis for a stay which will be fair as between the respective interests of the parties: *Alexander* at 694; *Adeels Palace v Moubarak* [2009] NSWCA 130 at [5]; *Bar Association of New South Wales v Stevens* [2003] NSWCA 95 at [83];

(viii) a relevant consideration in the exercise of the discretion is whether an appeal, if successful, will be rendered nugatory if a stay is not granted: *TCN Channel 9 Pty Limited v Antoniadis [No. 2]* (1999) 48 NSWLR 381; *Newcrest Mining v Industrial Relations Commission* [2005] NSWCA 91; *Maund v Racing Victoria Limited and anor.* [2015] VSCA 276 at [33].

SUBMISSIONS OF THE PARTIES

Submissions of the Appellant

17. The Appellant advanced three broad submissions in support of the grant of a stay, namely that:

    (i) she had been denied procedural fairness;

    (ii) there was a serious question to be tried, namely whether the presence of EPO in the sample could be attributable to what has been described as an "innocent positive"; and

    (iii) the balance of convenience favoured the grant of a stay.

18. As to the first matter, the Appellant submitted, in summary, that:

(i) the Respondent had forwarded the notice of hearing directly to the Appellant, in circumstances where the Appellant's solicitor had been engaged with the Respondent in relation to the allegation for some time prior;

(ii) the conduct in (i) had the effect of "side-stepping" and "isolating" the Appellant's solicitor;

(iii) the Appellant's solicitor was unavailable at the nominated time and date of the hearing, yet the Respondent indicated it would proceed with the hearing in any event;

(iv) there were no circumstances which justified the urgency with which the Respondent had proceeded;

(v) the Respondent had consistently failed to provide the Appellant with a transcript of the proceedings;

(vi) relevant contact details were not sent to the Appellant, which meant that she was not able to appear at the hearing;

(vii) the actions of the Respondent contravened its own policy which provided for *"the right of the participant to be held"* [sic]; and

(viii) the grant of a stay would "assist in accounting for these procedural irregularities and make them right".

19. As to the second matter, the Appellant relied upon a report of Dr Derek Major of 5 December 2023. Whilst I have considered that report in more detail below, the overarching submission of the Appellant was that it established that there were "serious questions of science" to be tried at the hearing of the appeal, including whether this was a case of an "innocent positive";

20. As to the third matter, the Appellant submitted, in summary, that:

(i) she was a person of prior good character, which was said to be a "critical consideration";

(ii) there was a real chance that the appeal would be rendered nugatory in the absence of a stay being granted; and

(iii) she would suffer a disproportionate penalty if a stay were not granted, both economically and otherwise.

Submissions of the Respondent

21. As to the first matter, the Respondent submitted, in summary, that:

    (i) when the Appellant attended the hearing on 10 November 2023, the Respondent exercised its discretion to impose an interim suspension, but acceded to an application made by the Appellant to adjourn the matter until 27 November to allow her to further consider her position and obtain advice;

    (ii) the Appellant's solicitor was advised of that decision, and was provided with an opportunity to make written submissions;

    (iii) the Appellant's solicitor availed himself of that opportunity, and provided written submissions on 26 November;

    (iv) on 27 November, the Respondent contacted the Appellant's solicitor seeking an indication of whether the Appellant wished to proceed with the proposed hearing or whether she was content to have the matter proceed on the papers;

    (v) no response was forthcoming on behalf of the Appellant and in those circumstances, the matter was determined in the Appellant's absence.

22. On the basis of those aspects of the procedural history, it was submitted that the Respondent had accorded procedural fairness to the Appellant. It was further submitted that even if a contrary view were reached, any procedural irregularities would be rectified by the fact that the proposed appeal would proceed by way of a hearing de novo.

23. As to the second matter, the Respondent submitted, in summary, that:

    (i) in circumstances where the offence in question is one of absolute liability, and in circumstances where, under the relevant rules, evidentiary certificates constituted conclusive evidence of the presence of EPO in the sample, the circumstances through which EPO came to be in the sample were irrelevant; and

(ii) although blamelessness may be a relevant consideration, it remained the case that the report of Dr Major was of no probative value.

24. As to the balance of convenience, the Respondent submitted, in summary, that:

(i) the offence in question was objectively serious;
(ii) there was a need to protect the integrity and image of the sport of greyhound racing; and
(iii) it was likely that the substantive disciplinary matter would proceed to finality with a period of approximately 4 weeks.

CONSIDERATION

The asserted procedural unfairness

25. Given the submissions of the Appellant on this issue, it is appropriate to commence by setting out the fundamental principles which govern the concept of procedural fairness.

26. First, an administrative decision maker such as the Respondent must accord procedural fairness to persons who are affected by its determinations: see for example *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326; [2015] HCA 40 at [30]. There is no doubt that in the circumstances of the present case, the Respondent was under an obligation to accord procedural fairness to the Appellant.

27. Secondly, the duty to accord procedural fairness has no fixed content. The content depends upon the nature of the matters in issue, and what is required to give a person a reasonable opportunity to present his or her case. The expression "procedural fairness" conveys the notion of a flexible obligation to adopt procedures which are fair, and which are appropriate to the particular circumstances: *Kioa v West* (1985) 159 CLR 550; [1985] HCA 81 at 585 (*Kioa*).

28. Thirdly, fairness is not an abstract concept. The concern of the law is to avoid practical injustice: see *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1; [2003] HCA 6 at [37].

29. Fourthly, the first of two fundamental requirements of procedural fairness is what is generally referred to as the hearing rule, which requires a decision maker to afford a person an opportunity to be heard before making a decision which affects their interests: see *Kioa* at 563.

30. Fifthly, although the specific content of the hearing rule will vary according to the applicable statutory or regulatory context, a fair hearing will generally require:

    (i) prior notice being given to the person that a decision affecting his or her interests may be made;
    (ii) disclosure of the critical issues to be addressed; and
    (iii) a substantive hearing, either orally or in writing, with a reasonable opportunity to present a case: *Kioa* at 587.

31. The submissions of the Appellant raise a myriad of issues regarding the procedure which culminated in the imposition of an interim suspension. It might be said that some aspects of the procedural history of this matter are curious. For example, why it was, having apparently corresponded with the Appellant's solicitor over a period of time, the Respondent opted to advise the Appellant directly of the hearing is not entirely clear. The curious nature of that circumstance is exacerbated by the fact that the notification of penalty was apparently sent to the Appellant's solicitor, rather than to the Appellant. It is also not entirely clear why, in all of the circumstances, the Respondent was not prepared to accommodate the availability of the Appellant's solicitor for the purposes of the hearing, or why a request for a transcript was apparently refused.

32. However, even accepting all of that, I remain unpersuaded, in light of the principles I have set out above, that the Appellant has been denied procedural fairness. I have reached that conclusion for a number of reasons.

33. To begin with, the submissions of the Appellant expressly acknowledge that the Respondent provided notice of the proposed disciplinary hearing. Whilst it might have been reasonably expected in the circumstances that the Appellant's solicitor would also have been notified, it is clear that notice was given to the Appellant herself.

34. Secondly, the Appellant was given the opportunity to appear and be heard. She availed herself of that opportunity by appearing on 10 November. She sought, and was granted, an adjournment to allow her the opportunity to obtain advice and make further submissions.

35. Thirdly, given that her solicitor provided further submissions on 26 November, it is clear that the Appellant availed herself of the opportunity which was provided to her.

36. Fourthly, the Appellant was given the opportunity to appear personally before the Respondent at a resumed hearing on 27 November, but did not do so. The matter was then determined to finality in her absence.

37. It follows that the Appellant:

(i) was given notice of the possibility of a decision being made which was adverse to her;
(ii) was made aware of the critical issues;
(iii) was given the opportunity to appear on 10 November;
(iv) took the opportunity to appear on 10 November;
(v) sought, and was granted, an adjournment of that hearing;
(vi) was given the opportunity to:
    (a) attend a further hearing on 28 November;
    (b) obtain legal advice; and
    (c) make submissions;

(vii) availed herself of the opportunities in (b) and (c), and made submissions, through her Solicitor, on 27 November;

(viii) chose (for reasons which are unexplained) not to attend the resumed hearing on 28 November.

38. In these circumstances, and whilst some aspects of the procedure may have been less than perfect, I am satisfied that the three requirements of the hearing rule set out at [30] above were met. The submission that the Appellant was denied procedural fairness must be rejected.

39. I should also make it clear that although there were aspects of the process which could perhaps have been better implemented, I do not accept that the Appellant's Solicitor was "isolated". The fact that he was the author of the written submissions provided on 27 November demonstrates, without more, that he was closely involved in the process.

40. Similarly, I do not accept the submission that the Respondent acted with "reckless indifference" to the Appellant's rights. To act with reckless indifference to a person's rights is to act with foresight of the probability that such rights will be illegally and thus adversely, affected. For the reasons I have outlined, and whatever shortcomings may have attended the process, the conduct of the Respondent did not rise to the level of gross culpability that has been suggested by the Appellant.

41. Finally, I do not accept that the Respondent acted in breach of its own policy guideline which contemplates preservation of the right of a person to be heard. The matters enumerated in [37] above make it plain that the Appellant's right was preserved.

42. In any event, even if I were satisfied that the Appellant had been denied procedural fairness, such a finding would not, of itself, support the grant of a stay, and would be rendered nugatory by the fact that the proposed appeal will operate as a hearing de novo.

Is there a serious question to be tried?

43. As I have previously noted, the Appellant's case on this issue is based principally on the report of Dr Major. Having set out the background to the matter, Dr Major's report states the following:

> *I have been following the development of sophisticated tests for exogenous peptides with some interest. These tests have the potential to be powerful anti-doping tools.*
>
> *A broad range such tests [sic] have been published in recent times [1-4]. The focus is on the detection of very small amounts of illicit substances.*
>
> *The available papers which describe scientific research are in general focussed on the test methods' sensitivity i.e. the tests' ability to detect down to picogram levels. I have not sighted any papers in which large numbers of dogs with a known administration status are tested so [sic] determine whether the peptide, or peptides, are present in the dog population at large. This is known as Specificity.*
>
> *I have not sighted the work which demonstrates the specificity of this test i.e. what is the likelihood of a dog which has not been administered human EPO showing as a positive to the test. I would be pleased to review such papers, as soon as they are provided.*
>
> *On the information available to me, there is a grave risk of a [sic] "innocent positive".*

44. Before addressing specific aspects of Dr Major's report, it is necessary to make some general observations about the nature of it.

45. Dr Major's report appears to be relied upon as some form of expert evidence. I have already noted that the Tribunal is not a Court, and is not bound by rules of evidence. However, when considering the probative value of, and the weight to be afforded to, material such as Dr Major's report, it is appropriate for the Tribunal to adopt, as a general guide, those authorities which govern the admissibility of such evidence in a Court. Accepting the correctness of such an approach, there are three matters which should be noted:

    (i) a person who seeks to express an expert opinion must obviously be established to be an expert, i.e., he or she must have some specialised knowledge based upon qualifications, training, study or experience;

(ii) the opinion expressed must be based upon such factors; and

(iii) the expert must explain how he or she reached the opinion expressed: see *Makita (Aust) Pty Limited v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305 at 743-744; *Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588; [2011] HCA 21 at [31].

46. With these matters in mind, three fundamental observations should be made regarding Dr Major's report.

47. The first, is that the training, qualifications, areas of study, or experience Dr Major may have, or may hold, so as to allow him to express any opinion in relation to this area of science, are not stated. That presents as a fundamental obstacle to accepting any opinion he might express.

48. The second, is that Dr Major's ultimate opinion, namely that there is a *"grave risk of a [sic] innocent positive"* is said to have been based upon the *"information made available to him"*. In the second last paragraph of his report, Dr Major expressly acknowledged that he had *"not sighted the work which demonstrates the specificity"* of the test in this case. It follows that the "*information*" provided to Dr Major, and which forms the basis of his opinion, was entirely generic in nature, and wholly bereft of anything which specifically relates to the circumstances giving rise to the charge in the present case.

49. The third, is that Dr Major's report is equally bereft of the exposition of the reasoning process which apparently led him to form the opinion that there was a *"grave risk of an innocent positive"*.

50. All of these factors overwhelmingly support the conclusion that Dr Major's report is of little or no probative value, irrespective of the grounds upon which the Appellant seeks to prosecute her appeal.

51. For these reasons I am not satisfied that the Appellant has discharged the onus of establishing that there is a serious question to be tried.

Balance of convenience

52. In light of the conclusion in [51] above, it is not necessary for me to consider the issue of where the balance of convenience lies. However, it is noteworthy that on the basis of the Respondent's submissions, the relevant investigations are likely to be completed within 4 weeks. That is a factor which supports a conclusion that the balance of convenience lies in favour of the Respondent.

ORDERS

53. For the reasons expressed, I make the following orders:

1. The application for a stay is refused.
2. The parties should provide the secretary, by 16 January 2023, with a form of proposed orders for the prosecution of the appeal.

DATED: 21 December 2023

THE HONOURABLE G J BELLEW SC