IN THE RACING APPEALS TRIBUNAL OF NEW SOUTH WALES

ALEXANDER VERHAGEN
Appellant

v

GREYHOUND WELFARE AND INTEGRITY COMMISSION
Respondent

REASONS FOR DECISION

Tribunal: **The Honourable G J Bellew SC**

Date of decision: **27 March 2024**

ORDERS

1. **The breach of Rule 106(1)(d) of the Greyhound Racing Rules as particularised in Charge 13 is established.**

2. **The Appellant is disqualified for a period of 10 months, commencing 26 August 2022.**

3. **The parties are to notify the Tribunal by 4 April 2024 as to the proposed course in relation to the appeal brought by Kerrie Verhagen.**

INTRODUCTION

1. This matter has come before the Tribunal following orders made by Acting Justice Elkaim in the Supreme Court of New South Wales on 20 September 2023.[1]

2. For the purposes of determining the matter, the Tribunal has been provided with two large folders of what I will refer to as the Appeal Book (AB), encompassing almost 1,000 pages of material, which has been read.

3. A directions hearing was conducted with the representatives of the parties on 11 March 2023. In the course of that hearing, a number of issues were raised by the Tribunal as to how the matter ought to proceed in light of the orders made by Acting Justice Elkaim. The Tribunal left it to the parties to consider those matters and advise of their respective positions.

4. Correspondence was then received from the parties indicating that they had reached what was described as an "agreed position" in relation to the matter, such position being that:

    1. the Appellant accepted the imposition of a 10-month disqualification;
    2. such disqualification was agreed by the Respondent to have commenced on 26 August 2022;
    3. the Respondent thus accepted that such disqualification had been served (or, in other words, accepted that any disqualification imposed should be backdated).

5. In advising the Tribunal of this position, the parties queried whether it was necessary for any formal orders to be made. There may well be an issue as to whether, in a case which remains before the Tribunal, and in the absence of the appellant withdrawing an appeal, it is open to the parties to resolve the matter in terms which are binding on the Tribunal, in the absence of formal orders being made. In this particular case, I take the view that as the matter has been remitted by the Supreme Court of NSW, it is necessary that I exercise the Tribunal's

[1] *Greyhound Welfare and Integrity Commission v Verhagen and anor.* [2023] NSWSC 1140.

jurisdiction, deal with the matter before me, and provide my reasons for doing so. In taking that course, and although any orders remain a matter for the exercise of my discretion, I have obviously had regard to the agreed position reached by the parties as previously set out.

THE CHARGE BROUGHT AGAINST THE APPELLANT

6. By a notice dated 18 February 2022,[2] the Respondent charged the Appellant with a number of offences contrary to various provisions of the *Greyhound Racing Rules* (the Rules). Only one of those charges (which will be referred to as "Charge 13") is relevant for present purposes.

7. Charge 13 alleged a contravention of Rule 106(1)(d) of the Rules and was in the following terms:[3]

> **Rule 106(1)(d) – Princess Zesta Litter**
> **Particulars**
> *That [the Appellant], as a registered Public Trainer and Breeder at all material times, between 25 May 2021 and 27 May 2021 failed to provide veterinary attention to greyhounds in his care or custody, with the circumstances being:*
>
> *(a) Between 25 May 2021 and 27 May 2021, the greyhound 'Princess Zesta' ("Greyhound") was in [sic] located at [the Respondent's] registered kennel address at 16 Cook Drive, Swan Bay ("Property") and was in his care;*
> *(b) On 25 May 2021 the Greyhound whelped a litter of pups be caesarean section at the Williams River Veterinary Clinic. The Greyhound then returned to the property that same date;*
> *(c) Between 25 May 2021 and 27 May 2021, the Greyhound attacked all ten (100 pups in the litter;*
> *(d) At least two pups have survived the Greyhound's attack;*
> *(e) [The Respondent] Filed to provide veterinary attention to the pups that survived the Greyhounds [sic] attack; and*
> *(f) The pups subsequently died as a result of their injuries.*

8. Rule 106(1)(d) of the Rules provided as follows:

> ***Rule 106 Proper care (welfare) of greyhounds***
> *(1) A registered person must ensure that greyhounds, which are in the person's care or custody, are provided at all times with-*
> *(a) ..*
> *(b) ..*

[2] AB 402 and following.
[3] AB 406.

(c) ..
(d) veterinary attention when necessary.

9. On 25 August 2022, following a disciplinary hearing, the Respondent imposed a penalty of a 10 month disqualification in respect of Charge 13.[4]

THE APPEAL TO THE TRIBUNAL

10. On 25 August 2022, the Appellant lodged a Notice of Appeal to the Tribunal against (amongst other things) the penalty imposed in respect of Charge 13. A hearing proceeded on 26 and 27 September 2022. The grounds of that appeal were pleaded as "guilt and severity".[5] In a judgment delivered immediately following the hearing, the Tribunal (differently constituted) dismissed charge 13.

THE FACTS GIVING RISE TO CHARGE 13 AS FOUND BY THE TRIBUNAL

11. The Tribunal set out the facts giving rise to charge 13 in the following terms:[6]

> *[11] In essence, this matter involved the death of two pups, and the charge of course is failing to provide veterinary attention under the old rule 106 (1)(d).*
>
> *[12] The bitch that produced the 10 greyhounds was the subject of a Caesarean operation. She was returned to the premises and was under observation for a number of hours, where she was seen to have settled down with the pups and was mothering them well. An American muzzle was placed on the mother and she was left for approximately 1 hour.*
>
> *[13] When the appellant and his wife returned, they found eight of the pups dead, and two, in their opinion, were presumed to be and appeared to be alive, showing some signs of being alive, making no noise but slight movement.*
>
> *[14] Perhaps the most graphic of images is before the Tribunal and that is two photographs taken of the subject greyhounds whilst they were alive. Those photographs depict two greyhounds that have literally been torn apart. There are explicit signs of damage about the head area. There are parts of internal organs and other parts of the greyhounds lying beside them, and evisceration of the most substantial extent apparent.*
>
> *[15] To an inexperienced, untrained outsider, the nature of those injuries can only be described as catastrophic. They were such that both the appellant and his wife were devastated, and devastated to such an extent that on his evidence, he could not have driven a vehicle, nor in his opinion could his wife.*
>
> *[16] He immediately, based upon his experience of some 20 years, formed an opinion that they could not survive. Objectively viewed, that opinion must be*

[4] AB 755.
[5] AB 6.
[6] Commencing at [11].

seen as open to him. There is no doubt they were very close to death. He formed an opinion he was not capable of saving them. He was of the opinion that any delay in attending to them would not lead to their survival. He said that they were not screaming in pain, did not appear to be in pain, but in fairness, both before the Tribunal, before the stewards' inquiry and at other times, he acknowledged that there obviously must have been pain.

[17] He had no immediate form of pain relief available. The only pain relief that could have been of any use whatsoever could only have been prescribed by a vet. He said in relation to this and other matters, that the vet was at least half an hour away, it was after hours, that the vet would require an appointment be made, and that would lead to a further delay. He determined, on the basis of all of that evidence, that there was nothing more he could do. In other words, even if he set out to get the vet, he did not believe he would get there in time.

[18] He also gave evidence that each of these pups was worth something up to $10,000 each, and that accordingly, he would have done anything he could to have kept them alive because of that value to him.

[19] There was some issue about his subsequent notification form and subsequent interview about how long they lived. On that evidence, the Tribunal is satisfied on what he said today on earth, that they did not survive very long.

[20] It is the case for the regulator that the severity of the injury was such that veterinary attention should have been obtained and they could live long enough for that veterinary attention to be obtained. Even though the vet was some 30 minutes away it is the case for the regulator that he made no attempt to phone event or even make inquiries of a vet but simply waited for them to die. And that was not consistent with his experience in the industry.

[21] In response for the appellant, emphasis was placed on the fact that he could do nothing for their pain, they were barely alive, treatment was at least half an hour away, even if he could get a vet to open the practice at that time, and that they died promptly. And, finally, that any veterinary attention simply could not have assisted these greyhounds.

[22] This is a failure under 106(1)(d) to provide veterinary attention. There is no doubt that veterinary attention was not provided.

[23] The whole of the rule must be looked at: "A Registered person must ensure that greyhounds which are in the person's care or custody are provided at all times with veterinary attention" – and Then these are the critical words – "when necessary." And the offence provision is that it is the person being responsible at the relevant time who fails to comply.

[24] In determining this matter, the Tribunal cannot lose sight of the gravity of the injures which each of these pups received. As described, they were horrific.

[25] The Tribunal is of the opinion that the conclusion reached by the appellant that there was nothing in reality that could be done to keep these greyhounds alive, that the prospect of taking them, if he could get to a vet within the half-hour possible – and he describes how neither he nor his wife were capable of driving them to a vet – that he formed an opinion that they were simply not able to survive.

[26] The issue then becomes one of aspects of pain and suffering. The Tribunal accepts that at some stage these greyhounds must have been in excruciating pain. But at the time they were observed by the appellant, the evidence that is available to the Tribunal is that there were no visible signs of pain, they having reached a stage of near death. It is possible, and it is conjecture, that their injuries at that point were so severe that they were incapable of depicting pain to an observer.

[27] Therefore, the aspects of rushing them off in the hope that the vet would be available is no more than that which, with hindsight, the appellant determined was not going to help.

[28] The rule requires veterinary attention when necessary. The totality of the evidence is that any veterinary attention would not have saved these pups. At best, it would have alleviated pain and suffering and, as described, it is not established on the evidence that by the time they reached a vet, a minimum of half an hour way, if immediate veterinary attention was available – and on the evidence that appears to be highly unlikely – that there would have been any alleviation of pain and suffering.

[29] The conclusion is these injuries were so horrific that the Tribunal accepts the appellant's expertise and explanation and is not satisfied, despite the gravity of the matter, that he has failed to ensure veterinary attention when necessary.

[30] Charge 13 is dismissed.

THE PROCEEDINGS FOR JUDICIAL REVIEW

12. The Respondent brought proceedings in the Supreme Court of New South Wales for judicial review of the Tribunal's determination. In doing so, the Respondent argued that the Tribunal had erred in law, or alternatively had fallen into jurisdictional error, in determining charge 13. Specifically, the Respondent argued that the Tribunal had erred in its construction of the words "*when necessary*" as they appear in r 106(1)(d), by applying a subjective, rather than an objective (or perhaps even an absolute) test.[7]

13. It was also the Respondent's position that "veterinary attention", in the sense in which that term is used in the rule, is not necessarily restricted to taking an animal to the vet. The Respondent argued that on the facts of the present case, a telephone call could have been made by the Appellant, and perhaps photographs

[7] Judgment of Acting Justice Elkaim at [12].

sent, to a vet. The Respondent also argued that the test of necessity could not incorporate evidence, or consideration, of the Appellant's subjective opinion.[8]

THE JUDGMENT OF ACTING JUSTICE ELKAIM

14. Acting Justice Elkaim found that the Tribunal had erred, and that jurisdictional error had been established.[9] In doing so his Honour said the following:[10]

> *I think jurisdictional error has been established. The problem with the Tribunal's findings rests in the reliance on the first defendant's expertise. There was some argument about the length of time during which the pups remained alive. The range seems to be between one and two hours. Even at one hour the pups could well have been in pain.*
>
> *The expertise of the first defendant may have extended to many aspects of breeding, but there is no evidence to suggest any expertise in the comforting of a dying greyhound. The first defendant had no pain relief available. At the very least a consultation with a vet might have assisted with this aspect or even the acceleration of the termination of life.*
>
> *The reliance of the Tribunal upon the expertise of the first defendant has the added question of when such an expertise becomes dependable. The first defendant had 19 years in the industry. Would 18 or 15 or 10 years have been sufficient?*
>
> *The first defendant submitted that, on the plaintiff's interpretation of "when necessary" he would have become liable to a guilty finding immediately upon finding the pups, or even had he placed them in his motor car to drive to the vet, notwithstanding that they soon died. In addition, the first defendant and his wife were apparently to upset to drive.*
>
> *I reject the submission that such a consequence would have ensued. The first defendant had the option of a telephone consultation with a vet. The fact that the vet could not have physically taken any action does not equate to an absence of veterinary attention. As with a "tele-health" call, advice and instruction can be provided by a medical practitioner over the phone.*
>
> *The two pups were obviously very seriously injured, and no doubt would never have been capable of fulfilling any racing objective. However, as seen above, the purpose of the rules is to "promote and protect the welfare" of greyhounds. This is not a utilitarian objective; welfare extends to the protection of the wellbeing of a greyhound for the duration of its life.*
>
> *As soon as the injured pups were discovered veterinary assistance became necessary. There was no avenue, other than for a very minor injury, for the first defendant to exercise any discretion to not seek veterinary assistance. This is especially so when, despite all his experience he had no means of assisting the pups through pain relief. One or two hours may seem a relatively short period*

[8] Judgment at [13]-[14].
[9] Judgment at [16].
[10] Judgment commencing at [17].

> *of time, but to a terribly injured and dying pup, it is the equivalent of a lifetime. One might also ask what the position would have been if the pups had remained alive for a longer period, and if so, what period would have been the cut-off time for reasonable action?*
>
> *In respect of the Cruelty to Animals Act, I agree with the plaintiff that s 4(2) is relevant only to this Act and that s 35 of the Greyhound Racing Act does not impose the provisions of the former Act upon the care of greyhounds.*
>
> *Accordingly, I am satisfied that there has been jurisdictional error and the finding of the tribunal must be quashed.*

15. The principal (and seemingly only) basis upon which his Honour found error stemmed from the Tribunal's "*reliance on the [Appellant's] expertise".* It is, with respect, somewhat difficult to correlate that finding with the submissions which appear to have been advanced by the Respondent before his Honour in support of the application for judicial review. As outlined above,[11] the Respondent appears to have relied on 3 factors to support a finding of error, namely that the Tribunal had:

    (i) incorrectly construed the words "when necessary" as they appear in the relevant rule;
    (ii) erred in applying a subjective test when construing the word "necessary'; and
    (iii) erred in determining that the Appellant's opinion as to whether veterinary attention was necessary was a relevant factor.

16. A further difficulty stems from order [3] which was made by his Honour in the following terms:

> *The matter is remitted in respect of Charge 13 to [The Tribunal] to determine any penalty* ***arising from the finding of liability in respect of this charge*** (my emphasis).

17. I am unable to identify any expressly articulated "finding of liability" in his Honour's reasons. Moreover, if his Honour did purport to make such a finding, it was, with respect, arguably not one which was within his power to make. The

[11] At [12]-[13].

proceedings which were brought by the Respondent were, as previously noted, an application for judicial review. Proceedings of that nature have, as their principal function, the identification of error (be it jurisdictional error, or error of law on the face of the record) on the part of the original decision-maker. They do not, on any view of the law, involve a consideration of the merits of the case. Indeed, a consideration of the merits of the case is prohibited on such an application. In my view, a "finding of liability" amounts to a finding on the merits. Such a finding, with respect, reflects an approach which is entirely inconsistent with the decision of the High Court in *Plaintiff M64-2015 v Minister for Immigration and Border Protection*[12] which makes it clear (in the very passage quoted by his Honour at the commencement of his judgment[13]) that judicial review is ***not*** an appellate procedure enabling a Court to substitute, for the original determination, the determination which the Court thinks ought to have been made. In purporting to make a "finding of liability" that is, with respect, precisely what his Honour appears to have done, as opposed to making orders in the generally accepted form when error is found, namely, remitting the matter to the decision-maker to be dealt with according to law.

18. These matters were raised with the parties in the course of the directions hearing. In the absence of any submissions, I consider that I must proceed to determine the matter according to law. Determining the matter according to law in this context involves applying what his Honour found to be the correct test of necessity, and then coming to my own conclusion as to whether Charge 13 is made out.

THE NATURE AND CIRCUMSTANCES OF THE ALLEGED OFFENDING

19. There is no suggestion that the facts found by the Tribunal in relation to Charge 13 as previously set out were erroneous, and I have therefore adopted them for present purposes. The following essential matters emerge from those facts:

[12] (2015) 258 CLR 173; [2015] HCA 50 at [23].
[13] At [1].

(i) the Appellant and his wife had gone out, and had returned to find eight of the ten pups dead, with the remaining two pups giving the appearance of being alive;

(ii) on discovering what had occurred, the Appellant was devastated, to the point where he considered himself unable to drive a motor vehicle;

(iii) the Appellant formed an opinion that:

(a) the two remaining pups could not survive;

(b) he was not capable of saving them; and

(c) any delay in attending to them would not lead to their survival;

(iv) aware that the pups must have been in pain, the Appellant had no form of pain relief available;

(v) the only pain relief that could have been of any use could only have been prescribed by a veterinary surgeon;

(vi) a veterinary surgeon was at least half an hour away, a period which would have been extended due to the fact that the surgeon would have required an appointment to be made;

(vii) the Appellant formed the view that, in all these circumstances, there was nothing more that he could do and, in particular, considered that even if he set out to obtain veterinary attention from the surgeon, he would not get there in time.

20. Bearing in mind those matters, and also bearing in mind the terms of r 106(1)(d), three matters must be emphasized.

21. The first, is that the duty imposed by the rule is mandatory, as indicated by the word “must”.

22. The second, is that the duty requires a person to whom the section applies to ensure that veterinary attention is provided when **necessary** or, in other words, when it is essential.

23. The third, is that what is "necessary" is a determination to be made by the application of an objective, as opposed to subjective, test.

24. I have no difficulty in accepting that the experience of being confronted with what had occurred must have been inherently traumatic for the Appellant. That said, it must have been obvious to the Appellant, as soon as he saw the two pups, that veterinary attention was necessary in the sense in which that word is used in the rule. It was not for the Appellant to determine that nothing could be done, or to conclude that a veterinary surgeon was too far away.

25. The fact is that the Appellant did nothing, and allowed the pups to die. He made no attempt to even contact a veterinary surgeon when it must have been obvious to him that there was a necessity to do so. That was tantamount to simply ignoring the circumstances which had arisen. The Appellant's experience and expertise, whatever they may have been, did not enable him to make the determinations that he apparently made, and do not provide him with a defence to the charge. That is so, no matter how well-intentioned those determinations may have been.

26. During the disciplinary hearing conducted on 17 August 2022, the Appellant maintained that he had *"done everything possible"*.[14] In light of the evidence, I am unable to accept that assertion. The Appellant also asserted that he didn't *"believe [he] would have got them to the vet alive at that time"*.[15] He described as "ridiculous" the proposition that he could have obtained veterinary attention.[16] The simple fact is that he made no attempt to obtain such attention, in circumstances where he must have known that it was necessary. His repeated assertions that the pups *"wouldn't have made it"* [17] was, from the point of view of r 106(1)(d), not a determination for him to make. The obligation imposed by the rule was to obtain veterinary attention, the circumstances clearly rendering it necessary to do so.

[14] AB 37.29.
[15] AB 42.6.
[16] AB 42.47.
[17] See for example at AB 42.30 – AB 43.19.

27. During the course of the disciplinary hearing, the Appellant accepted that there was a two hour window in which he could have acted.[18] In his evidence before the Tribunal, he maintained that he believed that he could not have provided veterinary attention, but also said that he had notified the authorities that the pups had died within 7 hours of being born.[19] In light of that evidence, I am not able to accept the Appellant's assertions that there was nothing he could have done.

28. It was put on the Appellant's behalf at the disciplinary hearing that his actions amounted to having made a "judgment call".[20] Even if full weight is given to that submission, the fact remains that the judgment call amounted to doing nothing, in circumstances where, objectively viewed, it must have been apparent to the Appellant that veterinary attention was necessary. To that extent, the "judgment call" was not for him to make. The rule imposed an obligation on the Appellant, which he ignored.

29. For all of these reasons, I am satisfied that a breach of r 106(1)(d) by the Appellant is made out. Given the matters I have outlined, I accept the Respondent's submission that the objective seriousness of the breach must be regarded as high.

THE APPELLANT'S HISTORY AS A TRAINER

30. The Appellant accepts that in 2019 he was suspended for a period of 12 weeks following the detection of a prohibited substance in a greyhound of which he was the trainer. There were also other penalties imposed by the Tribunal for other breaches arising out of the same circumstances as the present matter.[21] As a consequence the Appellant served a 4-month period of disqualification from 26 August 2022 until 25 December 2022, and a concurrent period of suspension which expired on 25 January 2023.

[18] AB 44.25 – AB 44.32.
[19] AB 941.39 – AB 941.40.
[20] AB 136.27 – AB 136.47.
[21] Respondent's submissions at [39]-[40].

THE APPELLANT'S SUBJECTIVE CIRCUMSTANCES

31. In the absence of any specific submissions made on behalf of the Appellant, I am left to ascertain his subjective circumstances from the material which has been provided to me, and which was previously before the Tribunal.

32. Whilst there is no specific evidence that the circumstances of what occurred affected the Appellant's judgment, I accept that such circumstances were horrific. Further, the Appellant pointed out at the disciplinary hearing,[22] that the pups were of significant monetary value to him, which he has lost. Whilst that is a relatively minor consideration, I have taken it into account.

33. During the previous proceedings before the Tribunal, the Appellant's legal representative advanced a number of other subjective factors which I have also taken into account.[23]

OTHER DETERMINATIONS OF THE TRIBUNAL

34. The Respondent referred me to several previous determinations of the Tribunal which, it was submitted, should be treated as "precedents" for the purposes of determining the appropriate penalty in the present case. Although it is the case that no two cases can ever be factually identical, the Tribunal is generally assisted by having its attention drawn to previous determinations. That said, it is also necessary to bear in mind my recent observations in *Duncan v Greyhound Welfare and Integrity Commission*[24] as to the use to which such determinations can be put:

> *Ultimately, a determination of what penalty is appropriate involves the exercise of a discretion, taking into account all relevant factors. What must be achieved is consistency in the application of principle, not numerical equivalence.*[25]

[22] AB 43.17.
[23] Those matters are summarised in the Respondent's submissions to the Tribunal at [37] and [38].
[24] A decision of 12 February 2024 at [52].
[25] See *Hili v R; Jones v R* [2010] HCA 45; (2010) 242 CLR 520 at [38]-[39].

35. I adopt the same approach in this case. An examination of the decisions to which I was referred out bears out the proposition that no two cases are the same. Nevertheless, those decisions may provide some guidance.

36. The first decision to which I was referred was that of *Hoare*[26]. The breach in that case arose from a greyhound being caught in the lure and colliding with the lure arm. The greyhound was subsequently euthanized, but only after extensive attempts were made by the Appellant to have it medically treated, [27] circumstances which are obviously in stark contrast to those in the present case. The Tribunal found that the Appellant in that case had taken "substantial steps" towards veterinary treatment, constituted by eight (8) attempts to have such treatment administered. [28] The culpability of the Appellant in that case was categorised by the Tribunal as *"a failure to do all that was required, not a failure to do anything"*.[29] Ultimately, in circumstances where the Appellant was not entitled to a discount to reflect a plea of guilty, the Tribunal adopted[30] a starting point of 9 months disqualification, which was reduced to 6 months on account of the Appellant's subjective circumstances. Those circumstances included his prior unblemished history over a period of 30 years in the industry, his prior good character, and the fact that he was an invalid pensioner.[31] It must be said that the objective seriousness of the present case is substantially greater than that considered in *Hoare*.

37. The second decision to which I was referred was *Cartwright*.[32] In that case, the greyhound suffered an injury during a race, and was provided with veterinary attention immediately afterwards. The initial indications were that the greyhound was well following that treatment. However, when presented to a veterinary surgeon some 25 days later for the purposes of desexing, the injury which had been sustained in the race was diagnosed as a crush injury. The greyhound was

[26] A decision of 23 November 2022.
[27] At [7]-[28].
[28] At [49].
[29] At [82]-[83].
[30] At [90].
[31] At [91]-[94].
[32] A decision of 8 October 2021.

then euthanized.[33] The Tribunal found that the Appellant's opinion that the animal was well between the time of the injury and the time of the veterinary examination was "misplaced" in light of medical assessments which had been subsequently conducted,[34] and the breach was categorized as a serious one.[35] The failure on the part of the Appellant extended over a period of 25 days, between the time that the greyhound was injured until the time it was euthanized[36] The Appellant's subjective circumstances included his plea of guilty to which the Tribunal applied a discount of 25%.[37] His history included 1 prior breach involving a prohibited substance in 17 years as a trainer, which provided his sole source of income.[38] Having considered outcomes in other matters, the Tribunal imposed a disqualification of 8 months.[39] Again, it must be said that the objective seriousness of that breach was less than that in the present case.

38. The third decision to which I was referred was that of *Weekes*[40] which involved a greyhound having sustained wounds in a fight. There was a failure on the part of the Appellant to seek veterinary attention until the following day, at which time the greyhound was euthanized, although the Appellant had administered his own treatment, including pain relief, when he initially discovered the injury.[41] He pleaded guilty to the breach, and was found to have expressed remorse.[42] He had been a greyhound trainer for 11 years with one prior breach[43] and the Tribunal found that he would suffer financial hardship as the consequence of any disqualification.[44] The Appellant was also in ill-health.[45] Ultimately, the Tribunal imposed a 6 month disqualification.[46] Again, that breach was objectively less serious than that of the present Appellant.

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[33] At [11]-[28].
[34] At [30].
[35] At [37].
[36] At [10].
[37] At [42].
[38] At [43]-[49].
[39] At [62].
[40] A decision of 20 April 2022.
[41] At [7]-[15].
[42] At [3]; [20].
[43] At [21].
[44] At [44].
[45] At [43].
[46] At [49].

39. The fourth decision to which I was referred was that of *McDonald*.[47] In that case, the greyhound had suffered a transverse fracture of the radius and ulna and the Tribunal found [48] that it had exhibited overt signs of discomfort which, it considered, should have put the Appellant on notice.[49] A starting point of an 8-month disqualification was adopted by the Tribunal, and a conclusion reached that the appropriate penalty was a disqualification for a period of 6 months. The Tribunal's reference to the fact that the Appellant should have been on notice as a consequence of the overt signs of discomfort being displayed by the greyhound are of particular significance given the facts of the present case.

40. I have taken all of these determinations into account. That said, and as I have pointed out, what is required in all matters is consistency in the application of principle. In that regard, in a case of this nature, the following matters are relevant to an assessment of penalty.

41. First, the welfare of the greyhound is paramount, a fact which is reflected in the objectives of the Respondent which are set out in s 11 of the *Greyhound Racing Act 2017* (NSW). Any breach of r 106(1)(d) must be assessed with that principle firmly in mind.

42. Secondly, and stemming from the first matter, the obligation imposed by r 106(1)(d) is to be discharged having regard to the primacy of the welfare of the greyhound.

43. Thirdly, and consistent with the use of the phrase *"at all times"* as it appears in the rule, the obligation is a continuing one.

44. Fourthly, registration as a greyhound trainer is not a right. It is a privilege. With that privilege comes the fundamental responsibility to ensure, at all times, the

[47] A decision of 15 October 2021 and 15 November 2021.
[48] At [10].
[49] At [107].

welfare of each and every greyhound in the trainer's care. Rule 106(1)(d) makes it clear that part of that responsibility includes providing appropriate veterinary attention when it is necessary or, in other words, when the circumstances require it.

45. Fifthly, an assessment of whether veterinary treatment is necessary involves the application of an objective test. There is no room for subjective opinions.

46. Sixthly, when determining the appropriate penalty for a breach of r 106(1)(d), general deterrence will always be an important consideration.

47. Finally, and absent some exceptional circumstance(s), a disqualification of some period will be imposed for a breach of r 106(1)(d).

CONCLUSION

48. Bearing in mind what I have set out above, I am of the view that the 10-month disqualification which was sought by the Respondent, and against which the Appellant makes no submissions, is appropriate. Such a penalty reflects the seriousness of the offending, takes into account the Appellant's subjective circumstances, and is consistent with the other determinations made by the Tribunal to which I have referred. It is appropriate in the circumstances set out above[50] that the penalty be backdated to the date agreed by the parties.

ORDERS

49. The Tribunal makes the following orders:

1. The breach of Rule 106(1)(d) of the Greyhound Racing Rules as particularised in Charge 13 is established.

2. The Appellant is disqualified for a period of 10 months, commencing 26 August 2022.

[50] At [30].

3. The parties are to notify the Tribunal by 4 April 2024 as to the proposed course in relation to the appeal brought by Kerrie Verhagen.

27 March 2024

THE HONOURABLE G J BELLEW SC