RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

RESERVED DECISION

14 MARCH 2023

APPELLANT CHLOE BILAL

RESPONDENT GWIC

GREYHOUNDS AUSTRALASIA RULE 83(2)(a)

BREACH DECISION

DECISION:

1. **Breach found established**
2. **Breach part of the appeal dismissed**
3. **Directions issued for further penalty submissions**

INTRODUCTION

1. The appellant, licensed owner and trainer, Ms Chloe Bilal, appeals against the decision of the Integrity Hearing Panel of GWIC of 6 September 2022 to find that she had breached the prohibited substance rule and against the decision of that panel of 25 November 2022 to impose a period of suspension of 18 weeks to commence on 25 November 2022.

2. The charge was that the appellant has breached Rule 83(2)(a), which, in relevant terms, is that "the trainer of a greyhound nominated to compete in an event shall present the greyhound free of any prohibited substances."

3. A summary of the particulars is that the appellant was in charge of the greyhound Flighty Fernando when it was presented to compete in race 3 at Nowra on 23 April 2022, in circumstances that it was not free of the prohibited substances lignocaine, norlignocaine and 3-hydroxylignocaine, and that each of those three substances are prohibited substances under the rules.

4. The facts to establish the ingredients of each of those particulars are not in issue. That is, the fact that the appellant had the status she did, she presented the greyhound to race and there was subsequently detected the subject substances in the greyhound and they are prohibited.

5. The challenge advanced by the appellant has at all times been to the processes engaged in by the parties of the respondent in the sample collection process and by the laboratories in the certification process such, it is submitted, that the evidence cannot be at a level where the Tribunal can be satisfied that the prohibited substances were in fact in the greyhound at the time of presentation.

6. The appellant pleaded not guilty before the hearing panel and has maintained a denial of the breach the rule on appeal. There is a severity appeal.

7. The matter has proceeded before the Tribunal on the basis of written submissions and an admission of the brief of evidence of the respondent. No oral evidence or additional evidence has been taken.

8. After the written submissions for the parties closed, the Tribunal identified further evidence relating to the second laboratory certification process, which had not been examined by the parties. Each party made supplementary submissions.

9. The key pieces of evidence that require analysis are the sample identity document, the kit audit document, the chain of custody document, the RASL sample receipt document, the RASL certificate of analysis, the RASL report

on the subject sample, photographs of the sample kit, and the ARFL certificate.

10. This is the second occasion on which the Tribunal, the Integrity Hearing Panel and the parties have had to address potential failures in the sampling, certification and certificate of analysis processes adopted by the respondent and the laboratories. The failures to be examined on behalf of the appellant identify a number of different matters. The appellant says that the processes required to be undertaken and the totality of the evidence are such that the appeal should be upheld and the respondent says that the totality of the evidence is such that the processes and the necessary certifications are sufficient to found an adverse finding.

11. On 24 October 2022, the Tribunal gave an ex tempore decision finding that in respect of a prior presentation on 17 January 2022, the appellant had breached the same rule with two of the three prohibited substances in this case present. The appellant had been notified of that first potential breach on 11 April 2022 and an inquiry was conducted on 13 July 2022. The appeal against the breach was dismissed, but the severity appeal was upheld and the appellant subjected to a 6-week suspension.

12. In general terms at this stage, it is noted that this presentation was on 23 April 2022, after the first presentation and after the first notification to the appellant of that first potential breach. A notice of proposed disciplinary action in respect of this second matter was issued on 18 July 2022, being after the adverse finding by the hearing panel on the first matter on 13 July 2022. In respect of this second matter, the Integrity Hearing Panel conducted its inquiry on 6 September 2022. The penalty decision in the second matter was issued after the Tribunal's determination in the first matter on 24 October 2022.

13. The Tribunal notes in this second matter a notice of appeal on 1 December 2022, appellant's submissions on 16 December 2022, respondent's submissions on 23 January 2023, appellant's reply submission on 13 February 2023, Tribunal's subsequent query on 16 February 2023 and appellant's submission on 13 February 2023, respondent's submission on 17 February 2023 and appellant's reply on 22 February 23, with final notification from the respondent on 7 March 2023, there would be no further submission.

14. That history is set out at this point to indicate that there was no opportunity for the appellant to address the issues between the first presentation on 17 January 2022 and the second presentation on 23 April 2022, other than the notice of proposed disciplinary action on 11 April 2022.

15. No issue has been taken in these proceedings that an additional prohibited substance of norlignocaine was found in the second presentation

as against the first presentation and that will not be examined further, it not being an issue that all three of the detected substances here are prohibited.

16. In the first Bilal decision of 24 October 2022, the Tribunal set out the applicable case law in paragraphs 12 to 14. It is not repeated but adopted.

17. In very brief summary the test to be analysed here when chain of custody issues are identified is to be satisfied that that which was sampled was that which was analysed and had not been interfered with. Because of the seriousness of the matter, the Briginshaw principles apply.

FACTS

18. The key points of deficiency identified by the appellant relate to the actions of the officers of the respondent and of the laboratories and various unanswered gaps in the processes.

19. On 23 April 2022, in the absence of the appellant, the greyhound was presented to race. The sample was taken at 6:55 pm that day and the responsible person, Mr John Wright, apparently stated, because the following words are written on the Sample Identity Document: “Happy with swab. Doesn’t sign because of water policy.” The document was appropriately signed by the sample collector Lorraine Currey. The document is numbered V757751.

20. Kit Audit Document ID 22/0811 was used. It was signed by Ms Currey and by steward N. Meyn. The kit contained the subject sample V757751 and the kit was sealed with seal 19243. The initial check contents match audit document was certified by each of Ms Currey and N. Meyn and the final check contents match audit document was signed by N. Meyn and Ms Currey.

21. Stewards M. Wright, N. Meyn and A. Bartle completed the Greyhound Sample Collection Operation Sheet and Chain of Custody Document on 23 April 2022. It identified sampling assistant as Lorraine Currey. Mr Bartle certified that “we collected 9 urine … samples whose numbers are recorded in Table 3”. The Tribunal notes that Table 3 identifies sample identity document for 9 greyhounds tested and this document identifies sample V757751 for the greyhound Flighty Fernando as being one of them.

22. On that chain of custody document, after the words “the bags used to store the samples was sealed with security serial numbers” Mr Bartle failed to record the seal numbers. This is the first complaint of the appellant.

23. The document then provides for identification of collection anomalies and an anomaly for another sample was identified in the terms “very small

sample" but, importantly, no anomaly for the subject sample V757751 was identified.

24. Mr Bartle then certified that the samples remained in his custody until they were posted from Oaks Flat to GWIC and he signed and certified that fact on 26 April 2022.

25. The next part of the chain of custody document is the certification of its receipt by GWIC on 28 April 2022 and its placement in a secured refrigerated storage facility until dispatch to RASL on 28 April 2022 at 11 am. That part of the form is signed by Paul Coschot (the signature is not clearly identifiable).

26. The chain of custody document then notes that, relevantly, the subject swab bag number 22/0811 (as identified in the kit audit document) was used.

27. The balance of the document is not relevant.

28. The mischief identified by the appellant is that Mr Bartle failed to certify the seal number 19243.

29. The mischief also identified by the appellant is that in the six days between 23 April and 28 April 2022, there is no evidence of the storing and transporting of the sample in a sealed bag.

30. The next relevant document is the sample receipt of RASL.

31. That document certifies the receipt of 20 samples received for analysis and, relevantly, includes sample V757751, which comprised 2U + 1C (the Tribunal interprets that to be two samples of urine and one control sample), and that that sample had sealing tag 19243.

32. The Tribunal notes that that sample receipt document makes provisions for comments and in respect of two other samples comments were recorded: "low volume", "right jar empty, extremely low volume". That is, that in the comments section, no comment is made in respect of the subject sample V757751. That is, there is no positive or negative comment about the status of the sample in the sealed bag 19243.

33. The sample receipt document indicates receipt at 10:28 on 29 April 2022 and received by Bhumit Patel. Other parts of the sample receipt documentation do not require analysis.

34. The appellant submits that sample receipt document was not signed on behalf of RASL and was not signed on behalf of GWIC despite the fact that there is provision made on that form for that to take place. At this point and

on the available evidence the Tribunal does not understand how a sample that is sent by courier to another entity and that other entity receives it then certifies its receipt could have a signature of the sender on the receipt. That is , when would a GWIC officer sign the receipt?

35. In addition the appellant says the document contains no comment about the seals being intact.

36. The next critical document is the RASL certificate of analysis.

37. The relevant parts of that document are its notation of sample received on 29 April 2022 and the comment on the status of the samples: “Samples arrived in good condition with seals intact.” The method of analysis was specified for sample V757751 and the results indicated the three subject prohibited substances. The document was signed by David Batty as Laboratory Director, on 8 June 2022. It states “sample analysed as received”. The document sets out the necessary accreditations.

38. For the appellant, it is pointed out that there is a gap of some length between the receipt of the sample at RASL on 29 April 2022 and the certificate of analysis of 8 June 2022. Challenge is made to Mr Batty’s capacity to state “arrived .. intact” when there is no linking of the receipt of the document by Mr Patel and Mr Batty’s certification with such a statement.

39. The next document is the RASL report on sample number V757751.

40. The necessary formal parts of that document involve the reporting of the three prohibited substances in the “sample V757751 …received by Bhumit Patel …on 29 April 2022”. The reasons for the detection of the irregularity and the screening tests applied are identified but do not require further analysis.

41. Critically, that document contained “digital photographs of sample number V757751 prior to dispatch to the Australian Racing Forensic Laboratory.” Mr Batty signed that document as Laboratory Director and it was countersigned by Mr Yamada as Acting Scientific Manager on 1 July 2022.

42. The photographs which were attached to the RASL report were the subject of the subsequent inquiry by the Tribunal of the parties.

43. The Tribunal is satisfied that the photograph depicts the front and back of the sample V757751 material. The photograph is signed and dated 8 June 2022 by Po Ling Noy (the signature is not clearly identifiable). The Tribunal is satisfied that the bottom of the two photographs depicts the sample bottle B and the control bottle as each showing the tamperproof seal running from the top of the cap down the side of the bottle past the point

where the screw cap touches the bottle top. The photograph does not depict the top of the cap. The top photograph is either unclear or such that it is not possible to identify the continuity of the seal in respect of one of the bottles, although it is possible to state, on examination, that the continuity of the seal shown on the other side of the bottle in the bottom photograph appears to come across what might be the top of the cap and very marginally down. Therefore, in each case in that top photograph, the balance of the seal is obscured. The photographs depict two distinct pouches in the bag with a bottle in each pouch and the third pouch is empty, which is, the Tribunal accepts, because the A sample has been removed when it was tested by RASL. The photographs otherwise appear to depict a seal across the top of the containers, but as the A sample has been removed, it is not possible to conclude that that seal was intact.

44. The final document of importance is the ARFL external confirmation test certificate.

45. It was issued on 1 July 2022 and states a sample receipt date of 10 June 2022 and, critically, “status of seals: intact”. It refers to both the urine and control samples being in the subject sample bottles V757751. It certifies “sample analysed as received.” It is signed by John Keledjian as General Manager. It contains the unchallenged certification of accreditation. It also confirms the presence of the three prohibited substances and states the methods used to determine that.

SUBMISSIONS

Appellant’s Submission

46. The appellant’s written submissions open by canvassing the facts which have been summarised above and identifies two failures.

47. The first failure is that on the chain of custody document there is no record of the seal numbers applied to the bags used to transport the samples.

48. The second failure is that Bhumit Patel, in his sample receipt document, makes no comment about the integrity of the seals of any of the bags or bottles.

49. The appellant then took the Tribunal to provisions of the Greyhound Racing Act and the necessity for the maintenance of integrity and public confidence.

50. The appellant took the Tribunal then to two rules.

51. The first rule is Rule 80, which relevantly provides:

> "(3)… sample is taken from a greyhound for testing … pursuant to any established procedures, the sample shall be placed in a sealed container having attached to it a number and such information as may be deemed necessary by the Stewards, and be delivered to an accredited laboratory. A report signed by a person who purports to have taken the sample shall be, without proof of the signature thereon, prima facie evidence of the matters contained therein for the purpose of any proceedings pursuant to these Rules."

52. The second is Rule 81:

> (1) Where a sample taken from a greyhound has been analysed by an accredited laboratory pursuant to Rule 80 (3), a certificate signed by an accredited laboratory officer shall be, without proof of the signature thereon, prima facie evidence of the matters contained therein for the purpose of any proceedings pursuant to these Rules."

53. The appellant then took the Tribunal to procedures for inquiries, but as this is a hearing de novo, examination of this is not required.

54. The appellant then took the Tribunal to the GWIC swabbing policy.

55. That policy provides that samples will be collected in accordance with guidelines provided by the testing laboratories and that protocols will be put in place to ensure the integrity of samples during transport and testing. There is no issue that such guidelines and protocols have been issued and apply.

56. The appellant then took the Tribunal to the various aspects of case law, including the Briginshaw test, which is sufficiently summarised on the submissions as requiring a comfortable level of satisfaction. In addition, the case law points out that there has to be a basis for any finding, but only on material that is readily available and relevant. It is said that the decision-maker must also ascertain relevant facts and, if material is readily available and it is not provided, there should be an attempt to obtain it. The Tribunal merely notes that it is not an evidence-gathering body but a decision-maker based upon the evidence before it and it has no obligation itself to go out and find evidence.

57. There is then a challenge to the decision-making processes of the hearing panel in that it had various options open to it and chose the wrong options. In particular, it was said that there was a failure to call additional evidence which would deal with the chain of custody and to ensure that the samples were intact and not tampered with. Suffice it to say that again the Tribunal notes this is a de novo hearing and it is its function to determine for itself on the submissions and evidence the appropriate options and make

the relevant decisions. The Tribunal certainly agrees that the issue here is not only chain of custody but also a finding that there has not been tampering with the samples.

58. The submission then goes to a lengthy dissertation on hearsay and its application here. Suffice it to say that the Tribunal is not bound by the rules of evidence and not bound to exclude evidence on the basis of hearsay. A fair decision must be made upon the relevant evidence before the Tribunal, with a party adequately able to examine it.

59. In support of the arguments on hearsay, the appellant identifies a gap of six days between the collection of the sample and its sending to GWIC, and in that time there is no record of it being stored in a sealed bag or transported in a sealed bag. Therefore, there is opportunity for tampering or sample degradation. It is then said that Mr Patel did not sign the sample collection receipt and there is no evidence of the person who handled the samples at the point of analysis. There is then a delay until 8 June before Mr Batty certifies analysis, and therefore a period of days where there is no record of the sample having its seals intact. It is been said that without evidence from Mr Patel and Mr Batty as to how the sample was provided to Mr Batty, anything he says subsequently is hearsay and not admissible. It is said Mr Batty does not say which seals were intact, and without the evidence of Mr Patel and Mr Batty, it is not possible to make such a determination. Therefore, it is said the groundwork for Mr Batty's comments is not laid. Therefore, he cannot give the evidence he purports to give on the certificate of analysis that it arrived with seals intact because he did not accept the sample when it arrived and his failure to explain that has not been set out.

60. The principles in Jones v Dunkel are then set out and, in particular, the failure to call Mr Patel and Mr Batty. It is said there was no explanation of why they were not called as witnesses. It is, therefore, said that in accordance with the principle that inferences favourable to the appellant should be drawn. It is further said that the principle is that, not having called that evidence, implications in favour of the respondent cannot be made.

61. It is then said that there are reasonable hypotheses consistent with innocence and they have not been excluded. That is, that the samples did not arrive at RASL with seals intact and they were not in a sealed bag for a period of some weeks and could well have been tampered with or degraded.

62. It is then submitted that there is a failure to comply with the legislative duties in the respondent and failure to comply with the swabbing policy and failure to comply with the rules and appropriate policies.

63. It is therefore said that with these failures, there can be no satisfaction on the integrity of the sample collection, transport and analysis.

Respondent's Submissions

64. The respondent opens by detailing the history of the matter, which is adequately set out above. It also takes the Tribunal to the evidence in this case, which is appropriately set out above.

65. The respondent does not dispute the fact that the chain of custody document does not record the security seal numbers used. It says, however, this is not fatal to its case.

66. It says that all of the documents have to be read together, and when read together, provide the appropriate clear chain of custody for the subject sample, its sealing and security, its transport and subsequent analysis. In support of that submission, the factual matters analysed above are set out.

67. The respondent then rejects the appellant's arguments on hearsay.

68. It is said that the analysis certificate signed by Mr Batty is prima facie evidence that it was the subject sample that was analysed. In particular, the fact that it is certified that the "samples arrived in good condition with seals intact".

69. As the respondent submits that the signed certificate goes to the sample in good condition with seals intact, the various hypotheses which the appellant advances cannot be sustained.

70. In particular, it is said that the evidence clearly establishes that the samples were stored in a sealed bag and it was that which was sent to the laboratory, where it arrived in a sealed bag and then went to the second laboratory so sealed.

71. It is therefore said it would be fanciful to suggest that Mr Batty would provide a signed certificate attesting to the arrival of the sample with seals intact if that were not true.

72. It is again repeated that there was an unfortunate error, but it was just that, in relation to the failure to record the seal number on the chain of custody document.

73. The respondent then rejects the challenges to its compliance with the statutory mandate, compliance with the rules or compliance with swabbing policies or protocols. It is submitted that the respondent has done all that was required of it, as have those who were responsible for their conduct, with that one exception of the unfortunate failure to record the seal number.

74. It is therefore said that such a minor administrative error is not a failure in the collection process.

Appellant in Reply

75. The appellant again sets out the problem with the evidence between Mr Patel and Mr Batty and the period of time that transpired before analysis on the basis that Mr Batty did not receive the sample, as Mr Patel did, and therefore there can only have been a conversation between Mr Patel and Mr Batty as to the samples being received with seals intact. It is said that is the only way Mr Batty could have formed his conclusion to enter his statement on the certificate. It is said that is hearsay.

76. It is pointed out that neither of those two people were called to give evidence.

77. Therefore, it is said that the respondent has not laid the groundwork for the existence of Mr Batty's comments. For example, it could be that Mr Patel did not open the bags, or opened the bags but did not open the seal, or opened both, and handed them to Mr Batty, but none of this is in evidence. It is again repeated that Mr Batty could not give his evidence because he was not the one who received the sample.

78. It is then said that the respondent's failure in its collection processes and the sampling and testing processes, which remain unexplained, are such that it is not possible to determine what happened.

TRIBUNAL QUERY

79. On 13 February 2023, having considered the parties' submissions and the evidence, the Tribunal wrote to the parties inviting further submissions.

80. The Tribunal stated:

> "2. The Tribunal notes that the photo by RASL of the bottles being sent to ARFL appears to show the seals intact on the control and the B sample. Dr Keledjian certifies ARFL received the bottles with seals intact. No challenge has been advanced, nor reference made, to those two pieces of possible evidence.
>
> 3. If the facts in 2 are found, would that not provide a Rule 81 certificate of a prima facie nature that has not been rebutted and therefore sufficient to find a breach?"

81. The Tribunal invited further submissions.

Respondent's Submission

82. The respondent relied upon both the RASL certificate signed by Mr Batty and the Certificate of Analysis from ARFL signed by Mr Keledjian as each providing prima facie evidence pursuant to Rule 81.

83. The respondent continued that it agreed with the Tribunal's identification that the photograph appears to show the urine and control sample with seals intact.

84. The submission continued by concluding that the Tribunal should find the breach established on the basis that the processes did not lead to any breach in the chain of custody or lead to any evidence that a finding of tampering could be found.

Appellant's Submission in Reply

85. The appellant opened by stating that there is an obvious breach in the chain of custody and there is no clear record of the samples being passed from collection to transport to storage to testing, as intended with the records of the seal numbers, bag seal numbers and people receiving giving appropriate evidence.

86. The appellant submits that the photos do not appear to show the seals intact. An examination of the photos by the appellant says that one side of the seals is uncovered, and from one of the photos the seals are intact because they are not obviously torn or damaged in any way. However, it is said that the other photos do not show the other side of the seal because that is obstructed. Importantly, it says that the photograph does not show the seals at the point where they would have been opened.

87. The submission continues on the failure to call Mr Batty and now, in addition, the failure to call Po Ling Noy. The submission continues that there is a failure to call Dr Keledjian as to why he was able to say the seals were intact. That is said to arise because, in addition to the other failures, there is no evidence of who received the sample at ARFL. It is said that Dr Keledjian does not say he received the sample and does not say who, and, accordingly, it is not possible to draw an inference that the seal was intact.

88. The submission concludes by again summarising the stated failures. In particular, the submission states: failure to record seal number of the bag; no comment by Mr Patel on the state of the seals; no comment by Po Ling Noy on the state of the seals; no evidence of how Mr Batty formed the view that the seals were intact; no evidence who received the sample at ARFL; no evidence of how the integrity of the seals was confirmed by Mr Batty.

89. Accordingly, it is submitted that the combination of all these failures and the failure to call evidence of appropriate witnesses is such that the Tribunal could not be satisfied that the sample has not been tampered with and that the seals may not have been intact.

DISCUSSION

90. The following facts are established:

Mr Bartle did not record the security seal number on the chain of custody form.

The sample receipt by Mr Patel makes no comment about the integrity of the seals on any of the bags or bottles.

There was a period of at least 6 days between the sample collection and its receipt at RASL.

There is no record of the sample being stored in a sealed bag at that time.

There is no record of the sample being transported in a sealed bag at that time.

Mr Patel did not sign the sample receipt form.

There is no evidence that Mr Patel handled the samples at the point of analysis.

Mr Batty analysed the sample on 8 June 2022, a period of 48 days.

There is no evidence from Mr Patel or Mr Batty as to how the sample was provided to Mr Batty.

There is no evidence of which seals Mr Batty says were intact.

None of Mr Patel, Mr Batty, Po Ling Noy or Dr Keledjian were called to give evidence.

There is no explanation as to why those potential witnesses were not called to give evidence.

Dr Keledjian does not state he received the sample, or who received it, and the basis upon which he says the seals were intact.

Mr Batty did not conduct an analysis of the B sample.

Po Ling Noy made no comment on the state of the seals.

Mr Batty has given no evidence as to how he formed the view that the seals were intact upon receipt.

91. The Tribunal does not form a view that the above factual matters and the brief summary just given establish that the respondent has failed to comply with its statutory obligations to act to safeguard the integrity of the industry or to maintain public confidence in it.

92. The Tribunal does not form the conclusion that the respondent has failed to follow the testing and swabbing procedures that are set out.

93. At its highest, the facts establish, and neither party disputes, that Mr Bartle failed to record the security seal number on the chain of custody form. The Tribunal is satisfied that was an administrative error. It is not fatal in the context of the whole of the evidence.

94. The remaining matters identified by the appellant and which require consideration do not go to a finding that other than that administrative error the respondent has ignored or failed to comply with the guidelines and protocols required of it in relation to the sampling processes.

95. That leaves open for determination two key areas for consideration. The first is whether the breach in the chain of custody is established and, secondly, whether the items identified by the appellant lead to a conclusion that opportunities existed for tampering or degradation.

96. Degradation can be disposed of on the basis that there is no evidence that any of the timeframes referred to in this matter, when considered alone or together, could mean there was degradation. There is simply no evidence that was possible.

97. There is also no evidence that any factual failures or factual matters identify that in relation to storage or transportation there was anything here that might have led to degradation.

98. On the issue of degradation, it is open to infer, by reason of the fact that the certificates of analysis by the two laboratories make no reference to it, any concerns of a possible degradation of sample.

99. On degradation, the Tribunal is satisfied that there is nothing on the facts which would indicate any reason why the respondent should have called witnesses to give evidence on the possibility of that leading to the positive detections.

100. There is simply no evidence that if there was degradation, and whatever type that might be, such a degradation could possibly lead to the detection of the three samples in greyhound urine.

101. That leaves for analysis chain of custody and tampering.

102. The Tribunal is satisfied that the totality of the evidence establishes a clear chain of handling of the subject samples from the moment the sample was collected until the second certificate issued.

103. There has been no issue throughout that the sample collected and numbered V757751 was that which was collected by the stewards, sent to GWIC, transmitted to RASL and transmitted to ARFL and analysed.

104. The Tribunal agrees that the failure of Mr Bartle to record the security seal number in a chain of custody document is not fatal. Other evidence provides the continuity that the respondent must establish.

105. That evidence is that the Kit Audit Document says that the sample V757751 was placed in a secured bag with seal number 19243. That sample was in swab bag 22/0811. That was the Kit Audit Document number and is referred to in the chain of custody as moving with the subject sample V757751. Mr Patel received sample V757751 with sealing tag 19243 and made no comment, which it was open to him to record, that there was any issue about the sample or the seal. As such comments were made in respect of other samples and sealing tags, it is an inescapable fact that he observed nothing that was untoward in respect of the sample receipt.

106. No evidence has been led to establish that the failure of Mr Patel to sign the sample receipt document was fatal. There is in fact no evidence that he was required to so sign it. It is unfortunate that he did not do so.

107. Accordingly, RASL, the first testing laboratory, has a sample in a sealed bag. There is no evidence it was not intact.

108. While it was received at RASL on 29 April and the circumstances of its handling and storage until tested and certified on 8 June 2022 are not in evidence, there is, likewise, no evidence to lead to any conclusion that RASL did not act properly. It is also important to recognise that the RASL certificate of analysis certifies that “Sample analysed as received.” That same certification of analysis states “Samples arrived in good condition with seals intact.” There is no reason to form any finding that between 29 April, when it arrived with seals intact, and the certification of analysis made on 8 June, with an unknown analysis date, the circumstances were such that, with the totality of that evidence, there can be any conclusion that the seals were not intact.

109. It was not necessary to call Mr Batty to state why he was able to form that opinion.

110. The Tribunal is nevertheless satisfied that Mr Batty was able to rely upon the sample receipt document by Mr Patel, although unsigned, to the effect that there was no notation on that document that might indicate that there was anything untoward about the sealing tag and the sealing of the sample V757751 with that seal 19243.

111. There is further reinforcement in that conclusion by the report on sample number V757751 signed by Mr Batty and Mr Yamada. Attached to that document which is signed by Mr Batty is the photograph certified by Po Ling Noy.

112. It is the Tribunal's opinion of its assessment of the photograph of the bottles in the bag that they sufficiently depict that the caps on the B sample and the control were sealed. Whilst only one side of the bottles is depicted, the Tribunal is satisfied, applying a test of common sense, that it would not be possible to unscrew that tamperproof cap without breaking the seal on one side but expecting somehow it could have been broken on the other side such that anyone could have interfered with that sample and the control. It would verge on the absurd to have to conclude that the top photograph, being unclear as to whether the seals were intact, could possibly overcome that factual finding. In any event, as limited as the top photograph is, it nevertheless leaves corroboration in a limited way only that the seals on the two caps were intact.

113. That photograph cannot indicate that the A sample seal was intact because the A sample was not in the satchel.

114. In any event, absent any specific evidence by photograph, there is the other evidence that, in any event, prior to the photograph being taken on 8 June 2022, that it had been the certification of Mr Patel and Mr Batty that the seals were otherwise intact. That is open to conclude that the A sample seal was intact.

115. The Tribunal does not reject the factual findings just made on the basis of hearsay, to the extent it might have any application in this jurisdiction, on the basis that various witnesses were not called to state that which they did, observed or were told. The totality of the evidence just identified enables each of those authors of the written statements to have material before them which would satisfy them that their statement about seals intact and samples as received has been a correct statement of evidence. It did not require someone else to come along and fill in the chain of conversation that might have taken place, if any.

116. There is further corroboration in those conclusions of fact that the seals were intact by reason of the ARFL certification. It contained two key ingredients, namely, “seals intact” and “sample analysed as received”. The same statement of fact made by RASL.

117. It would be drawing too long a bow to find that somehow at some stage in these controlled processes those seals became broken improperly, or broken at all.

118. Those factual findings lead to the conclusion that the seals were intact on the subject bottles when they were opened for testing by the two laboratories.

119. The sample receipt form attributed to Mr Patel does not provide a section for him to state “seals intact’. It provides for comments and that is the area where it would be expected that seals not intact would be recorded. That is the normal does not require comment. As set out above he made no comment on the subject sample. It is clearly open to conclude the seals were therefore intact.

120. There is no failure by the various officers to have further expanded upon their comments on the certificates of analysis. Noting the form of those documents and what is set by the guidelines and protocols to be included on them, there is, therefore, no necessity for the authors of those documents to set out further comments when there is no need to make comment. For example, if it is necessary to state “seals intact”, there is then no necessity by guidelines or protocols for the author of the document to set out a dissertation on why that conclusion was reached. Again the normal does not require further comment.

121. There is no Jones v Dunkel inference drawn against the respondent for failure to call witnesses.

122. In essence the appellant is inviting the Tribunal to speculate that the issues litigated might raise matters of concern. There is no reason identified as to why or by whom any tampering might have taken place. Mere speculation is insufficient to rebut evidence.

123. That disposes of the potential for tampering and there is no tampering finding.

124. That disposes of the limited concerns that arise from the administrative error of Mr Bartle in not recording the security seal number on the chain of custody document. The balance of the evidence cures that administrative failure.

125. There is no chain of custody failure.

126. The appropriate testing and swabbing procedures and the appropriate compliance with the guidelines and swabbing policies were, with the minor exception identified, complied with.

127. The Tribunal is satisfied that that which was sampled was that which was analysed. The second limb of the Brereton J test is satisfied.

128. The totality of the procedures followed by the various officers in this case, despite the unfortunate administrative error, do lead the Tribunal to conclude that there is a factual basis upon which it can find that the rule was breached. The determination is made, having regard to the Briginshaw standard and with the appropriate level of comfortable satisfaction on matters of this seriousness.

129. Under the rules the certificates of analysis are each prima facie evidence of their contents, that is the presence of substances which are prohibited. There is no evidence to rebut the prima facie nature of those certificates. All other particulars are not in issue.

130. No hypotheses in favour of the appellant remain to be considered.

131. The Tribunal determines that the appellant has breached the subject rule as particularised.

132. The appeal against the adverse finding of the breach of the rule is dismissed.

PENALTY

133. The parties have made written submissions on penalty.

134. The Tribunal emphasises that it has not made any predetermination on penalty.

135. The Tribunal has determined that further submissions are required by both parties. There are three reasons.

136. Firstly, neither party has seen these reasons for decision and may wish to supplement their submissions after reading the decision.

137. Secondly, the guideline starting point needs consideration even though it will not be the final arbiter for penalty.

138. That arises because it provides a heavier starting point penalty for ”one category 3 substance rule breach in the previous 3 years”.

139. It is open to the Tribunal to find that this breach does not activate that heavier penalty. That may arise on the timings of the conduct here. First presentation 17.1.22. First notice of proposed disciplinary action 11.4.22. Second presentation 23.4.22. First penalty finding of breach 13.7.22.

140. Therefore it is open to find that at the time of the second breach there was no first “breach” because it did not operate until 13.7.22.

141. Therefore the second breach may be determined without the heavier penalty. That would mean a starting point here of a suspension of 2 months not 6 months.

142. Again it is emphasised that it is a guideline only.

143. Thirdly, those facts may raise consideration of partial concurrency between the two breaches even though the first penalty has been served. That may be effected by, eg, reducing any found period of suspension.

144. That may arise as the second breach occurred before there was disciplinary action although there was notice there will be. That may lead to a finding that little could be done to prevent the second breach.

145. In any event in the second and third scenarios there may be a need to consider the fact the appellant was on notice of the first breach when the second breach occurred.

146. The following directions are issued.

DIRECTIONS

1. The respondent to advise if further submissions are to be made on or before 22.3.23 and if yes to make any such submission on or before 29.3.23.

2. The appellant to file and serve any submission within 14 days of receiving the respondent’s submission, if any.

3. The respondent to file and serve any reply submission within 7 days of receiving the appellant’s submission.
