IN THE RACING APPEALS TRIBUNAL

STEPHEN FAIRBAIRN
Appellant

v

GREYHOUND WELFARE AND INTEGRITY COMMISSION
Respondent

REASONS FOR DETERMINATION OF THE APPELLANT'S APPLICATION PURSUANT TO CLAUSE 14(1)(a) of the RACING APPEALS TRIBUNAL REGULATION 2015

INTRODUCTION

1. By a Notice of Appeal filed with the Appeals Secretary on 20 May 2024, Stephen Fairbairn (the Appellant) has appealed against a determination of the Greyhound Welfare and Integrity Commission (the Respondent) of 17 May 2024 to impose an interim suspension pursuant to r 169(5)(c) of the *Greyhound Racing Rules* (the Rules).

2. The Notice of Appeal was accompanied by an application by the Appellant for a stay, which is opposed by the Respondent. It is that application which is now to be determined.

THE FACTS

3. The Appellant is a registered Public Trainer and was present at a race meeting at Wentworth Park on 10 May, 2024. It is alleged that on that occasion, he engaged in a physical altercation with another industry participant, Patrick Mulrine.

4. On 13 May 2024, the Respondent wrote to the Appellant, advising that it was commencing an inquiry as to whether the Appellant was a fit and proper person to be registered within the industry, and advising that consideration was being

given to the imposition of an interim suspension. The correspondence invited the Appellant to make submissions before any determination was made.

5. The Appellant's Solicitor responded on the Appellant's behalf on 16 May 2024. In the course of that response, the Appellant's Solicitor:

    (i) noted that the Appellant had not been charged with any offence;
    (ii) asserted that the Respondent's consideration of the imposition of an interim suspension was an abuse of process; and
    (iii) further asserted that such consideration was contrary to principles of natural justice and procedural fairness.

6. In the circumstances discussed below, it is not without significance that in that correspondence, the Appellant's Solicitor made reference to being provided with CCTV footage of the incident, as well as witness statements. Whilst I have the former, I have not been provided with the latter. In any event, on the basis of that material, the Appellant's solicitor made submissions to the Respondent as to the relative levels of culpability of the parties who were involved in the incident, and specifically raised the issue of the Appellant having acted in self-defence, or under duress (or perhaps provocation). He also asserted that there was footage which was missing which, I infer, is said to be exculpatory of the Appellant.

7. By letter of 17 May 2024, the Respondent advised the Appellant's Solicitor that it had determined to impose an interim suspension. In an accompanying document headed *Disciplinary Action Decision,* the Respondent's reasons for its determination were stated in the following terms:

> *[The Respondent] is investigating the conduct of [the Appellant] at the Wentworth Park meeting of 10 May 2024. After considering the evidence … [the Respondent] imposed an interim suspension upon [the Appellant] pending the finalisation of an inquiry into this matter, pursuant to Rule 169(5)(c) of the Greyhound Racing Rules. The investigation into this matter is ongoing.*

8. It is noteworthy that approximately 2 weeks have elapsed since that correspondence was forwarded. I infer that no charge(s) have yet been laid against the Appellant arising from the incident, and that no other action has been taken.

9. I should also note that I have been provided with two photographs, one of Mr Mulrine and one of the Appellant. The photograph of Mr Mulrine shows blood across the left temple, extending down to the left cheek and temporomandibular joint. The photograph of the Appellant shows something which may be in the nature of a haematoma on the left cheekbone.

SUBMISSIONS OF THE PARTIES

Submissions of the Appellant

10. To some extent, the submissions advanced by the Appellant's Solicitor on this application essentially mirrored those made to the Respondent in the correspondence referred to at [5] and [6] above. However, the Appellant's Solicitor made additional submissions to me as to the respective levels of culpability of the Appellant and Mr Mulrine. The effect of those submissions was that the culpability of the Appellant was far less than that of Mr Mulrine, such that the most likely penalty, in the event of a charge being laid, was the imposition of a fine. Finally, the Appellant's Solicitor submitted that, absent a stay, and in circumstances where there was no indication at all as to when any further inquiry might be concluded, the Appellant would suffer *"serious and unrecoverable financial implications"*. In this regard, the Appellant specifically relied upon the fact that there was no time limit imposed by r 169(5)(c), such that he was placed in a position where, absent a stay, any interim suspension was effectively open-ended.

Submissions of the Respondent

11. The Respondent's submissions confirmed the fact that, aside from the CCTV footage, the incident was said to have been witnessed by three named persons. I infer that each of those persons, or at least some of them, were the authors of the

statements to which I have previously referred (but with which I have not been provided for the purposes of determining this application).

12. The Respondent submitted that the investigation of the incident involved *"possible breaches"* of the Rules, and in that context emphasised its statutory charter to maintain public confidence in, and safeguard the integrity of, the greyhound racing industry.

13. The Respondent's submissions went on to state this:[1]

> ***As seen in the evidence filed by the Respondent in respect of this matter, the Appellant has clearly engaged in a serious physical altercation with Patrick Mulrine***. *Whilst the Tribunal is not required to make any findings in respect of the evidence when considering a stay application, the Respondent submits that the CCTV and the photographs filed by the Respondent are sufficient to support the necessity of an interim suspension of the Appellant's registration* (emphasis added).

14. In terms of the Appellant's submissions regarding the process generally, and the determination to impose an interim suspension in particular, the Respondent rejected any suggestion that there had been a breach of the principles of natural justice and procedural fairness. In particular, the Respondent submitted[2] that it was *"not required to state the particulars behind each investigation prior to the completion of that investigation"* and that[3] its *"inability to provide particulars cannot form grounds for a stay as this does not constitute a serious question to be tried in the context of an interim suspension pending finalisation of the investigation"*.

15. As to the investigation, and in response to the submissions of the Appellant as to the time that such investigation might take, the Respondent submitted:[4]

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[1] At [14].
[2] At [15].
[3] At [15].
[4] At [17].

> *The Respondent respectfully submits that the Appellant's accusation that the Commission is abusing its power in not specifying the duration of the investigation is beyond the scope of this stay application. The time taken to investigate by the Respondent depends on the nature and circumstances of each individual matter and the action taken during the period of investigation is directly attributable to the Commission's duty to maintain public confidence in the greyhound racing industry and in protecting the industry.*

16. In terms of the respective levels of culpability of those involved in the incident, the essence of the submission advanced by the Respondent was that this was not relevant. In particular, the Respondent submitted:[5]

> *...The Appellant raising Mr Mulrine's culpability in commencing or instigating the incident doesn't raise a serious question to be tried in respect of this stay application. The disciplinary action taken by the Commission is in respect of the Appellant's alleged conduct in which he, on first review of the evidence, left Mr Mulrine with a bleeding forehead on the day of the incident.*
>
> *The culpability of another party is not a consideration in whether an interim suspension should be imposed, and the Respondent submits that it cannot be considered when determining whether there is a serious question to be tried.*

17. Consistently with this, the Respondent submitted that in the event that a charge were laid, the imposition of a suspension was unlikely. Finally, and insofar as the Appellant relied on financial considerations as a matter going to the balance of convenience, the Respondent submitted that such a circumstance was outweighed by the other factors relied upon.

THE APPLICABLE PRINCIPLES

18. The principles to be applied in an application of this nature have been set out in previous determinations. They were addressed at length in *Marshall v Greyhound Welfare and Integrity Commission*.[6] Put simply, the Appellant must establish that:

    1. there is a serious question to be tried; and
    2. the balance of convenience favours a stay.

[5] At [20] – [21].
[6] A decision of 22 December 2023 at [16].

19. Some of the submissions made by the parties going to these issues mirror those made in a recent determination of *Clarke*.[7] I appreciate that the parties did not have the benefit of that determination when preparing the submissions for this matter. However, it is obviously not helpful, nor it is efficient, for submissions going to matters of principle to be repeated, in circumstances where I have already determined the same (or similar) issues in the context of other applications and appeals. In an effort to assist parties in the conduct of cases coming before the Tribunal, it is appropriate that I expand upon, and in some instances re-state, matters of principle which should be taken to apply generally to applications of this kind.

The nature of a serious question to be tried

20. The notion of what might amount to a serious question has been interpreted by appellate Courts in wide terms, as being in the nature of *"a reason or an appropriate case to warrant the exercise of the discretion in the party's favour"*[8], or a *"serious issue for determination"*[9]. Two important matters arise form that approach.

21. The first, is that does ***not*** mean that an applicant for a stay is required to establish special or exceptional circumstances.[10]

22. The second, is that the identification of whether there is a serious question is one to be made ***by reference to the circumstances of the case as a whole*.**

The balance of convenience

23. A determination of where the balance of convenience lies is one to be made by reference to an overarching consideration of what the broader interests of justice

[7] A determination of 30 May 2024.
[8] See *Alexander v Cambridge Credit Corporation Limited* (1985) 2 NSWLR 685 at 694 per the Court (Kirby P (as his Honour then was); Hope and McHugh JJA.
[9] *Kalifair Pty Limited v Digi-Tech (Australia) Limited* (2002) 55 NSWLR 737; [2002] NSWCA 383.
[10] *Alexander* at 694 – 695.

require.[11] That consideration will obviously take into account the interests, and respective positions of, both parties.

24. The personal circumstances of an Appellant, and the ramifications of a stay, will be relevant to the question of where the balance of convenience lies. However, those circumstances will not necessarily be determinative. Moreover, if an Applicant for a stay of proceedings seeks to advance the proposition that the balance of convenience lies in their favour because they will suffer economic hardship if a stay is not granted, the Tribunal would expect that there will be some information put before it which will support that proposition. Merely asserting that to be the case in a submission is not an appropriate manner in which to address that issue. The Tribunal is not a Court, and it is not bound by rules of evidence. At the same time, if a party urges a particular determination to be made, there has to be something which supports it, over and above a bald proposition or submission.

Natural justice and procedural fairness

25. In *Marshall*[12] I made a number of observations as to what is required by way of procedural fairness in matters of this nature. In light of the submissions advanced by the Appellant, those observations warrant repeating:

> *[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).*
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> *[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].*

[11] See generally *NSW Bar Association v Stevens* [2003] NSWCA 95 at [83] and following.
[12] At [26] and following.

[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.

26. Those matters having been addressed, I turn to the circumstances of the present case.

Is there a serious question to be tried?

27. The essence of the submissions advanced on behalf of the Appellant on this issue is that, assuming a charge is laid, and assuming a finding of guilt, there is a serious question to be tried in terms of the penalty which might be imposed. In support of that issue, the Appellant has raised questions of the relative levels of culpability as between he and Mr Mulrine. Whilst those submissions may not be entirely irrelevant, they tend to overlook the fact that what is presently sought is a stay of the Respondent's determination to impose an interim suspension under r 169(5)(c) of the Rules. Given that no charge has actually been laid, questions of what penalty might be imposed in that event may be, at this point, a secondary consideration. It is important to focus, at this point, upon the Respondent's determination to impose an interim suspension, for the simple reason that it is ***that*** determination in respect of which the stay is sought.

28. Bearing in mind the observations made above concerning general principles of natural justice, it is noteworthy that the Respondent gave the Appellant notice of the fact that it was considering the imposition of an interim suspension, and gave him the opportunity to be heard in relation to that issue before making a determination. In those circumstances, there is no substance in the submission

advanced on behalf of the Appellant that the Respondent has approached its determination in a way which is procedurally unfair. That said, I do not accept the submission of the Respondent[13] to the effect that issues of that kind are incapable of giving rise to a serious question to be tried on an application such as the present. If there was evidence that the Appellant had not been afforded natural justice and procedural fairness, that would strike at the very heart of the lawfulness of any decision that followed. By its very nature, that would give rise to a serious question to be tried. Any suggestion to the contrary is entirely untenable.

29. In the present case, the Respondent has exercised its discretionary power under r 169(5)(c) of the Rules which is in the following terms:

> (5) *Pending the decision or outcome of an inquiry or other disciplinary process, a Controlling Body or the Stewards may direct that:*
> ...
> *(c) a registration, licence or other type of authority or permission be suspended.*

30. A number of matters regarding r 169(5)(c) should be noted at this point.

31. The first, is that r 169 is contained within Part 10 of the Rules which addresses disciplinary processes and penalties.

32. The second, is that generally speaking, r 169 is directed to matters relevant to the conduct of an inquiry.

33. The third, is that r 169(5)(c) does not confer a discretion to impose an interim suspension independently of the conduct of an inquiry or other disciplinary process. Inherent in r 169(5)(c) is the proposition that carrying out the *"inquiry or other disciplinary process"* to which reference is made is ***necessary*** for the purposes of the Respondent being in a position to make a determination (amongst other things) as to what, if any further action should be instituted. That view is fortified by the provisions of r 169(3) which are in the following terms:

[13] At [15].

> *[3] A controlling body or the stewards may do any one or more of the following in relation to an inquiry or other disciplinary process:*
> ...
> *(b) determine that no charge should be laid;*
> *(c) lay a charge;*
> *(d) dismiss a charge.*

34. In other words, the discretion to impose an interim suspension is inextricably linked to the necessity for the conduct of some inquiry or process. It is the necessity of that inquiry or process which triggers the discretion to impose an interim suspension.

35. I do not accept the submission advanced on behalf of the Appellant that r169(5)(c) can only be resorted to in *"serious cases"*. Given that the circumstances of cases can differ markedly, there is nothing whatsoever in the terms of the rule itself, or the Rules generally, which would support that proposition. Moreover, r169(5)(c) recognises that, although there might be a degree of unfairness to a participant in being suspended without any charge, there may be cases in which investigations are complex, and in which an interim suspension is appropriate to protect the integrity of the greyhound racing industry pending the finalisation of such investigation. Needless to say, in any such case the Respondent is under an obligation to conduct any investigation or inquiry efficiently and expeditiously in order to resolve the question of what, if any, further action is to be taken.

36. I unreservedly acknowledge that decisions taken, and powers exercised, in the course of investigations are, in the first instance, matters for the Respondent. However, they become matters for the Tribunal on applications of this nature where the exercise of such powers, and the making of such decisions, are called into question on an application of this kind. For the reasons that follow, there is, in my view, a serious question to be tried as to whether, in the circumstances of ***this*** case, there has been a proper exercise of the discretionary power under r 169(5)(c) to impose an interim suspension.

37. The Rules do not prescribe the criteria which inform the exercise of the discretion contained in r 169(5)(c). An obvious (but certainly not the only) instance in which the exercise of the power under r 169(5)(c) might be appropriate would be in circumstances of there being prima facie evidence of a presentation offence, but where the Respondent is required to await the results of scientific analysis before being able to bring a charge. Another might be where a criminal charge has been laid against a participant, and the Respondent understandably wishes for that charge to be determined by a Court of competent jurisdiction before determining what further action might be taken. The exercise of the discretion to impose an interim suspension in cases of that kind might well be warranted.

38. However, the present case is quite different. On the information which is available to me, and bearing in mind my interpretation of r 169(5)(c) as set out above, the incident involving the Appellant which is said to warrant further investigation, and which is thus said to justify the imposition of an interim suspension:

    (i) is depicted on CCTV footage available to the Respondent;
    (ii) was observed by no less than three witnesses; and
    (iii) is the subject of documented accounts by those witnesses which are also apparently in the possession of the Respondent.

39. It was put on behalf of the Respondent that the Appellant *"has clearly engaged in a serious physical altercation"*. If that is the Respondent's position, then there is a strong argument that there is presently sufficient evidence in the Respondent's possession to bring a charge against the Appellant. There is an equally strong argument that in those circumstances, there is little or no warrant for the exercise of the discretion to impose an interim suspension, for the simple reason that there is no identified basis on which any further substantive investigation or inquiry is necessary.

40. I accept the Respondent's submission[14] that the time taken to carry out an investigation depends on the nature and circumstances of the case. That is self-evident. However, the Respondent's submissions are silent on why it is, in the circumstances of ***this*** case, that a further investigation is required before a determination can be made as to whether any action is to be taken, or any charge is to be laid. On the Respondent's own case, it has in its possession objective and independent evidence which, it says, establishes the Appellant's involvement in what it has described as *"a serious physical altercation"*. Needless to say, I make no determination on this application as to whether that is, in fact, the case. But if that ***is*** the Respondent's position, an obvious question arises: *What is it that remains to be investigated so as to justify the imposition of an interim suspension?* Other than advancing the proposition (which I accept) that the time taken to investigate a case will depend upon its circumstances, the Respondent's submissions do not provide an answer to that question, in circumstances where the issue was squarely raised by the Appellant. This does not appear, on its face, to be a matter of any real complexity.

41. It was put on behalf of the Appellant that these circumstances amount to an abuse of process. That is, obviously, a serious allegation, and is not one that should be made absent a proper basis on which to do so. Generally speaking an abuse of process connotes the unjustifiable use of a discretionary power or process in a manner which is unfair.[15] In circumstances where the Respondent's submissions do not substantively engage with that submission, and in the interests of fairness, I am not prepared to accept what has been put by the Appellant. However, I am prepared to conclude that there is a serious question to be tried. That serious question is whether the Respondent's decision to exercise the discretion to impose an interim suspension on the Appellant under r 169(5)(c) is appropriate in circumstances where:

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[14] At [17].

[15] See generally *Williams v Spautz* (1992) 174 CLR 509; [1992] HCA 34 at 520 per Mason CJ; Dawson, Toohey and McHugh JJ.

(i) the Respondent is in possession of evidence of a physical altercation involving the Appellant;

(ii) that evidence is in the form of film, and documented eyewitness accounts, of the incident;

(iii) the Respondent effectively asserts, in submissions made on this application, that such evidence is sufficient to establish a breach of the rules;

(iv) the Respondent has been in possession of that evidence for at least 2 weeks, and perhaps longer;

(v) the Respondent has not identified the scope of any further investigation of the Appellant's involvement in that incident which is said to be required; and

(vi) the scope of such investigation, viewed objectively, is non-existent.

42. Put simply, the exercise of the power to impose an interim suspension under r 169(5)(c) is predicated upon the necessity for an inquiry. Nothing has been put to me on behalf of the Respondent as to why any further inquiry is necessary in the circumstances of this case.

43. Given the conclusion I have reached, I do not need to consider the submissions of the parties as to a likely penalty in the event that the Appellant is charged with some offence. I will, however, say that what the Appellant has put raises clear issues of culpability. A determination of culpability must necessarily be relevant to a question of penalty, if and when any charge is brought. The circumstances of this particular matter aside, a question of culpability bearing on an assessment of penalty might well be relevant to a determination of whether there is a serious question to be tried.

Where does the balance of convenience lie?

44. I am unable to accept the submission advanced on behalf of the Appellant that the refusal to grant a stay would result in *"serious and unrecoverable financial ramifications"*. There is absolutely nothing before me which would support that

conclusion. As I have stated, it is simply not sufficient to make a broad submission of that kind, without advancing some basis to support it.

45. However, I reiterate my earlier observation[16] that a consideration of where the balance of convenience lies involves, amongst other things, a determination where the overall interests of justice might lie. Bearing that in mind, the Respondent's submission that the issue of the length of any inquiry or investigation is beyond the scope of this application, cannot be accepted. On the contrary, that is a matter which bears directly on the question of fairness. In those circumstances, and having regard to what I have said about the exercise of the power under r 169(5)(c) in this case, the overall interests of justice lie overwhelmingly in favour of the Appellant, and thus overwhelmingly in favour of a stay being granted.

46. It may well be, as the Respondent has submitted, that conduct of the kind alleged against the Appellant has the potential to have a deleterious impact upon the greyhound racing industry.[17] However, there is something of a displacement between that proposition, and the fact that notwithstanding the evidence which appears to be in the Respondent's possession, the conduct referred to is presently not the subject of any charge. It is noteworthy in this regard that I made the following observation in *Clarke*:[18]

> *Put simply, it would be unfair to place the Appellant in a position where she is the subject of an interim suspension for the purposes of the conduct of an inquiry which, prima facie, may have limited utility given that the evidence to be relied upon in support of any charge which might be laid has already been identified, and is seemingly available.*

47. I would only add that in the present case, not only has the relevant evidence been identified, and not only is it available, it is actually in the Respondent's possession.

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[16] At [23] above.
[17] Respondent's submissions at [30].
[18] At [33].

ORDER

48. Pursuant to cl 14(1)(a) of the *Racing Appeals Tribunal Regulation 2015* (NSW), and until further order, the decision of the Appellant of 17 May 2024 to impose an interim suspension on the Appellant is not to be carried into effect.

THE HONOURABLE G J BELLEW SC

1 June 2024