RACING APPEALS TRIBUNAL

NEW SOUTH WALES

TRIBUNAL: MR D Armati

EX TEMPORE DECISION

APPELLANT: Neil Staines

GRR 83(2)

SEVERITY APPEAL

DECISION:

1.Severity appeal dismissed

2. Disqualification of 24 weeks to expire 27 May 2019.

3. Appeal deposit forfeited

1. The appellant appeals against a decision of the Acting Steward of the Greyhound Welfare Integrity Commission of 11 February 2019 to impose upon him a period of disqualification of 24 weeks of which nine weeks of that was suspended.

2. The appellant faced an alleged breach of rule 83(2) which relevantly is in the following terms:

> "The trainer of a greyhound nominated to compete in an event shall present the greyhound free of any prohibited substance."

The breach was particularised as follows: that Mr Staines, a registered public trainer, while in charge of the greyhound presented the greyhound for the purpose of competing in race 8 at the Goulburn meeting on 19 July 2018 in circumstances where the greyhound was not free of any prohibited substance, that the sample contained the presence of 5b-Androstane-3a, 17b-Diol at a mass concentration greater than 20 nanograms per millilitre and that the sample contained the presence of Nandrolone and its metabolites 5a-Estrane 3b, 17a-Diol, 5a-Estrane 3b 17b-diol 19 Noritio cholanolone and 19- Norepiandrosterone which is an anabolic androgenic steroid.

3. The steward dealt with the matter by way of submissions. There was no stewards inquiry.

4. At the outset the appellant admitted a breach of the rule and has maintained that admission on this appeal. This is a severity appeal only and accordingly, the need to analyse the evidence in great detail falls away.

5. The evidence has comprised the brief of evidence which in very summary terms contains all of the necessary papers upon which the steward formed her decision together with the submissions of the appellant's legal representative, some precedent cases, the decision of the steward and some material relating to a subsequent order under LR 99B(2). The brief also contains the reasons for, and the submissions that were made in respect of it, a subsequent interim suspension that was effected on 12 December 2018. The effect of the LR 99B(2) decision of 15 February 2019 was to remove a restriction in 99B(1)(f) of the rules in relation to

permitting the appellant to reside at his premises but on conditions. The additional evidence has been the statement of the appellant and a reference by Robert Hill. It's noted that Mr Hill was contained in a bundle had previously provided a reference as had Ms Leanne Heffernan.

6. The issue is penalty. The respondent advocates that the decision of the steward was correct and should be imposed. The submissions of the appellant submit that a disqualification no greater than three months is appropriate.

7. The first issue for determination is objective seriousness. The Tribunal is required to determine a civil disciplinary penalty. In doing so for many years in this code, since 2012 when the GRNSW the penalty table was introduced, the Tribunal has indicated that it will treat that table as a guideline and not a tramline but that consistent with numerous decisions both in this and in harness racing the Tribunal considers that it must give weight to those guidelines because otherwise there would not be the element of certainty for the regulator, its stewards, trainers and other persons likely to be called upon to answer those guidelines.

8. The guidelines provide five categories of substance which fall into the definition of prohibited substance. Relevant to this matter the substances is particularised are category 3. Category 3 provides as a starting point of 52 weeks disqualification. The guidelines go on to talk about possible additions of aggravating factors, an approach which the Tribunal does not adopt. It approaches the matter on the basis of an assessment of objective seriousness and a factual objective seriousness determination which takes into account factors which might otherwise be described as aggravating but in essence really go to what was the seriousness of the offence.

9. The aspect of seriousness of offence will be returned to on the basis of parity cases.

10. Here there were two separate types of substance. Firstly, testosterone which was that in excess of the permissible, at 10, at a level 14. The parties invite the Tribunal to determine that is a low level reading and accordingly it does so absent evidence that might indicate what is low as compared to what is high and the like, issues which have recently troubled the Tribunal in harness racing matters.

11. The case is one in which a second prohibited substance, namely, an anabolic androgenic steroid, was present. The mere expression permanently banned prohibited substance indicates the gravity with which the regulator addresses such substances in greyhounds presented to race. The Tribunal also embraces that concern. It is satisfied that the presence of the testosterone which otherwise might be capable of some explanation

at a low level is masked by the fact there is a permanently banned prohibited substance. There can be no level playing field on the presentation of a greyhound to race in which there are permanently banned prohibited substances.

12. Testosterone, of course, is endogenous, and it is to be found in many substances legitimately administered, veterinary prescribed and the like. An error could be made in the administration of it both by a trainer and a veterinarian on withholding periods. There have been many such cases but the introduction of the rule on permanently banned prohibited substances changes the consideration that the regulators had and accordingly the Tribunal must have in relation to severity of this matter.

13. At the end of the day the regulator does not have to establish how, when, why or by what route these substances came to be present in the greyhound and that is because a presentation with such substances breaches the rules ,with the appropriate certificates being available

14. There is no evidence of administration. There is no evidence of how this substance came to be present. The appellant was unable to explain it to the steward and has not done so to the Tribunal. His explanation is he does not know. He embarked upon, quite understandably, a normal human reaction to aspects of conjecture. He's thought of various other means by which this substance might have come to be present. He does so on the basis of several key factors which are also relevant to his subjective concerns; namely, he is a trainer of very longstanding, certainly not less than 32 years and on and off possibly up to 43 years, that he has no prior prohibited substance matters, that he is a person deeply concerned by animal welfare and that he says he would not engage in such conduct; therefore, as explained, he has sought to find possible reasoning.

15. He reinforces his reasoning by the fact this was a C grade race. The difficulty for that submission is that it was a TAB race so far as issues of level playing field are concerned. The dog had been injured, he knew if it won that it would be tested, that is, the greyhound. He is concerned something may have happened in the identification room with the water bowls and bedding, the possibility of contamination in the swabbing and all of those matters because he is able to establish he otherwise always complied with the rules. At the end of the day the Tribunal agrees with the submission from the respondent that those matters cannot be given any weight because they are pure conjecture. There is not a skerrick of evidence that can touch upon any likelihood of any of those matters arising as a means of explanation.

16. In determining aspects of objective seriousness the message to be given to this individual trainer and to the community at large remains available

to the Tribunal. Contrary to the recent decision in New South Wales of Kavanagh v Racing NSW [2019] NSWSC 40 where Justice Fagan made it quite clear that when a total lack of blameworthiness is established it is not possible to use the Tribunal or any public penalty processes to introduce a general message or as it is commonly called, general deterrence. Likewise, consistent with Justice Fagan's decision, such facts would not warrant a subjective message or, as it is known elsewhere, subjective deterrence but those matters are not available to this appellant because there is no room to find that he is not entirely blameworthy.

17. That then raises, how is the penalty to be assessed as against other types of conduct and that was dealt with by Justice Garde in a Victorian decision of Kavanagh v Racing Victoria [2018] VCAT 291. There his Honour adopted the decision of McDonough v Harness Racing Victoria, a decision of Judge Williams. As this Tribunal has said on a number of occasions in analysing that decision, the date of McDonough is now known. In essence, to paraphrase Justice Garde in his decision of 27 February 2018 in the Victorian Civil and Administrative Tribunal, Administrative Division (Review and Regulation) List, there are cases if blameworthiness is able to be clearly established against a trainer then the full range of penalties must be imposed. There is a second category where the Tribunal is unable to determine, and the appellant is unable to indicate a possible cause of a positive prohibited substance matter, in which case standard penalties are required and a third category where the appellant is able to establish a total lack of blameworthiness in which case the issue of whether any penalty is appropriate must be determined on the facts and the circumstances but is unlikely. An example of that is where, for example, a prohibited drug such as cocaine is found in a presented animal and it is established that the particular presenter, usually the trainer, had no reason whatsoever to remotely anticipate the possibility that other husbandry practices about the kennel, or the presentation of the animal, were required to preclude the possibility that a handle and some others tainted by that prohibited drug, for example, cocaine, was likely to have caused it to become present in the animal.

18. The most oft quoted case is the trainer Waller in New South Wales. There are other matters of Waterhouse in New South Wales and there are other matters in the other jurisdictions where no penalty has been imposed. It is not the suggested outcome here and the matter need not be analysed further.

19. What that means is that in assessing objective seriousness for this appellant, falling within that second category in the absence of an explanation, that appropriate starting point, the appropriate penalty for the facts and circumstances of this matter is based on its own objective

seriousness to be that against which subjective and other factors are determined.

20. The guidelines here provide a starting point of 52 weeks, that which the steward determined to be appropriate. The Tribunal is of the opinion, having regard to the facts and circumstances of this case where permanently banned prohibited substances were present in addition to the testosterone, that a starting point of 52 weeks is appropriate. There is no submission that the starting point should not be a disqualification. Having regard to this Tribunal's determinations in respect of numerous prohibited substance matters over the years, it is of the opinion that a disqualification is appropriate. Accordingly, the starting point is a disqualification of 52 weeks.

21. The respondent here, quite fairly, as did the steward who took these matters into account, accept that there are very strong subjective factors for this appellant which require a reduction from that 52-week disqualification.

22. As expressed, a trainer for up to 43 years and certainly 32 years absent any evidence. The fall-back position is 32 years with perhaps some additional years where when he was in a fulltime occupation of shearer that he from time to time held the trainers licence or other licences. The key point, however, is that in respect of that 32 and up to 43 years he has no prior prohibited substance matters.

23. There is one prior matter of 2016 relating to a breach of the hydration policy. He was not alone in respect of breaches of that policy when it was introduced for the welfare of greyhounds. He relies upon the welfare and the Tribunal will return to that. In relation to that breach of the hydration policy he acted on the basis of his belief of the welfare of the greyhound by not complying with the policy. He was not alone in respect of that approach. The Tribunal dealt with a number of such appeals in which it found that that was a subjective factor that did not go whether the rule was breached or not. Here he advises the Tribunal in a submission that, in fact, he was subsequently given an exemption for that particular greyhound. The issue related to the likely harm to the animal from it having a water bowl in its kennel once it was locked away prior to racing. In that matter he received, it was put to the Tribunal, an eight-week suspension wholly suspended for a period of 12 months. The evidence is that he did not breach that good behaviour period. There are no other matters put to the Tribunal of a disciplinary nature of any relevance.

24. By reason of the length of his career as a full-time trainer, certainly in recent times, he has raced, as he says, thousands of greyhounds. As is the case with all successful trainers and others there have been numerous

tests by swabbing of greyhounds presented. There have been no prior positives. In that regard he is not greatly different to a number of trainers of longstanding. The Tribunal has already referred to the fact that he knew by reason of the absence of this particular greyhound for a long period of time ,because of serious injury, that the prospect of the greyhound being swabbed were very high and at 100 per cent if the greyhound won and it did.

25. The appellant relies upon his record in animal welfare, that is accepted by the respondent. He is supported in that regard by Mr Robert Hill both in his statement to this appeal and in his reference to the steward.

26. The appellant has trained a number of Mr Hill's dogs and he finds him to be honest, a man of integrity and respectful of everybody. A person who always goes out of his way to assist in rehousing greyhounds. The appellant sought out Mr Hill to assist him in finding a greyhound for rehabilitation purposes for a friend who had a disabled child. The appellant went out of his way to assist the provision of that greyhound, the proper arrangements with the family and constantly went out of his way to ensure that that compassionate approach to the disabled child was able to be kept to a high level. He has also acted in rehabilitating greyhounds on his property.

27. The reference of Ms Heffernan is one which is in similar terms. She would strongly recommend the appellant to anyone who wished to have a greyhound.

28. Greyhounds was his sole source of income and hardship has flown from his presentation. The Tribunal said as long ago as Thomas v HRNSW in 2011 that in appropriate circumstances the consequences of a breach of a rule is the loss of the privilege of a licence and in appropriate circumstances, therefore, that hardship is an inevitable consequence of one's own conduct. The Tribunal accepts that he has suffered and will suffer hardship by any order affecting his ability to train.

29. The Tribunal accepts his contribution to the community. The Tribunal accepts that it was a low level in respect of the testosterone at 14 against a presentation level of 10. The Tribunal cannot make that same determination in respect of the anabolic androgenic steroid. There is also the fact that prize-money has to be refunded.

30. Those subjective factors must be coupled with the ready admission of the breach and the cooperation with the stewards. As the Tribunal has said, and has been adopted by the industries, a 25 per cent discount for that is appropriate from the starting point of 52 weeks, that is a period of 13 weeks and he shall receive that.

31. The next factor is, is there to be a further discount for all of the subjective matters to which reference has been made? The steward quite fairly gave a generous discount. It is submitted today that a more generous discount should be given. The respondent concedes that there is to be a discount and says that the steward was correct in her assessment. The steward reduced that 39-week period after the 25 per cent discount by a further 15 weeks or as submitted, some 33 per cent - the Tribunal has not done the maths - to bring in a period of 24 weeks.

32. Generally in respect of subjective factors alone this Tribunal has found in many, many decisions that a discount of some 15 to 20 per cent is more than appropriate for the majority of subjective circumstances. Much emphasis is placed upon animal welfare, up to 43 years in the industry and good character. Those matters are accepted. To extend that 15 to 20 per cent discount to a possible 33 per cent discount or in any event, the number of weeks considered appropriate, is a substantial extension of leniency to this appellant.

33. Other factors to be taken into account are the impacts of the disqualification and the exercise by the Commission of its discretion under 99B(2) to waive the prohibition contained in 99B(1) on residence at a property at which greyhounds are kept. That is a substantial reduction on the impact of a disqualification. This appellant did not make an application for a stay. He has had the benefit of that discount since 15 February, today being 15 April. The Tribunal does not have to decide whether it is required to give consideration to the exercise of an 99B(2) order in determining whether there is to be a disqualification and, if so, for how long. The Tribunal is troubled by finding any power to do so but it doesn't have to make that determination because the submissions are that such a waiver of a provision of 99B(1) will continue.

34. It is also to be noted that at the beginning of this matter there was submission and discussion in respect of a delay between the conclusion of a disqualification and any relicensing. That is a matter that is not within the powers of the Tribunal to take into account as it applies to every person who is the subject of a disqualification. To the extent to which it is possible that expedition can be given, assuming it is, and assuming that a licence will subsequently be given back to him, that is not even guaranteed, that is a matter for the regulator. It is not a factor which motivates the Tribunal to consider a further reduction for subjective facts.

35. The Tribunal considers that the discount that the steward very fairly provided is more than a sufficient discount for the total subjective factors of this appellant. That would mean, therefore, that the period of disqualification of 24 weeks is appropriate.

36. There are two matters further to be considered. One is whether such an outcome would be inconsistent with cases of parity which would mean by their application the Tribunal reconsiders its assessment of objective seriousness and/or subjective factors or otherwise comes to the conclusion ,not applying the totality principle because there is only one matter, but balancing the total matters whether it is fair to this appellant when he says other people have been dealt with more leniently that he should receive 24 weeks.

37. A number of cases have been put before the Tribunal. It is not proposed to analyse each one of those and to come to a conclusion whether the orders should be up or down. The reason for that is this. There are many of them, they range from fines through suspensions to disqualifications and in some cases a suspension of those orders. Each case has to be determined on the same facts and circumstances. Parity is for guidance only. As is so often stated, the capacity to find precise and similar facts exists so rarely that it can be disregarded.

38. The key submission for the respondent here is that many of those cases predated the introduction of the permanently banned prohibited substances rule. The Tribunal agrees with that submission. Many of those older matters can be discounted. Some involve pleas of guilty, some involve pleas of not guilty. Some involve people with priors, some with no priors. Some with records equating to decades in the industry, some only short periods of time. The range, however, of disqualification periods is both less and more than this appellant is, on the assessment the Tribunal has embarked upon, to receive.

39. Applying principles of parity, carefully considering those cases, although not referring to them and analysing each of them in detail, the Tribunal is not persuaded that it would fall into error by not further reducing the period of disqualification on the basis that it would be unfair on principles of parity. Again, emphasis is made on permanently banned prohibited substance matters to reinforce that conclusion.

40. Therefore, this being a severity appeal, the severity appeal is dismissed.

41. The Tribunal imposes a period of disqualification of 24 weeks.

42. In fairness to the appellant, consideration must be given to the fact that he was subject to an interim suspension from 12 December 2018. Rule 95(3) enables a suspension of part of a period of disqualification. The steward assessed it on the basis that she would take into account the period of interim suspension served by the appellant from 12 December 2018 until she made her determination on 11 February 2018. The steward

expressed her determination in the following terms: "9 weeks suspended pursuant to GAR 95(3) being the period between 12 December 2018 and 11 February 2019 taking into account the period of interim suspension already served by Mr Staines and for the remaining period of disqualification of 12 February 2019 to end on 27 May 2019".

43. It is not submitted that the Tribunal should approach the matter in any different way and the Tribunal is conscious of the fact that if it was to say that that nine-week period should be taken off the 24-week period to leave a period of 15 weeks disqualification from 11 February 2018 that the great difficulty that creates is that a 15-week disqualification would then be used by numerous appellants to submit why they should not receive 24 weeks when others receive 15 weeks because so often the case is that with parity submissions, not all of the facts are taken into account.

44. The Tribunal will avoid a further reduction of 24 weeks to 15 weeks by reason of that interim suspension period.

45. Therefore, that means that the order of the steward which effectively means that the period of disqualification will conclude on 27 May 2019 is an appropriate order for the Tribunal to make.

SUBMISSIONS ON APPEAL DEPOSIT

46. The Tribunal, in the absence of any application, orders the appeal deposit forfeited.