

## **IN THE RACING APPEALS TRIBUNAL**

**MERLE CLARKE**

**Appellant**

**v**

**GREYHOND WELFARE AND INTEGRITY COMMISSION**

**Respondent**

### **REASONS FOR DETERMINATION OF AN APPLICATION BY THE APPELLANT PURSUANT TO CL 14(1)(a) OF THE RACING APPEAL TRIBUNAL REGULATION 2015**

#### **INTRODUCTION**

1. By a Notice of Appeal dated 16 May 2024, Merle Clarke (the Appellant) has appealed against a determination of the Greyhound Welfare and Integrity Commission (the Respondent) made on 10 May 2024 to impose an interim suspension pursuant to r 169(5)(c) of the *Greyhound Racing Rules* (the Rules). That Notice of Appeal was accompanied by an application for a stay of the Respondent's determination pursuant to cl 14(1)(a) of the *Racing Appeals Tribunal Regulation 2015* (NSW). This determination relates to that application.

#### **THE FACTS**

2. The Appellant is a registered Public Trainer and greyhound Breeder. On 14 March 2023, the Respondent imposed two conditions on the Appellant's licence. Those conditions prevented the Appellant from:
  - (i) engaging in breeding activities at her property, or allow any other person to do so; and
  - (ii) acquiring any additional greyhounds, or allowing any additional greyhounds to be brought on to her property.

3. On 5 June 2023, the Respondent imposed a further condition, the effect of which was to limit the number of greyhounds that the Appellant was permitted to have on her property to 30.
4. It would appear that in or about early April 2024, the records held by the Respondent (electronic access to which was apparently available to the Appellant) indicated that the Appellant's breeding registration was still current. That, of course, was at odds with the condition which had been imposed to which I have referred at [2](i) above.
5. On the Appellant's account of events, and because she was in some doubt about the true position, she made an application on 5 April 2024 for certification (i.e. permission) from the Respondent to breed with the bitch "My Dixie". On 15 April 2024, and in response to that application, a member of the registration and welfare team wrote to the Appellant in the following terms:

*I'm writing to you to confirm the Animal Exemption Order application you submitted is approved.*

6. The submissions of the Respondent<sup>1</sup> concede that this approval was granted in error. Be that as it may, the Appellant acted on the information with which she was provided and My Dixie was inseminated.
7. On 23 April 2024, officers of the Respondent attended the Appellant's premises and carried out an inspection. On 26 April 2024, the Respondent wrote to the Appellant in the following terms:

*On 23 April 2024 it came to [the Respondent's] attention that two greyhounds in your care had been served and as a result of that service is (sic) pregnant. On the face of it, the Commission has cause to believe that you breached [the condition in [2](i) above].*

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<sup>1</sup> At [23].

8. I interpolate that the submissions of the Respondent<sup>2</sup> appear to concede that the assertion in that correspondence that *two* greyhounds in the Appellant's care were pregnant is also an error, and that only one pregnant greyhound (inferentially, *My Dixie*) was identified.

9. The Respondent's letter went on to state:

*During an inspection of the property .... there was found to be 32 greyhounds at the Property in breach of [the condition in [3] above].*

10. The Respondent advised the Appellant that a view had been formed that there were "*reasonable grounds to consider implementing an interim suspension*", and invited the Appellant to respond.

11. In a letter to the Respondent dated 4 May 2024, the Appellant said that as a consequence of the records which she had accessed, she was in some doubt as to the position in terms of her breeding registration. Obviously, that doubt was fuelled by the fact that the Respondent's records were not accurate. The Appellant pointed out that she was then granted permission *prior* to *My Dixie* being inseminated. She also pointed out (and the Appellant now concedes) that there was only one pregnant greyhound in her care, although the Appellant appeared to take some issue as to whether *My Dixie* was, in fact, pregnant.

12. As to the second matter, the Appellant said that it was only recently that she had two greyhounds which she had owned had been returned to her, and that she had arranged for them to be desexed on 6 May. On the Appellant's account, the presence of those greyhounds on her property was an interim measure, and that they were being prepared for "rehoming".

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<sup>2</sup> At [21].

13. By letter of 10 May 2024, the Respondent advised that it had determined to impose an interim suspension on the Appellant. That suspension was imposed pursuant to 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, or other type of authority or permission, be suspended.*

14. The power in s 169(5)(c) is obviously discretionary. The rules do not prescribe the factor(s) by which that discretion is to be exercised.

### **THE RELEVANT PRINCIPLES**

15. The principles by reference to which an application of this kind is to be determined have been set out at length in other determinations.<sup>3</sup> Put simply, the Appellant must establish that:

- (i) there is a serious question to be tried; and
- (ii) the balance of convenience favours the grant of a stay.

### **SUBMISSIONS OF THE PARTIES**

#### **Submissions of the Appellant**

16. The Appellant submitted that on the whole of the evidence, and in the event that she is charged with a breach of either or both of the identified conditions, the most likely outcome is the imposition of a fine. The Appellant submitted that in these circumstances she had an “arguable case”, such that there is a serious question to be tried.

17. The Appellant further submitted that the Respondent should resort to the use of r 169(5)(c) only in serious cases. Stemming from this, the Appellant submitted that:

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<sup>3</sup> See for example *Marshall v GWIC* 21 December 2023 at [16].

- (i) r 169(c) could not be relied upon for the purposes of allowing the Respondent to conduct an investigation, absent any charge being laid;
- (ii) the imposition of an interim suspension in the absence of a charge “*goes against the rules of procedural fairness*”, particularly in circumstances where r 169(5)(c) imposes no time limit within which any investigation must be completed;
- (iii) the imposition of an interim suspension in the circumstances of the present case was an “*abuse of process*”.

18. The Appellant further submitted that there was nothing to suggest that she posed any danger or threat to the welfare of the industry, and that if the interim suspension were to remain, she would be financially prejudiced, as would other people who rely upon the fact that she holds a licence.

19. The Appellant submitted that in all of these circumstances, a stay should be granted.

#### **SUBMISSIONS OF THE RESPONDENT**

20. The Respondent’s submissions set out the history of dealings between the Appellant and the Respondent dating back to December 2022. That history discloses that previous inspections of the Appellant’s premises have found them to be non-compliant. It also discloses the fact that in March 2023, the Respondent advised two other industry participants associated with the Appellant that it was proposing to impose restrictions on their registrations. Those restrictions were subsequently imposed. An inspection of the Appellant’s property in December 2023 confirmed that she was, at that point, complying with the restrictions imposed on her as to the number of greyhounds she was permitted to have in her care.

21. The Respondent points to this history as providing the context in which the Appellant’s most recent conduct took place. I should say that whilst all of these

matters provide some background in relation to dealings between the Appellant and the Respondent, it must be emphasised that the present application is to be determined solely by reference to the matters emanating from the inspection which took place on 23 April 2024, and nothing else.

22. It was submitted that the Respondent's oversight regarding the breeding restrictions which had been imposed on the Appellant was of limited consequence. The Respondent submitted that, irrespective of that oversight, the Appellant had failed to comply with the relevant conditions and that in those circumstances, there was no serious question to be tried. It was further submitted that the Appellant's continued participation in the industry posed an imminent risk to the welfare of greyhounds in her care. In these circumstances, the Respondent submitted that the balance of convenience tended against the grant of a stay.

### **CONSIDERATION**

23. I turn firstly to consideration of whether there is a serious question to be tried.

24. On the face of the material with which I have been provided, the Appellant breached the condition imposed on her regarding breeding restrictions. At the same time, there is evidence that because she was in some doubt as to the true position, she made an application to the Respondent for an exemption. The Respondent approved that application. The Appellant acted on that approval and inseminated the greyhound. Accepting those facts, and whilst the Appellant's actions might constitute a breach, there is a strong argument that she was unwittingly (but expressly) led into that breach by the Respondent's conduct. Whilst those circumstances would not provide the Appellant with a defence, they would constitute a significant mitigating factor.

25. Further, whilst there is prima facie evidence that the Appellant breached the condition limiting the number of greyhounds she could have in her care, her case is that any such breach was a limited one, and that it was never intended that the

two greyhounds, her custody of which exceeded the limit placed on her, would remain with her permanently. Once again, those circumstances, whilst not providing a defence, would be significant mitigating factors.

26. It would be both impossible and inappropriate to foreshadow, on an application such as this, a likely outcome in terms of sanction in the event that the Appellant is charged. However, the circumstances clearly raise, in that event, a serious question to be tried in terms of penalty.

27. In considering the balance of convenience, it is necessary to firstly address the submissions advanced on the Appellant's behalf regarding the Respondent's decision to invoke the provisions of r 169(5)(c). The Respondent's submissions do not engage with those issues.

28. Firstly, I am not persuaded that r 169(5)(c) does not permit the Respondent to take the course that it has taken. The rule allows an interim suspension to be imposed pending the outcome of *an inquiry or other disciplinary process*. That phrase is not defined but in the context in which it is used, the term "*inquiry*" is, in my view, capable of encompassing an investigation.

29. Secondly, I am unable to accept the submission that imposing an interim suspension absent a charge is contrary to rules of procedural fairness. The course followed by the Respondent in the present case is precisely that which r 169(5)(c) permits. Moreover, it is clear in the present case that the Appellant was accorded procedural fairness by being permitted to make submissions to the Respondent prior to any determination being made which was adverse to her.

30. Thirdly, there is nothing before me which provides a proper basis for a conclusion that the Respondent's decision to invoke r 169(5)(c) constitutes an abuse of process. An abuse of process connotes an unjustifiable use of (amongst other things) a discretionary power. An allegation that an abuse of process has occurred

is an obviously serious one. Commensurate with that, proof of such an abuse requires a high bar to be overcome.

31. However, whilst I am unable to conclude that the Respondent has engaged in an abuse of process in imposing an interim suspension, I do find the course adopted in the present case somewhat curious. One can well understand the Respondent resorting to the use of r 169(5)(c) in a case of complexity, where there existed some prima facie evidence of a breach which required further investigation. However, in the present case, the Respondent's submissions include the following:<sup>4</sup>

*Evidence gathered during an inspection of the Appellant's property .... indicates that the Appellant had breached all three conditions imposed on her property in that more greyhounds had been brought onto the property, bringing the number of greyhounds kept on the property to 32. One greyhound was also pregnant, indicating the Appellant had conducted greyhound breeding activities.*

32. Accepting what has been advanced in the Respondent's submissions, and accepting further that the evidence upon which the Respondent relies is largely constituted by the observations made by its officers when then visited the premises (and is thus readily available), one wonders what there is left to inquire about. If the issues are as clear as the Respondent's submissions suggest, then there would not appear to be any impediment to a charge or charges being laid against the Appellant at the present time.

33. I do not accept the Appellant's submission that resort can be had to r 169(5)(c) only in "serious cases". Quite apart from anything else, what might constitute a "serious case" would be open to interpretation. However, I do accept the proposition inherent in that submission that the Respondent cannot be permitted to exercise the discretion conferred by r 169(5)(c) capriciously. Whilst I am not persuaded that this has occurred in the present case, I am satisfied that on the facts I have outlined the balance of convenience favours granting a stay of the

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<sup>4</sup> At [21].

Respondent's decision. 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.

34. It follows that both of the pre-requisites to the grant of a stay have been made out.

**ORDER**

35. Until further order, and pursuant to cl 14(1)(a) of the *Racing Tribunal Regulation 2015* (NSW), I order that the determination of the Respondent of 10 May 2024 to impose an interim suspension on the Appellant pursuant to r 169(5)(c) of the *Greyhound Racing Rules* is not to be carried in to effect.

36. The Respondent should advise the Tribunal of the progress of any investigation.

**THE HONOURABLE G J BELLEW SC**

**30 May 2024**