RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D B ARMATI

EX TEMPORE DECISION

WEDNESDAY 14 SEPTEMBER 2022

IN THE MATTER OF A STAY APPLICATION BY JASON MACKAY

RESPONDENT GWIC

GREYHOUNDS AUSTRALASIA RULE 169(5)(c)

DECISION:

1. **The decision of GWIC of 7 September 2022 is not to be carried into effect pending the determination of the appeal on condition that the appellant prosecutes the appeal expeditiously**

2. **Directions on conduct of the actual appeal**

1. The appellant, licensed trainer Mr Jason Mackay, appeals against the decision of the stewards of GWIC of 7 September 2022 to impose an interim suspension upon him under Rule 169(5)(c). The Tribunal notes that precedent cases dealt with the previous rule which was 92(5)(c). This is an application for a stay order only.

2. The decision is based upon two laboratory certificates showing the presence of a permanently banned prohibited substance, gonadorelin, found in two greyhounds in the possession of and trained by the appellant on 22 June 2022 at his training establishment.

3. The interim suspension is designed to provide protection to the industry, once these two certificates have demonstrated the presence of the substance and, of course, as the rule indicates, pending the actual inquiry by the stewards into these positives for what is known as an out-of-competition test.

4. The challenges made to the interim suspension do not touch upon the fact that a lawful out-of-competition test was conducted, that the samples were taken, that the samples are positive, that the substance is a permanently banned prohibited substance, and that those facts can lead to a finding of a breach of the rule. As to whether there are any challenges to those matters is, of course, for a stewards' inquiry and not for determination. But those remarks are made to provide a background to the factual scenario that needs to be considered.

5. The two greyhounds were nominated for and were to race in races at Richmond within a few days of the actual testing taking place. Because of the status of the two races, one being an Oaks and the other a Derby, it was the practice of the respondent, the regulator, to conduct out-of-competition testing.

6. It is apparent from the evidence of the appellant that that is a well-known fact; it is not something of a surprise to him. He knew he had nominated the greyhounds in races of status and he knew his two greyhounds would be the subject of out-of-competition testing. He knew that on the Tuesday they were to be a subject of the out-of-competition testing. That was deferred because of weather, with conversations between the testing officer and the appellant, and it took place the next day at about 6 am, or thereabouts, at a time the appellant knew that the testing officer would attend his premises and each of the two subject dogs would be tested.

7. It might be noted that one of the greyhounds which ran in the Oaks came second and therefore was swabbed and was negative for any prohibitive and negative for any permanently banned prohibited substance, and obviously therefore did not have this substance in it. The other greyhound,

in the Derby, was not placed and was not tested, and neither of them were required to be prior to the race as a preventative testing regime.

8. What the appellant did not know, and advises the Tribunal today as a result of his inquiries of the respondent's officer Mr Birch, is that it appears that the subject substance has a half-life between 10 and 50 minutes. He now knows that. There is no evidence he knew it at the time of the testing or, more importantly, prior to the testing.

9. The appellant has given evidence that he knew of this substance in the past, he has never possessed it, he has never used it, he did not administer it to the two dogs and he cannot explain from his operation how that drug – that substance – came to be present in his two greyhounds.

10. It is, therefore, that the appellant may be able to establish to the stewards' inquiry in due course that he knew the greyhounds were to be tested and that it would therefore not be sensible to administer the subject drug which would lead to the permanently banned prohibited substance being detected.

11. The stewards, on or about 4 August, armed with the first laboratory testing result for this substance, attended upon the appellant's kennels and conducted a kennel inspection of some detail. The evidence does not disclose that they there found the subject permanently banned prohibited substance or anything that could produce that permanently banned prohibited substance in the system of the greyhounds. That is a matter for further investigation on the case for the respondent today.

12. The case for the respondent is that five items were seized and are to be analysed. The appellant in reply says that of those items, four were named as oxygen drops, and the fourth was a substance known as Ofact 200, which is an antibiotic powder. As to whether any of those substances subsequently produced the permanently banned prohibited substance is a matter of analysis. There is no other evidence of anything being found which would cause concern as to the existence of a product which would produce that permanently banned prohibited substance found during the kennel inspection. Apparently, other items were found which are not relevant to this permanently banned prohibited substance and are not further examined.

13. The appellant is a professional trainer. He has been, on his evidence, for 25 years. He had 34 greyhounds in work. He is a public trainer. He does not own any of the greyhounds. His income comes from his training activities and he gives evidence of the impact of any orders against him in the interview he had on 7 September 2022 with stewards when he was given, in accordance with procedural fairness, an opportunity to make submissions on their proposal to impose the interim suspension under the subject rule.

14. For privacy reasons, the financial material he gave to the stewards on 7 September will not be read into this decision. He describes a condition – and again, that will not be referred to for privacy reasons – which would prevent him otherwise obtaining full-time employment elsewhere. And after 25 years as a full-time trainer, it can be understood that finding any other employment, although he gave no such evidence, may well be troublesome.

15. He does have a prior. Some 12 years prior to this he received a fine for a prohibited substance, on his evidence today, administered by him in ignorance of a recently changed rule. And noting he was given a fine and not a disqualification or a suspension may truly reflect those facts. And, in addition, as a salutary lesson to him, he lost $100,000 in prize money, of which $50,000 apparently would have been his share as the trainer.

16. The appellant, prior to the inquiry on 7 September, had approached the regulator to advise of his concern that nominated persons may well have been involved in the act that led to the presence of the prohibited substance. The evidence before the Tribunal does not go any higher than that. As to whether these persons were likely to have had the subject substance, as to whether they knew how to administer it, whether they could have had an opportunity to administer it, and matters of that nature, are simply not canvassed on the evidence here, and that is not a criticism, it is an understandable fact.

17. The appellant also gave some evidence to the stewards about issues involving his daughter, and that will not be read into this decision, and as to whether that relates back to the nominated persons, the Tribunal is uncertain. Suffice it to say that that may well be the implication he sought to advance.

18. The Tribunal is satisfied that the actions taken by the appellant to nominate persons as possibly having been involved in the matter and of a sufficient credibility to lead to an agreed fact in these proceedings that the regulator is investigating those nominated persons takes that evidence beyond pure speculation and not being a spurious attempt to avoid the consequences of this permanently banned prohibited substance being in the greyhounds. As to what may come from that is a matter for the future and is merely something upon which the appellant says he has an arguable case.

19. The respondent submits that under Rule 139 there will be an offence established, and that may well be the case and does not have to be decided. But the Tribunal does note in its considerations that a possible outcome in respect of an issue of penalty, if it has to be considered, could be done under the McDonough principles on the basis that the appellant can establish he was blameless. That is not to hold out any prospect that that is going to happen.

20. But, if he was to be blameless, the fact that there was an out-of-competition testing, the fact that he was the trainer, the fact the greyhounds were in his possession and the fact that the permanently banned prohibited substance was found in those greyhounds of course leads to a breach. But it does not necessarily lead to a penalty. It could be that no action is taken against him.

21. On the other hand, being a second prior – although the first was aged – there is the prospect of a not-insubstantial period of disqualification, for two reasons. One, because of the seriousness of the detection, in an out-of-competition testing, of a prohibited substance; but, secondly, that that is a permanently banned prohibited substance.

22. Those are matters for the stewards to determine in the future and is merely a reflection of possible outcomes both in favour of and against the arguable case arguments for the appellant.

23. The Tribunal did not mention, but notes in passing, in addition to aspects of hardship, to which reference has been made, that the appellant has at least four employees, all of whom, of course, would themselves be adversely affected by any loss of training privilege. It is, of course, to be noted that this is a suspension that is interim, it is not a disqualification, so the extent to which they may be themselves inconvenienced by any suspension is not determinable upon the facts available.

24. The appellant has to establish an arguable case. The Tribunal has had the benefit of sworn evidence. It is that in respect of this matter there is an arguable case. That arises by reason of the actions in nominating other persons about whom there might be some responsibility – it can be put no higher – which, if able to be established in any way at all, might mean, despite the strict nature of the facts of the breach, no penalty at all. That makes the case arguable. The remaining matters might otherwise be subsumed by the issues of balance of convenience with integrity, etc.

25. Turning then to balance of convenience generally, there is no doubt that the impact of an interim suspension on this appellant will be substantial for the financial reasons he has mentioned. He is a professional trainer. Thirty-four greyhounds at one stage, now reducing in number by reason of him taking proactive action based upon the suspension. That it is his sole source of income. Presently, he would not be able to find alternative income.

26. That there is, in addition, although it would be an inevitable consequence of wrong conduct, the feature races upon which a professional trainer very much relies, one of which is is one of the major races in the calendar, and the potential loss of income from greyhounds which might reach that final would be great. Aspects of hardship are usually subsumed and overcome by matters of integrity. Integrity, of course, is critical. It has

been referred to by the Tribunal over and over and does not need further analysis on the facts that are here.

27. It seems to the Tribunal that anyone viewing the facts of this determination would come to a conclusion that the integrity can be balanced on this occasion by the fact that there may be – and it can be put no higher – innocent actions by this appellant and would be seen, therefore, to be an unnecessary requirement that other things in his favour were simply set aside based solely on integrity.

28. The balance of convenience is found in favour of the appellant.

29. The Tribunal was only asked to deal with a stay of the order of 7 September 2022.

30. The Tribunal orders that the decision of the stewards of the respondent of 7 September 2022 not be carried into effect pending the outcome of the appeal against the interim suspension under 169(5)(c) on condition that the appellant prosecutes the appeal expeditiously.

31. The Tribunal will turn to an issue of directions in respect of the conduct of that appeal, if required, whilst the parties are present.

32. The appeal is adjourned for a period not to exceed 14 days pending advice from the respondent that it requires the hearing to proceed and the reasons therefor, and following receipt of such advice, the Tribunal will, if necessary, issue directions for grounds of appeal based upon those reasons.
