RACING APPEALS TRIBUNAL NEW SOUTH WALES

TRIBUNAL MR D. B. ARMATI

RESERVED PENALTY DECISION

MONDAY 20 APRIL 2023

APPELLANT CHLOE BILAL

RESPONDENT GWIC

GREYHOUNDS AUSTRALASIA RULE 83(2)(a)

DECISION:

1. **Period of suspension of six weeks imposed**
2. **Penalty to be partially concurrent with penalty imposed on 24 October 2022**
3. **Appellant to serve a period of suspension of three weeks calculated from 17 April 2023, noting that a period of seven days of that suspension has been served**
4. **Directions on appeal deposit**

INTRODUCTION

1. This is the Tribunal's penalty decision following upon its finding on 14 March 2023 that the appellant breached the rule.

2. In that decision the Tribunal reserved the question of penalty and invited submissions from the parties.

3. The respondent made her submission on penalty on 24 March 2023 supplementing the original decision of 16 December 2022 and the respondent made its reply submission on 11 April 2023 supplementing its penalty submission of 23 January 2023.

4. In an earlier appeal, on 24 October 2022, the Tribunal issued a penalty of six weeks' suspension to the appellant on effectively the same facts and circumstances as in this case. There the Tribunal set out in paragraphs 39 to 65 its determination on the issue of penalty.

5. The Tribunal adopts its determination of 24 October 2022 in paragraphs 39 to 65 as being appropriate to the determination of penalty in this case and does not repeat those findings.

6. Independently of the determination of 24 October 2022, the Tribunal determines on the facts and circumstances of this case that there be a period of suspension of six weeks. The Tribunal will expand upon its reasons for that determination below.

GWIC PENALTY GUIDELINES

7. At the time of the commission of this breach the respondent's penalty guideline provided, for a Category 3 substance as is the case here, a minimum starting point and then allowed for a reduction of 25 per cent for an early guilty plea. The precise terminology of the table indicating minimum starting points is:

> "First offence for any prohibited substance—2 month suspension
>
> One Category 3 substance rule breach in previous 3 years—6 month suspension"

8. The first issue for determination is whether this matter for penalty is to be treated as a second breach attracting a six-month suspension or whether that provision does not apply, in which case the starting point would be a two-month suspension.

9. The appellant argues that it must be treated as a first breach and the respondent that it be treated as a second breach.

10. The key facts relating to this issue are as follows:

- 17 January 2022 first sample.
- 23 February 2022 respondent notifies appellant of positive A sample.
- 11 April 2022 respondent issues a charge in respect of the first breach.
- 23 April 2022 the subject second presentation sample taken.
- 13 July 2022 respondent determines first matter and issues a suspension.
- 24 October 2022 Tribunal determines on appeal a suspension in the first matter.

11. Those facts indicate that at the time of the second sample, the subject of this breach, the respondent had not determined an adverse finding on the first breach nor imposed a penalty for the first breach, and indeed it could be said that it was not until the Tribunal determined those matters that there was a penalty following an adverse finding on the first breach.

12. The facts clearly indicate that the appellant was on notice that the first sample had produced a positive and had been charged subsequent to the second sample with that breach. The facts clearly indicate that the second presentation occurred after those facts, but before an adverse finding was actually made.

13. The issue is, therefore, do the words "rule breach in previous three years" mean that on those facts and circumstances such a previous rule breach existed at the time of the second sample.

14. Interpreting the penalty guidelines requires a purposive approach. However, the Tribunal has indicated since penalty guidelines came into existence in this State in 2011 that they are guidelines, not tramlines, and must be interpreted with that in mind. It is appropriate that they be interpreted fairly, but with a view to reflecting the intentions of the regulator as to what is an appropriate outcome on certain facts and circumstances. That does not mean that such a specified penalty will be imposed, and very often in this and other jurisdictions, such a penalty as is specified by the guidelines is neither the starting nor ending point.

15. The criminal law has no part to play in this determination, it being a civil disciplinary matter. However, the principles of the criminal law can provide some guidance as to how this penalty might be considered. That guidance flows from the criminal law concept of a person standing for penalty where there are increased penalties provided if at the time of the commission of a subsequent matter there is an existing conviction and a higher penalty applies. However, for that to apply there must have been a first conviction.

16. Here there was no equivalent of a conviction. The first adverse finding was made on 13 July 2022, well after the second presentation on 23 April 2022. The issuing of a charge as took place on 11 April 2022 does not equate to the making of an adverse finding or the equivalent of a conviction or a determination of breach.

17. Therefore, the Tribunal concludes that at the time of the second presentation there had been no prior “rule breach”.

18. The Tribunal is satisfied that such an interpretation will not cause subsequent presenters with positive substances to intentionally defer a determination in a first case where, before that determination, a second case arises. Should such an eventuality become apparent then it is open to the respondent to vary its penalty guidelines or to put to the decision-maker that fact and invite a more appropriate penalty to the facts and circumstances of such a case.

19. Essentially the key point on this issue of interpretation is the necessity to impose the appropriate message of deterrence in the public interest to the facts and circumstances of this case not being bound by the application of interpretations that may be unduly harsh.

DETERMINATION

20. As stated, the Tribunal considers that the facts and circumstances of this case are so similar to the first that they warrant the same period of suspension of six weeks.

21. The issue, however, now becomes whether such a penalty should be concurrent or cumulative with the first determination.

22. Rule 97, as it then was, at the time of this presentation provided that if a person had been previously disqualified or suspended for any period and during that period is again disqualified or suspended then that subsequent suspension, as is the case here, would be cumulative unless some alternative direction is made.

23. Consistent with the interpretation of the penalty guidelines, the Tribunal interprets that Rule 97(b) to be non-applicable as at the time of the second breach there was not in fact a suspension in place.

24. Nevertheless, those principles guide how this second matter should be considered.

25. The principle of totality does not arise.

26. However, it has been the Tribunal’s oft-stated deterrence approach that those who breach more than once cannot expect to receive the same leniency or penalty as those who breach only once.

27. While the Tribunal has found there is not a mandatory need to impose a higher starting point, the facts and circumstances of this case justify that the appellant receive some additional penalty for this subsequent conduct.

28. That is appropriate notwithstanding that the appellant has given evidence that she had searched for the cause of the first positive and had found nothing, and thus was not in a position to change any of her husbandry practices between the notification of the first sample and the charge and prior to the presentation for the second breach. The Tribunal notes the very short time frame between each of those dates in any event.

29. Again, the approach the Tribunal adopts is to find the appropriate message of deterrence in the public interest and that in the Tribunal’s view that issue and message of deterrence requires some additional time be served for the second breach.

30. That determination is made notwithstanding that it was the same trainer and the same drug, and the presentations were relatively proximate, being 17 January and 23 April 2022.

31. This case could have ben determined at the same time as the first and there might have been concurrency but that does not pursuade the Tribunal that concurrency is appropriate.

32. The Tribunal has determined that there be partial concurrency with the first penalty of six weeks’ suspension as to three weeks of this six-week suspension.

33. That is, the appellant needs to serve an additional period of suspension of three weeks to that which she has served of six weeks for the first breach.

34. The Tribunal notes that the appellant had the benefit of a stay of seven days and that seven-day period should be taken into account by the respondent in determining the date upon which the appellant is entitled to treat her suspension as having been served.

35. The Tribunal imposes a period of suspension of six weeks, of which three weeks is to be served concurrently with the penalty of six weeks issued on 24 October 2022, and this penalty is to commence on 17 April 2023.

APPEAL DEPOSIT

36. The parties were not invited to make submissions on the appeal deposit.

37. This was an appeal against breach and severity. The first part of that appeal was unsuccessful. The second part of that appeal was successful.

38. If the appellant wishes to make application for a refund in whole or in part of the appeal deposit then she must make such an application to the Tribunal's secretary within seven days of receiving these reasons for decision and such an application must be accompanied by submissions. Upon receipt of that application the respondent, if required, will be invited to make a reply submission.

______