TASMANIAN RACING APPEAL BOARD

Appeal No 17 of 2014/15

Panel:	**Mr Tom Cox (Chair)** **Ms Kate Cuthbertson** **Dr Sue Martin**	**Appellant:**	**Mr Gary Johnson**
Appearances:	**Mr Greg Richardson on behalf of the appellant** **Mr Paul Turner on behalf of the stewards**	**Rules:**	**Greyhound Rule 83(2)(a)**
Heard at:	**Hobart**	**Penalty:**	**A six month disqualification**
Date:	**18 May 2015**	**Result:**	**Penalty reduced to a three month disqualification**

REASONS FOR DECISION

1. The appellant is a greyhound trainer. He presented a greyhound, *Jazaan's Boy*, to race in Race 2, of the Tasracing.com.au Juvenile at the Hobart Greyhound Racing Club on the 22nd of January 2015. *Jazann's Boy* finished in first place. A post-race urine sample was taken from the greyhound. That urine sample was found to contain a prohibited substance, namely Caffeine and its metabolites.

2. During the stewards' inquiry, the appellant pleaded guilty to the charge and was disqualified for six months. He has appealed against the severity of that penalty.

3. GAR 83(2)(a) of the *National Greyhound Rules* relevantly provides that:

> *"The owner, trainer or person in charge of a greyhound nominated to compete in an event; shall present the greyhound free of any prohibited substance".*

4. Caffeine is a prohibited substance, it being a central nervous system stimulant.

5. It was common ground at the inquiry and before this Board that the presence of caffeine in *Jazann's Boy* was unable to be explained. The appellant had not taken the dog to the races. There was nothing remarkable or unusual in his feeding regime and no criticism was levied at the precautions taken by the appellant to guard against the risk of presenting a dog with a prohibited substance.

6. As this Board has previously noted, the rule imposes an absolute duty on all trainers to ensure that every dog presented to race is presented free from prohibited substances. The duty is an onerous one; in meeting that duty one may not be able to guard against all risks. For instance, what response could be expected of a trainer against the risk posed by a malevolent third party? As has also been noted by this Board, there is no tariff for offences of this type. Each case must turn on it facts and be judged on its own merits.

7. In determining penalty, stewards took into account the following matters:

   - The appellant's guilty plea.

- His cooperation and forthright evidence throughout the inquiry.
- His lengthy period of time in the industry (40+ years).
- His personal circumstances.
- That this was his first prohibited substance offence.
- His level of involvement and investment within the greyhound industry.
- That penalties for drug related breaches should act as a deterrent to all industry participants so as to ensure the integrity of the industry is maintained to a high standard.
- That the substance, caffeine, is a stimulant.

8. The stewards also purported to take into account "precedents of breaches of the prohibited substance rules and penalties that have been issued for similar offence throughout Australia." It is not apparent from the transcript of the inquiry that such consideration was given. No discussion took place regarding specific penalties imposed in Tasmania and elsewhere in Australia for a breach of the rule or the appellant's level of culpability in comparison with those other decisions.

9. Having regard to the matters considered by the stewards and some further matters, referred to below, the appellant contends that a penalty other than disqualification is appropriate in this case. Those other matters include:

- At the time of this offence the appellant was, by numbers, the second largest trainer of greyhounds in Tasmania and his training operations employed two casual staff.
- His kennels supplied approximately ten other trainers with dogs.
- Since 1989 he has trained 11,272 starters for 1,356 wins, 1,467 second places and 1,454 third places.
- Since 2010 he has had 98 dogs swabbed without concern.
- The levels of metabolites found in the sample, according to Dr Tregear, were "relatively low."
- He and his wife are the largest greyhound breeders in Tasmania. In January this year there were 12 breeding bitches on the property at Ulverstone and 140 pups aged two weeks to 16 months.
- He has made significant personal and financial investments to the industry, including expenditure in the order of $40,000 for runs, watering systems, and fencing at his property.
- At the time of the offence, he was in the process of installing CCTV cameras at his property for the purpose of added security.
- He and his wife own and operate an abattoir which serves the industry through the provision of greyhound feed. It also provides a broader community service by taking in injured farming stock. There are five employees at the abattoir.
- The greyhound feed from the abattoir is delivered to industry participants on race days at Launceston, Devonport and Hobart. Although the feed is taken by staff

that occurs only because the staff also take the dogs for racing. If dogs aren't racing, it is not viable for him to have his staff travel for the sole purpose of delivering the feed.

- *Jazann's Boy* won the race, but not as a result of the presence of the prohibited substance. The dog won in the slowest time of the night (26.78 seconds) and did so, according to the appellant, because two other dogs collided after the start and fell over.

- The appellant did not bet on the race. He obtained a little over $700 for the win.

10. Moreover, the appellant contends that as a result of his disqualification and the operation of local rule 42.5, which effectively prohibits his wife from stepping into his shoes to train the dogs, the consequences on him, his wife and the industry, are such that the penalty imposed was unjust. In lieu of a period of disqualification, the appellant noted a number of recent decisions from other jurisdictions in which a fine (between $2,000 and $5,000) was preferred. The Board was also referred to decisions in other jurisdictions where suspensions, rather than disqualifications, had been handed down.

11. In our view, it is not necessary to consider those decisions in any detail. As noted, there is no tariff for offences of this type and each case must turn on its facts and be judged on its own merits. It is accepted that the full range of penalties available to be imposed must be considered in determining the appropriate response to the offence.

12. The stewards contend that the penalty imposed was appropriate in the all the circumstances for the reasons given by the stewards. In addition, it was submitted that:

- No specific error attended the stewards' approach and none is contended by the appellant.

- The approach taken was appropriate and involved the weighing of the matters referred to in the stewards' determination.

- The weighing of those matters was solely a matter for the stewards and this Board should not interfere with their decision save in the presence of specific error or where the penalty imposed was plainly unjust.

- In the alternate, if this Board exercises its own discretion in determining penalty, it should reach the same conclusion reached by the stewards. The nature of the rule, the integrity of the racing industry and its protection, along with the penalties imposed by this Board in like cases in the past, warrant the exercise of the discretion in the usual way, that is, by imposing a period of disqualification.

- The appellant's invitation to depart from the imposition of a period of disqualification is made in circumstances which are not exceptional.

13. This Board need not find any specific error on the part of the stewards before it may exercise its own discretion in determining the appropriate penalty in all the circumstances. In exercising that discretion, the Board must have regard to all of the evidence before the Board and the stewards' inquiry.

14. We are guided by what was said in Hillier, Appeal No.1 of 2013/14:

> "*The hearing of appeals for this Board is prescribed by statute. Relevantly, s.30 of the* Racing Regulation Act 2004 *provides:*
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> (6B) An appeal is to be heard and determined upon the evidence at the original hearing when the decision or finding appealed against was

made, but, if the presiding member considers it to be proper, expert or other evidence may be required or admitted.

(6C) The appellant may request the TRAB to admit any expert or other evidence that the appellant considers necessary.

(6D) The TRAB -

(a) is to make a full and thorough investigation in open court, without regard to the forms, requirements or solemnities that might have been appropriate in legal proceedings; and

(b) may inform itself on any matter in such manner as it think fit, and admit any evidence considered by the presiding member to be relevant notwithstanding that that evidence would not be admissible in a court of law; and

(c) may take into account any matters relating to, or to the administration of, racing that are within the knowledge or experience of a member of the TRAB or which have arisen in or as a result of other proceedings or appeals before the TRAB.

In our view, the following propositions may be drawn from this statutory scheme:

(a) An appeal from the stewards to this Board is not an appeal in the strict sense, nor is it an appeal de novo.

(b) The appeal is in the nature of a re-hearing with this Board exercising its own discretion.

(c) The appeal is decided upon the materials before the stewards, together with any further evidence the Board may see fit to receive.

(d) The Board has full power to receive further evidence and, in deciding whether or not to do so, will be guided by what it considers to be the interests of justice in the particular circumstances.

(e) The power or discretion to receive further evidence, whatever its form, is unfettered.

(f) No error on the part of the stewards need be demonstrated before an appeal can succeed.

(g) *It will remain for the Board to be comfortably satisfied, having regard to the evidence before it, that the appellant was in breach of any particular rule or rules (See* Briginshaw v Briginshaw (1938) 60 CLR 336)."

15. This Board has upheld disqualifications of four months in a number of previous cases: *Hills,* Appeal No. 10 of 2006/2007; *Medhurst,* Appeal No. 11 of 1991; *Bullock,* Appeal No. 23 of 2012/13. In one case, the Board reduced a four month period of disqualification to one of three months; *Pearce,* Appeal No. 17 of 2009/10. In that case, the Board accepted there were some very unusual circumstances that justified a reduction in the penalty that might otherwise be appropriate for such an offence. In another case, *Sherriff,* Appeal No. 7 of 2011/12, the Board upheld a disqualification for a period of three months for a first offence and a further, cumulative but suspended, disqualification for a period of three months for a second distinct breach of the Rules.

16. In another case *Connelly*, Appeal No. 19 of 2008/09 a penalty of four months was reduced to three months. It is worth recording what this Board said in *Pearce* of that case and like cases involving inadvertence on the part of an appellant for breaches of this rule, the need to deter like offending and recourse to the imposition of a period of disqualification as an appropriate form of penalty. At paragraphs 25 – 26, the Board said:

> "*25. … The facts of that case involved the presence of human blood pressure medication in a sample taken from a greyhound. It was accepted, in that case, that the wife of the appellant had deliberately given some of the appellant's medication to a number of greyhounds to cause harm to her husband and the owner of the dogs in his care in the context of a difficult marriage relationship. The Board noted in that case that "Disqualification is generally the appropriate penalty for a breach of the drug rules". They also noted the need for general deterrence and consistency in penalty. In* Connelly, *the Board levelled some criticism at the appellant for leaving "his wife, with whom he had a turbulent relationship, who he knew to be prone to unpredictable behaviour and who had already acted vindictively towards him, in a position where she had unsupervised access to an unlocked kennel containing dogs due to race that day". No such criticism could be levelled at the appellant in this case.*
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> *26. A number of other decisions of the Board have considered penalties for like offences where the presence of the substance in the dog's system was inadvertent or occurred as a result of recklessness on the part of those involved in the care of the dogs. Those decisions include* Maddox *No.6 of 2001 (caffeine and metabolites in urine sample as a result of feeding the dog tea),* Glover *No.12 of 2000 (caffeine and metabolites as a result of giving the dog Fortex and it being retained in system longer than anticipated) and* Hills *No.10 of 2006/07 (Heptaminol in urine as a result of administration of Kynoselen to dog and it being retained in the dog's system longer than anticipated). In each of those cases a four month period of disqualification was imposed by the TRAB. …*".

17. In our view, the imposition of a period of disqualification for a period of three months is appropriate in the circumstances of this case for the following reasons:

    a. The culpability of the appellant is low. This is not a case where he was reckless, negligent or inadvertent in the manner in which he guarded against the risk that the dog would present with a prohibited substance.

    b. No criticism has been or can be levelled at the appellant for the manner in which he cared for, or supervised his dogs.

    c. The evidence does not permit us to make any finding about the manner in which the dog came to be presented with a prohibited substance. Having said that, we are satisfied that the appellant had no knowledge or involvement, either by act or omission, in the manner in which the dog was so presented.

    d. The need to protect the integrity of the industry and deter similar offending ordinarily warrants the imposition of a period of disqualification in the absence of exceptional circumstances. However, there is no requirement for a period of disqualification to be imposed, and this should not be the premise from which a decision is made.

    e. There are no exceptional circumstances in this case. His culpability is low, but that is not exceptional in itself. His record, career, achievements, presence in the industry and contribution to it are all matters for which he should receive credit, but again they do not take this case into any exceptional category.

f. The consequences of a period of disqualification will be significant and extend, by operation of the Local Rules, to his wife. We have regard to those consequences, but are of the view that disqualification is nevertheless warranted. The Local Rules prescribe that his wife shall not "be permitted to be or remain registered." As was observed in *Sherriff*, the absence of this preclusion would erode the deterrent effect of a disqualification. In any event, the consequences to his wife may be ameliorated by the exercise of the Director of Racing's discretion, including any review of that discretion. That is not a matter for this Board.

18. In all the circumstances, the Board upholds the appeal, quashes the penalty imposed by the stewards and imposes a substitute penalty of three months disqualification.

19. We order that the appellant have his deposit returned to him pursuant to Section 34(2) of the *Racing Regulation Act 2004*. The appeal having been successful we make no order as to transcription costs.