

TASMANIAN RACING APPEAL BOARD

Appeal No 10 of 2021-22

Panel:	Dr Kim Backhouse (Chair) Ms Wendy Kennedy (Member) Mr Rod Lester (Member)	Appellant:	Mr Adam Whitford
Appearances	Mr Dinesh Loganathan on behalf of the appellant Ms Louise Brooks on behalf of the Office of Racing Integrity Mr Michael Hoyle as an observer	Rules:	Greyhound Australasia Rule 83(2)(a)
Heard at:	via Microsoft Teams	Penalty:	4 Months disqualification
Date:	Wednesday 16 March 2022	Result:	Dismissed

REASONS FOR DECISION

Background

1. The appellant, Mr Adam Whitford, is a registered greyhound trainer and the trainer of the greyhound "TRYING AGAIN". Mr Whitford presented his greyhound TRYING AGAIN to compete in Race 8 at Launceston on 5 August 2021. Subsequently, TRYING AGAIN won the race. A post-race sample of urine taken from the greyhound TRYING AGAIN found the presence of the prohibited substance caffeine and its metabolites.
2. An inquiry was conducted by stewards in relation to the presence of the prohibited substance in TRYING AGAIN's urine on 5 August 2021.

3. The Stewards of the Office of Racing Integrity charged Mr Whitford with breaches of the Greyhound Australasia Rule (“GAR”) 83(2) (a) by presenting a greyhound for an event while not free of a prohibited substance. In addition, Mr Whitford was charged with a second offence under GAR 84A(1) of failing to produce treatment records.
4. The particulars of the first charge stated –*“Mr Adam Whitford is a registered greyhound trainer and the trainer of the greyhound “TRYING AGAIN”. TRYING AGAIN competed in Race 8 at Launceston on 5 August 2021. TRYING AGAIN won the race, but a post-race sample of urine taken from the greyhound showed the presence of the prohibited substance caffeine and its metabolites”.*
5. The particulars of the second charge stated – *“That on notification of his positive swab stewards requested to see [the appellant’s] treatment book and stewards were advised that he did not have one.”*
6. Mr Whitford pleaded not guilty to the prohibited substance offence and pleaded guilty to failing to produce treatment records.
7. Stewards found the appellant guilty of the prohibited substance charge.

Rule No: GAR83(2)(a) Greyhounds Australasia Rule (“GAR”)

83(2) states: The owner, trainer or person in charge of a greyhound- (a) nominated to compete in an Event; (b) presented for a satisfactory, weight or whelping trial or such other trial as provided for pursuant to these Rules; or (c) presented for any test or examination for the purpose of a period of incapacitation or prohibition being varied or revoked shall present the greyhound free of any prohibited substance.

Rule No: GAR 84A(1) (1)

The person in charge of a greyhound must keep and retain records detailing all vaccinations, antiparasitic and medical treatments administered to a greyhound from the time the greyhound enters their care until the greyhound leaves their care and for a minimum of two (2) years. Such record of treatment must be produced for inspection when requested by a Steward or a person authorised by the Controlling Body. Any person responsible for a greyhound at the relevant time who fails to comply with any provision of this rule shall be guilty of an offence.

8. During the Inquiry, the Panel members were provided with evidence from a certificate of the sample analysed by Racing Analytical Services Laboratory (RASL) which outlined the sample contained caffeine and its metabolites. The certificate was signed by the Laboratory Director David Batty.
9. During the Inquiry, the appellant could not explain how caffeine came to be in TRYING AGAIN system.
10. The decision reached by the Stewards at the Inquiry included that:
 - a. Mr Whitford was cooperative with Stewards and informed them that the only source he could think of was a Dare Ice Coffee drink. He told Stewards that while he was in Campbell Town that he spilt the Dare iced coffee down the front of him after being asked by Mr Brown – *Is that one of the ways you think may have been contaminated.* Otherwise, Mr Whitford had no other explanation on how it may have been given to the greyhound.
 - b. Mr Whitford accepted no responsibility as to how the dog returned the positive sample and pleaded not guilty to the charge.
 - c. Mr Whitford has been training for two and half years and had recently become a full-time trainer.
 - d. Mr Whitford's record in relation to greyhound racing was good and he had no convictions recorded. Mr Whitford had always projected a professional attitude when dealing with stewards and attending race meetings.
 - e. In assessing penalty, the stewards took into consideration general deterrence, specific deterrence, and the importance of maintaining a level playing field by keeping a drug free industry. The stewards also took into account penalties in previous cases within the industry. They ordered that Mr Whitford be disqualified for a period of 4 months for the prohibited substance charge and a fine of \$200 was imposed for not maintaining records in relation to a treatment book.
 - f. In arriving at penalty, the following factors were taken into consideration: first, Mr Whitford's not guilty plea and forthright evidence; his time in the industry; and secondly his remorse, including financial commitments and personal circumstances. Stewards also took into account evidence submitted by Dr David Batty from Racing Analytical Services that the sample was ten times over the limit of normal testing levels.
 - g. Stewards invoked GAR 83(4) which reads "*A greyhound presented for an Event contrary to subrules (1), (1A) or (2) shall be disqualified from the event or any benefit derived from a trial or test*".

- h. As a consequence, Stewards disqualified the greyhound from winning Race 8 the Ladbrokes Tasmanian National Sprint Championship Heat at the LGRC meeting on 5 August 2021.
- i. Stewards also invoked GAR83(5) which reads *“Where an Event is being or has been conducted as a series, if upon a single analysis a prohibited substance is found in a sample - (a) the greyhound shall be disqualified from the Event from which the sample was taken and shall not be eligible to compete in any further Event in the series; and (b) if the greyhound has competed in any further Event of the series the greyhound shall be disqualified retrospectively from the Event”*.
- j. As a consequence of this rule, TRYING AGAIN was also disqualified from winning the Final of the Ladbrokes State National Sprint Championship Final held on 12 August 2021 at the LGRC Meeting.

11. In conclusion, when assessing penalty, Steward’s took into consideration the importance of maintaining a level playing field by keeping a drug free industry and the need for the penalty to act as a deterrent to other participants to ensure that greyhound racing in Tasmania is conducted in a fair manner and that the integrity of the industry is maintained to a high standard.

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

13. 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:

(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.

As noted in Johnson Appeal No. 17 of 2014/15, 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)."

14. This Board had 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.

THE APPEAL

15. The appeal is against both conviction and penalty.

16. Mr Whitford's grounds for appeal were that the 'procedures were not followed' and that the penalty was "excessive".

17. Mr Dinesh Loganathan on behalf of the appellant Mr Whitford did not specifically make reference to 'which procedures' were not followed by the Stewards at the time under the Greyhound Australasia Rules (GAR) or Tasmanian Greyhound Local Rules of Racing.

18. Notwithstanding, the Counsel for the appellant Mr Whitford pursued the following grounds of appeal in relation to conviction:

- a. that in relation to the charge of 'presenting' TRYING AGAIN' on 5 August 2021, the greyhound was presented with no prohibited substance in its system;
- b. that the swabbing procedures were not followed. For example, it was submitted that ordinarily the swabbing Steward (in this case, Mr Dennis) would normally stand adjacent to the greyhound or follow it around until the swab collected. This did not occur on this occasion¹;
- c. that once the greyhound passed the finishing line, no-one informed him that TRYING AGAIN would be swabbed;
- d. it was submitted that only 'after' the steward was talking with Mr Whitford, that he was advised that TRYING AGAIN was going to be swabbed;
- e. The appellant argued that following the race the usual procedures were not followed, and there was at least 20 minutes of unaccounted time where there was unauthorised handling of TRYING AGAIN;
- f. it was submitted by this time, the greyhound TRYING AGAIN had been handled and touched by other people, who were not its trainer or handler that were registered to be with TRYING AGAIN and submitted that was a contravention of the Greyhound Australasian Rule 28(4);

¹ Mr Whitford's statutory declaration highlights that he took a photo from his mobile of his son and ex-partner's son and submitted that there was no steward next to his son when this photo was taken (refer Annexure D).

- g. it was argued that the steward had observed TRYING AGAIN being handled and patted within his line of sight and did not do anything about it and in addition allowed swabbing knowing that there was unauthorised handling of the dog; and
- h. Accordingly, it was further argued by the appellant's counsel that contamination of the greyhound 'was possible' and 'was likely'.

19. The appellant's counsel noted that Mr Whitford's house and kennel were inspected and that no prohibited substances were found at the time and that Mr Whitford had not been charged with administration of the prohibited substance. Mr Whitford's only charge with 'presenting' a greyhound with a prohibited substance.

20. The appellant's counsel argued that contamination occurred at the track².

21. The appellant's counsel raised an issue that Mr Dennis's Statutory Declaration could not recall where sample was collected and should not have a lot of probative value in this matter.

22. The appellant's counsel noted a week later on the 12 August TRYING AGAIN was swabbed and produced a negative result.

23. The appellant's counsel submitted that TRYING AGAIN was 'presented' with no prohibited substance to the race track. During the inquiry, the appellant could not explain how the prohibited substance came to be in TRYING AGAIN system. The appellant did not dispute the finding of the prohibited substance in the urine sample.

24. Ms Brooks representing the Office of Racing Integrity submitted that the evidence conclusively showed that caffeine was present in the sample.

25. Ms Brooks referred to Mr Whitford's evidence in the Inquiry transcript with respect to his circumstances and noted Mr Whitford had no idea how the caffeine was in his dog's system. Dr Batty gave evidence in the inquiry that it was unlikely that a spill of the Dare Ice Coffee drink down his shirt would lead to a positive result.

26. Ms Brooks submitted in relation to the photos relied upon by the appellant that it was not an uncommon practice for photos to be taken and others to touch the dog post the race. Mr Dennis's

² There was no evidence submitted to support this statement by the appellant.

statement contained a comment 'that he usually adopts a position adjacent to the photographer' but did not say that always occurred.

27. Ms Brooks submitted in relation to CONVICTION that there is no need to prove 'intention' as the test is around the 'greyhound being presented'.

28. Ms Brooks referred to the decisions of *Hillard*. Ms Brooks noted that in *Johnson* No. 17 of 2014/15 the presence of the caffeine was unable to be explained. The Board noted in that decision the 'onerous duty' created by rules such as GAR83(2)(a) and in meeting that duty one may not be able to guard against all 'risks'. Ms Brooks also submitted that on the balance of probability the Board could be satisfied, (as the stewards were) that TRYING AGAIN was not presented free from a prohibited substance in the event, namely Race 8 Ladbrokes National Sprint Championship on 5 August 2022.

29. In relation to penalty, Ms Louise Brooks submitted that the onus was on the appellant to show that the penalty was 'manifestly excessive'. Ms Brooks referred to previous Tasmanian matters: *Dobson* (2016) and *Johnson* No. 17 of 2014/2015 and the penalties attached provided to the Board as illustrative of range of penalties only.

30. Further, Ms Brooks referred to the *Rossendell* No. 14 of 2014/15 matter and it was submitted that when one considered the penalties for prohibited substance offences that had been given previously, a four-month period of disqualification was not unreasonable balanced against the principles of deterrence and submitted that it was necessary to apply consistent penalties. It was submitted that with reference to other Board decisions, that it is always a serious matter to breach a duty to present a greyhound to a race drug free. The penalty was appropriate. Ms Brooks submitted that the penalty ought not be disturbed.

PENALTY

31. The appellant's counsel argued that the penalty was 'too harsh' and 'excessive'.

32. The appellant's counsel, in relation to penalty argued that the stewards' inquiry misinterpreted the rules of mitigation and natural justice. He argued that Mr Whitford cannot be penalised for his not guilty plea.

33. It was argued that Mr Whitford assisted the stewards with this inquiry. It was noted that Mr Whitford had left a full-time role to be a trainer and this incident has had an impact on his personal and financial circumstances. Further, the appellant's counsel stated that rumours have been circulating that 'he is a cheat' within the industry.
34. The appellant's counsel argued that that Mr Whitford is entitled to an 'non guilty plea' and that the stewards had misinterpreted the principles of natural justice. The appellant's counsel noted that his client could not be penalised for having a non-guilty plea and noted that Mr Whitford had assisted the Stewards during the course of the Inquiry and allowed inspection of his kennels and his home.
35. The appellant's counsel referred the Panel to Greyhound rule 95 (3) – *Any proportion of the penalty enforced may be suspended for such time.....and argued that this was an option for the Stewards and failed to give this penalty into consideration.*

Conclusion

36. In *Johnson* Appeal No. 17 of 2014/2015 the Board noted that GAR 83(2)(a) rule imposes an absolute duty on all trainers to ensure that every dog presented to the race is presented free from prohibited substances. The duty is an onerous one and each case must turn on its facts and be judged on its own merits.
37. In relation to the issue raised by the appellant in relation to a lack of natural justice, the board did not find that there had been a breach in the principles of natural justice as the appellant was afforded the opportunity to be heard at the Inquiry in respect to the matters relevant to the decision.
38. The Board concluded as to conviction that it was comfortably satisfied that greyhound presented to the race with a prohibited substance in its system.
39. The Board in this case considered all of the evidence presented to the Board and was not persuaded that the penalty imposed under the circumstances was 'manifestly excessive'. The Board is of the view that the penalty imposed was well within the range available to the stewards and could not be said to be so unreasonable and unjust that it was manifestly excessive in the circumstance of the case. There was no specific error detected in their reasoning for imposing the penalty that was stipulated

40. Previously, the Board has upheld four-month disqualifications in a number of cases including: *Hills*, Appeal No. 10 of 2006/2007; *Medhurst*, Appeal No. 11 of 1991; *Bullock*, Appeal No.23 of 2012/2013; and *Rossendell*, No.14 of 2014/2015 and considered by this Board as a starting point for a prohibited substance offence within this industry.

41. The appeal against conviction and penalty is dismissed.

42. In accordance with section 34(1A) and (2)(a) of the *Racing Regulation Act 2004*, fifty percent of the Appellant's prescribed deposit is to be forfeited to the Secretary of the Department. The Appellant is ordered to pay fifty percent of the cost incurred in the preparation of the transcript in accordance with s34(4A) and (4B)(a) of the Act.

DATE: JULY 2022