

RACING APPEALS TRIBUNAL

RAT 8/20

DATE: FRIDAY 16 OCTOBER 2020

TRIBUNAL: **PRESIDENT:** MR T ANDERSON, QC

DEPUTY PRESIDENT: MR M KING

IN ATTENDANCE: **GREYHOUND RACING SA LTD:** MR DEREK
KORDICK, RISK AND COMPLIANCE MANAGER,
GREYHOUND RACING SA LTD

APPELLANTS: MR RONALD SCHADOW
MRS JOAN SCHADOW

IN THE MATTER of an Appeal by **Mr Ronald Schadow and Mrs Joan Schadow**
against a decision of Greyhound Racing SA Ltd Stewards:

Mr Ronald Schadow:

Charge 1 **Breach of Rule:** GAR 86B(1)(b)
attempts to possess, or has possession of, or brings onto, any grounds, premises or within the boundaries of any property where greyhounds are, or are to be trained, kept or raced, any live animal, animal carcass or any part of an animal for the purpose of being, or which might reasonably be capable of being, or likely to be, used as bait, quarry or lure to entice or excite or encourage a greyhound to pursue it.

Penalty:
Disqualification for 10 years

Charge 2 **Breach of Rule** GAR 86B(1)(a)
A person who, in the opinion of the Stewards or Controlling Body- (a) uses in connection with greyhound training, education or preparation to race, or racing, any live animal, animal carcass or any part of an animal whether as bait, quarry or lure, or to entice, excite or encourage a greyhound to pursue it.

Penalty:
Disqualification for 10 years, concurrent with the penalty for charge 1.

Charge 3 **Breach of Rule:** GAR86(e)
being an owner, trainer, attendant or a person having official duties in relation to greyhound racing, refuses or fails to attend or to give evidence at an inquiry, or produce a document or other thing in relation to an investigation, examination, test or inquiry pursuant to these Rules when directed by the Controlling Body, Stewards or the committee of a club to do so;

Penalty:

6 Months suspension and a fine of \$750.00

Mrs Joan Schadow:

Charge 1

Breach of Rule: GAR 86B(1)(f)

aids, abets, counsels or procures any person to commit such conduct as set out in (a), (b), (c) or (d) of this Rule.

Penalty:

Disqualification for 10 years

Charge 2

Breach of Rule GAR 86B(1)(b)

attempts to possess, or has possession of, or brings onto, any grounds, premises or within the boundaries of any property where greyhounds are, or are to be trained, kept or raced, any live animal, animal carcass or any part of an animal for the purpose of being, or which might reasonably be capable of being, or likely to be, used as bait, quarry or lure to entice or excite or encourage a greyhound to pursue it.

Penalty:

Disqualification for 10 years, concurrent with the penalty for charge 1.

Charge 3

Breach of Rule: GAR86(e)

being an owner, trainer, attendant or a person having official duties in relation to greyhound racing, refuses or fails to attend or to give evidence at an inquiry, or produce a document or other thing in relation to an investigation, examination, test or inquiry pursuant to these Rules when directed by the Controlling Body, Stewards or the committee of a club to do so;

Penalty:.

6 Months suspension and a fine of \$750.00

BACKGROUND

Mr and Mrs Schadow have appealed to the Tribunal from decisions of the Greyhound Racing SA Integrity Hearings Panel (the IHP) which resulted in them being disqualified in each case for 10 years. They were both charged by the Stewards with three offences which will be detailed later.

A number of hearings took place before the IHP, and it handed down its decision on 11 December 2019. It was not until 20 January 2020 that the reasons were given. Neither Mr or Mrs Schadow were required to attend the hearing at which the decision was announced and as a result they were not given any important information regarding their rights of appeal and in particular the time in which any appeal should be lodged.

There is no proof that any written information regarding their rights of appeal was forwarded to them. There was a letter on file and GRSA accepts that that letter on file may not have been sent.

APPEAL OUT OF TIME

The appellants were required to lodge appeals within seven days of the decision. The appellants sought to proceed with an appeal to the Tribunal by a notice dated 16 August 2020, well outside the seven-day period prescribed by the Rules.

The Tribunal has been provided by the appellants with a variety of reasons explaining why they did not appeal at the appropriate time. GRSA advised that it did not oppose the appellants lodging their appeals out of time in the circumstances which were outlined by the appellants.

The appellants were advised that they needed to show good reasons for the late appeals and that they also had to advise the Tribunal of their reasonable chance of success. They provided such information and as a result the appeals were allowed out of time.

It was apparent that neither Mr or Mrs Schadow understood the charges or the consequences of being found guilty. This was clearly obvious when they were interviewed by the Stewards. They both believed that the charges related to live baiting, and therefore they pleaded not guilty. They did not understand that the charges related to possession only of "any part of an animal" which might be used as bait, quarry or lure, in this case two fox tails.

The Tribunal believes neither of them understood the consequences of disqualification, but that dawned on them when they realised it meant that they could have no contact with those friends that they had made over many years in the greyhound racing industry.

As a result, both Mr and Mrs Schadow suffered from both physical and mental ailments. The Tribunal considered this to be a clear case of exercising a discretion in favour of allowing their appeals out of time.

THE CHARGES AND PARTICULARS

Mr Ronald Schadow

Charge number 1 - breaching Greyhounds Australasia Rule 86B(1)(b) which reads as follows:

R86B Offences relating to luring and baiting

(1) A person who, in the opinion of the Stewards or Controlling Body-

(b) attempts to possess, or has possession of, or brings onto, any grounds, premises or within the boundaries of any property where greyhounds are, or are to be trained, kept or raced, any live animal, animal carcass or any part of an animal for the purpose of being, or which might reasonably be capable of being, or likely to be, used as bait, quarry or lure to entice or excite or encourage a greyhound to pursue it; or shall be disqualified for a period of not less than 10 years and, in addition shall be fined a sum not exceeding such amount as specified in the relevant Act or Rules, unless there is a finding that a special circumstance exists, whereupon a penalty less than the minimum penalty may be imposed.

Particulars of Charge 1

1. Mr Schadow was, at all relevant times, a trainer registered by Greyhound Racing SA and a person bound by the Greyhounds Australasia Rules.
2. GRSA Welfare Compliance Officers conducted a kennel inspection at his registered kennel address on Monday 18th February 2019.
3. During that inspection, two fox tails were discovered on the premises of the registered kennel address.
4. A fox tail is a part of an animal.
5. Mr Schadow took possession of a fox tail and brought it onto his premises where greyhounds are trained and kept, for the purpose of using it as bait, quarry or lure to entice, excite or encourage a greyhound to pursue it.

Charge number 2 - breaching Greyhounds Australasia Rule 86B(1)(a) which reads as follows:

R86B Offences relating to luring and baiting

(1) A person who, in the opinion of the Stewards or Controlling Body- (a) uses in connection with greyhound training, education or preparation to race, or racing, any live animal, animal carcass or any part of an animal whether as bait, quarry or lure, or to entice, excite or encourage a greyhound to pursue it or otherwise; or shall be disqualified for a period of not less than 10 years and, in addition shall be fined a sum not exceeding such amount as specified in the relevant Act or Rules, unless there is a finding that a special circumstance exists, whereupon a penalty less than the minimum penalty may be imposed.

Particulars of Charge 2

1. Mr Schadow was, at all relevant times, a trainer registered by Greyhound Racing SA and a person bound by the Greyhounds Australasia Rules.
2. By his own admission, Mr Schadow used part of an animal, namely fox tails, for the purpose of using them as bait, quarry or lure to entice, excite or encourage a greyhound to pursue.
3. This activity was undertaken whilst a greyhound or greyhounds were being trained or educated on a walking machine located at the registered kennel address.

Charge number 3 - breaching GAR86(e) which reads as follows:

R86 Offences A person (including an official) shall be guilty of an offence if the person-

(e) being an owner, trainer, attendant or a person having official duties in relation to greyhound racing, refuses or fails to attend or to give evidence at an inquiry, or produce a document or other thing in relation to an investigation, examination, test or inquiry pursuant to these Rules when directed by the Controlling Body, Stewards or the committee of a club to do so;

Particulars of Charge 3

1. Mr Schadow was at all relevant times, a trainer registered by Greyhound Racing SA and a person bound by the Greyhounds Australasia Rules.
2. Mr Schadow had been advised in a letter dated 14th November 2019 that his attendance was required at an inquiry.
3. That letter stated 'You are further advised failure to attend this inquiry is a breach of GAR86(e), the inquiry may be held in your absence and charges may be laid pursuant to the GRSA Rules of Greyhound Racing.'
4. Mr Schadow failed to attend an inquiry on 26th November 2019 which in the opinion of the Stewards is a breach of the Rules.

Penalties imposed on Mr Ronald Schadow by the IHP

In relation to Charges 1 and 2, having found that a special circumstance did not exist, the IHP imposed a penalty of a minimum disqualification of 10 years with the penalties to run concurrently.

In relation to the third charge of breaching GAR86(e), the IHP imposed a penalty of 6 months suspension (reduced from a period of 12 months disqualification) and a fine of \$750.

Mrs Joan Schadow

Charge number 1 - breaching Greyhounds Australasia Rule 86B(1)(f) which reads as follows:

R86B Offences relating to luring and baiting

(1) A person who, in the opinion of the Stewards or Controlling Body-

(f) aids, abets, counsels or procures any person to commit such conduct as set out in (a), (b), (c) or (d) of this Rule; or shall be disqualified for a period of not less than 10 years and, in addition shall be fined a sum not exceeding such amount as specified in the relevant Act or Rules, unless there is a finding that a special circumstance exists, whereupon a penalty less than the minimum penalty may be imposed.

Particulars of Charge 1.

1 Mrs Schadow was, at all relevant times, a breeder and owner attendant registered by Greyhound Racing SA and a person bound by the Greyhounds Australasia Rules.

2. GRSA Welfare Compliance Officers conducted a kennel inspection at her registered kennel address on Monday 18th February 2019.

3. During that inspection, two fox tails were discovered on the premises of the registered kennel address.

4. A fox tail is part of an animal.

5. When Mrs Schadow was present in a GRSA interview on 4th March 2019, Mr. Ronald Schadow, stated that she directed him to 'go and pick up the fox tail'. Mrs Schadow gave evidence to that effect. During the record of interview, she went on to make further reference to the collection of at least one fox tail.

6. Mr. Schadow has been charged with conduct under GAR86B(1)(b).

7. Stewards proceeded with the 'procure' portion of the Rule as they were of the opinion that Mrs Schadow had encouraged Mr. Schadow to have collected at least one fox tail. That fox tail had been brought onto the Schadows' registered premises where greyhounds are trained and kept, for the purpose of using it as bait, quarry or lure to entice, excite or encourage a greyhound to pursue it.

Charge number 2 -breaching Greyhounds Australasia Rule 86B(1)(b) which reads as follows:

R86B Offences relating to luring and baiting

(1) A person who, in the opinion of the Stewards or Controlling Body-

(b) attempts to possess, or has possession of, or brings onto, any grounds, premises or within the boundaries of any property where greyhounds are, or are to be trained, kept or raced, any live animal, animal carcass or any part of an animal for the purpose of being, or which might reasonably be capable of being, or likely to be, used as bait, quarry or lure to entice or excite or encourage a greyhound to pursue it; or shall be disqualified for a period of not less than 10 years and, in addition shall be fined a sum not exceeding such amount as specified in the relevant Act or Rules, unless there is a finding that a special circumstance exists, whereupon a penalty less than the minimum penalty may be imposed.

Particulars of Charge 2.

1. Mrs Schadow was, at all relevant times, a breeder and owner attendant registered by Greyhound Racing SA and a person bound by the Greyhounds Australasia Rules.
2. GRSA Welfare Compliance Officers conducted a kennel inspection at her registered kennel address on Monday 18th February 2019.
3. During that inspection, two fox tails were discovered on the premises of her registered kennel address.
4. A fox tail is a part of an animal.
5. By her own admission during a GRSA interview on 4th March 2019, at least one fox tail had been procured by Mrs Schadow from a farmer and was brought onto the Schadows' registered premises where greyhounds are trained and kept, for the purpose of using it as bait, quarry or lure to entice, excite or encourage a greyhound to pursue it.

Charge number 3 - breaching Greyhounds Australasia Rule 86(e) which reads as follows:

R86 Offences A person (including an official) shall be guilty of an offence if the person-

(e) being an owner, trainer, attendant or a person having official duties in relation to greyhound racing, refuses or fails to attend or to give evidence at an inquiry, or produce a document or other thing in relation to an investigation, examination, test or inquiry pursuant to these Rules when directed by the Controlling Body, Stewards or the committee of a club to do so;

Penalties imposed on Mrs Joan Schadow by the IHP

In relation to Charges 1 and 2, having found that a special circumstance did not exist, the IHP imposed a penalty of a minimum disqualification of 10 years with the penalties to run concurrently.

In relation to the third charge of breaching GAR86(e), the IHP imposed a penalty of 6 months suspension (reduced from a period of 12 months disqualification) and a fine of \$750.

The appellants both pleaded not guilty to all three charges.

IN RELATION TO CHARGE THREE

It should be noted that Mr and Mrs Schadow were notified that they were required to attend a hearing before the IHP. They were both at that time legally represented. Their lawyers sought and obtained an adjournment to another date. Their lawyers advised the IHP that they could not attend because of ill health, and a medical certificate was provided.

The IHP did not accept the medical evidence because it “bore no resemblance to [the explanation] that was provided by the legal advisor”.

On that basis, the IHP recorded a finding of guilty in relation to both Mr and Mrs Schadow. In the information provided before the Tribunal regarding the medical condition of both appellants, it is apparent that there were good reasons why Mr and Mrs Schadow could not attend.

Charge 3 and the finding of guilt resulted in a 6-month suspension from 26 November 2019, together with a fine of \$750.00 imposed on each appellant.

The appellants in their original appeal to the Tribunal appealed against their convictions and also the penalty, but later advised the Tribunal that they were only seeking to advance an argument regarding penalty. In other words, they accepted their convictions.

Although it does not matter given that both Mr and Mrs Schadow have accepted the plea of guilty to Charge 3 in each case, the Tribunal believes that they were rather harshly dealt with by the IHP.

THIS APPEAL

As indicated, the appeal proceeded before the Tribunal solely on the basis of penalty. It was argued that the penalties were manifestly excessive because the IHP arrived at a finding under Rule 86B that a special circumstance did not exist to reduce the penalty

from the minimum of 10 years' disqualification. It was argued that there were many factors which cumulatively amounted to a special circumstance.

Written submissions were provided by Ms Kerry Braun, who is Mr Schadow's daughter. She represented he and his wife at the hearing. Ms Braun, in addition to her written summary, also spoke to the factors contained in her written submission.

The Tribunal summarises her submissions in relation to whether there should have been a finding of a special circumstance as follows: -

- (1) The offending took place at the lower end of the spectrum. This was acknowledged by the IHP. There was no animal cruelty involved.
- (2) Mr and Mrs Schadow's contribution to the industry for over 45 years both financially and physically was an important factor.
- (3) Both of them were held in the highest regard in the industry. They both possessed an excellent character which was spoken of by various people who gave references.
- (4) Never in the time of being an owner/trainer had they been involved in any prohibited substance or any positive swab. They had an extremely good record in the industry.
- (5) They were honest and cooperated throughout the whole process of the investigation.'
- (6) In relation to their age, Mr Schadow is now 86 and Mrs Schadow 84, and the fact of not being able to have contact with their lifelong friends within the greyhound racing industry has had detrimental effects on their health. Doctor's certificates were presented to support that. Mr Schadow now suffers with depression and a lack of energy and has ongoing appointments with a psychologist. Mrs Schadow is being monitored for a heart condition and sleep deprivation due to stress and anxiety brought on by the disqualification.
- (7) Their lack of understanding of the live baiting rules and its process was the reason they pleaded not guilty, because they believed they had been charged with live baiting.
- (8) With all of the changes in the industry, they were not familiar with the updated rules and lacked any computer skills to inform them of these changes.

SPECIAL CIRCUMSTANCE - THE IHP's REASONING

It is not clear from the reasons of the IHP how exactly they reasoned the issue of whether a special circumstance existed in this matter.

The IHP said at page 5 of its reasons:

“Special circumstances” (sic) is a term that adjudicating bodies have often been called upon to interpret in many areas within our community. The preferred view of the IHP, which reflects a contemporary and widely settled view of decision makers throughout Australia, is as follows:

1. Special circumstances cannot be exhaustively defined and must take its meaning and context from the rule it seeks to address. ▪ In the context of this matter, it is clear to the industry, and the entire community, that offences falling within the domain of animal welfare, in particular, the domain that encompasses offences related to luring, baiting and live game, are to be treated extremely seriously.

2. Special circumstances contemplates a set of circumstances that take a particular case outside of the contemplated purpose of the rule. ▪ GAR86B specifically prohibits the offending for which the IHP have found proven against Mr (and Mrs) Schadow. Accordingly, and in light of the submissions and material the IHP have considered, there is nothing before the IHP that could reasonably take this matter outside of what the rule had contemplated.

The IHP also said, after referring to some interstate decisions, *“The IHP has considered that case (Psalias) and remains firm in the view of the appropriate interpretation of special circumstances as discussed above. The views expressed by the RAD Board in the matters of Desmond Dooley and Tim Noy, although non-binding on the IHP, as is Psalias, are considered to reflect the more appropriate approach to be taken.”*

Several interstate decisions were referred to the Tribunal, and Mr Derek Kordick, the Risk and Compliance Manager for GRSA, helpfully provided copies of those decisions.

Reviewed in chronological order, the decisions to which the Tribunal was referred included:

1. Diane Dooley v GRV [2019] VCAT 1514

A decision of VCAT Member R Tang AM on 1 October 2019.

The Tribunal considered the meaning of, and what might amount to, special circumstances. The Tribunal addressed the six principles set out later in these reasons and found them to be relevant to, and persuasive in respect to the interpretation of the meaning of special circumstances. In this case the Tribunal identified the following factors:

- Offence at the lower end of the spectrum.

- Applicants record, character, admissions, guilty plea and co-operation.
- Applicant having suffered significant adverse consequences already.
- At the time of offending and subsequently Applicant suffering from a debilitating medical condition.
- Applicant's lack of knowledge of sheep skin and no involvement in its use.

and found special circumstances existed. A disqualification of eight months plus a subsequent suspension for 10 months (which period of suspension was wholly suspended) was imposed.

2. **Noy v GRV [2019] VCAT 1763**

A decision of the VCAT, Senior Member J Smithers on 11 November 2019. The Tribunal accepted that whether special circumstances existed can be looked at with the six principles outlined in the Diane Dooley case in mind. Identifying the following factors:

- Offending at the lower end of the spectrum;
- No disciplinary history, excellent character and full co-operation;
- Significant adverse effects in terms of mental health and financial hardship;
-

The Tribunal found special circumstances existed.

A penalty of 12 months disqualification plus a further period of 12 months suspension (which period of suspension was wholly suspended) was imposed.

3. **Psaila v GRV**

A decision of Racing Appeals & Disciplinary Board of Victoria of 18 November 2019

Factors identified as potentially giving rise to special circumstances were:

- Age;
- Fifty-year good record;
- Health related matters and personal circumstances;
- Offending at the lower end of the spectrum;

Following the decisions in **Diane Dooley** and **Noy**, the Board found special circumstances existed. A penalty of 12 months disqualification and a further period of suspension of 12 months (which period of suspension was wholly suspended) was imposed.

4. **Des Dooley v GRV [2020] VCAT 189**

A decision of VCAT Member R Tang AM on 18 February 2020.

A range of factors were identified which, while considered individually, may not constitute special circumstances, but when considered in combination, special circumstances were found to exist. A penalty of disqualification for 18 months

with a further period of suspension for 12 months (which period of suspension was wholly suspended) was imposed.

5. Kimber v NSW Greyhound Welfare and Integrity Commission

A decision of J Lind, CEO of NSW Greyhound Welfare and Integrity Commission on 4 May 2020 found special circumstances existed and a penalty of 2 years disqualification was imposed. Of the period of disqualification, 16 months was suspended.

The Tribunal is much assisted by these decisions, but none more so than that of Noy, which was a decision of the Victorian Civil and Administrative Tribunal.

The Noy decision at page 3 sets out six principles which in the view of the Tribunal are both accurate and helpful. The Tribunal respectfully agrees with the principles as set out in the decision of Noy. Those principles are as follows: -

[Principle 1:] The meaning to be given to the phrase “special circumstances” and what matters will amount to such in any particular case are to be viewed in the light of the spirit and intendment of the legislation and its purpose or object.

[Principle 2:] In my opinion, [the trial judge] was correct in taking the view that he could look at both the circumstances surrounding the offence and the personal circumstances of the offender ...

[Principle 3:] Mr Sturgess for the appellant referred to the definition of “special” in the Shorter Oxford English Dictionary: “marked off from others of the kind by some distinguishing qualities or features”. That does appear to be the general sense in which the word is used in s. 218(3), but perhaps the emphasis ought to be towards the next meaning given in that dictionary: “additional to the usual or ordinary”.

[Principle 4:] In the context of s. 218 the court is not concerned so much with the offence itself, but whether there are circumstances which make the question of sentencing of the offender “special”, in the sense that the case is distinguishable from that which could properly be described as usual or ordinary. Against that background I would say that circumstances usually relied on in mitigation of penalty could, of course, still be relied upon in support of the proposition that the penalty should be closer to the minimum than the maximum, but such factors would not ordinarily constitute “special circumstances” justifying the court in imposing a sentence less than the statutory minimum.

[Principle 5:] ... it is not sufficient merely to look at the relevant factors in isolation. When considering whether circumstances are “special”, a factor which, standing alone, would be insufficient may have an

altogether different value when found in combination with some other factor or factors which in turn would be insufficient if standing alone ...
[Principle 6:] *If the accused person submits that there are “special circumstances” then those circumstances should be established by evidence led before the court so that specific findings of fact are made by the sentencing judge.*

THE IHP's REASONING

It seems that the IHP, whilst accepting that there were relevant personal circumstances for both appellants, did not regard them as amounting to a special circumstance within Rule 86B.

It is not clear if the IHP directed itself at all in relation to the cumulative effect of those personal circumstances taken together with the circumstances of the offending. One way or the other the Tribunal considers that the IHP is in error.

Clearly in this case the combination of the circumstances referred to earlier is relevant. In the view of the Tribunal the cumulative effect of all those circumstances is very important.

In the Tribunal's view, the IHP has misdirected itself as to what can amount to a special circumstance. It has found the offending to be at the lower end of the scale and says that that is not a special circumstance. That in itself may be correct, but in combination with the other factors referred to earlier, clearly the decision should have been that a 'special circumstance' existed in these matters.

In the view of the Tribunal, the IHP has misdirected itself on the cumulative effect referred to in the decision of Noy.

THE TRIBUNAL'S VIEW

In the view of the Tribunal, the combination of factors and the cumulative effect of those factors make this a very obvious case where there should have been a finding that a 'special circumstance' existed in each case.

DECISION OF THE TRIBUNAL

The appellants have been suspended (wrongly, in the view of the Tribunal) since 26 November 2019 and disqualified since 29 January 2020. Although they did not pursue their appeals against conviction, the Tribunal considers that the fact that they were harshly treated for the failure to attend is relevant in relation to what penalty should be substituted for the one imposed by the IHP.

In addition, each appellant has paid a fine of \$750.00.

The date of 26 November 19 is therefore important in finalising this matter.

The orders of the Tribunal in relation to Mr Ronald Schadow and Mrs Joan Schadow are as follows: -

- (1) Leave to appeal out of time is granted in each case.
- (2) The Tribunal finds that a special circumstance exists in each case in the terms of Rule 86B.
- (3) The decisions of the IHP are set aside.
- (4) In lieu of a disqualification of 10 years, in each case the Tribunal imposes a disqualification of two years from 29 January 2020.
- (5) However, both those disqualifications are suspended in each case beyond 26 November 2020 on the condition that neither appellant is involved in any reoffending in relation to these types of offences.
- (6) There will be a refund of the applicable portion of the bonds.