

RACING APPEALS TRIUNAL

DATE: MONDAY 9 DECEMBER 2019

RAT 9/19

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

IN ATTENDANCE: **MR TIMOTHY MCGRATH**, CHAIR, GRSA INTEGRITY HEARINGS PANEL

MS LISA MICHALANNEY, INTEGRITY MANAGER, GREYHOUND RACING SA LTD

APPELLANT: MS KATHLEEN JOHNSTONE

APPELLANT'S COUNSEL: MR SAMUEL JOYCE

IN THE MATTER of an Appeal by **MS KATHLEEN JOHNSTONE** against a decision of Greyhound Racing SA Ltd Stewards:

BREACH OF RULE: GAR 83 (2) (a) which states:

*The owner, trainer or person in charge of a greyhound-
(a) nominated to compete in an Event:
shall present the greyhound free of any prohibited substance.*

PENALTY:

Training licence suspended for six months, with three months of that period of disqualification suspended on provision that the Appellant does not reoffend for 24 months.

BREACH OF RULE: GAR 84A(1)

Fail to present a treatment book for inspection when requested by the Stewards

PENALTY:

Fine of \$150.00

DETERMINATION

Ms Kathleen Anne Johnstone is the owner and trainer of a greyhound, Dynamic Lee, which won Race 3 at Gawler on 1 March 2019.

A swab taken from the urine of the greyhound following the race revealed the presence of a prohibited substance, namely Tenoxicam.

As a result, Ms Johnstone was charged by the Stewards with an offence contrary to Rule 83(2) in failing to present the greyhound free of a prohibited substance.

She was also charged with an offence under Rule 84A(1) for failing to provide records of medical treatment at the time her kennels were inspected.

At the GRSA Integrity Hearings Panel (IHP), she pleaded guilty to both charges.

Ms Johnstone stated that she had no knowledge of how the substance came to be present in her dog.

The presence of Tenoxicam in this dog still remains a mystery. It is to be noted that Ms Johnstone was not charged with the administration of the prohibited substance. The drug is an anti-inflammatory drug which can provide pain relief, reduce inflammation and fever, and is capable of affecting the digestive musculoskeletal and urinary systems of a dog.

Tenoxicam is not registered in Australia for either human or animal use. I was informed that this is the first case in Australia in all three codes of racing in which the drug has been detected.

This matter was the first case to be heard by the IHP, which was set up in June 2019.

The IHP heard submissions from the Stewards and Ms Johnstone and subsequently imposed a penalty of a \$3500 fine plus a six-month suspension.

In relation to the suspension, the Panel ruled that, provided three of that six months was served, the balance of three months would be suspended in relation to the breach of Rule 83(2).

In relation to the breach of Rule 84A(1), Ms Johnstone was fined an additional \$150.

This appeal is against the severity of the penalty imposed by the IHP.

The IHP took account of previous decisions of both the Stewards and the Racing Appeals Tribunal in relation to penalties generally for prohibited substances.

At the hearing in the Racing Appeals Tribunal, Mr Joyce appeared for the Appellant, Ms Michalanney for the Stewards, and Mr McGrath sought to represent the IHP.

After some discussion I allowed Mr McGrath to be present during this appeal but indicated I wanted to clarify his role.

Mr Joyce submitted that Mr McGrath should not be entitled to appear to justify the decision of the IHP of which he was the chair.

Mr McGrath prepared a written submission in answer to one prepared by Mr Joyce.

Some of Mr McGrath's submission is clearly outside any role which he, as Chair of the IHP, may have at the Tribunal, and I have not considered his submission on those matters in reaching my decision.

There was a suggestion by Mr Joyce that although the Tribunal had said on several occasions that normally with a prohibited substance there should be a period of disqualification, that should only be limited to certain other drugs which have a performance enhancing aspect.

It was put that in decisions by the Tribunal, there was a view expressed that presenting a greyhound with a prohibited substance would normally require a period of disqualification.

It was also pointed out that in one decision, that of Turner, the Tribunal had also reviewed some penalties in relation to cobalt. In that decision I said, "In these matters, it is my view that disqualification is the appropriate penalty unless there are unusual circumstances." It was suggested by the Appellant in this matter "these matters" was a reference to offences involving cobalt.

If it has been interpreted in that way, namely as a reference to cobalt only, then that is an incorrect interpretation.

My view as previously expressed in other decisions, and my view now, is that a prohibited substance is exactly what it says and there is no distinction within prohibited substances weighting them in terms of performance enhancing or otherwise.

What I had attempted to convey and wish to convey again is that with prohibited substances in a presentation offence, unless there are unusual circumstances, a disqualification should be the appropriate penalty.

The IHP did refer to several previous Tribunal decisions in its own decision, but it did not refer to a previous decision of the Tribunal in the matter of Cryer.

Cryer involved the presence of the banned substance Flunixin. There was evidence that the most likely source of the drug was from the meat purchased from a knackery. Flunixin can enhance performance.

The Tribunal stated in Cryer that, "The Appellant has committed an innocent, if careless, breach of the Rule." As a result, the Appellant changed his practice in relation to the purchase of knackery meat.

The Tribunal considered in that case in those circumstances that a suspension of two months and a fine of \$1500 may not have reflected other penalties, and suspended the two-month suspension but upheld the \$1500 fine.

Mr Joyce submitted that the IHP erred in not referring to the Cryer decision.

A reference to this decision may or may not have made any difference to the consideration of the IHP.

As I have said many times, it is very difficult to ever find that two cases are identical in relation to either their facts or the background to the offence including the personal circumstances of the Appellant.

Based on the previous decisions of the Racing Appeals Tribunal, the Stewards argued before the IHP for a disqualification in this matter.

The IHP did not impose a disqualification. The Panel weighed up all the relevant circumstances, including the personal circumstances of Ms Johnstone and her very good record in two states.

In other words, following the decisions by earlier Tribunals, the IHP without having said as much, clearly must have regarded the circumstances of this matter as unusual.

As a result, the IHP decided to impose both a fine of \$3500 together with the suspension of six months, with half of that to be served, with the balance being suspended.

It is my view that, taking account of the limited value of earlier Tribunal decisions, the result reached by the IHP as to suspension was correct.

In relation to the other charge under Rule 84A(1), Ms Johnstone could not produce her treatments record book when asked for it and offered no explanation for its absence.

This in itself is a serious offence and by itself would normally have resulted in a much higher penalty than the \$150 imposed. It clearly was regarded in connection with the more severe penalty imposed for the breach of Rule 83(2).

The book was finally produced at the hearing of the matter some six months later, but I was informed that it was not inspected at that time by the Stewards because it was regarded as too remote from the time in question.

Having considered the evidence and the submissions of the parties, I consider that the combination of the suspension and the fine is excessive, and I would therefore substitute a fine of \$2000 in lieu of the \$3500 imposed.

The conclusion then is that the appeal is allowed in respect of the fine. The IHP's decision in relation to suspension is upheld and that part of the appeal is dismissed.

I do not interfere with the \$150.00 fine in relation to the breach of Rule 84A(1).

The Appellant is entitled to the refund of that portion of the bond to which she is entitled.

The suspension will take effect on a date to be agreed between the Appellant and the Stewards, but no later than 9 days following the publication of this decision.

Because this is the first appeal from the new Integrity Hearings Panel, it seems to me that the role of the Panel in relation to its input into this Tribunal should be clarified.

Mr Joyce has provided me with submissions to assist me in this regard and cited relevant decisions.

Mr McGrath has responded with decisions to support his role, but Mr Joyce distinguishes those decisions.

The Tribunal has not been able to research these matters in the time available to date.

It is an important matter and the Tribunal will give it full consideration at the earliest opportunity.

The Tribunal will promulgate a separate document involving a practice direction regarding the role of the IHP at Tribunal hearings, as I do not wish to delay the publication of the result of this appeal.