

RACING PENALTIES APPEAL TRIBUNAL DETERMINATION

APPELLANT: BEN ABERCROMBIE

APPLICATION NO: A30/08/810

PANEL: MS K FARLEY SC (CHAIRPERSON)
MR R NASH (MEMBER)
MS J OVERMARS (MEMBER)

DATE OF HEARING: 31 MAY 2018

DATE OF DETERMINATION: 29 JUNE 2018

IN THE MATTER OF an appeal by BEN ABERCROMBIE against the determination made by the Racing and Wagering Western Australia Stewards of Greyhound Racing to impose a \$1000 fine and a six-month disqualification suspended for two years for breach of Rule 86(o) of the Racing and Wagering Western Australia Rules of Greyhound Racing.

Mr J Abercrombie represented Mr B Abercrombie.

Mr D Borovica represented the Racing and Wagering Western Australia Stewards of Greyhound Racing.

1. Mr Abercrombie had a greyhound racing in race 4 at Cannington on Wednesday 27 December 2017.
2. Following the race, Mr Abercrombie discovered that his dog had suffered a shattered toe.

3. Mr Abercrombie consulted the vet, Dr Stephanie Wu, and whilst speaking to Dr Wu was approached by a Steward, Mr Kaitse. What followed is documented by the Stewards in their ultimate decision, but it appears that it was not in dispute that Mr Abercrombie said words to the effect of 'this fucking greyhound is ruined' and that that comment was made when speaking with Mr Kaitse. As a result of complaints made by both Mr Kaitse and Dr Wu, the Stewards convened an inquiry after race 7 on 27 December 2017 in relation to those complaints. By letter dated 2 January 2018, the Stewards wrote to Mr Abercrombie advising that, following the inquiry, the Stewards had decided to take no further action in relation to the complaint of Dr Wu, however, in respect of the complaint lodged by Mr Kaitse, the Stewards had decided to lay a charge against Mr Abercrombie under GAR 86F(1) of the RWWA Rules of Greyhound Racing 2008, which reads:

'R86 Offences

A person (including an official) shall be guilty of an offence if the person –

(f) engages in, publishes or causes to be published, broadcasts or causes to be broadcast, the use of any contentious, unseemly, improper, insulting, or offensive language, conduct or behaviour in any manner or form towards, or in relation to – (i) a steward....'

4. The particulars of the charge were that Mr Abercrombie had engaged in the use of offensive language towards Mr Kaitse by swearing at him.
5. The inquiry resumed on 9 January 2018, following which the Stewards wrote again to Mr Abercrombie by letter dated 11 January 2018, wherein they advised that the above charge had been withdrawn and instead, a new charge under GAR 86(o) would be laid against him. That rule reads:

'R86 A person (including an official) shall be guilty of an offence if the person – (o) has, in relation to a greyhound or greyhound racing, done a thing, or omitted to do a thing, which, in the opinion of the stewards or the controlling body, as the case may be, is negligent, dishonest, corrupt, fraudulent or improper, or constitutes misconduct.'

6. The particulars of the new charge were that Mr Abercrombie used offensive language whilst speaking with a Steward in the vicinity of the wash bay area, 'a thing which in the opinion of the Stewards constitutes misconduct' (emphasis added).

7. The inquiry resumed on 17 January 2018. Mr Abercrombie was supported by his father Mr John Abercrombie. At the conclusion of a discussion as to the charge as it finally stood, the Stewards retired for a short time and, at page 10 of the transcript of the inquiry on 17 January 2018, the Stewards returned to advise that they found Mr Abercrombie guilty as charged. Their reasons as transcribed at page 10 of the transcript of the inquiry read as follows:

'The stewards have considered all the evidence in respect to the question of guilt. We consider this matter to be of a serious nature and therefore determine it using the Briginshaw Principle working to the higher level. The facts of this matter are not in dispute, on the 27 December 2017 after the running of race 4 at Greyhounds WA, Cannington, you used the word "F" whilst speaking with Mr Kaitse in the vicinity of the wash bay area. This has been acknowledge (sic) by you when Mr Kaitse first lodged his complaint on 27 December 2017, at the last hearing on 9 January 2018 and again today. In our opinion "F" does constitute offensive language. Taken (sic) into account all of the evidence the stewards find that you Mr Ben Abercrombie following the running of race 4 on 27 December 2017, did use offensive language whilst speaking to the steward Mr Kaitse in the vicinity of the wash bay area, a thing which in the opinion of the stewards constitutes misconduct and we therefore find you guilty as charged'.

8. The Stewards then held further enquiries in terms of penalty.
9. On 18 January 2018, the Stewards wrote to Mr Abercrombie advising that the penalty to apply would be a fine of \$1,000 payable to RWWA offices within 14 days and a six-month disqualification wholly suspended for a period of two years. Those penalties were available to the Stewards pursuant to GAR 95(1) of the RWWA Rules of Greyhound Racing 2008. A 'steward's determination' was attached to the letter of 18 January 2018 and consisted of 12 numbered paragraphs.
10. In paragraph 4 the Stewards found that Mr Abercrombie's conduct (in swearing when speaking with Steward Mr Kaitse) was 'unnecessary and uncalled for'. It 'was totally unwarranted and cannot be allowed to continue'. The conduct 'fell well below what stewards expect from registered person'.
11. Notably, notwithstanding that Stewards had previously withdrawn a charge against Mr Abercrombie pursuant to Rule 86(f), the Stewards stated in paragraph 4 'stewards are entitled to a safe workplace free of harassment, abuse or conduct of this nature'. There was

no suggestion at any of the inquiry hearings that the actions of Mr Abercrombie in using the "F" word in the vicinity of the Steward caused him to feel harassed or abused.

12. The Stewards found (in paragraph 5 and 6) that Mr Abercrombie had failed to meet the standard of conduct expected from persons voluntarily agreeing to comply with all of the rules of greyhound racing. This of itself of course added nothing to the fact that a charge had been laid under Rule 86.
13. In paragraph 7 it would appear that it was accepted by the Stewards that by his language, Mr Abercrombie was 'expressing (his) anger and frustration'.
14. Also, in paragraph 8, the Stewards found that swearing in the vicinity of Stewards and others by a registered person can only harm the industry and has the potential to impact negatively on it. In paragraph 9 the Stewards repeat:

'Your conduct was totally unnecessary and could have easily been avoided, it was rude and in the presence of others to observe. It was said to an official which reflects poorly on you and in the eyes of others demeans the authority of the official who endures it publicly. This is not the conduct which will assist the industry in raising its reputation amongst the public and others who are closely monitoring the industry'.

15. The Stewards state at paragraph 10 that they have had regard to previous similar matters. These are not enunciated. In the hearing of 17 January 2018, reference is made to recent matters involving a Mr Coldstream, a Mr Anderson, a Mr McPherson, and a Mr Stone (page 14 of the transcript).
16. It would appear that Mr Coldstream was fined \$400 for his first 'offence of misconduct', Mr Anderson was fined \$400 for 'swearing on the dais', Mr McPherson was fined for 'swearing at a steward' and Mr Stone was disqualified, although there was no discussion of what he was found guilty of. It is also not clear what charges were faced by the other three gentlemen or what the details of the charge against Mr Coldstream were.
17. 'Misconduct' is not defined in the rules of greyhound racing. At no stage during the inquiry do the Stewards indicate what is meant by the term, save that they find that 'using offensive language in speaking with a steward in the vicinity of a wash bay area', constitutes misconduct. In this regard it should also be noted that in the course of the inquiry on 9 January 2018, Mr Abercrombie Senior tendered a document that appears to have been

obtained from the internet reporting that the 'F' word is no longer deemed offensive in Australia. That document was Exhibit 3 in the inquiry on 9 January 2018. It should also be noted that at no time did Mr Abercrombie face a charge of committing or omitting to do any act or engaging any conduct which is anyway detrimental or prejudicial to the interests, welfare, image, control or promotion of greyhound racing (Rule 86(q)). It is unclear why the Stewards would make the comments that they did in paragraph 8 and 9 of their determination.

18. Mr Abercrombie filed his notice of appeal on 28 January 2018. Attachment 1 to his notice advises that his grounds of appeal are as follows:

'1. The articulation of the "F" word in the presence of a steward is not misconduct for the purpose of GAR 86(o) of the Rule of Greyhound Racing 2008 (Rules).

2. Having regard to the conduct complained of, a steward could not reasonably form an opinion that this conduct constituted misconduct (by definition).

3. The penalties of \$1,000 and a six-month disqualification (albeit suspended) are manifestly excessive and inconsistent with the totally principle.'

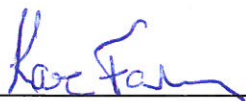
19. The matter came on for hearing before the Tribunal on Thursday 31 May 2018. Leave was granted pursuant to section 17(6)(b)(ii) Racing Penalties (Appeal) Act for the appellant to be represented by his father Mr John Abercrombie. Mr Borovica, with Mr Martins, appeared for the Stewards.
20. The facts giving rise to the complaint against the appellant were not in dispute. Mr Abercrombie contended that his son's choice of language in the presence of Steward Kaitse and others following the running of race 4 at Cannington on 27 December 2017 was not offensive, and could not therefore constitute 'misconduct' for the purpose of Rule 86(o).
21. The Stewards, on the other hand, contended that Mr Abercrombie's conduct on the evening in question was unnecessary and unprofessional, and set a poor example to other registered persons. Mr Borovica submitted that the Stewards had a responsibility to ensure that registered persons behaved with decorum at the racetrack, particularly in the presence of officials and racetrack staff. Were high standards not to be expected of registered persons, the industry could be increasingly negatively impacted by a perception that such inappropriate behaviour would be tolerated.

22. There is force to this argument. Mr Abercrombie's loss of control on the evening of 27 December, born although it was out of frustration and understandable distress following a serious injury to his dog, was avoidable conduct which was indeed, when considered objectively, unprofessional and unnecessary. It would have been perfectly acceptable, in the Tribunal's view, for Mr Abercrombie to voice his frustration and distress in a more temperate fashion.
23. The Tribunal finds it unnecessary to determine whether for the purpose of a finding of guilt under GAR 86(o) the 'F' word (as it was referred to by both Mr Abercrombie and Mr Borovica) is 'offensive' in itself. The use of the word must be considered in all the surrounding circumstances of the case. Certainly, in this instance Mr Kaitse (and initially Dr Wu) were sufficiently concerned as to its use, and the context in which it was used, to make complaints to the Stewards about it.
24. The articulation of the 'F' word in the presence of Stewards may or may not constitute misconduct for the purpose of GAR 86(o) of the Rules of Greyhound Racing 2008.
25. The Stewards found that it did, in the circumstances of this case.
26. The Tribunal is not satisfied that no Stewards, acting reasonably, could have found that the conduct complained of could not be improper conduct, if not 'misconduct'.
27. For those reasons grounds 1 and 2 of the appeal, constituting Mr Abercrombie's appeal against conviction, must fail.
28. Although the Tribunal makes no determination in relation to the point as it is unnecessary to do so, it is noted also that Mr Abercrombie's conduct may well have formed the basis of a charge against him pursuant to GAR 86(q), or GAR 86(f) as he was originally charged.
29. Despite some concern on the part of the Tribunal about whether the appellant should have been charged under rule 86(o) or whether it would have been more appropriate to charge him under some other rule, there was no argument put to the Tribunal that the words 'improper' and 'misconduct' as they appear in rule 86(o) ought be construed in any way other than according to their ordinary meaning. The appellant did not agitate the point and the Tribunal has not heard any argument on it. The Tribunal is satisfied, having regard to the particular circumstances of this case and the need to determine the appeal according to equity, good conscience and the substantial merits of the case, that there is no injustice in leaving that issue unaddressed.

30. Turning to the question of penalty. The Stewards fined Mr Abercrombie \$1,000, and imposed upon him a six-month disqualification of his trainer's licence, suspended for a two-year period.
31. In so doing, the Stewards (at paragraph 12 of their determination), referred to a suggestion made by Mr Abercrombie's father that (whilst he did not believe his son's conduct warranted disqualification) suspension of any such disqualification should be considered.
32. In sentencing deliberations, Stewards referred to previous findings of 'misconduct' against Mr Abercrombie, which resulted in fines, and a warning given to him on 21 September 2017 to moderate his behaviour in the presence of officials.
33. As the Stewards noted, however (at paragraph 12 of their determination) Mr Abercrombie has a high passion for the industry and becomes frustrated on occasions 'due to varying circumstances'.
34. Prior offences cannot aggravate the circumstances of the present offence. The Tribunal does not agree that Mr Abercrombie's record is 'appalling and is of no assistance at all to (his) cause'. (Stewards determinations paragraph 11).
35. Whilst Mr Abercrombie's prior record provides no mitigation for this offence, it must be viewed in light of the fact that his prior 'misconduct' offences were not comparable, being true 'misconduct' offences rather than improper behaviour.
36. It could not be said that Mr Abercrombie's conduct on this occasion could fall within the more serious category of offending of this nature.
37. It should also be noted that GAR 86(o) covers a wide range of offending behaviour including dishonesty, corruption and fraud.
38. Mr Abercrombie's behaviour in the context of his greyhound's serious injury on the night in question was not, in the Tribunal's opinion, of such a serious nature as to require a period of disqualification (albeit suspended). It was indeed more properly an improper thing to do for the purposes of GAR 86(o).
39. Stewards provided two comparator cases through the course of the Tribunal hearing which became Exhibits 1 and 2. In both of those cases fines were imposed. The Tribunal finds both

of those 'comparators' distinguishable and unhelpful in imposing an appropriate penalty in Mr Abercrombie's case.

40. We do however, believe that Mr Abercrombie needs to be reminded, for a time at least, to temper his language and his behaviour, even when frustrated and distressed. We also believe it to be important that a clear message be sent to other registered persons that intemperate language will not be tolerated by Stewards at the racetrack, to protect the integrity of the Greyhound Racing industry as a whole.
41. Considering all of the circumstances of this case, Mr Abercrombie's antecedents and his forthright conduct at the various hearings in relation to this matter, and his care for his greyhounds, which appears to be exemplary, we find that ground 3 of his appeal has been made out, insofar as it claims that the penalty imposed to excessive (there being only one charge, the 'totality principle' appears to me to have no application to this matter).
42. The Tribunal would uphold the first part of ground 3 of the appeal, and quash the penalty of a fine of \$1,000 and six months disqualification suspended for two years.
43. Having considered all of the circumstances of the case we would impose in lieu thereof a fine of \$1,000, \$500 of which is to be suspended for a period of 12 months.
44. My view is that this penalty satisfies the need to punish Mr Abercrombie and deter him from future improper conduct, and serves as a general deterrent to other registered persons that such conduct will not be tolerated in Greyhound Racing.



KAREN FARLEY SC, CHAIRPERSON



RACING PENALTIES APPEAL TRIBUNAL
REASONS OF DETERMINATION OF MR R NASH (MEMBER)

APPELLANT: BEN ABERCROMBIE

APPLICATION NO: A30/08/810

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MR R NASH (MEMBER)
MS J OVERMARS (MEMBER)

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Mr J Abercrombie represented Mr B Abercrombie.

Mr D Borovica appeared for the RWWA Stewards.

I have read the draft reasons of Ms K Farley SC, Chairperson.

I agree with those reasons and conclusions and have nothing further to add.



ROBERT NASH, MEMBER



RACING PENALTIES APPEAL TRIBUNAL
REASONS OF DETERMINATION OF MS J OVERMARS (MEMBER)

APPELLANT: BEN ABERCROMBIE

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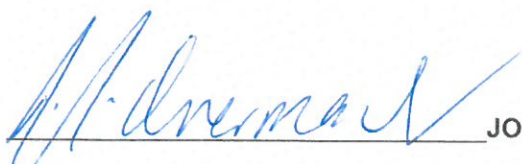
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JOHANNA OVERMARS, MEMBER

