APPEAL NO. 775

THE RACING PENALTIES APPEAL TRIBUNAL

DETERMINATION

APPELLANT:	**LINDA JOY BRITTON**
APPLICATION NO:	**A30/08/775**
PANEL:	**MR D MOSSENSON (Chairperson)** **MR J PRIOR (Member)** **MR A E MONISSE (Member)**
DATE OF HEARING:	**13 APRIL 2015**
DATE OF DETERMINATION:	**20 AUGUST 2015**

IN THE MATTER OF an appeal by Ms Linda Joy Britton against the determination of Racing and Wagering Western Australia Stewards of Greyhound Racing imposing a disqualification of a total of 18 months for two breaches of Rule 83(2)(a) of the Rules of Greyhound Racing

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Mr T Percy QC, assisted by Mr G Yin, instructed by D G Price and Co, represented Ms L Britton.

Mr RJ Davies QC represented the Racing and Wagering Western Australia Stewards of Greyhound Racing.

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1. By unanimous decision of this Tribunal, the appeal by Ms Linda Britton against penalty under Greyhound Racing Rule 83(2)(a) is upheld.

2. By a majority decision, Mr A Monisse, Member dissenting:

    1. The two periods of disqualification are both reduced to 7 months.

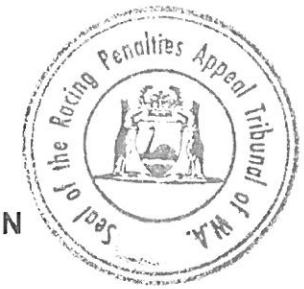
    2. The second 7 month disqualification period is to be served partially concurrently and partially cumulatively with the first disqualification period.

    3. The first 2 months of the second 7 months disqualification period is to be

served concurrently with the last 2 months of the first 7 month disqualification period.

4. The remaining 5 months of the second 7 months disqualification period is to be served cumulatively with the first 7 months disqualification period.

5. The total disqualification period to be actually served by the Appellant will be 12 months expiring on 18 January 2016.



DAN MOSSENSON, CHAIRPERSON

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR J PRIOR (MEMBER)

APPELLANT:	**LINDA JOY BRITTON**
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Mr RJ Davies QC represented the Racing and Wagering Western Australia Stewards of Greyhound Racing.

INTRODUCTION

1. The Appellant is the State's premier licensed public trainer of greyhounds with Racing and Wagering Western Australia ("RWWA"). The Appellant was the trainer of the greyhound ZELEMAR FEVER which raced at Cannington on 16 and 23 August 2014. The Appellant has been a licensed trainer for approximately 30 years, with a very large operation and vast numbers of greyhounds.

2. Race day urine samples taken on 16 and 23 August 2014 from ZELEMAR FEVER returned a result exceeding the threshold limit for testosterone as evidenced by 5β

– androstane - 3α, 17β – diol for each race day sample reading being 19 nanograms per millilitre and 24 nanograms per millilitre respectively. These results were obtained by analysis at the WA Chem Centre and similar results were obtained from the Australian Racing Forensic Laboratory.

3. The threshold limit under Rule 83(6) of the Rules of Greyhound Racing ("RGR") is 10 nanograms per millilitre. The evidence of Dr Mead at the Stewards' inquiry was that at the levels found in the samples, the greyhound's performance would have been affected.

4. On 10 and 28 October 2014, investigators from RWWA attended at the Appellant's residential property and kennels situated at 84 Gull Road, Nambeelup to interview the Appellant and her partner, Christopher Halse and search these premises.

5. The investigators also seized various items including medication books and 500 unlabelled tablets.

6. On 4 December 2014, RWWA Stewards of Greyhound Racing conducted an inquiry into the two post race urine samples taken from ZELEMAR FEVER.

7. Following the Stewards' inquiry, the Appellant was charged with the following four offences in breach of the RGR:

   (a) Presenting ZELEMAR FEVER to race on 16 August 2014 not free of the prohibited substance testosterone (RGR 83(2)(a);

   (b) Presenting ZELEMAR FEVER to race on 23 August 2014 not free of the prohibited substance testosterone (RGR 83(2)(a);

   (c) Failure to keep any treatment records detailing the administration of ethylestrenol tablets to greyhound bitches (RGR 84A(1)); and

   (d) Possession of Schedule 4 medications without prescription (RGR 84A(4)(b)).

8. The Appellant was notified of the charges by letter from the Stewards dated 17 December 2014.

9. The Stewards inquiry resumed on 15 January 2015 and the Appellant pleaded guilty to each of the four charges. The Appellant, through her counsel, made submissions on the appropriate penalty. The Stewards reserved their decision on

the Appellant's penalty.

10. In a letter to the Appellant dated 19 January 2015, the Stewards delivered their reasons and penalty imposed for each offence.

11. The reasons for the penalty imposed published by the Stewards were comprehensive, extending to 10 pages and 35 paragraphs ("the Stewards' reasons").

12. The penalties imposed by the Stewards for each offence were the following:

    (a) Breach of Rule RGR 83(2)(a) 16 August 2014 – 9 months disqualification;

    (b) Breach of Rule RGR 83(2)(a) 23 August 2014 – 9 months disqualification.

    Both disqualifications were ordered by the Stewards to be served cumulatively resulting in a penalty of an 18 month disqualification of the Appellant effective from the date of the Stewards' letter and expiring at midnight on 18 July 2016.

    (c) Breach of Rule RGR 84(1) - $200.00 fine;

    (d) Breach of Rule RGR 84A(4)(b) - $300.00 fine.

THE APPEAL

13. The Appellant, on instructions to her solicitors, filed a Notice of Appeal dated 29 January 2015. The Appeal was only in relation to the disqualification penalties imposed for the offences for breach of Rule RGR 83(2)(a) and the Stewards' decision that the two disqualification penalties be served cumulatively.

14. The draft grounds of appeal are in the following terms:

    1. "The Stewards erred in their consideration of penalty on counts 1 and 2 by failing to consider and follow penalties imposed for similar offences in other States of Australia.

    2. The Stewards erred in their consideration of penalty on counts 1 and 2 by:

        (a) dealing with the absence of an explanation by the appellant for the presence of the prohibited substance as an aggravating factor; and

        (b) dealing with the absence of such an explanation by the appellant as a

matter that it was incumbent to provide.

3. The Stewards erred by dealing with the question of penalty in relation to counts 1 and 2 by reference to the matters the subject of counts 3 and 4 as aggravating factors.

4. The Stewards erred in their consideration of penalty in counts 1 and 2 by wrongly considering and applying the *"totality principle"*.

5. The penalty imposed by the Stewards on counts 1 and 2 was manifestly excessive having regard to all the circumstances of the case, penalties imposed for similar offences in this State and penalties imposed in other States of Australia."

15. At the hearing of this Appeal, Ground 3 of the draft grounds of appeal was abandoned by the Appellant's counsel.

16. At both inquiries before the Stewards the Appellant was represented by her counsel and instructing solicitor who also both appeared before this Tribunal. The Appellant filed detailed written submissions in support of her 4 remaining grounds of appeal.

GENERAL MATTERS

17. Rule RGR 83(2) 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 substances*".

18. Rule RGR 83(3) states:

"*The owner, trainer or person in charge of a greyhound presented contrary to sub-rule (2) shall be guilty of an offence.*"

19. Rule RGR 83(6) states:

"*Testosterone as evidenced by the presence of 5β – androstane-3α, 17β–diol at or below a concentration of 10 nanograms per millilitre in a sample of urine taken from a bitch will not breach the provisions of sub rule (2) of this rule.*"

Rule RGR 83(6) was added to the Rules on 1 January 2013.

20. This prohibited substance can be generally described as testosterone and to some degree this is an endogenous substance.

21. The offence described in RGR 83(2) is generally described as a "presentation offence" and is different from "an administration offence". (This type of offence is referred to in RGR Rule 83(1)).

22. Administration offences, unlike presentation offences, are offences which occur in circumstances when a person is convicted of the breach of the relevant rule when it is considered the prohibited substance was given to the greyhound intentionally. Often, in relation to presentation offences, it is considered that the relevant greyhound had the prohibited substance in it due to a lack of proper precaution to prevent accidental administration or the reason for the presence of the offending substance cannot be determined.

23. Other codes of racing also have these two distinct categories of offences. Before this Tribunal and the relevant Stewards at first instance these two types of offences have been treated as different levels of seriousness in offending. An administration offence is considered more serious than a presentation offence.

24. As this offence is a relatively new offence under the rules of the RGR, there are very few appeal decisions relating to this offence in Western Australia and throughout Australia. The two most significant appeal tribunal decisions are the Western Australian decision *Wayne Jacobson* Appeal No. 762, dated 29 January 2014 and the Victorian decision *Bate v Greyhound Racing Victoria* VCAT1903/2013, dated 20 November 2013. Both of these decisions were referred to at the hearing of this appeal by counsel for both the Appellant and Respondent.

25. The Stewards also referred to the case of *Jacobson* in their reasons for imposing the penalty on the Appellant.

26. In the case of *Jacobson*, this Tribunal allowed the appeal for a single offence of breach of RGR 83(2)(a) and reduced the original disqualification period imposed by the Stewards from 9 months to 6 months disqualification. All three members of the Tribunal as constituted published reasons and all three members referred to the decision of *Bate*.

27. In *Bate*, Her Honour Judge Jenkins, the Vice President of the Victorian Civil and Administrative Tribunal, reduced the original disqualification period of 12 months, of which 3 months was suspended for a period of 12 months, to a 9 month disqualification of which 3 months was suspended for 12 months for a single offence of breach of RGR 83(2)(a). Her Honour Judge Jenkins, at paragraphs 26-28, considered the penalties imposed for the same offence in Victoria and other States of Australian in 2013. Her Honour also considered at paragraph 29 other cases involving anabolic steroids.

28. In Judge Jenkins decision in *Bate* at paragraph 28, in considering financial penalties imposed in the early cases in Queensland and New South Wales, noted that the Stewards acknowledged that a level of leniency should be shown, as the rule change "requires a cultural change".

29. Judge Jenkins then went on to state in her reasons at paragraph 43 that there is no basis for permitting leniency in the determination of an appropriate penalty, by reference to the time of when the offence occurred.

30. The Appellant in this case committed the offences approximately 18 months after the amendment to the RGR's.

31. As the Stewards stated in their reasons for imposing penalty:

> "*It has often been said in cases involving potentially performance enhancing substances, that with the exception of unique and special circumstances, disqualification will often be the most appropriate mode of penalty given the seriousness of that matter*". (Stewards' Reasons paragraph 24).

32. Given the factual circumstances in which the offences were committed by the Appellant and considering her personal antecedents, including her record as a trainer, it was inevitable that disqualification penalties would be imposed by the Stewards. The main focus of the Appellant's submissions, both written and oral, was as to whether the length of the disqualifications imposed indicates an express or implied error and whether the disqualification periods should have been served cumulatively resulting in a final total disqualification period of 18 months.

GROUND 5 – Manifestly Excessive Penalties

33. A ground of appeal which claims the penalty imposed by the Stewards was

manifestly excessive in the circumstances is a ground of appeal which is well known to this Tribunal.

34. The ground suggests there has been an implied error made in the penalty imposed (see *Chan v The Queen* (1989) 38 A Crim R 337 per Malcolm CJ at 342 and *The State of Western Australia v Wilson* [2015] WASCA 119 per Mazza JA [21]).

35. In considering if an implied error has been established by an appellant, it is useful to consider if there is a demonstrable range of penalties or sentences imposed for the same type of offences. Proper consideration also needs to be taken of the individual factual circumstances of each case.

36. In this ground of appeal the Appellant submits that the 9 months disqualification imposed by the Stewards for each of the two offences under Rule RGR 83(2)(a) was manifestly excessive in the particular circumstances of the Appellant's case, indicating an implied error by the Stewards in imposing the penalty.

37. As I have already referred to in these reasons, the only offence and resulting penalty in Western Australia which has been the subject of an appeal to this Tribunal was the case of *Jacobson*. Other penalties for the same offence in other States and Territories of Australia were considered in the case of *Bate*.

38. A 9 month disqualification penalty for this type of offence is clearly the highest that has ever been imposed in Australia for this offence. The length of disqualification is therefore at the top end of the range for penalties imposed for this type of offence. The question remains therefore, did the Appellant's relevant factual circumstances justify the disqualification period of 9 months disqualification imposed?

39. The Stewards' reasons for penalty properly recognises that there were mitigating circumstances in the Appellant's case. The most powerful mitigating circumstance was the Appellant's pleas of guilty before the Stewards. The Appellant, although having incurred a record of two previous offences in 1984 and 1999, given her level of involvement in the greyhound racing industry had her record described by the Stewards as "a good record".

40. The Stewards in their reasons distinguished the Appellant's case from that of *Jacobson*, in particular as to the different evidence in each case, as to how the administration of the prohibited substance had occurred.

41. In my view, the factual circumstances in the case of *Bate* were not less serious than those present in the Appellant's case. (See *Bate* at paragraph 30).

42. The Appellant was a very experienced and highly regarded trainer. The evidence as to her kennel management and in particular, the evidence relating to the other two offences for which she was fined, could not result in a finding that her behaviour was merely "a sloppy and careless approach".

43. Notwithstanding this view of the factual circumstances of the offending in the Appellant's case, I am not satisfied that when consideration is properly given to all the mitigating circumstances, including the Appellant's personal antecedents, that a 9 month disqualification penalty imposed at the highest end of the range was appropriate.

44. An implied error has been demonstrated by the Appellant. The length of the period of disqualification of 9 months exceeds the previously established range of penalties for these types of offences, given the factual circumstances of the Appellant's case.

45. In my view, giving proper weight to the mitigating and aggravating facts that applied to the Appellant's case and considering the demonstrated range of penalties throughout Australia, a period of 7 months disqualification is the appropriate length of disqualification.

46. I would allow the Appeal on this ground and substitute a penalty of 7 months disqualification for each offence of the two offences for breach of rule RGR 83(2)(a) committed by the Appellant.

GROUND 1 – Failure to Consider and Follow Penalties Imposed for Similar Offences in Other States

47. I have dealt with Ground 5 before I have dealt with this ground because, in my view to some extent this ground is merely a particular of Ground 5. In any event, as I have already set out in my reasons, the Stewards in their reasons for imposing their penalty on this Appellant specifically referred to in the case of *Jacobson* and this Tribunal in the case of *Jacobson* specifically referred to in the case of *Bate*. As a result, the Stewards when dealing with the penalty imposed for the Appellant were clearly aware of the range of penalties imposed for these types of offences throughout Australia.

48. As I have referred to in my reasons for allowing Ground 5 in this appeal, those two relevant decisions established a range of penalties in Australia for the type of offence for which the Appellant was punished by the Stewards.

49. Although Chairperson Mossenson was in the minority in the case of *Jacobson* in what he considered should be the appropriate penalty in allowing that appeal, I agree with his reasons in which he states that some variance in severity of penalty range can occur in different States and Territories of Australia. (See pages 13-14 of Chairperson Mossenson's reasons in *Jacobson*).

50. In *McPherson v Racing Penalties Appeal Tribunal of Western Australia and Others*(1995) 79 A Crim R 256, Rowland J commented (with Ipp J and Steytler J (as he then was) agreeing):

> *If there is some reason why penalties for this type of offence should exceed those given in another State when the Rules of Racing seem to be similar, then one might expect that reason to be exposed. (Page 261).*
>
> *If it be the fact that there is a range of penalties which has been imposed in this State, which is greater than those which apply in New South Wales, then it seems to me that both that fact and the reasons for such a large discrepancy should be identified. The failure to give the type of reasons I have indicated, in the circumstances, discloses error of law. (Pages 261 to 262).*

51. In the Stewards reasons for imposing the Appellant's penalties they made the following comments:

> *We are aware and mindful of some penalties imposed in other jurisdictions, however (sic) believe they are not determinative of themselves and each case must be judged on its own merits within the respective jurisdictions who are charged with the control of the industry in their State.*
>
> *WA has traditionally had a reputation for having harsher penalties than some eastern states jurisdictions and also a proud and enviable record with regard to the level of positive swabs when compared nationally. (Paragraph 22).*

52. As I have stated above, the Stewards were mindful of the penalties imposed in other jurisdictions for this type of offending and distinguished the Appellant's case as more serious than the facts in *Jacobson*. I agree with this.

53. I have allowed this Appeal in relation to Ground 5 as I have found the 9 months disqualification imposed was manifestly excessive in the factual circumstances and accordingly reduced the sentence to 7 months disqualification. I cannot accept on the facts of the Appellant's case this is a significantly harsher penalty than that which may have been imposed in other parts of Australia for the same factual circumstances.

54. I would dismiss this ground of appeal.

GROUND 2 – Absence of an Explanation for a Prohibited Substance

55. In both the oral and written submissions, the Appellant suggests the Stewards fell into error in imposing the penalties for the two breaches of Rule RGR 83(2)(a) as they treated the lack of an adequate or any explanation by the Appellant as to how the greyhound ZELEMAR FEVER had the prohibited substance present in its two urine samples as an aggravating factor.

56. As I have already referred to in these reasons these were presentation, not administration, offences in relation to the prohibited substance. No proof was required as to how the prohibited substance came to be present in the urine samples of ZELEMAR FEVER. The Appellant, in her interviews with the investigators and in her evidence given at the inquiry hearings, did not give any clear explanation which the Stewards could rely on.

57. I accept that in some factual circumstances for these types of offences, what amounts to mere negligence as opposed to recklessness, could constitute a mitigating factor. This is what occurred in the case of *Jacobson* and it was recognised by the Stewards in this Appellant's reasons. It is an entirely different scenario to suggest a lack of explanation is an aggravating factor which results in an increase in the ultimate penalty imposed.

58. As I have already referred to in these reasons, the Stewards gave lengthy and comprehensive reasons for imposing the disqualification penalties. The Appellant submits in this ground of appeal, that a close analysis of the Stewards reasons suggests there was an implied error by the Stewards, in that they increased the penalty due to the Appellant's failure to provide an explanation for the prohibited substance being present in the greyhound's urine samples. No actual express error in the Stewards reasons has been identified.

59. I agree with the submission by the Appellant that an offender's failure to provide an explanation cannot be seen as an aggravating factor and at worst is a neutral factor in the sentencing process.

60. My analysis of the Stewards reasons for imposing the penalties, in particular at paragraphs 7 to 28, does not indicate that comments the Stewards made about the Appellant's lack of an explanation for the presence of the prohibited substance resulted in them increasing the Appellant's penalties. At best all these comments made by the Stewards in their context merely indicate that a possible mitigating factor, such as low level negligence by the Appellant, was not available to her in the sentencing process.

61. I am satisfied that no implied error has been demonstrated by the Appellant. I find that the Stewards did not treat the lack of an explanation for the presence of the prohibited substance by the Appellant as an aggravating factor thereby resulting in an increased penalty.

62. I would dismiss this ground of appeal.

GROUND 4 – Totality

63. The power for the Stewards to make penalties for two separate offences to be served cumulatively or partially cumulatively arises from Rule 97 of the RGR which states:

> "*If a person or a greyhound:*
>
> *(a) is disqualified or suspended on any occasion for more than one (1) period; or*
>
> *(b) has been previously disqualified or suspended for any period and during that period is again disqualified or suspended,*
>
> *any period of disqualification or suspension other than the first or any further period of disqualification is, if the Controlling Body or the Stewards so directs, to be cumulative*".

64. As the Appellant had been convicted of two offences and disqualified for each offence, the Stewards were entitled to exercise their power pursuant to Rule 97 of the RGR.

65. Rule 92 does not specify how this power is to be exercised by the Stewards. In the Stewards' consideration as to whether they should direct that the penalties should be served cumulatively, I see no reason why the principles of totality in sentencing that arise in the criminal law sentencing process should not be applied in this case. (As to the first limb of the totality principle see *Roffey v The State of Western Australia* [2007] WASCA 246 [24]). It was the first limb of the totality principle that this ground of appeal was focused. An aggregate penalty could be considered inappropriately long under the first limb of the totality principles, even though the length of the penalty could not be described as "crushing". (See *Jarvis v The Queen* (1998) 20 WAR 201 Anderson J 216).

66. The Stewards, in their reasons for imposing the concurrent penalties, stated that:

> "*Automatic concurrency in matters such as this would create an undesirable perception or precedent*". (Stewards reasons paragraph 28).

67. What the Stewards then failed to do was consider whether partial cumulation of the two disqualification periods was appropriate, rather than total cumulation. In this respect, in my view, the Stewards fell into error.

68. Although there were two separate breaches of Rule RGR 83(2)(a), there was no clear evidence to suggest that the administration of the prohibited substance that led to the Appellant's two presentation offences could not have occurred due to the same course of conduct. The offences related to the same greyhound and occurred seven days apart. The offences involved the same prohibited substance and the readings derived from the urine samples were fairly similar. When the greyhound raced in each race in August 2014, the Appellant was not aware that the urine samples taken from the greyhound had exceeded the threshold limit under Rule RGR 83(2)(a). Given these factual circumstances, in my view total cumulation of both the relevant disqualification periods was not appropriate. A total disqualification of 18 months did not reflect the overall offending behaviour or overall criminality. Some concurrency in the two penalties was required. (See *Pearce v R* (1998) 194 CLR 610 McHugh, Hayne and Callinan JJ 623-624).

69. I would allow this ground of appeal.

70. In my view, giving proper weight to all the relevant mitigating and aggravating factors of the Appellant's case, the second disqualification imposed of 7 months

should be served concurrently with the last 2 months of the first 7 months disqualification. The effect of this would be a total penalty of 12 months disqualification for the two offences, which does adequately reflect the overall offending behaviour.

CONCLUSION

71. I would allow this Appeal in relation to Ground 5. As a result, I would reduce the two disqualification periods to 7 months for each offence of breach of Rule RGR 83(2)(a).

72. I would allow this Appeal in relation to Ground 4. As a result, I would order that the second 7 month disqualification period be served partially concurrently and partially cumulatively.

73. On this basis the first 2 months of the second 7 months disqualification penalty would be served concurrently with the last 2 months of the first 7 month disqualification period. The remaining 5 months of the second 7 months disqualification penalty would be served cumulatively.

74. The total disqualification period to be actually served by the Appellant would be 12 months, which will expire on 18 January 2016.

JOHN PRIOR, MEMBER

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR A E MONISSE (MEMBER)

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1. I have had the advantage of reading the draft reasons of Mr John Prior, Member. I agree with those reasons except as to the final penalty Mr Prior would impose and the manner by which he arrives at it.

2. I consider that more concurrency of the two 7 month disqualification penalties is required, whereby the second disqualification should be served concurrently with the last 5 months of the first disqualification. I arrive at this result given in particular the reasons Mr Prior expresses at paragraph 68, and the exceptional mitigation in this matter.

3. This mitigation includes that the Appellant has for some 32 years been an exemplary participant and highly respected figure in the greyhound racing industry, has for most of that time operated at a high level with within it, is recognised by Stewards as the State's premier trainer who has over many years enjoyed high levels of success, has had in all her time only two greyhounds that have tested positive (her first back in 1984 and her last being in 1999). There is also the enormous impact (including financial) that a penalty of disqualification will have on the Appellant and others, from her being a professional trainer who has invested heavily in the sport so as to train a very large number of greyhounds (when the Stewards inquired into this matter there were about 52 greyhounds).

4. Accordingly, I would impose a final penalty of 9 months disqualification. In my view this penalty acknowledges not only the serious nature of the Appellant's two *presentation* breaches, but also her otherwise exemplary participation in the industry over a very long period of time.

A E Monisse

_____ **A E MONISSE, MEMBER**

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Mr RJ Davies QC represented the Racing and Wagering Western Australia Stewards of Greyhound Racing.

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1. I have read the draft reasons of Mr J Prior, Member.

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

DAN MOSSENSON, CHAIRPERSON

Seal of the Racing Penalties Appeal Tribunal of W.A. 1035