

## REASONS FOR DETERMINATION OF THE RACING PENALTIES APPEAL TRIBUNAL

**APPELLANT:** **BRIAN JACOBSON**

**APPLICATION NO:** **A30/08/794**

**PANEL:** MR D MOSSENSON (CHAIRPERSON)

**DATE OF HEARING: 5 JANUARY 2017**

**DATE OF DETERMINATION: 5 JANUARY 2017**

**DATE OF REASONS:** 21 APRIL 2017

**IN THE MATTER OF an appeal by BRIAN JACOBSON against the determination made by Racing & Wagering Western Australia Stewards of Greyhounds Racing on 1 November 2016, imposing a three months disqualification for breach of Rule 86(o) of the Racing & Wagering Western Australia Rules of Greyhound Racing.**

Mr A J C Mossop on instructions from DG Price & Co appeared for Mr B Jacobson.

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

## BACKGROUND

- 1 Mr Brian Jacobson is a greyhound breeder and public trainer who has been involved  
in the greyhound industry for some 55 years. During that very extensive period no  
findings were made against him regarding the mishandling of animals.
- 2 On 13 September 2016 an experienced panel of Racing & Wagering Western  
Australia (**RWWA**) Stewards was convened to inquire into Mr Jacobson's conduct on

20 August 2016 during public trials at Greyhounds WA Northam. The panel comprised Mr C Martins, as chairman, and two other members, namely Messrs. P Searle and M Kemp. The incident in question which was the subject of the inquiry related to Mr Jacobson's handling of the greyhound CHANNING which was under his charge at the time.

3 At the outset of proceedings, Mr Jacobson sought an adjournment in order to obtain legal representation. The Stewards agreed and the inquiry was adjourned. However, prior to adjourning the Stewards suspended Mr Jacobson's licence pursuant to Rule 92(5) of the RWWA Rules of Greyhound Racing ("the Rules") pending the outcome of the inquiry.

4 At the resumption of proceedings on 6 October 2016, Mr AJC Mossop, a barrister, appeared on Mr Jacobson's behalf. Early in the hearing Mr Mossop raised an issue regarding the composition of the panel. Counsel sought to have Mr Kemp disqualified from sitting on the inquiry on the basis that a fair minded observer may have a perception of bias. The reasoning behind this proposition was the fact that Mr Kemp, in his capacity as a steward, had previously been a witness or complainant against Mr Jacobson in an inquiry involving an allegation that Mr Jacobson had acted in an aggressive or abusive manner towards Mr Kemp. After considering the matter during a short break, the Stewards ruled "... *that Mr Kemp has no connection whatsoever with this case ...*". Further, the Stewards stated that they were "... *satisfied Mr Kemp can perform his duties as a panel member in the appropriate manner*".

5 During the course of the ongoing proceedings the Stewards viewed a video of the incident. They also received a report of the interview which had taken place arising out of the incident at Mr Jacobson's kennels, from Senior Steward Mr G O'Dea. Mr O'Dea concluded his report as follows:

*There can be no question that this behaviour is improper and unacceptable to industry participants or the general public.*

*This incident would be detrimental to the image of greyhound racing without doubt.*

*Behaviour such as this adds fuel to the fire regarding welfare concerns in the greyhound industry and treatment of animals under licensed persons' control.*

6 As the inquiry progressed, Mr Martins indicated that he was telephoned by someone from the RSPCA which had received complaints from members of the public in relation to an incident that occurred at Northam. Information as to those complaints had not been previously disclosed to Mr Jacobson and nor was it revealed in the course of the inquiry. Counsel for Mr Jacobson sought disclosure of the initial complaint made to the Stewards which gave rise to their investigation into the incident. A similar request had previously been made by email to Mr Martins on 30 September 2016. This request was made in the context that the initial allegation against Mr Jacobson appeared to have been that someone had seen him "kick" a dog. The Stewards refused to disclose the requested information.

7 Mr Jacobson was ultimately charged with having breached Rule 86(o), in that he had:

*...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.*

The particulars of the charge were:

*... [o]n the 20<sup>th</sup> of August 2016 during public trials at Greyhounds WA Northam you, Mr Brian Jacobson being a registered person with Racing & Wagering WA did use excessive and undue force when handling the greyhound CHANNING in the vicinity of the track by yanking CHANNING back towards the outside fence and then by dragging CHANNING over the*

*outside fence and in so doing you have done a thing which in the opinion of the Stewards is improper.*

- 8 Mr Jacobson pleaded not guilty to the charge. Mr Mossop submitted the suspension on 13 September 2016 had been imposed prematurely. Further, even if Mr Jacobson were convicted of the charge, the nature of the offence only warranted a fine which meant that the suspension was unjust and not warranted.
- 9 Two weeks later the Stewards reconvened their inquiry into the matter and heard some further evidence. Then, on 24 October 2016, the Stewards published their detailed reasons for convicting Mr Jacobson. In summary the reasons specify that:
- 9.1 Mr Jacobson used excessive and undue force when handling CHANNING by forcefully yanking and dragging him over the fence.
- 9.2 These actions were considered to be serious. Despite then being spur of the moment reactions, they were two separate angry actions approximately 16 seconds apart.
- 9.3 The actions were not consistent with someone with a genuine care for greyhounds or the industry.
- 9.4 No remorse was shown by Mr Jacobson.
- 9.5 Venting anger on a defenceless animal was totally unnecessary, and was intolerable.
- 9.6 There was no excuse for this “appalling” and “disgusting” conduct.
- 9.7 At a time when the whole greyhound industry is facing unprecedented and continuous scrutiny, the welfare and wellbeing of greyhounds is of paramount importance.
- 9.8 The industry cannot afford to have licensed persons behave in this manner and all the more so in a public arena for those present there to observe.

- 9.9 Very high standards for industry participants are required to ensure that the welfare and wellbeing of greyhounds are never placed at risk.
- 9.10 The industry and its participants are expected to uphold the highest animal welfare standards. Animal welfare and care are extremely serious matters.
- 9.11 Irrespective of the industry's current plight, the actions would never have been considered proper, being well below the standard that is expected of registered persons.
- 9.12 Those persons who contravene acceptable standards, particularly in welfare related matters, must be dealt with appropriately.
- 9.13 The clear message to the industry and the public at large needs to be sent, that welfare offences will not be tolerated and are simply unacceptable.
- 9.14 The wellbeing of the industry relies heavily on the public being able to be confident that those transgressing will receive sufficient punishment to reflect the seriousness of their offences.
- 9.15 The deterrent value, both individual and general must be clear in the hope that it will both encourage higher standards and discourage this unacceptable conduct by registered persons.
- 9.16 Actions of this nature that portray such a strongly negative image do potentially attract negative publicity which can lead to a detrimental effect on the industry.
- 9.17 The future and wellbeing of the industry relies heavily on public support.

10 After reconvening to hear submissions in relation to penalty on 27 October 2016, the Stewards published detailed written reasons. Mr Jacobson was disqualified for three months. The disqualification was backdated to the start of the suspension. This meant the disqualification in fact ceased to apply on 12 December 2016. Although the disqualification no longer applied by the time the appeal could be heard, Mr Jacobson wanted to clear his name and avoid having to reapply for registration.

11 Mr Jacobson appealed against the Stewards' determination on the following grounds:

1. *There was a reasonable apprehension of bias in that a member of the inquiry panel, Mr Mark Kemp, had previously been a complainant and witness in an inquiry in which allegations were made by Mr Kemp against the appellant.*
2. *Further, there was a reasonable apprehension of bias in that a member of the inquiry panel, Mr Carlos Martins, had, at some stage prior to the inquiry, personally received a complaint about this matter from the RSPCA and was thereby a witness.*
3. *Further, the appellant was denied procedural fairness in that the nature of the original complaint made to the Stewards, and the identity of the person who made the complaint were never disclosed to the appellant.*
4. *Further, the appellant was denied procedural fairness in that at some stage prior to the inquiry, a member of the inquiry panel, Mr Carlos Martins, was the recipient of a complaint about this matter from the RSPCA, the details of which were never disclosed to the appellant.*
5. *Further, the inquiry panel erred in concluding that the appellant had contravened Rule 86(o) of the Rules of Greyhound Racing.*
6. *Alternatively, the penalty imposed was excessive.*

12 An application to suspend the operation of the penalty was also made in conjunction with the appeal. The Stewards strongly opposed the stay application. After receiving written submissions from both parties, I refused to grant the application.

## REASONS

- 13 Under the Rules, the Stewards are given wide powers and are required to perform a diverse range of functions. The reason for this is to ensure greyhound racing is properly monitored, policed and carried out with propriety at all levels. It is clearly in the public interest for the industry to be run efficiently and in accordance with the Rules. Because of these powers and functions at different times and stages in carrying out their duties, the Stewards in effect act like managers, supervisors, investigators, policemen, complainants, witnesses, cross examiners, adjudicators, sentencers and enforcers. The role of the Steward clearly is a multifaceted one.
- 14 Because of their special empowerment and the multiple changing roles they play, combined with the nature of the industry and the requirements of natural justice, the inquiry proceedings conducted before racing Stewards are somewhat different and clearly more relaxed compared to the operation of courts and many other decision making bodies. This less than exacting standard is also partly due to a combination of some other relevant factors. One is the nature of the relationship enjoyed by licensed persons who voluntarily agree to be bound by the rules of the sport. Another is in part due to necessity. As a matter of practicality, Stewards cannot completely divest themselves of their past associations with industry participants. Stewards are obliged to receive, investigate and act on all bona fide ongoing feedback as to potential transgressions which they receive from many quarters. If the reasonable suspicion of bias were to become a disqualification consideration in the case of all racing matters including innocuous ones, then the enforcement of the consensual rules which regulate the conduct of the sport would be likely to become largely unworkable.
- 15 The outcome which is sought by the appellant in this appeal does have the potential to lead to a situation where the RWWA Stewards would in a practical sense, be prevented from performing their duties. For this reason and in this context, an uninformed and uninstructed observer cannot be regarded as a reasonable determiner of an apprehension of bias. In order for there to be a reasonable

apprehension of bias, the person concerned must have some knowledge of the way the racing system operates (*S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* [1988] NSWLR 358 at 379). The hypothetical reasonable observer must be aware of the relevant facts to be able to form a proper impression or suspicion of lack of impartiality in order to have a reasonable apprehension that the duly appointed racing industry adjudicators might not bring fair and may not have unprejudiced views to the resolution of the issue before them. (*R v Watson; Ex Parte Armstrong* [1976] 136 CLR 248 AT 262; *Johnson v Johnson* [2001] 201 CLR 488).

- 16 I was satisfied that an objective and informed assessment of the matters complained of in the grounds of appeal 1 to 4 would lead a reasonable observer to the conclusion there is no merit in any of the allegations made for overturning the Stewards' decision. Nothing was presented to persuade me to support the alleged apprehension of bias against the two Stewards in question. I was of the opinion that the receipt and non-disclosure of a complaint did not influence the outcome or in any way could be the proper basis to exonerate Mr Jacobson's misconduct. No procedural unfairness was shown to have occurred.
- 17 As to ground 5, Rule 86(o) makes it an offence of acting improperly should the Stewards come to a conclusion improper conduct has occurred. Having read the transcript, viewed the film and listened to the arguments, I was fully satisfied that the Stewards were entitled to reach the conclusion which they did in relation to Mr Jacobson's handling of CHANNING on 20 August 2016 at the public trials. I therefore dismissed ground 5.
- 18 I was not persuaded that the penalty for this offence is beyond the range of what could be said to have been appropriate for this excessive and unnecessary use of force which occurred in the public domain.
- 19 In conclusion, I found nothing wrong with any of the reasons advanced by the Stewards in relation to the matter as summarised at paragraph 11 hereof.



20 For these reasons I dismissed the appeal.

Dan Mossenson

DAN MOSSENSON, CHAIRPERSON

