APPEAL NO.854

DETERMINATION OF THE RACING PENALTIES APPEAL TRIBUNAL

APPELLANT: **MR DEREK COLDSTREAM**

APPLICATION NO: **22/2786**

PANEL: **MR ROBERT NASH (CHAIRPERSON)**
MR ANDREW E MONISSE (MEMBER)
MS JOHANNA OVERMARS (MEMBER)

DATE OF HEARING: **5 AUGUST 2022**

DATE OF DETERMINATION: **11 NOVEMBER 2022**

IN THE MATTER OF an appeal by DEREK COLDSTREAM against a determination made by Racing and Wagering Western Australia Stewards of Greyhound Racing on 17 May 2022 to impose a disqualification of 24 months for two breaches of Rule 83(2)(a) of the RWWA Rules of Greyhound Racing, of which 3 months was to be served concurrently, resulting in a total disqualification of 21 months.

Mr Derek Coldstream self-represented.

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

Summary

1. By a unanimous decision of the members of the Tribunal, the appeal against penalty for the two breaches of Rule 83(2)(a) of the RWWA Rules of Greyhound Racing ("Rules") is dismissed.

______________________________ **ROBERT NASH, CHAIRPERSON**

APPEAL NO.854

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Mr Derek Coldstream self-represented.

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

Summary

1. For the reasons which follow, the Appellant's appeal against penalty for the two breaches of Rule 83(2)(a) of the RWWA Rules of Greyhound Racing ("Rules") should be dismissed.

Background

2. Derek Coldstream ("Mr Coldstream" or the "Appellant") is a RWWA Licensed Trainer in the WA Greyhound Racing Industry.

3. Mr Coldstream appeals to this Tribunal against a penalty imposed by the RWWA Stewards on 17 May 2022 where they imposed a disqualification of his trainer's licence for 21 months for two presentation offences involving the presentation of two greyhounds with a prohibited substance, namely caffeine, in their system.

4. Mr Coldstream has been a greyhound trainer for approximately 27 years. For about the last 10 years he has been a licensed trainer with RWWA, and prior to that he was a licensed trainer in Victoria and New South Wales.

5. At the material times, he was the trainer of the greyhounds, SHAKA ROCK and GO BONNIE.

6. Mr Coldstream pleaded guilty before the Stewards to two breaches of Rule 83(2)(a) of the Rules, namely:

   a. presenting SHAKA ROCK to compete in Race 8 at Cannington on 11 December 2021 where it raced and finished first, not free of the prohibited substance caffeine; and

   b. presenting GO BONNIE to compete in Race 3 at Cannington on 6 February 2022, where it raced and finished first, not free of the prohibited substance caffeine and its metabolites theophylline and theobromine.

7. Mr Coldstream accepted that the offences were ones of absolute liability.

8. There was no issue that caffeine is a stimulant and falls within the definition of a prohibited substance within the meaning of the Rules.

Stewards' Hearing

9. By letter dated 23 February 2022 from Mr Denis Borovica, RWWA's Chief Racing Integrity Officer, Mr Coldstream was notified that a report had been received from the WA ChemCentre advising of the detection of caffeine in the post-race urine sample taken from SHAKA ROCK.

10. During an interview with RWWA Investigators on 24 February 2022, Mr Coldstream stated that he would occasionally take a cup of tea or coffee into the dog kennels but was unsure how caffeine would be in his kennels let alone in a sample taken from his greyhound. He said the dogs did not receive tea or coffee as part of their feeding regime. He said he was not aware of caffeine being in any of the feed products that he gave his dogs. He said that since having a previous cobalt positive, he had been very mindful of his dogs' feeding regimes and the products used. Mr Coldstream advised he had a product Garcinia Cambogia, for his own personal use which contains caffeine, but it was not given to his dogs.

11. In a further letter dated 17 March 2022 from Mr Borovica, Mr Coldstream was further notified that a report had been received from the WA ChemCentre advising of the detection of caffeine, theobromine and theophylline in the post-race urine sample taken from another of his greyhounds, GO BONNIE.

12. The RWWA Investigators conducted a second interview with Mr Coldstream on 17 March 2022 in relation to the GO BONNIE positive sample. He was not able to explain how the caffeine came to be detected in the urine sample. He put forward that it may have come from possible contamination of the Livamol and Fenugreek products that he used, when they had been repackaged from larger bags to smaller bags. He stated he had no incentive to engage in using prohibited substances, since he had a good job at Alcoa and loved being in the Greyhound Racing industry.

13. Racing Analytical Services Limited in Victoria ("RASL") confirmed caffeine was detected in both samples, and theobromine and theophylline were also found in the sample taken from GO BONNIE.

14. By letter dated 13 April 2022, following the RASL confirmations, Mr Borovica wrote to Mr Coldstream requiring that he attend a Steward's Inquiry into the two matters at which he was to present any evidence and call any witnesses he may consider would assist the Inquiry.

15. By email dated 2 May 2022, Mr Coldstream notified the Stewards that he would be pleading guilty to the charge of presenting a dog with a prohibited substance.

16. The Stewards commenced the Inquiry into the matter on 10 May 2022.

17. At the outset of the Inquiry, the Stewards made clear that they considered it was a serious matter and warned Mr Coldstream that a charge under the Rules may result (T12.9).

18. Dr Nicola Beckett from the ChemCentre was called by the Stewards. She confirmed the reported results that caffeine had been detected in both samples. She gave evidence that caffeine was a stimulant, and said the caffeine concentration detected in the SHAKA ROCK sample was 3,500 nanograms per ml, and the concentration in the GO BONNIE sample was 870 nanograms per ml. She said theobromine and theophylline, which are metabolites of caffeine, was detected in both samples (T24). She said that there was no screening limit that applied to greyhounds, although in the case of horses there was a screening limit so that positive samples were only reported if there was greater than 100 nanograms per ml detected. The screening limit was intended to take into account residual levels of caffeine in the environment (T25.7). She described the detected levels in SHAKA ROCK and GO BONNIE as being elevated and easy to detect (T26-27).

19. Dr Judith Medd said that the levels detected were high levels (T29). She said that caffeine is a stimulant and is performance enhancing (T39, T43). Dr Medd said that when she inspected Mr Coldstream's kennels, they were clean, tidy and in good order, and the dogs were in good condition (T43).

20. Mr Coldstream gave evidence that he had had the Livamol product he used for his dogs analysed to see if it had been contaminated with caffeine, which he had opined was possibly as a result of the handling of the product by the supplier when it was transferred into smaller bags for retail purposes. He provided an analysis made of an uncontrolled sample to the Inquiry by the Merieux Nutrisciences Laboratory in which they recorded that the sample provided had 47.709 micrograms of caffeine per 100 grams of product (T51).

21. Dr Medd noted that there was no way of checking the integrity of the sample of Livamol provided by Mr Coldstream to the Merieux Nutrisciences Laboratory and whether the sample provided was in precisely the same form as it had been when it was supplied by the supplier to Mr Coldstream. Dr Medd said the recorded concentration was the equivalent of half a No Doz tablet per 100 grams of Livamol, which she observed was 'quite high'. She expressed the view that if Livamol was being supplied by the supplier to trainers with that level of caffeine concentration, then she would have expected the Stewards would be seeing a lot of positive tests for caffeine, which they were not (T55). Dr Medd was of the view that the high level recorded in the analysed sample was not consistent with what would be expected if there had been an accidental contamination resulting from the decanting process where bulk product quantities are reduced to smaller quantities for supply to the retail market. Dr Medd was of the view that to achieve the level of concentration that was detected in the Livamol sample, it would need to have been mixed with caffeine (T55).

22. Dr Medd noted that not only was the sample that was provided to the Merieux Nutrisciences Laboratory uncontrolled, but that laboratory was not an approved laboratory under the Rules (T57). Mr Coldstream accepted that the Stewards had had no control over the sample that he had provided to the Laboratory (T58).

23. Mr Coldstream was asked during the Inquiry when he had stopped using the suspect batch of Livamol. He said he thought it was after he got the second positive result which was about 17 March 2022. It was then pointed out to him that he had another dog KAKADU STORM that ran and was swabbed on 27 February 2022 which did not return a positive swab. After that fact was brought to his attention, Mr Coldstream's evidence, from a review of the transcript, became more uncertain and less committal as to whether he may have stopped using the Livamol before 27 February 2022 (see T67 to T68).

24. After considering the evidence adduced before the Inquiry, the Stewards deliberated for a short while and then notified Mr Coldstream that they had determined to charge him with two breaches of Rule 83(2)(a) in the terms set out in paragraph 6 above.

25. Mr Coldstream immediately pleaded guilty to both charges.

26. Mr Coldstream confirmed that he had a fulltime position at Alcoa. He said he did not rely on greyhound racing for his income.

27. The Stewards went through Mr Coldstream's disciplinary record as a trainer and noted he had one previous charge of making a misleading statement for which he received a $400 fine, and three presentation offences relating to cobalt all dealt with at the one time which led to him receiving a 17-month disqualification.

28. Following the Inquiry hearing, Mr Coldstream sent an email to the Stewards later the same day, in which he provided further information to the Stewards in relation to the issue of penalty. Specifically, he drew their attention to the fact that the property he was leasing for $600 per week was 60% used for greyhounds, and he estimated that he would suffer a weekly loss of $300 per week if he was disqualified as a trainer. He also drew their attention to the fact that he had set up the greyhound kennels from scratch at his own cost.

Stewards' Decision

29. The Stewards published their decision on penalty by letter dated 17 May 2022, imposing a total disqualification of 21 months on Mr Coldstream.

30. In their reasons for decision, the Stewards expressly had regard to the following factors in relation to Mr Coldstream:

    a. that he pleaded guilty to the charges;

    b. that he had full time employment outside of greyhound racing but that he had significant involvement in the industry;

    c. that he had ongoing lease obligations on the property he used to live at and train the dogs from; and

    d. that he had incurred considerable expenses in settling up his greyhound training facilities.

31. Furthermore, the Stewards gave consideration to the potential explanation for the positive caffeine swabs that had been proffered by Mr Coldstream at the Inquiry, being the possibility of pre-existing contamination of the Livamol he had been supplied with and the testing results undertaken by the Merieux Nutrisciences Laboratory. The Stewards did not accept pre-existing contamination as a potential explanation. Relevantly, they noted:

    a. what they described as a change in Mr Coldstream's evidence about the timing of when he stopped using the relevant batch of Livamol once it was pointed out to him that he had a dog that ran on 27 February 2022 which did not return a positive test for caffeine;

    b. that the proffered explanation did not adequately explain the significant difference in the levels of caffeine found in SHAKA ROCK and GO BONNIE;

    c. what they described as Mr Coldstream being somewhat half hearted in the way he put the explanation forward and also in how he had dealt with the feed supplier in relation to the matter of potential contamination;

    d. that there were no other known instances in the local industry of such contamination involving the supply of Livamol, being a substance that as manufactured does not include caffeine; and

    e. that there was no capacity for RWWA to check the veracity of the testing process or the integrity of the sample made available by Mr Coldstream to the laboratory for testing.

32. The Stewards also did not accept another possibility that had been put forward by Mr Coldstream as a potential explanation for contamination of Livamol with caffeine, namely the use of old coffee jars for storing Livamol. The Stewards did not consider a possible slight contamination from the use of old coffee jars could reasonably explain the high levels of caffeine detected in each dog's system.

33. The Stewards concluded that they were left in the 'all too familiar' position of there being no cogent and persuasive explanation provided for how the two dogs had the levels of caffeine that was found in their systems.

34. The Stewards noted that although the absence of a cogent explanation did not aggravate the offences, it meant that the Stewards were not in a position they might otherwise have been in, if a cogent and persuasive explanation had been put forward that explained the presence of the prohibited substance in the greyhounds.

The Appeal

35. Mr Coldstream filed a Notice of Appeal dated 26 May 2022. The ground of appeal was as follows: "*I am appealing the severity of the penalty*". The ground of appeal was not particularised by the Notice of Appeal.

36. At the outset of the hearing of the appeal on 5 August 2022 (**Appeal Hearing**), Mr Coldstream, who was self-represented, clarified that he was contending that he was appealing against the totality of the penalties imposed on the basis that they were manifestly excessive. In developing that contention, he argued that in reaching the penalties imposed:

a. the Stewards did not reasonably have regard to all of the circumstances;

b. the penalties were excessive when compared to those imposed in other cases for breaches of Rule 83(2)(a) of the Rules and for equivalent offences imposed in other states;

c. the high levels of caffeine detected in the dogs' systems were not pertinent and should have had no bearing on penalty;

d. references to his prior record, especially the offence relating to cobalt, was not relevant as the facts were quite different; and

e. the Stewards had not taken into account the potential innocent explanation he had put forward for the caffeine found in the dogs' systems.

37. Mr Borovica, who appeared on behalf of the Stewards before the Tribunal, argued that the appeal should be dismissed on the grounds that the penalties imposed for both charges were appropriate and fell within the available range of penalties open to the Stewards.

38. Amongst other things, Mr Borovica submitted in defence of the penalty imposed:

a. that it was a pertinent factor that the prohibited substance was stimulatory and not therapeutic;

b. caffeine had the potential to make a dog perform better;

c. that disqualifications are always imposed when the prohibited substance is of a stimulatory nature;

d. 6 to 12 months disqualification is the range in WA for first offenders in the case of caffeine;

e. Mr Coldstream did not have the benefit of an unblemished record;

f. that the penalties imposed in this jurisdiction for prohibited substances have served the local industry well, in that WA has far less presentation breaches of the Rules than in some other jurisdictions;

g. the Stewards can't be seen to be taking a light touch on these types of offences;

h. the Stewards did not accept as credible Mr Coldstream's proffered explanation about the contamination of Livamol with caffeine as a cause, and did not accept the veracity of the evidence put forward in respect of the sample tested by the Merieux Nutrisciences Laboratory; and

i. contamination arguments in such cases are not new, and the onus is on the trainer to establish satisfactorily that it is a case of contamination.

Applicable Principles

39. As with the other racing codes, there is a significant policy consideration enshrined in the rules of racing, being the requirement that races be won by honest means so that public support of the racing industry is maintained. In *Harper v Racing Penalties Appeal Tribunal of Western Australia & Anor* (1995) 12 WAR 337*,* Anderson and Owen JJ when considering the rationale for absolute liability in presentation cases (albeit in the context of harness racing), said at paragraph [349]:

'It may well be the case that those familiar with every aspect of the industry and with long experience in it have come to the conclusion that to ensure the integrity of racing and to

maintain public confidence in its integrity, there is a need to impose very stringent controls and that those who wish to participate in racing for rich rewards will have to accept that the privilege of doing so may well be taken from them if for any reason, even without fault on their part, they present a doped horse for racing.'

40. In more recent times it has been acknowledged that the issue of public confidence in the racing industry is not confined to the need for the betting public to have confidence that races are conducted fairly and honestly, but extends to being satisfied that the industry is maintaining high standards of animal welfare, and those responsible for the regulation of industry are taking necessary measures to safeguard the welfare of the animals involved: *Mitchell* (Appeal 853).

41. An appeal to this Tribunal against a penalty imposed by the Stewards is an appeal against a discretionary decision.

42. Murray J in *Danagher v Racing Penalties Appeals Tribunal* (1995) 13 WAR 531 said at [553] to [554] that an appeal to the Tribunal is by way of rehearing and is not a hearing de novo, and that the Tribunal is to approach the appeal in the same way an appellate court reviews a discretionary decision of a lower court where the appeal is by way of rehearing.

43. In order to succeed, an appellant must establish that the primary decision maker expressly or impliedly made a material error of fact or law: *House v The King* (1936) 55 CLR 499 at [505].

44. A ground of appeal that asserts a penalty is manifestly excessive, asserts the existence of an implied error. A penalty will only be manifestly excessive if it is shown to be plainly unreasonable or unjust. The range of penalties customarily imposed is of significance although each case turns on its own facts and circumstances. Sentencing ranges provide a general guide only and is merely one of the factors to be taken into account. The discretion conferred on the primary decision maker is of fundamental importance and this Tribunal will not substitute its own opinion merely because it would have exercised the discretion differently: See generally, *Houghton v State of Western Australia* [No 2] [2022] WASCA 7, [224] to [228].

Consideration of all the Circumstances

45. It is not clear on what basis Mr Coldstream asserts that the Stewards failed to consider all of the circumstances. In his oral submissions to the Tribunal, Mr Coldstream asserted that:
    - he is a particularly caring trainer for greyhounds;
    - he set up a rehoming greyhounds project and opened up his kennels to help rehome approximately 85-90 dogs;
    - he re-homes most of his dogs;
    - he checks the muscular and nervous systems of other trainers' greyhounds for well-being;
    - he knows what caffeine does and that it can be toxic, and finds it disconcerting that the Stewards would think he could give it knowingly to his dogs; and
    - he prides himself on love of the animal.

46. These are matters which Mr Coldstream did not specifically put before Stewards at the Inquiry hearing. It cannot be said therefore, that the Stewards failed to consider them. However, having reviewed the transcript of the Inquiry, it is understandable that Mr Coldstream overlooked putting these specific factors forward during the consideration of penalty. The sentencing process was largely question and answer, which meant Mr Coldstream might not have realised he needed to ensure that all mitigating factors were put forward.

47. In terms of his love, care and treatment of his dogs, and the assistance he provides to other trainers, these are obviously matters that are in Mr Coldstream's favour although they are matters of limited weight. There is an expectation in the greyhound industry that all trainers of racing greyhounds will adopt proper care practices as a matter of animal welfare. Further, there is now an expectation that all trainers will seek to rehome dogs rather than euthanise them once they have ceased to be engaged in racing. This practice of rehoming and the maintenance of high standards of animal welfare are essential to the ongoing survival of the industry in WA.

48. Accordingly, even if the Stewards had expressly referred to each of the above matters in their penalty reasons, those matters could not be expected, in my view, to have been sufficiently material as to lead a reasonable decision maker to reach a different conclusion on penalty.

49. Mr Coldstream also submitted he would not deliberately administer caffeine to his dogs. The Stewards made no finding that Mr Coldstream deliberately administered caffeine to his dogs. That was not an element of the charge. The fact that the Stewards were not willing to accept Mr Coldstream's suggested explanation of contamination, did not mean they found he deliberately administered the caffeine. It is quite common in presentation cases for there to be no satisfactory explanation for the prohibited substance being in the animal's system. There is a heavy onus on all trainers to ensure they have the systems in place to prevent it from happening.

Comparison With Other Cases

50. At the hearing Mr Coldstream referred to a number of NSW cases and a Victorian case where trainers received much lighter penalties for presenting animals not free of a prohibited substance. He also referred to the WA cases of:

    a. *Ben Abercrombie* 22 May 2018 where a greyhound was presented not free of caffeine and the trainer was disqualified for a period of 9 months. It is to be noted in that case there was only one charge, and it was Mr Abercrombie's first offence; and

    b. *Bradley Keel* 8 February 2013 where a greyhound was presented not free of caffeine and its metabolites, and the trainer was disqualified for a period of 6 months. In that case there was also only one charge, and it was Mr Keel's first offence.

51. A table of penalties imposed was tendered by Mr Borovica (Exhibit 1), on behalf of the Stewards, summarising penalties that have been imposed in presentation cases for caffeine in WA from 11 September 2006 until 17 May 2022. The Stewards relied on those cases in support of their contention that Mr Coldstream's penalty was within range.

52. In addition to the cases of *Ben Abercrombie* 22 May 2018 and *Bradley Keel* 8 February 2013, Exhibit 1 also included the following:

- *Albert Van De Klashorst* 11 September 2006 – received 12 months disqualification for presenting his greyhound with caffeine and metabolites. That was his second drug related offence.
- *Francesco Vitanza* 6 December 2006 – received 6 months disqualification for presenting his horse with caffeine and metabolites, first offence.
- *D Groves* 2 October 2008 – received 9 months disqualification for presenting his greyhound with caffeine and metabolites, first offence.
- *Damian Winn* 22 July 2011 – received 5 months disqualification for presenting his horse with caffeine and theophylline and theobromine, first offence.
- *Lyn Voak* 5 March 2013 – received 9 months disqualification for presenting her horse with caffeine and theophylline and theobromine, second drug offence.
- *Lyn Voak* 10 April 2013 – received 12 months disqualification for presenting a second horse with caffeine and theophylline and theobromine, of which 9 months was to be served cumulatively on the disqualification imposed for the 5 March 2013 offence, and 3 months was to be served concurrently.
- *Jo-Anne Leeson* 12 November 2015 – two charges – received 7 months disqualification for each charge with 2 months to be served concurrently making a total disqualification of 12 months, first offence.
- *Kevin Green* – received 7 months disqualification for presenting his horse with caffeine and metabolites, first offence.

53. It is recognised that each State has its own rules of racing, and therefore penalties can vary between jurisdictions.

54. Whilst it is important for there to be reasonable consistency in the approach to setting penalties for breaches of the Rules in this jurisdiction after allowing for the fact that each case is necessarily different in terms of the relevant facts and circumstances, it is not a requirement that the Stewards apply the same range of penalties that stewards in other state jurisdictions adopt. Further, there is no compelling reason why the approach adopted in Western Australia is not the one that should continue to be followed, given it has served the local racing industry well by minimising rule breaches and maintaining high standards. This issue has been discussed in a number of previous decisions of this Tribunal, including the cases of *GW O'Donnell* (Appeals 263 and 264), *G Slater* (Appeal 750), *S Beard* (Appeal 536), and *T Gummow* (Appeal 833), and it is unnecessary to restate again what has been said before.

55. The approach the Stewards took in considering the penalty based on the range of penalties that have been applied in this jurisdiction rather than in other states, was correct and consistent with prior decisions of this Tribunal.

56. It is apparent from a survey of past cases, that in WA caffeine presentation offences ordinarily carry a disqualification ranging from 5 to 12 months depending on the nature and extent of mitigatory factors including a trainer's prior good record. Where there is more than one presentation offence involved, then the penalty imposed for the second offence will

often be substantially cumulative on the first penalty albeit with some degree of concurrency having regard to the circumstances of the case and considerations of totality.

The High Levels

57. Mr Coldstream argued that the Stewards took into account the high levels of caffeine, which he contends was not a pertinent nor relevant consideration to the question of penalty.

58. In my view it is not apparent that the Stewards went so far as to impose a greater penalty due to the high levels of caffeine detected. They simply noted that the levels were high and that the Rules did not require them to make a definitive assessment of the recorded levels.

59. However, even if the Stewards had taken into account the high levels detected as being a relevant consideration, in my view that would not have been an error.

60. Caffeine, which is a stimulant, has the potential to seriously pervert the fundamental underlying assumptions of those who participate in the greyhound racing industry, whether they be sponsors, owners, trainers, or those involved in betting on races, namely that the greyhounds are presumed to be running on their natural ability and merit. It is particularly damaging to the standing, reputation and prospects of ongoing public support of the industry, if greyhounds that win races, are later found to have been running with high levels of stimulants, such as caffeine.

61. In my view, it is a relevant factor for the Stewards to have regard to the levels of prohibited substance detected in determining the penalty to be imposed.

Prior Record

62. Mr Coldstream argued that the reference by the Stewards to his prior record, especially the cobalt related offences, were not relevant to penalty because the factual circumstances were different.

63. A prior record of offending may preclude an offender from being entitled to leniency for prior good character.

64. Mr Coldstream had a record which included misconduct towards officials, making misleading statements and presenting greyhounds with a prohibited substance. His record was relevant to the assessment of the degree of mitigation that could be afforded to him for prior good character. The fact that the circumstances of the prior offending may have been different does not mean they had no relevance to the consideration as to whether Mr Coldstream was entitled to a reduction in his penalty on the grounds of prior good character.

65. I am unable to discern any error on the part of the Stewards in their consideration of Mr Coldstream's prior record as a relevant factor in their assessment of penalty. There is nothing in their reasons for determination that suggests the Stewards treated the prior record as an aggravating factor or as a justification for increasing the sentence they would otherwise have imposed.

Potential Cause

66. Mitigation may be afforded where the cause of the presence of the prohibited substance has been satisfactorily identified or explained.

67. In this case the Stewards did not consider a satisfactory explanation had been given, and the Appellant was, accordingly, not afforded any mitigation for that as a sentencing factor.

68. As was submitted by Mr Borovica, claims of contamination are not uncommon when a trainer is dealing with an offence of presenting a dog or horse with a prohibited substance. It is easy to assert contamination, but no mitigation can be afforded unless it can be satisfactorily demonstrated by the trainer in question that not only was it a case of inadvertent contamination, but the contamination occurred despite the trainer having taken all reasonable precautions to prevent it from happening.

69. I do not consider any error is revealed in how the Stewards dealt with the claimed contamination as a potential explanation for the presence of the caffeine in the system of the two dogs.

Conclusion

70. I do not consider, having regard to all of the circumstances, that it has been demonstrated by Mr Coldstream that the total penalty of 21 months disqualification was plainly unreasonable or unjust, so as to give rise to an implied error.

71. In the circumstances, I would dismiss the appeal.

ROBERT NASH, CHAIRPERSON

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Mr Derek Coldstream self-represented.

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

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1. I have read the draft reasons of the Chairperson, Mr Nash.

2. I agree with those reasons and conclusions but add the following by way of further detail or qualification.

Animal Welfare

3. In *Mitchell* (Appeal 853, 22 July 2022) I stated the following on animal welfare:

   "[W]hat remains in this case is a horse which had just run a race involving the betting public being euthanised before a crowd at Ascot Racecourse. Further, that the same horse was later shown not to be free of a prohibited substance. From an animal welfare perspective alone, significant harm was at least then caused to the image of the racing industry in Western Australia by that type of death to one of its participating thoroughbred racehorses. At paragraph 9 of their reasons the Stewards made similar observations."

Applicable Principles

4. Murray J in *Danagher v Racing Penalties Appeals Tribunal* (1995) 13 WAR 531, 553 to 554, held that an appeal to this Tribunal was of the following variety:

   "[A]n appeal by way of rehearing may be an appeal in the true sense to review the correctness of the decision appealed from, but the power to take further evidence or to otherwise supplement the materials at first instance leads to the conclusion that the question is to be determined by reference to the circumstances as they exist at the time of the appeal, so that the appellate court is empowered to give the decision which the tribunal at first instance should have given if the case was before it at the time of the appeal."

5. The Appellant appeals to the Tribunal claiming that the Stewards made an error in their decision on their penalty for his two breaches of the Rules. The High Court in *House v The King* (1936) 55 CLR 499, 504-505 (Dixon, Evatt and McTiernan JJ) held that in an appeal:

   "It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

The level of a prohibited substance

6. I do not consider that it is relevant factor for the Stewards to have regard to the levels of the prohibited substance detected in determining the penalty to be imposed. The Stewards did not do that as confirmed in their reasons when they stated *"it would be difficult to assess what effect each different level would be having on the respective greyhounds"* – I agree. With possible imprecision on dissipation rates of prohibited substances and all the other variables in play, making that assessment is likely to be a complex, speculative exercise.

A E Monisse ______________________________ **ANDREW E MONISSE, MEMBER**

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APPLICATION NO:	**22/2786**
PANEL:	**MR ROBERT NASH (CHAIRPERSON)** **MR ANDREW E MONISSE (MEMBER)** **MS JOHANNA OVERMARS (MEMBER)**
DATE OF HEARING:	**5 AUGUST 2022**
DATE OF DETERMINATION:	**11 NOVEMBER 2022**

IN THE MATTER OF an appeal by DEREK COLDSTREAM against a determination made by Racing and Wagering Western Australia Stewards of Greyhound Racing on 17 May 2022 to impose a disqualification of 24 months for two breaches of Rule 83(2)(a) of the RWWA Rules of Greyhound Racing, of which 3 months was to be served concurrently, resulting in a total disqualification of 21 months.

Mr Derek Coldstream self-represented.

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

1. I have read the draft reasons of the Chairperson, Mr Nash.

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

JOHANNA OVERMARS, MEMBER