

**BEFORE THE APPEAL BOARD
OF THE GREYHOUND BOARD OF GREAT BRITAIN
AND IN THE MATTER OF
MR BRUNO BERWICK**

**DECISION OF THE APPEAL BOARD
26 & 27 MARCH 2015**

Present:

Mr P H Cadman: Chair

G Whitlow

R Woolf

(A) Background

1. The Appellant appealed against the decision of the Disciplinary Committee made on 22 January 2015 that he had breached Rules 152(i) & (ii), 174(1)a and 217 of GBGB Rules of Racing. He had been disqualified for 6 months and ordered to pay a £2,000 fine.

- 2.1 Both the Appellant (represented by Mr H Berlin) and the GBGB (represented by Mr L Weston of Counsel) had submitted helpful skeleton arguments covering the full appeal, the application to admit new evidence and the application for disclosure.

- 2.2 The application for disclosure did not need to be considered by the Appeal Board because the GBGB voluntarily produced the requested material during the course of the hearing on 26 March 2015.

- 3.1 At the start of the appeal hearing Mr Berlin helpfully clarified the following:
 - (a) There was no dispute that a sample was taken from the greyhound Mays Goodluck.

(b) There was no dispute as to the drug analysis of that sample.

3.2 Mr Berlin also confirmed that the appeal sought to replace the finding under 174(1)a with a finding under Rule 174(1)b together with an appropriate reduction of penalty. Mr Berlin conceded that, if the appeal as to culpability failed, there would be no standalone appeal as to penalty. The appeal against penalty therefore only needed to be considered by the Appeal Board if the Appeal Board were to substitute a finding under Rule 174(1)b for the Disciplinary Committee finding under Rule 174(1)a.

(B) New evidence

4.1 Mr Berlin applied under Rule 11 of the Appeal Board Rules to admit new evidence to be considered in the appeal itself. The Appeal Board considered this application at a preliminary hearing on 26 March 2015. Mr Weston on behalf of GBGB opposed the admissibility of any of the evidence.

4.2 The Appeal Board was assisted by a specific skeleton argument from Mr Berlin as to new evidence and the relevant parts of the full skeleton argument produced by Mr Weston on behalf of GBGB.

4.3 The Appeal Board thereafter heard oral submissions in support of the skeleton arguments from both Mr Berlin and Mr Weston.

5.1 The decision of the Appeal Board is that permission will not be granted for the admission of any of the new evidence. The reasons for this are given below with regard to the relevant category of evidence.

5.2 Both the Appellant and the GBGB agreed that the admissibility of evidence should be considered under three limbs of Ladd –v- Marshall. The Appeal Board also took into consideration the interest of justice.

6.1 The first area of evidence was an application to admit the evidence from the witness Mr Powles and exhibits 10 and 11 being the full case files from the laboratory.

6.2 The statement of Mr Powles was the statement of an expert witness, who after the disciplinary hearing, had been asked to give his opinion about the drug analysis. There was no challenge to the drug analysis itself.

6.3 Although Mr Berlin asserted that this witness had seen exhibits 10 and 11 the statement itself made no reference to those documents. Within the statement it made specific reference to “data” which was the identical evidence that had been seen by the witness, Professor Morris.

6.4 The Appeal Board decided that the evidence of Mr Powles was evidence that could have been available at the Disciplinary Committee hearing. There was no reason why this evidence was not obtained at that time. Mr Berlin, who was not retained by the Appellant at that stage, conceded that the Appellant

was aware of the evidence of Professor Morris and that evidence of the drug sample would be adduced and considered by the Disciplinary Committee.

- 6.5 With regard to exhibits 10 and 11 (the case files) the Appeal Board determined that these would not be admitted into evidence. The evidence was obtainable prior to the disciplinary hearing. Further, the witness Mr Powles makes no reference to these documents within his statement and the fact of the drug analysis has not been challenged.
 - 6.6 In any event, the Appeal Board are disappointed that the report of the expert does not clarify exactly what material the expert has considered. The report is silent as to whether the expert had considered the decision of the Disciplinary Committee and indeed is silent as to what extent, if at all, the witness disagreed with the evidence provided by Professor Morris. Within the statement of Mr Powles there is no critique or criticism or indeed mention of the evidence of Professor Morris.
 - 6.7 In the circumstances the Appeal Board refuses permission for the admissibility under the first two principles of Ladd –v- Marshall.
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- 7.1 The second area of evidence was the witness statement of Mrs Clare and statements in rebuttal of the statement of Mrs Clare.
 - 7.2 The Appeal Board found this application rather unusual. Mrs Clare's statement suggested that the Appellant had lied at the Disciplinary Committee. Mr Berlin, who wanted the Appeal Board to consider the evidence of Mrs Clare, also produced witness statements specifically to contradict her evidence.
 - 7.3 During the hearing the Appeal Board queried with Mr Berlin how he intended to adduce in evidence the evidence of Mrs Clare as a witness of truth and then call witnesses to rebut her evidence as being untrue.
 - 7.4 The Appeal Board did not need to resolve this problem as it ruled that the evidence of all these witnesses was not admissible.
 - 7.5 The Appeal Board did not feel that any of the material before it would assist it in determining on review of the decision of the Disciplinary Committee as to whether a finding under Rule 174(1)a was proper rather than Rule 174(1)b.
 - 7.6 The Appeal Board therefore determined not to admit this evidence on the second limb of the Ladd –v- Marshall test.
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- 8.1 The third area of evidence was the lie detector. Mr Berlin wished to adduce into evidence the result of a lie detector test that the Appellant had taken after the Disciplinary Committee hearing.
 - 8.2 The Appeal Board took the view that this evidence was not admissible at all. It had been the role of the Disciplinary Committee to decide the truthfulness or otherwise of a witness and this could not be delegated to a witness.

- 8.3 In any event the Appeal Board noted the assertions from GBGB that, during the lie detector tests, the questions asked of the Appellant were compound and not simple questions.
- 8.4 Evidence from lie detectors is generally not admissible in English Law. Further, if the Appellant had wished to attempt to rely on such evidence, there is no reason why it would not have been available at the Disciplinary Committee stage.
- 8.5 The Appeal Board decided that this evidence is not admissible on all three grounds of Ladd –v- Marshall.
- 9.1 The fourth area of new evidence was the video clips. Mr Berlin on behalf of the Appellant conceded that the video evidence of the performances of Mays Goodluck was not needed as that evidence was not in issue. He did, however, feel that the evidence of the parade might need to be considered.
- 9.2 The Appeal Board considered that the video of the parade was not admissible. Nothing had been drawn to the Appeal Board’s attention to suggest that there is any relevant material within that video evidence to assist the Appeal Board in its decision as to whether the finding under Rule 174(1)a should be replaced by a finding under Rule 171(1)b.
- 9.3 The Appeal Board agreed this evidence would not have been available at the disciplinary hearing, especially as a witness had indicated that no such evidence existed, albeit that that seems to be hearsay evidence. However, the Appeal Board decided that this evidence was not admissible under the second limb of Ladd –v- Marshall.
10. Having rejected the evidence as stated above under the Ladd –v- Marshall test, the Appeal Board considered whether in the wider interest of justice any of the evidence should be admitted. The Appeal Board determined not to exercise its discretion and admit the evidence.

(C) Full Appeal

- 11.1 The hearing resumed on Friday 27 March 2015 when the full appeal was heard. The Appeal Board was again helped by the skeleton arguments produced on behalf of the Appellant and on behalf of GBGB. During the hearing itself both Advocates fully addressed the Appeal Board.
- 11.2 At the end of Mr Berlin’s submissions on behalf of the Appellant his submissions were clarified and agreed as being the following:
- (a) A technical point as to the admissibility of the evidence of Professor Morris as an expert.

- (b) Criticism of the evidence given by Professor Morris especially as to his evidence as to timing.
 - (c) Criticism of the Disciplinary Committee in the approach they took as to the evidence of Professor Morris and the decision they reached.
 - (d) Criticism of the Disciplinary Committee in the approach they took about the evidence of the Appellant in that the Disciplinary Committee disbelieved the Appellant and found allegation 174(1)a proved.
 - (e) Criticism of the Disciplinary Committee with Mr Berlin asserting that there were crucial differences between the oral decision given at the end of the Disciplinary Committee and the written decision, especially as to timing.
- 11.3 Both parties agreed that the Appeal Board deal with appeals by way of review. As a result of this, for an appeal to succeed, the Appeal Board must examine the Disciplinary Committee decision. The Appeal Board will uphold the decision of the Disciplinary Committee for breach of Rules unless the finding was one that no reasonable Disciplinary Committee could have made.
- 11.4 The Appeal Board considered the Appellant's areas of appeal as identified at paragraph 11.2 and decided as follows with specific reference to the subparagraphs at paragraph 11.2 above:
- (a) This technical point, not in the skeleton argument of the Appellant and raised on the morning of 27 March, was in short that the evidence of Professor Morris should not have been considered as his statement was not compliant with the Civil Procedure Rules as to expert evidence. The Appeal Board considered this point had no merit whatsoever as the Civil Procedure Rules do not apply to these proceedings. Further, there could have been no unfairness at the Disciplinary Committee hearing as all parties conceded that Professor Morris was giving expert evidence. His expertise was stated in paragraph 1 of his statement.

The Appeal Board rejected this point of appeal.

- (b) Both Advocates addressed the Appeal Board about the content of Professor Morris' statement and his oral testimony. Mr Berlin asserted, amongst other things, that the oral evidence was at variance with the written statement. The Appeal Board noted that his evidence that cocaine had been ingested on the day was stated on more than one occasion. The oral testimony with regard to the ingestion of cocaine was explored during the disciplinary hearing and Professor Morris gave evidence that it was ingested within hours of the sample.

The Appeal Board rejected this point of appeal.

- (c) The criticism of the Disciplinary Committee and its approach to Professor Morris' evidence. The Appeal Board had analysed the evidence of Professor Morris. The Appeal Board would only interfere in a decision if the decision of the Disciplinary Committee was one that no reasonable Disciplinary Committee could have reached. Not only does the criticism presented to the Appeal Board not reach that

threshold but the Appeal Board takes the view that the Disciplinary Committee was fully entitled to reach the conclusions it did on the basis of the evidence presented to it.

The Appeal Board rejected this point of appeal.

- (d) Criticism of the Disciplinary Committee approach to the evidence of the Appellant. Mr Berlin submitted vehemently and repeatedly that the Appellant was an honest man and that the Appeal Board's decision should take that into consideration. With respect that assertion totally failed to appreciate the purpose of this appeal and the relevant criteria. The Appeal Board had to review the decision of the Disciplinary Committee. The Disciplinary Committee had considered all the evidence and had the benefit of hearing the evidence of the Appellant. By its verdict the Disciplinary Committee, having heard the evidence of the Appellant, disbelieved it. The assessment of evidence is the role and obligation of the Disciplinary Committee. None of Mr Berlin's arguments were persuasive that the decision of the Disciplinary Committee as to the credibility of the Appellant was a decision that no reasonable Tribunal could have reached.
- (e) The Appeal Board noted Mr Berlin's assertion that the Disciplinary Committee's written wording was different from the oral statement. The written decision, however, was clear as to its findings of fact and the reason for the decision which the Appellant through Mr Berlin was able to address fully. Any discrepancies were not substantial and the written reason is the decision of the Disciplinary Committee.

The Appeal Board rejected this point of appeal.

11.5 In the light of the appeal the Appeal Board did not consider that the decision of the Disciplinary Committee on review should be varied. It therefore follows that the appeal against the finding that breach of 174(1)a had been proved must fail.

(D) Penalty

12. Mr Berlin had properly conceded that, if the appeal against the finding of 174(1)a failed, there would be no appeal against sentence.

(E) Costs

13.1 After giving the oral decision that the appeal had failed Mr Weston on behalf of GBGB made a costs application. This application was vehemently opposed by Mr Berlin.

13.2 After questioning by the Appeal Board the following facts were established:

- (a) The GBGB costs schedule had been provided to Mr Berlin whilst the Appeal Board was in retirement considering the appeal itself.
- (b) Mr Berlin was aware that a costs application was to be expected if the appeal failed.

- 13.3 The Appeal Board heard submissions as follows:
- (a) On behalf of the GBGB it was submitted that the GBGB had succeeded on all points and therefore as a matter of principle was entitled to its costs. Further a costs schedule had been provided to the Appellant.
 - (b) Mr Berlin on behalf of the Appellant submitted that as a matter of principle under the Civil Procedure Rules the costs schedule had been served too late and that costs should not be awarded against the Appellant. He also submitted that the costs were disproportionate. At the hearing Mr Berlin was offered time to consider the quantum of the costs but declined that offer.
- 13.4 The Appeal Board, having heard full submissions as to costs, concluded that GBGB had been put to costs by the fact of the appeal and the myriad points that were raised on behalf of the Appellant. The decision of the Appeal Board as to costs is informed by the failure of the application for new evidence determined on 26 March and the failure of the full appeal on 27 March 2015. The Appeal Board realised that the effect of any decision as to costs in such proceedings decided whether the costs of an appeal fall on an Appellant or fall on GBGB generally.
- 13.5 The Appeal Board do not agree that no costs orders should be made. The Appeal Board find no merit in the argument that the service of the costs schedule today means that no order is appropriate. Further, the Appeal Board are not of the view that, in an appeal of this nature, no costs order should be made as a matter of general principle.
- 12.6 The Appeal Board do, however, take the following into consideration:
- (a) The Appellant had been forced to make an application for disclosure of emails. There had been no agreement as to that disclosure until during the course of the hearing itself when GBGB quite properly conceded that disclosure should take place.
 - (b) The Appeal Board considered that costs should be proportionate.
 - (c) The Appellant had not made any submission as to quantum despite the offer of further time to consider the costs schedule.
 - (d) The effect of the dismissal of the appeal was that the Appellant remained subject to a current disqualification.
 - (e) No statement of means had been provided by the Appellant nor did his representative submit that there were any issues of hardship.

12.7 For the above reasons the Appeal Board summarily assessed the costs to be paid by the Appellant to GBGB as being in the sum of £6,500. The appeal fee is also forfeit to GBGB.

Dated this 31st day of March 2015

Signed:

Peter Cadman