

## THE HIGH COURT

Record No.: 2017/928 JR

BETWEEN:

GRAHAM HOLLAND

APPLICANT

-AND-

THE CONTROL COMMITTEE OF BORD NA GCON

RESPONDENT

**JUDGMENT of Ms. Justice Tara Burns delivered on 28th September, 2018**

1. On 11th September 2017, the Applicant, who is a well-established, successful greyhound trainer, was notified by phone, by a member of the Regulatory Division of Bord na gCon (hereinafter referred to as "the Board"), that samples, taken on 24th June, 1st and 22nd July 2017, from a particular greyhound trained by him, had tested positive for a prohibited substance. A formal letter to this effect was sent to the Applicant, by the Board, on the same date. An Investigation Report Form was included within that correspondence which the Applicant was requested to complete within a 14 day period. It was further indicated that this information had been provided to the Respondent, who had been requested to investigate the matter pursuant to s. 43 of the Greyhound Industry Act 1958. The Notification/Report to the Respondent from the Board was also included.

2. In accordance with Art. 29(3B)(d) of the Greyhound Industry (Racing) Regulations 2007 to 2017 (hereinafter referred to as "the Racing Regulations"), these findings were published by the Board on its website.

3. On 19th September 2017, a letter was sent by the Applicant's solicitor to the Board requesting a detailed list of documents/information and access to the samples in question so that an independent expert analysis could be carried out in relation to same.

4. On 28th September 2017, solicitors acting on behalf of the Board replied to the Applicant's solicitor indicating that they were taking instructions in relation to his letter; that the Applicant did not have to complete the Investigation Report Form until they responded to the letter of 19th September; and, that the Respondent, who was investigating the matters, was a separate and independent entity to their client, the Board.

5. The Respondent wrote to the solicitor for the Board on 10th October, informing him that the Respondent would be in a position to proceed with the matter when the Board had dealt with the disclosure requests. On the 23rd October, the Respondent again wrote to the Board's solicitor indicating that it was its view that any reasonable disclosure requests should be dealt with by the Board in advance of a hearing and that in the event of the Board declining to make disclosure, the Respondent anticipated that the defence would object to the matter proceeding on the first date.

6. By 27th October 2017, the Applicant's request for information still had not been responded to, despite a reminder being sent to both the solicitors acting on behalf of the Board and the Respondent.

7. On 7th November 2017, the Applicant was notified that the Respondent was going to meet on 1st December 2017 to carry out an investigation into the adverse analytical findings of a prohibited substance in the urine samples taken from the particular greyhound on the dates already referred to. The Applicant was requested to confirm the attendance of himself and/or his solicitor at this meeting.

8. On foot of this notification, the Applicant's solicitor again wrote to the Respondent on 9th November, requesting the documentation/information previously sought and raising the issue that it would be unfair to proceed with a hearing on 1st December when the requested information/documentation and access arrangements had not yet been provided to the Applicant. It was further pointed out that even if the material was provided prior to 1st December, sufficient time would be required for an expert to address the material and provide a report in relation to same.

9. By letter dated 13th November 2017, the solicitors acting on behalf of the Board responded to the Applicant's letter of 19th September providing some of the information which had been requested. Of note, at para. 1(b) of that letter, in response to a query from the Applicant as to what allegations he was facing, it was stated that: - *"It is the [Respondent] that will decide whether in the first instance to pursue an investigation and, if it so decides, the format of same and the information required in order to assist it in making a determination on the issues"*. That letter also stated that it was now incumbent on the Applicant to complete the Investigation Report Form. While facilities to permit an independent analysis of the samples in question were agreed to, an appropriate accredited laboratory was required to be identified by the Applicant for this to be carried out.

10. Further requests for information/documentation ensued from the Applicant's side by letter dated 17th November 2017. The issue of proceeding to hearing on 1st December was again raised in light of the matters outstanding, most particularly, the independent analysis which had yet to be carried out.

11. A letter from the Respondent dated 14th November 2017 indicated that *"[i]t is the intention of the Committee to convene on the 1st December to commence its adjudication herein subject to any preliminary issues which might be raised by either party in this matter."* In response, the Applicant's solicitor, by letter dated 17th November, repeated his concern regarding a hearing commencing on 1st December and asked for clarification of the allegations which the Applicant had to meet. By letter dated 21st November 2017, the Respondent replied stating that they were proceeding with the hearing on 1st December; if disclosure issues remained outstanding, then the Respondent would rule on any such issues. It added:-

*"If you were of the view that you are not in a position to deal with the matter because of any difficulty in relation to disclosure, the matters at issue between the parties can be considered by the Committee in the ordinary way and a Ruling given following any submissions made in relation to any such matters."*

*In relation to your request for clarification of all allegations being made the Committee note that you have been furnished with copies of all documents received by it from the Irish Greyhound Board and which appear to set out details*

*of the issues in respect of which the Committee have been requested to conduct an investigation. If you require any other clarification of allegations it is the view of the Committee that this is a matter which should be taken up with the Legal Representatives of the Irish Greyhound Board in the first instance and any further issues arising therefrom can be raised before the Committee when it commences its investigations on the 1st December next.*

*The Committee propose commencing its investigations on the 1st December and will address any issues which may be raised by the parties at that stage."*

12. A further letter dated 21st November was sent on behalf of the Applicant to the Respondent indicating that in the absence of knowing what the allegation against him was (para. 13), and having regard to the fact that an independent analysis had not yet been carried out, the Applicant could not receive a fair hearing should the matter proceed on 1st December. The Respondent was again called on to not proceed with the hearing on that date. The letter reads:- *"It is simply not appropriate and wrong as a matter of law for the Control Committee to convene any hearing whether preliminary or otherwise which our client is obliged to attend in circumstances where the above matters have simply not been addressed"*.

13. In response, on the same date, the Respondent stated:-

*"In relation to your comment at paragraph 13 of the said letter the Committee would refer you to the Notification/Report to Control Committee which specifically refers to the Statutory basis for the Notification and quotes the relevant sections of the Greyhound Industry Act, 1958 and the Regulations made thereunder on foot of which the request to investigate has been made. The Committee does not consider that it is appropriate for an independent body to engage in protracted correspondence with the parties in advance of the commencement of the investigation and are quite satisfied to deal with any issues which may be raised by either party when it convenes to commence its investigation in the ordinary way.*

*If any matters remain outstanding it is the view of the Committee that these matters should be discussed immediately between the Legal Representatives of the Board and your office. If the representatives of Mr Holland and the Irish Greyhound Board agree that any matters are outstanding and that the hearing is not in a position to commence on the 1st December, it would not be anticipated that any issue will arise in relation to postponing the commencement of the formal investigation. If the parties are not agreed the Committee are of the view that it should consider the situation on the 1st December and rule accordingly after submissions are made.*

*The Control Committee have decided that the matter should be listed on 1st December, to deal with preliminary issues only and the attendance of witnesses will not be required on that day."*

14. An application seeking leave to apply for Judicial Review for various reliefs was moved before the High Court on 27th November. Those reliefs principally sought a range of declaratory relief in relation to alleged breaches of fair procedures and natural and constitutional justice; *certiorari* of the decision of the Respondent to proceed with its *"disciplinary hearing against the Applicant"*; and an injunction prohibiting the meeting of 1st December occurring.

15. On foot of Leave being granted to institute Judicial Review proceedings, the hearing scheduled to commence before the Respondent on 1st December was enjoined and the Respondent has agreed not to proceed with the hearing until after the determination of these proceedings.

#### *Real Question at Issue*

16. As the scheduled hearing commencement date of 1st December has long since passed and as no reliefs are sought which relate to any future conduct of the proposed hearing, the real question at issue in these proceedings, at this stage, is whether the Applicant was correct to institute these proceedings at all.

17. The Respondent claims that these proceedings were premature; that the rights of the Applicant were not disregarded by the Respondent; and that the decision which is sought to be reviewed, namely to proceed with the meeting of 1st December, is not of its nature reviewable.

18. It points to commentary at para 16.241 of Hogan and Morgan's Administrative Law in Ireland 4th ed., wherein it is stated:-

*"The requirement for ripeness insists that a litigant whose interest is likely to be affected by an administrative action or law may not initiate proceedings until the threat has actually materialised or until the public body in question has taken concrete steps. In short, he may not take action in respect of an abstraction or a hypothesis".*

19. It also seeks to place reliance on *Philips v. Medical Council* [1992] ILRM 469, wherein Carroll J stated at p 475 of the report:-

*"Judicial review does not exist to direct procedure in advance but to make sure that bodies which have made decisions susceptible to review have carried out their duties in accordance with the law and in conformity with natural and constitutional justice."*

20. Further, in *County Louth VEC v. The Equality Tribunal* [2016] IESC 40, McMenamin J stated:-

*"54. [I]n order to obtain relief, even by way of declaration, it would be necessary for the appellant to demonstrate that it is in imminent danger of suffering a diminution of rights, or a detriment."*

21. In reality, the issue between the parties boils down to a question of costs. It is unfortunate that valuable Court time has been taken up with this issue and that the parties could not reach an agreement in relation to same.

22. Counsel on behalf of the Respondent accepts that there was "looseness" in the correspondence which had been engaged in between the parties. That this is so is very much the case and it is unfortunate that exactness and clarity did not extend over what was being stated in relation to the Respondent's investigation and possible hearing arising therefrom. In noting that, account must also be taken of the fact that correspondence to the Applicant emanated from both the Respondent and Board. The Respondent is an independent, separate entity to the Board and cannot be held responsible for the correspondence emanating from the Board.

23. Whilst noting the "looseness" of the correspondence, the question which I have to determine is whether the Applicant was

correct to have moved the Judicial Review proceedings. That requires me to determine what was at issue for the Applicant at the time the Judicial Review proceedings were initiated and whether this involved an imminent danger of him suffering a diminution of rights, or a detriment. I have no jurisdiction to interfere with any decision of the Respondent unless this point in fact was reached.

#### *The Regulatory Framework*

24. Bord na gCon was established pursuant to the Greyhound Industry Act 1958 (hereinafter referred to as "the Act of 1958") and its functions, in a general way, are to regulate the greyhound industry.

25. The Respondent was established pursuant to s. 5(3) and s. 13 of the Act of 1958, as amended by s. 9 of the Horse and Greyhound Racing (Betting Charges and Levies Act) 1999 and by the Greyhound Industry (Control Committee and Control Appeal Committee) Regulations 2007 to 2017 (hereinafter referred to as "the Control Committee Regulations").

26. Membership of the Respondent is regulated pursuant to Art. 5 of the Control Committee Regulations which includes amongst its conditions that the Respondent shall consist of five members who are appointed by the Board and that no member of the Respondent shall be a member, an officer or an employee of the Board.

27. Pursuant to Art. 6(1) of the Control Committee Regulations, the functions of the Respondent include: that it investigate and make a decision on any matter notified to it....by an authorised officer of the Board or by the Board itself.

28. Article 8 of the Control Committee Regulations states:-

*"(1) Where the Control Committee is dealing with any matter, it shall inform any person who might be affected by their decision of their intention to enquire into such matter and afford such person the opportunity of making such representations whether in writing or orally to them as may be appropriate, such persons having being informed of the matters being dealt with by the Control Committee.*

*(2) Where any matter being enquired into by the Control Committee may result in a sanction of any kind being imposed upon any person or the taking of any disciplinary action, then the person against whom such sanction or disciplinary action may be imposed shall be informed of the matter the subject of the enquiry, the allegations being made against him and the date and time and venue of any hearing the Control Committee may hold in the matter."*

29. The sanctions which may be imposed by the Respondent on any person who appears to the Respondent to have contravened any provision in the Control Committee Regulations, the Racing Regulations or any other direction or regulation made by the Board, which remains in force, are set out at Art. 8(5) of the Control Committee Regulations.

30. A right of appeal to the Control Appeal Committee exists pursuant to Art. 8(7) of the Control Committee Regulations in respect of any person who is the subject of a decision of the Respondent.

31. Accordingly, the Respondent is an independent and separate entity to the Board who is mandated to investigate and determine any issue notified to it by an authorised officer of the Board or by the Board itself.

32. The current procedures regarding the testing of samples taken from a greyhound are set out in the Greyhound Industry (Racing) (Amendment) (No. 2) Regulations 2015 which substitutes sub-article 3 of art. 29 of the Greyhound Industry (Racing) Regulations 2007. Article 29 (3B) provides:-

*"(a) The result of an analysis...shall be forwarded to an officer of the Board authorised by the Board to receive it and to perform the functions of this sub-article. As soon as practicable after receiving it the officer concerned shall make the result of the analysis available to the Control Committee, and to the owner and trainer of the greyhound concerned.*

*(c) Where the result of an analysis being made available to the owner and trainer of the greyhound is an adverse analytical finding, the owner and trainer shall be informed that the finding will be published in accordance with the provisions of paragraph (d);*

*(d) The officer authorised to receive the result of an analysis shall, where there is an adverse analytical finding and after having met the requirements of paragraph (a) and (c), publish on the Board's website the following information, that is to say –*

*(i) That there has been an adverse analytical finding,*

*(ii) The name of the prohibited substance,*

*(iii) The name and identification number of the greyhound concerned,*

*(iv) The name of the registered owner and the licenced trainer at the time of the taking of such sample, and*

*(v) The date upon which and the place at which the said sample was taken."*

An "adverse analytical finding" is defined in Article 29(3B)(b) of the Racing Regulations as:-

*"A result of an analysis referred to in paragraph (a) which is reported to be positive for a prohibited substance shall be referred to in these regulations as "an adverse analytical finding."*

A "prohibited substance" is defined in Art. 2 of the Racing Regulations as:-

*"any substance which by its nature could affect the performance of a greyhound the origin of which on or in the tissues, body fluids or excreta of a greyhound could not be traced to normal and ordinary feeding. A finding of a prohibited substance means a finding of the substance itself or a metabolite of the substance or an isomer of the substance or an isomer of a metabolite."*

33. Regarding the present case, the Respondent, having been notified of the three adverse analytical findings, was under a duty to commence an independent investigation into these matters and determine any issues arising in relation to the investigation conducted. In conducting this investigation, and in due course making a determination, if that arose, in relation to the Applicant, the Applicant is clearly entitled to fair procedures and that natural and constitutional justice be observed. However, within that matrix, the manner in which the investigation and possible determination, if it arose, are carried out, are entirely a matter for the Applicant.

#### *The Applicant's Complaints*

34. The Applicant complains that the Respondent, in its dealings with him, did not observe fair procedures and that natural and constitutional justice did not apply. As stated above, that requires me to determine what was at issue for the Applicant at the time the Judicial Review proceedings were initiated and whether this involved an imminent danger of him suffering a diminution of rights, or a detriment.

#### *Publication of the adverse analytical findings*

35. While the Applicant complains about the publication on the Board's website of the adverse analytical findings, it is clear that there is a mandatory requirement upon the Board to so publish, pursuant to Art. 29 3B(d) of the Racing Regulations. Furthermore, it is the Board who published this information, pursuant to this mandatory requirement, rather than the Respondent. Accordingly, no issue arises in relation to same. However, the Applicant's complaint in this regard is more subtle. His complaint rather is that there is an added onus on the Respondent to observe fair procedures in circumstances where the adverse analytical findings had already been made public resulting in a tarnishing of his name.

36. I do not agree with that submission. There is an onus on the Respondent to observe fair procedures and act in accordance with natural and constitutional justice regardless of this prior publication. The publication does not increase the onus the Respondent is under, the onus exists already.

#### *Notification of the allegations made against the Applicant and the sanctions applicable*

37. As noted in the summary of the correspondence set out above, the Applicant complains that he was not provided with sufficient information regarding the allegations made against him and the sanctions which could be applied should an adverse finding be made against him.

38. With regard to the allegations which the Applicant is facing, the Respondent submits that sufficient detail was given to the Applicant in the information he was provided with on 11th September: three separate letters of that date, informed him, in respect of each of the samples which had returned an adverse analytical finding, that the result of an analysis of a urine sample obtained from the named greyhound at a particular greyhound stadium on a particular date had returned an adverse analytical finding for a specified prohibited substance. A Notification Report to the Respondent had also been provided to the Applicant in respect of each incident which indicated that the Board notified and reported the matter to the Respondent "pursuant to Article 29(3B) of the Greyhound Industry (Racing) Regulations 2007 to 2017 and requested the Respondent to investigate the matter pursuant to s. 43 of the 1958 Act and Article 6 of the Greyhound Industry (Control Committee and Control Appeal Committee) Regulations, 2007 to 2017".

39. As already noted, the Respondent has a dual function "to investigate and determine" matters referred to it. This is very different to a situation where an investigation process has concluded and charges arise therefrom. The precise allegations, if any, against the Applicant have yet to be determined on foot of the investigation. I am of the view that the details of what was to be investigated by the Respondent were sufficiently notified to the Applicant in the letters dated 11th September 2017. Indeed, as the investigation had not yet commenced by the Respondent, one would not anticipate that there was any further information regarding the adverse analytical findings which would have further detailed any allegations against the Applicant. Also, in the course of correspondence, the Respondent replied to the Applicant's complaint in this regard to the effect that any issue in relation to this matter could be raised before it. Accordingly, a situation had not been reached where the Applicant's rights were put at risk.

40. The sanctions which can be imposed by the Respondent in the event of a finding by it of a breach of the 2007 Regulations, the Racing Regulations or any direction or regulation made by the Board are set out in Article 8(5) of the 2007 Regulations.

41. Accordingly, the sanctions which the Applicant could face are easily ascertainable.

42. I do not find that there was any breach of the Applicant's right to be given adequate notice of the allegations made against him or the sanctions applicable.

#### *Ability to challenge the adverse analytical findings*

43. The Applicant also complains that he would not have been in a position to challenge the adverse analytical findings regarding the three urine samples had the matter proceeded to hearing on 1st December 2017 and that this left him with no option but to launch the Judicial Review proceedings. This is in a situation where the Board was willing to permit an independent analysis take place regarding these samples once an accredited laboratory was identified by the Applicant. Such a condition is not unreasonable. Accordingly, the issue was not that access had not been permitted to the samples, but rather it was the ability of the Applicant to have appropriate tests carried out in relation to the samples, in light of the time frame involved.

44. While the correspondence received from the Respondent initially described the 1st December as a hearing date, this description varied as the correspondence continued between the parties: the fact that preliminary issues could be considered and that the 1st December meeting was the commencement of the Respondent's investigations, entered into the frame. Finally, by letter dated 21st November, the Respondent indicated that the 1st December meeting would be a preliminary meeting only, at which witnesses were not required to attend. It was reiterated that outstanding issues could be raised and ruled upon at that meeting.

45. Fair procedures obviously require that the Applicant be able to challenge the adverse analytical findings. However, the Respondent's final position, as of the 21st November, clearly indicated that the meeting of the 1st December was a preliminary meeting only and that issues outstanding, which by implication included facilitating an opportunity to obtain an independent analysis, which had been consented to by the Board, but not yet obtained by the Applicant, would be dealt with by the Respondent. In light of this late clarification, I cannot see how the Applicant's right to fair procedures is violated. No more than a court hearing, the matter must commence at some stage and fair rulings then ensue. Had the meeting taken place and had the Respondent refused to adjourn the matter to permit the testing to take place, then issues would obviously have arisen regarding such a ruling. However, this position was never reached.

46. The Applicant asserts that the concession that the meeting of 1st December was only a preliminary meeting, did not go far enough; that the meeting could have taken place very shortly afterwards. On the Applicant's behalf, an affidavit filed goes so far as to state that there was a very real prospect that the hearing would take place shortly thereafter. There is no evidence to support this averment. The fact remains that the Applicant was not required to meet the adverse analytical findings without the benefit of his own expert report. Accordingly, his right to fair procedures was never put at risk.

47. The Applicant complains that the Respondent should have done more to get the Board to comply with his disclosure request whilst at the same time complaining about the Respondent being in contact with the Board in relation to disclosure. Obviously these two positions do not marry. In reality, if the meeting of 1st December had not been enjoined, this issue would have been dealt with. If this issue had not then been resolved in a fair manner, the Applicant would have had a remedy available to him, but this scenario never arose.

48. With regard to the issue of the Applicant not being informed of the estimated levels of concentration of the prohibited substance in the samples, the position is that the Applicant was eventually informed, although it is noted that this was at a very late stage. While the Court is of the opinion that this should have been notified to the Applicant at a much earlier stage, noting that no explanation has been forthcoming as to the reason for such late disclosure, the Court is also of the view that the Applicant has not suffered any prejudice arising from same. As Counsel for the Respondent points out, the level of the prohibited substance is not what is at issue in this matter, but rather the fact that same exists. While it is clear from the record of other proceedings before the Respondent, exhibited in an affidavit sworn by the Applicant's Solicitor, that the level of a prohibited substance is a matter that is taken into account by the Respondent, it appears that this is a matter which is taken into account in terms of sanction. In any event, the Applicant was notified of this information before the 1st December, albeit that the Judicial Review leave application had already taken place. Again, while the Court is not impressed that this disclosure occurred as late as it did, nonetheless, the Applicant was not in fact adversely effected by this.

#### *The requirement to complete the Investigation Report Form*

49. As earlier commented on, it is unfortunate that exactitude did not apply over the correspondence which emanated from the Board and the Respondent. The Applicant was informed variously that he had to complete this form within 14 days of its receipt on 11th September; to the not being required to complete same until receipt of the disclosure information; to it being incumbent on him to complete the form. That said, that correspondence issued from the Board and not the Respondent.

50. The Respondent's position is that there is no onus on the Applicant to complete the form and that clearly is the case having regard to the legislation. The Respondent has indicated that it does not and cannot draw inferences from a failure to complete this form. The Applicant has taken issue with this assertion, in an affidavit sworn by the Applicant's solicitor, pointing to and exhibiting cases where the Respondent has referred to what has been stated in such forms. However, this is not a direct comparison because in the cases referred to and exhibited, regard was had by the Respondent to assertions made in forms which have been completed rather than regard being had to the fact that a form was not completed, as is the case here.

51. Regardless of the above, the position is that the Applicant was not required to complete the form. Of more importance, however, is the fact that nothing adverse had yet occurred to the Applicant in relation to the non-completion of the form. To return again to an already cited issue, had the Respondent made a determination against the Applicant which involved a consideration of him not completing the form, a remedy would be open to the Applicant. This had not occurred.

#### *Issue of Bias*

52. The Applicant has made an allegation of bias against the Chairman of the Respondent, who has greyhounds in training with one of the Applicant's main competitors. The Respondent has submitted that it is an argument without merit and that it is inappropriate to have raised this. In terms of the pleadings and the issues raised, I agree that this is a matter which was inappropriate to have raised in these proceedings, particularly in light of the fact that an application was not made before the Respondent in this regard.

#### *Conclusion*

53. Accordingly, I am of the view that the Judicial Review proceedings were launched prematurely at a time when the Applicant's rights to fair procedures and natural and constitutional justice had not been breached, nor were in imminent danger of being breached. Neither was there a breach of the statutory framework governing the consideration of these matters. I therefore must find against the Applicant.