JUDICIAL CONTROL AUTHORITY
FOR RACING
TE MANA WHAKAHAERE Ā-TURE MŌ TE PUREI

Appeal GRNZ v L Cole - Decision dated 23 September 2019 - Chair, Hon J W Gendall QC

Rules:

Repondent(s)/Other parties:

Name(s):

Decisions:

Before an Appeals Tribunal of the Judicial Control Authority

In The Matter of the Rules of New Zealand Greyhound Racing (Inc)

Between GREYHOUND RACING NEW ZEALAND (GRNZ)

Appellant

And MRS LISA COLE, Licensed Trainer

Respondent

Tribunal: Hon J.W. Gendall QC - Chair

Mr T. Utikere - Member

Appeal held at Palmerston North on 18 September 2019, on the papers (by consent of the parties).

(1) This is an appeal by GRNZ against orders for costs made against it by a Judicial Committee on 31 July 2019. Those orders were in the sum of $6500 to Mrs Cole and $1000 to the JCA which followed upon the dismissal by the Committee on 22 May of a charge (Information number 11251) brought against Mrs Cole for a breach of Rule 55.1 (b) of the GRNZ Rules in that a dog she trained failed to pursue a lure in a race at Hatrick Raceway, Wanganui on 5 October 2018.

(2) We have before us the Committee's substantive decision on the charge, the submissions of counsel (Mr P. Brosnahan) for Mrs Cole to the Judicial Committee and his time records, the costs decision, and the submissions made on this appeal.

(3) No issue arises over the Committee's decision to dismiss the charge. The appellant had accepted that a "modest" award was justified but contends that the award of $6500 is substantially excessive, and that the award of $1000 to the JCA inappropriate. Further the appellant now contests the decision to award costs as well as the quantum.

(4) The appellant has submitted to this Tribunal that the Judicial Committee erred in:

• failing to apply the JCA Practice Note of 3 September 2015 or failing to properly exercise its discretion awarding costs against the prosecution where there was no evidence that the prosecution was misconceived or should not have been brought. That is, no costs order should have been made.

• failing to give any or sufficient weight to the public interest in bringing charges

• making an award of costs that was not reasonable

• failing to make an assessment as to whether Mrs Cole's counsel's cost were reasonably incurred

• failing to have regard for the objective of the Rules of Racing to promote the just, fair, speedy and inexpensive determination of a proceeding

• exercising its powers under section 39(2)(b) of the Racing Act 2003 in a manner that is disproportionate and unreasonable

(5) Mr Brosnahan, for Mrs Cole, submitted to the Committee, and expanded in written submissions on this appeal:

• the proceedings were ill conceived and should not have been brought

• they were contrary to the Rules of Greyhound Racing "and effectively ultra vires"

• he had "at an early stage" contended that R55.1 and R55.2 (i.e. that it is for the stipendiary stewards to impose suspension on a dog, and if there is a failure to pursue a lure a veterinary examination is required) had not been complied with and Mrs Cole had "effectively been dragged into a dispute between GRNZ and the RIU as employer of Stipendiary Stewards."

• the dispute was only between GRNZ and the RIU/stipendiary stewards and this had been raised and argued by counsel before the hearing proceeded

• the GRNZ had ignored advice give to it and the proceedings were ill conceived and wrongly involved Mrs Cole

• Mrs Cole had "incurred costs in total of $14,547.50 He produced his time sheet records for his services representing 32.5 hours at a charge out rate of $400 per hour, plus GST.

THE COSTS DECISION

(6) In its decision, the Committee records the submission of counsel that the proceedings were ill conceived leaving Mrs Cole to incur unnecessary costs; that GRNZ accepted that a modest award was proper but disputed that the proceedings were ill conceived; that the request made to review the Stewards decision "was something of a test case and the first of its type."

(7) It then sets out the relevant Clause 29 of the 7 th Schedule to the Rules which empowers the making of a costs order, and refers to Practice notes of the JCA that include:

• costs should only be made against the prosecution where the charges are misconceived or should not have been brought for some other reason and costs should not be awarded against the prosecution simply because it has failed.

• there is a public interest in bringing charges in order to promote and protect the interests of consumers and the integrity of the industry

• the application of principles and weight to be accorded to them is a matter for the judicial committee in the circumstances of each case

(8) The Committee correctly noted that its discretion is broad and to be exercised on a principled basis. It said it accepted that it was a test case and that Rule 55.2 provided a barrier to a review. It did not agree with counsel's submission that the proceedings should never have been brought But it said that "it is a step too far to state that the application was ill-conceived." It went on to say that (in terms of "failing to pursue") the informant's case "was not without some merit" but it found that some award of costs in favour of Mrs. Cole was proper.

(9) It concluded that as the informant had recognised, an award of costs was appropriate "but moderate the award having regard to the matters identified in the JCA Practice Note and the highly unusual circumstances of this case."

THE APPEAL TRIBUNAL'S CONSIDERATIONS

(10) Firstly, we repeat that GRNZ did not contend to the Judicial Committee that no costs order should be made in favour of Mrs Cole. Rather its position then was that any order should be "modest." Although this appeal is a rehearing we do not accept that a different stance can now properly be taken given that concession. The sole issue is whether the award of costs was reasonable in all the circumstances. Secondly, the Practice Note is but a guide to judicial committees and no more and does not have the force of law or mandatory application. It may be given such weight as a judicial committee thinks proper in the exercise of its discretion according to the circumstances of each case. The terms of the guide to committees are not rigid or inflexible rules to be followed as though they are mandatory. It will all depend on many factors.

(11) It has been long recognised that costs decisions are discretionary as the Committee observed, but several guidelines may assist in various and different cases, as the Committee kept in mind. It had the advantage of hearing the charge and the submission of the parties as well as having the JCA Guidelines, and they are no more than that, as many cases are unique and not amenable to inflexible approaches. The Committee recognised and was well alive to that.

(12) Appeals are said to be by way of rehearing. Although regard is had for the earlier decision, in terms of dicta from the Supreme Court decision in Austin Nicholls v. Stichting Lodestar [2007] SC 103, whilst weight is to be given to the original decision, the appellate court must come to its own decision on the merits. It is entitled to take a different view to the original tribunal. But the onus is on an appellant to satisfy the appellate tribunal that the decision was wrong. Where discretion exists in a decision, an appellate body should be slow to substitute its discretion, but it may do so.

(13) As we have said there was no argument before the Judicial Committee as to whether Mrs Cole should have the benefit of an award of costs. In fixing the amount of the costs award, the committee may have taken as a bench mark or starting figure in its deliberations the figure of $14,547.50 submitted by counsel and in reducing the guideline of 60% to 45%, in coming to the figure it did. But that figure may have started from the time basis upon which Counsel says he is entitled to submit a fee to Mrs Cole. No information was presented to the Committee or to us as to what actually Mrs Cole was or will be charged by counsel. The submission was simply that the sum was what his time spent and hourly rate equated to. We emphasise at once that this is a matter for her and her lawyer to agree upon and it is not our task to comment upon arrangement with counsel. But neither the Committee nor the tribunal have been told of the actual fee charged to Mrs Cole and what she must pay (if different). It may well be the full $14,547.50 but the Committee and we have not been told of that. That is a matter between her and Mr Brosnahan as to what has been agreed or accepted between client and counsel. The appellant contends that the Committee had to, but failed to, assess whether Mr

Brosnahan's claimed costs were reasonably incurred. In the end the issue is whether the award by the Committee of $6500 was just and reasonable in this case.

(14) In exercising the discretion to award costs or not to a respondent, some guidance may be discerned from and seen from the JCA guidelines, the Costs in Criminal Cases Act 1967, the Court of Appeal (Civil) Rules and the High Court Rules as they relate to "reasonable costs." The Committee correctly identified some of the relevant considerations where reasonable costs are to be awarded to a successful respondent, and the GRNZ then accepted that some award (it said "modest") is appropriate. As we have said we do not propose to enter into a discussion on the correctness of the decision to award costs , other than to say that we accept the Committee's conclusions that it was going "too far" to say the proceedings were ill conceived, and there was some merit in the argument (although it was not upheld) on "failing to pursue". But the decision to make a costs order was appropriate and we do not accept that the concession made to the Committee can now be withdrawn. The only and crucial issue on appeal is the amount of the award.

(15) Any award has to be reasonable, just and fair in all the circumstances of the particular case. There is no formulaic approach. A guideline sometimes used is a figure of 60% of actual expense a party incurs, but that is no more than a guide. The starting point must be actual out of pocket expense of the party. It is well established that (unless there is an award of indemnity costs) that an award of costs in proceeding, whether in a court or domestic tribunal, is an award for the benefit of the party and not solicitors or counsel. It seems that the Committee accepted - although as we have said this is not made clear - that counsel's full time costed amount $14,547.50 is the amount charged to Mrs Cole as her actual expense. So the Committee appears to have taken that as its starting point in assessing what is reasonable. In its decision it said it "moderated" the award for various factors which may suggest a reduction from the 60% suggested in the guidelines, if it be that the starting figure was $14,547.

(16) Where there is disagreement between parties as to the amount of any costs order, some assistance may be gained from how the Courts deal with the "reasonableness" issue in the High Court Rules 2016 which deal with costs of a successful party, We recognise that these proceedings under a Racing Code and are neither criminal nor civil, but in fixing the amount of costs award some guidance may be gained from some useful principles used under Schedule 2 of the High Court Rules 2016 . An appropriate daily rate is fixed according to the degree of complexity of a case, with "Category 2" being for those of average complexity. These proceedings involved a "not pursuing the lure" claim and an application of the rules relating to the steps required to be followed if that occurs. They were of moderate, but not special, complexity. The High Court is required to apply a fixed appropriate daily rate, which is normally 2/3 of the daily rate considered reasonable. Importantly , Rule 14.2 (1) (c) provides that "the appropriate daily rate and what is reasonable time should not depend on the skill or experience of solicitor or counsel or the time actually spent or the costs actually incurred by the party claiming". In determining the reasonable amount of time for various steps in a proceeding, Schedule 3 itemises what would be normal. One day is allocated as reasonable for preparing submission and preparing for a witness hearing as well as 1 day for each hearing days (measured in ¼ days). The rates per day were increased slightly on 1 August 2019, but at the time of this hearing were $1480 for Category 1 and $2230 for Category 2.

(17) Simply as an example, and based on those provisions, if this had been a civil case in the High Court ,and involved only involved preparing submissions, (1 day) general preparation,(1 day) and a ½ day hearing (it commenced at 11am and finished at 3pm) , a costs award for a category 2 proceeding, may have been in the region of $3716 , or $4460 if a full day is allowed for the hearing. Counsel for the appellant has referred us to the District Court rules which he says might lead to a figure in the region of $5270 .Why that should be different, we are not sure, but the examples provide some measure of "reasonableness." These proceedings were not within the High or District Court's jurisdiction or regime and were rather domestic tribunal regulatory proceedings perhaps of lesser general significance – of course not to the parties- so that factor is to be weighed in the balance in deciding whether there may be a discount or mitigation from such guides in determining a reasonable costs award in this case.

(18) The foregoing discussion naturally does not determine what precisely is just and reasonable in this case. It may illustrate a measured procedure adopted by Courts in an endeavour to achieve consistent standards in litigation. Consistency and a degree of certainty is also important in RIU and JCA disciplinary processes, when the costs discretion is exercised in making orders. We agree with the findings of the Committee, that:

• there was a public (and Code) interest in bringing the proceedings

• the proceeding could not be categorised as ill-conceived -despite Mr Brosnahan's contention

• the case, as it related to failing to pursue the lure, was not without some merit

In applying our judgment and discretion to the ultimate test of what is just and reasonable, and for the reasons we have outlined, we find the award of $6500 to be manifestly excessive. We conclude that the appeal should be allowed. The costs payable by GRNZ to Mrs Cole are fixed at $3000.

(19) The award of costs made in favour of the JCA is vacated. That is because there is a compelling public and industry/code interest that requires the JCA mechanism and hearing process to be available to an informant without there existing a fear of costs being awarded to the JCA should the informant not succeed. It is usually the case some order for costs may be made in favour of the JCA

where a charge involving some form of wrongdoing or breach of the Rules succeeds against a respondent. That is part of the consequences such a Respondent who breaches the Rules must face. But it should not usually be a consequence to the informant (whether the RIU, GRNZ or other informant) where a proceeding is reasonably brought and does not succeed. It may be different if use of the procedure is seriously unwarranted , but that was not the case here.

OUTCOME

(20) The appeal is allowed and the costs payable by GRNZ to Mrs Cole are fixed at $3000. The award of costs to the JCA is vacated. There is no order for costs on this appeal.

Dated at Palmerston North this 23rd day of September 2019

Hon J.W.Gendall QC, Chair

Mr T. Utikere, Member

Penalty: