APPEAL COMMITTEE OF THE FOOTBALL FEDERATION OF AUSTRALIA

Decision in Relation to an Appeal by Ney Fabiano, Melbourne Victory against the determination of the Disciplinary Committee of the Football Federation of Australia dated 17 September 2008

Introduction

1. The Appellant, Mr Ney Fabiano, a player registered with the Melbourne Victory Club, lodged an Appeal pursuant to clause 21 of the FFA A-League Disciplinary Regulations ("the Regulations") against a decision of the Disciplinary Committee of the Football Federation of Australia ("the Disciplinary Committee") dated 17 September 2008 whereby the Disciplinary Committee found the Appellant guilty of the offence of spitting at an opposing player and imposed a sanction of eight matches over and above the Mandatory Match Suspension.

2. The sole ground of Appeal relied upon by the Appellant is that contained in Rule 21.5(c) of the Regulations which is that:

> *"The decision was one that was not reasonably open to the Disciplinary Committee … having regard to the evidence before the Disciplinary Committee …".*

3. Mr Nick Pappas of Counsel who appeared on behalf of the Appellant before us at the hearing of the Appeal which took place in the evening of Wednesday 24 September 2008 confirmed that Rule 21.5(c) was, indeed, the only ground of Appeal relied upon and that the Appeal was being prosecuted in respect of both the Disciplinary Committee's finding that the offence had been committed and, also, in respect of the sanction imposed by the Disciplinary Committee in respect of that offence. Mr David McLure, the FFA Disciplinary Counsel, who appeared before us on the Appeal confirmed that he was not prejudiced by this clarification by Mr Pappas that the Appeal was in respect of both aspects of the determination of the Disciplinary Committee.

4. As stated, the Appeal was heard by the Appeal Committee of the FFA comprising Mr Alan Sullivan Q.C. as President, and Mr Arthur Koumoukelis and Mr Brad Maloney as members, on the evening of Wednesday 24 September 2008.

5. At the conclusion of the hearing of the Appeal, the Appeal Committee stated orally that:-

   (a) it unanimously dismissed the Appeal in respect of the commission of the offence; and

   (b) it unanimously upheld the Appeal in respect of the sanction imposed and, in lieu of the sanction imposed by the Disciplinary Committee, substituted a sanction of five matches over and above the Mandatory Suspension (meaning that the total suspension was one of six matches).

6. At the conclusion of the hearing of the Appeal, the Appeal Committee also indicated that it would publish its written reasons for its decision in the near future. These are those reasons.

7. The Appeal Committee had before it, as evidence, all of the documents and materials which constituted the record of the proceedings before the Disciplinary Committee including:-

   (a) Exhibit 1: the referee's report;

   (b) Exhibit 2: the Disciplinary Notice;

   (c) Exhibit 3: DVD footage prepared by FFA;

   (d) Exhibit 4: DVD footage prepared for the Appellant; and

   (e) the Disciplinary Committee Determination.

8. In addition, by consent, the following materials were also placed in evidence before the Appeal Committee:

   (a) a split screen DVD of the incident prepared on behalf of the Appellant;

(b) a letter dated 23 September 2008 from the Chonburi Football Club attesting to the Appellant's good character whilst playing for that Club; and

(c) a document entitled "Red Card and Yellow Card Record" prepared by the Chonburi Football Club in respect of the Appellant.

Had it not been that the documents referred to in (b) and (c) were tendered by consent, we would have been minded to reject their tender for the reasons expressed in [11] below.

9. Also before the Appeal Committee were a copy of the written submissions made by the Appellant before the Disciplinary Committee (including a statement of the Appellant's version of events prepared by his lawyer following consultation with him) and a transcript of the hearing of the hearing before the Disciplinary Committee prepared by the FFA's judicial body administrator but which is not a verbatim transcript (due to malfunctioning of the recording equipment). Rather, that transcript was based on the FFA's judicial body administrator's recollection, notes and consultation with Mr Nikou, the Appellant's solicitor. Each of Mr McLure and Mr Pappas agreed that, although the transcript was not a verbatim transcript of the hearing before the Disciplinary Committee, in substance, it was an accurate record of the hearing although one question and answer was inserted in that transcript out of sequence. Accordingly, we have had regard to it.

10. On the Appeal the Appellant also sought to tender two other documents namely a document entitled "Speech Pathology Consultation Report" dated 20 September 2008 prepared by Ms Rachael Stocks and a document dated 19 September 2008 prepared by a biomechanist, Ms Lee Nicholson. Notwithstanding that each of these documents was prepared after the hearing by the Disciplinary Committee and hence were not materials to which the Disciplinary Committee could have had regard, nevertheless Mr Pappas, on behalf of the Appellant, informed the Appeal Committee that the Appellant wished to rely upon those documents in support of the appeal against the finding of liability. Mr McLure opposed the tender of those documents.

11. After hearing submissions from each of the parties, the Appeal Committee unanimously rejected the tender of those documents. As explained orally at the hearing of the Appeal, since the sole ground of appeal was pursuant to Rule 21.5(c) of the Regulations, the consequence was that the only relevant evidence in respect of that ground was evidence "before the Disciplinary Committee". Since these two documents in question were not before the Disciplinary Committee it followed that they could not be relevant to the ground of appeal relied upon and, hence, this Appeal Committee rejected the tender.

12. The hearing of the Appeal proceeded in two distinct, consecutive stages. First the appeal in respect of liability was heard and then following the Appeal Committee's dismissal of that appeal, the appeal in respect of the sanction was heard. These reasons follow the same sequence.

Appeal in Respect of Liability

13. The Appellant had a very heavy onus to overcome to establish that the decision of the Disciplinary Committee on liability was not one which was "reasonably open" to it "having regard to the evidence before" it. Contractual language of this nature imports, as submitted by Mr McLure and not demurred to by Mr Pappas, what is commonly known as "Wednesbury" unreasonableness, namely that the decision is so unreasonable that no reasonable tribunal could have made it on the materials before it (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] KB 223). In the context of the disciplinary rules of sporting tribunals, and hence in the context most analogous to the present, the most relevant decision is that of the Victorian Court of Appeal in *Australian Football League v. Carlton Football Club Ltd* [1998] 2 VR 546 at 558. In that case, Tadgell JA explained that an appellate body was only entitled to intervene with a decision on the ground of such unreasonableness if "there was no information available to the tribunal on which reasonable and honest minds could possibly reach the conclusion reached." Hayne JA, as Honour then was, indicated that where such unreasonableness is relied upon the tribunal's decision can only be interfered with if it was demonstrated to be "manifestly untenable" (at 565, 567 – 569).

14. One thing is clear beyond any doubt, namely, that this Appeal Committee, in determining this appeal on such a ground of appeal, must not come to a conclusion on the merits of the case under the guise of making a finding that the Disciplinary Committee acted unreasonably (see, eg, the *Carlton Football case* at 558 – 559; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40; *Zhang v Canterbury City Council* (2001) 51 NSWLR 589 at 601). In other words, for this appeal to succeed, it is not sufficient that the Appeal Committee, had it been the Disciplinary Committee, would have decided the matter differently. Rather, it must be demonstrated that the Disciplinary Committee's decision is so unreasonable that no reasonable Disciplinary Committee could have reached the decision based on the evidence before it.

15. In coming to its decision, the Disciplinary Committee relied upon the referee's report, the DVD footage of the incident, the Appellant's evidence and the written submissions placed before it by the Appellant (see paragraphs 7 – 11 and 16 – 18 of the Disciplinary Committee's determination).

16. Rule 19.2 of the Regulations provides that the "facts contained in the referee's report are prima facie evidence of the contents of the referee's report". Although somewhat inelegantly worded, we construe this rule to mean that the representations of fact made in the referee's report are taken as prima facie evidence of the existence of those facts. Although the referee's report contained representations of fact adverse to the Appellant, no application was made by the Appellant, who was legally represented before the Disciplinary Committee, to seek to cross-examine the referee on the contents of the referee's report before the Disciplinary Committee. We are satisfied that such an application could have been made by the Appellant and that, had it been made, it would have been given serious consideration by the Disciplinary Committee having regard to the obligation under Rule 19.1 of the Regulations to conduct the hearing in accordance with the principles of natural justice. Since the Regulations provide that the statements made in the referee's report are prima facie evidence of the fact, it seems to us that a strong case can be made for the proposition that natural justice requires that a player be given the right to cross-examine the

referee if the player is wishing to assert that the facts contained in the referee's report are incorrect. Moreover, procedural fairness or natural justice also has to be seen from the referee's position. It is unfair to the referee to permit a player to attack findings or views expressed in the referee's report without giving the referee the opportunity of explaining such statements at the hearing.

17. We have discussed this matter because one of the submissions that Mr Pappas made was that certain statements in the referee's report were clearly wrong and that the referee could not have seen what he asserted to see. Thus, according to Mr Pappas' submission, the Disciplinary Committee was wrong to have regard to the views expressed by the referee in his report. In the light of the failure of the Appellant to seek to cross-examine the referee before the Disciplinary Committee, we would attach little or no weight to the submission even if we considered it was otherwise a relevant one. For the reasons which follow, however, we do not consider it to be a relevant submission.

18. As the hearing unfolded before the Appeal Committee, it became common ground that the sole issue of liability was not whether or not the Appellant spat at the opposing player but whether he did so intentionally on the one hand or accidentally or in voluntarily on the other hand. It was common ground that, for the offence to be made out, the spitting had to be an intentional act.

19. The question for the Appeal Committee was, therefore, whether it was reasonably open to the Disciplinary Committee to find that the Appellant's admitted spitting at the opposing player was intentional.

20. On appeal, the Appellant's attack on the decision was based on the following submissions:-

    (a) that the Disciplinary Committee applied the wrong standard of proof in that it did not approach its task in a manner which reflected the seriousness of the charge and that it failed to realise that it had to be satisfied to quite a high degree that the innocent hypothesis advanced by the Appellant should be rejected.

According to the Appellant, applying that standard of proof, no reasonable tribunal could have come to the decision that the Disciplinary Committee did on the evidence before it.

(b) that no reasonable Disciplinary Committee could have relied upon the contents of the referee's report because examination of the video footage showed that certain of the contents of the referee's report were manifestly wrong;

(c) that the Appellant's story was not inherently incredible and any inconsistencies in his evidence were accounted for by his difficulties with the English language which a reasonable tribunal would have appreciated;

(d) that the Disciplinary Committee, although referring to the Appellant's good character and prior good playing record, in relation to the question of penalty, failed to consider it, as it should have, in respect of the issue of liability;

(e) that the Disciplinary Committee failed to take into account the fact that if the Appellant was spitting intentionally at the opposing player it was unlikely that he would have missed the opposing player;

(f) that the Disciplinary Committee failed to take into account that it was inherently unlikely that the Appellant would have deliberately spat upon an opposing player directly in front of the referee; and

(g) that the Disciplinary Committee failed to consider the Appellant's immediate reaction to being sent off for spitting, which reaction was, it was said, inconsistent with guilt.

21. Many, if not all, of the submissions appear to us to be submissions which might be relevant if this was a merits review (which it is not) but are not relevant to the ground of appeal in fact relied upon namely that, on the materials before it, it was not reasonably open to the Disciplinary Committee to find that the Appellant deliberately spat at the opposing player.

22. However, out of deference to the careful and helpful submissions made by both Mr McLure and Mr Pappas, we propose to give brief reasons why we reject those submissions.

23. We consider there is to be little or no substance in each of those submissions even if they are relevant. We will briefly summarise our reasons for reaching this conclusion:-

(a) first, in respect of the onus of proof, although it was common ground that the relevant standard of proof was the so-called *Briginshaw* standard (see *Briginshaw v. Briginshaw* (1938) 60 CLR 336), that standard of proof is nowhere near as high as asserted by the Appellant. As stated by Heydon J (writing extra-judicially) in Cross on Evidence, 6th Australian edition at page 260:-

> *"The most that can be said in such a case is that the trial judge should be conscious of the gravity of the allegations made on both sides when reaching his or her conclusion. Ultimately, however, it remains incumbent upon the trial judge to determine the issue by reference to the balance of probabilities."* (see also *Neat Holdings Pty Ltd v. Karajan Holdings Pty Ltd* (1992) 67 ALJR 170).

We see no evidence that the Disciplinary Committee failed to apply the correct standard of proof.

(b) the Disciplinary Committee did not rely solely upon the referee's report but observed the DVD footage itself. So did we. We are satisfied that it was reasonably open to make the findings it did on the basis of the DVD footage. Moreover, we do not believe the DVD footage conclusively demonstrates that the referee could not have seen what he asserts to have seen. DVD footage presents a two dimensional rather than a three dimensional picture of events and does not permit inferences to be drawn relating to such things as peripheral vision. That is why, if such a challenge was to be made, application should have been made to the Disciplinary Committee for leave to cross-examine the referee. In the absence of such cross-examination, it is impossible to accept this submission of the Appellant.

(c) whilst the Appellant's evidence may not have been inherently incredible nevertheless the Disciplinary Committee was entitled to rely upon the demonstrated inconsistency in the Appellant's version of events. Having read the "transcript" of the evidence given by the player and the written

document prepared and tendered to the Disciplinary Committee as presenting his evidence of the incident, we are satisfied that there were inconsistencies in his evidence in relation to his versions of what he said to the opposing player and that it was reasonable of the Disciplinary Committee to have regard to those inconsistencies in determining the weight to be attached to the Appellant's evidence overall;

(d) in respect of the allegation that the Disciplinary Committee failed to consider, on the question of liability, the evidence of the Appellant's good character and prior good playing record, we note that no submission appears to have been made to the Disciplinary Committee that such matters should be taken into account on the question of liability. We say this based on our examination of the written submissions placed before the Disciplinary Committee and the transcript of the hearing. Both of those records indicate that "good character" was only relied upon in respect of the sanction. However, even if this was not the case, and even if the Disciplinary Committee wrongly failed to take such evidence into account (which is a submission we do not accept), the finding made by the Disciplinary Committee was still clearly open even if it had regard to such evidence;

(e) the submission that it is inherently unlikely that the Appellant would have missed the opposing player if he had intended to deliberately spit at him, is not only irrelevant to the present ground of appeal (it might be relevant on a merits review) but also factually wrong. The referee observed spit hitting the opposing player and the video appears to corroborate the referee's version. In any event, fortunately, we are not in a position to know how good a marksman the Appellant is when he spits. Rightly, Mr Pappas conceded this was not his strongest submission.

(f) the submission that it was inherently unlikely that the player would have deliberately spat upon the opposing player in front of the referee overlooks entirely the passion and heat of the moment evident from watching the video footage. The Appellant was obviously in an agitated, worked-up state and people in such a condition often do things they would not have done had they been calm and had time to consider or reflect upon

the possible consequences of their actions. Further, once more, this submission has no place in this appeal although it might have been a valid, if slender, one in a merits review; and

(g) in respect of the submission relating to the Appellant's reaction on being sent off, we repeat the comments made in the immediately preceding sub-paragraph.

24. We have dealt with the Appellant's submissions at some length because of the seriousness of this matter. As indicated, however, we regard most, if not all, of those submissions as really irrelevant to the issue before us. We have considered all the evidence which was before the Disciplinary Committee, particularly the DVD footage. On the basis of that evidence, we are comfortably satisfied that it was reasonably open to the Disciplinary Committee to make the finding that it did in respect of the commission of the offence.

25. Thus, we dismissed the Appeal in respect of this aspect.

Appeal in respect of Sanctions

26. Both the Disciplinary Committee and this Appeal Committee are required to determine the scope and duration of any sanction in accordance with Rule 11.1 and 11.2 of the Regulations and Annexure A to the Regulations, being the Table of Offences. In respect of the offence of spitting at a player, the minimum sanction which may be imposed is one of five matches additional to the Mandatory Match Suspension. The maximum sanction which may be imposed for **any** offence contained within the Table is 24 months (see paragraph 4 of Annexure A). The Regulations thus, theoretically, empowered the Disciplinary Committee to impose, at its discretion, a sanction of between 6 matches (5 additional matches plus the Mandatory Match Suspension) and 24 months, taking into account the matters set forth in Regulation 11.2.

27. It is to be observed that the minimum sanction for spitting at a player is, itself, a very high or severe one. It is much more severe than the minimum sanction for other offences which are calculated to cause much more serious injury to a player such as serious foul play, assault on a player, or serious unsporting conduct. Undoubtedly this high minimum sanction reflects the high degree of

disapproval and loathing of the football community towards the act of spitting and, also, a recognition of its potential to provoke a violent reaction from the person who is the target for the spitting or from his team-mates. Presumably for the latter reason the minimum sanction is the same as that for inciting a brawl.

28. Moreover, although, technically, the maximum sanction for spitting is 24 months because that is the maximum sanction for all offences in the Table of Offences, we do not regard it as legitimate, in determining the appropriate sanction for the offence of spitting, to say that the range is from 5 matches to 24 months for that offence. There are several other offences which carry much greater minimum sanctions such as assault a match official or spitting at a match official and where the maximum sanction is also only 24 months. As acknowledged correctly by Mr McLure, it is hard to imagine a case of spitting at a player where the maximum sanction of 24 months would ever be justified.

29. In our respectful view, the Disciplinary Committee, in assessing the relevant level of sanction, does not appear to have paid regard or sufficient regard to the fact that the minimum sanction, itself, is, properly, a very severe one.

30. Rather, the factors which the Disciplinary Committee regarded as significant on the question of sanction are recorded in paragraph 20 of its determination. They are:-

> *"(1) the player spat **at** an opposing player, not merely in his general direction to record disgust;*
>
> *(2) the player took aim not only at an opposing player, but **at the face** of that player;*
>
> *(3) the main globule of the spit did **not** make contact with the opposing player;*
>
> *(4) the player has had a long career and tells us this is his first direct red card. He has only been sent from the field of play on one occasion in his long career, and that was, according to his evidence, as a result of two yellow cards in one game."* (emphasis in original)

31. Of these four factors, factors (3) and (4) are clearly mitigating factors and could not properly have been used by the Disciplinary Committee to increase the

sanction above that of the minimum one. Rather they are matters which diminish the culpability of the offence.

32. Further, we respectfully disagree with the Disciplinary Committee that the factor mentioned in (1) namely that the player spat **at** an opposing player was significant or even relevant. The offence stated in the Table of Offences is spitting **at** a player. The fact, therefore, that the Appellant spat at an opposing player is an essential element of the offence itself and not an aggravating factor in respect of that offence. If the Appellant had not spat at the opposing player, he could not have committed the offence. Hence, with great respect, we think that the Disciplinary Committee was clearly in error in considering this matter as an aggravating factor.

33. Thus, the only legitimate aggravating factor expressly relied upon by the Disciplinary Committee as a reason for imposing a sanction above the minimum sanction was the fact that the Appellant aimed his spit not only at an opposing player but at that player's face.

34. We acknowledge that it may be relevant, for the purposes of imposing a sanction, to have regard to the precise part of the body which was the target of the "attack". However, we do consider it unreasonable, in the sense explained above, to increase the minimum sanction by some 60% based on such consideration alone especially in the light of the mitigating factors which the Disciplinary Committee correctly took into account and other mitigating factors which we consider relevant but which the Disciplinary Committee did not appear to take into account namely the severity of the minimum sanction in any event and, in particular, the provocation, even taunting, of the opposing player which appears to have precipitated or provoked the Appellant's explosive outburst and spitting. The conduct of the opposing player, who was a much bigger man, is clearly evident from the DVD footage and includes unnecessarily and intentionally approaching the Appellant in an apparently aggressive way and making apparently derogatory comments to him. Whilst such conduct could never justify a spitting offence nor be used to excuse such an offence, it is, in our view, an extenuating circumstance relevant to the commission of the

offence which the Disciplinary Committee ought to have taken into account as required by Rule 11.2 of the Regulations.

35. Given the circumstances of this particular offence, as we have recounted, and the matters we have discussed above, we have come to the conclusion that the Disciplinary Committee, acting reasonably, on the evidence before it, ought to have imposed a less severe sanction than it did. We do not think, with great respect, it was reasonably open to it to impose the sanction it did. We would, therefore, allow the Appellant's appeal in respect of the sanction.

36. In reaching this conclusion, we do not wish to send a message that the Appeals Committee will readily interfere with a Disciplinary Committee's assessment of the appropriate sanction on the grounds of unreasonableness. On the contrary, it is likely that it would only do so very rarely. However, for the reasons we have given, this is one of those rare cases.

37. Rule 21.6 of the Regulations empowers the Appeal Committee to substitute its own sanction or finding. Having regard to all the circumstances of the case, as outlined above, we considered that the minimum sanction stipulated in the Table of Offences, namely a sanction of five additional matches in addition to the mandatory match suspension, to be the appropriate sanction and we so decided.

Alan Sullivan QC
President

Arthur Koumoukelis
Member

Brad Maloney
Member

26 September 2008

APPEAL COMMITTEE OF THE FOOTBALL FEDERATION OF AUSTRALIA

DECISION IN RESPECT OF NEY FABIANO
