



# FOOTBALL NSW

## APPEALS TRIBUNAL OF FOOTBALL NEW SOUTH WALES

### DETERMINATION IN THE FOLLOWING MATTER:

Player/Official/Member/Association Member/Participant/Club	Yianni Fragogiannis – Sydney United 58 FC
Decision Appealed	Appeal from the decision of FNSW Disciplinary Committee
Date of Decision	15 August 2016
The basis upon which the matter is before the Appeals Tribunal	Sections 9.1(a) & 9.2(b) of the Football NSW Grievance and Disciplinary Regulations, 2016
Ground(s) of Appeal	Sections 9.3(d) and (e) of the Football NSW Grievance and Disciplinary Regulations, 2016
Date of Hearing	24 August 2016
Date of Determination	25 August 2016
Appeals Tribunal Members	Anthony Lo Surdo SC, Chair David Stanton, Member Julia Sorbara, Member

#### A. INTRODUCTION AND JURISDICTION

1. The Appeals Tribunal (**AT**) has been established in accordance with sections 4 and 9.1 of the Football NSW Grievance and Disciplinary Regulations, 2016 (**FNSW Regulations**) to determine appeals from the Disciplinary Committee (**DC**), the General Purposes Tribunal (**GPT**) and Member Appeals Committees (**MAC**). "Body" is defined in the Regulations to mean a body established under section 4 of the

Regulations and relevantly includes for the purposes of an appeal to the AT, the DC and the GPT.

2. The sole grounds of appeal prescribed by section 9.3 of the FNSW Regulations are as follows:
  - (a) a party was not afforded a reasonable opportunity to present its case;
  - (b) lack or excess of jurisdiction of a Body or a Member Appeals Committee;
  - (c) the decision of a Body or Member Appeals Committee was affected by actual bias;
  - (d) the decision was one that was not reasonably open to a Body or Member Appeals Committee having regard to the evidence before the decision-maker;
  - (e) severity, only where the decision imposed a sanction of at least:
    - i. a Fixture/Match Suspension of 6 or more Fixtures/Matches (excluding Trial Matches, Tournaments, the NPL Pre-Season Competition, the FFA National titles or any Football NSW Representative Matches); or
    - ii. a Time Suspension of three (3) or more months; or
    - iii. a fine of three thousand dollars (\$3,000) or more; or
    - iv. a bond to be of good behaviour of three thousand dollars (\$3,000) or more;
    - v. a deduction, loss or ban on accruing six (6) or more competition points; or
    - vi. exclusion, suspension or expulsion of a Club or Team from a competition; or
    - vii. relegation to a lower division;
  - (f) leniency, but only in the case of an appeal brought by Football NSW or an appeal allowed by the Executive pursuant to section 9.2(h) (Appeal from a MAC).
3. A Participant who challenged a Notice of Suspension to the DC pursuant to section 7.5 of the FNSW Regulations has standing to appeal to the AT the decision of the DC in respect of that challenge (section 9.2(b) of the FNSW Regulations).
4. Upon the hearing of an appeal, the AT may:

- (a) dismiss, allow in whole or part, or vary (whether by way of reduction or increase) a Determination, including any sanction or penalty made by a Body or a MAC, as the case may be;
- (b) subject to any applicable Minimum Suspension, impose any sanction, measure or make any order it thinks fit or that a Body or MAC, as the case may be, could have imposed under the Regulations or its regulations, as the case may be;
- (c) conduct a fresh hearing of the matter (**hearing de novo**); or
- (d) refer the matter to the Body or the MAC from which the appeal originated, or to the Tribunal (or similar) that dealt with the matter at first instance for rehearing and issue any directions or orders in relation to the rehearing of the matter that the AT deems appropriate.

(s 9.4(b) of the FNSW Regulations)

- 5. The AT is satisfied that it has jurisdiction to hear the appeal. Further, neither party raised any objection to the AT's jurisdiction upon being provided an opportunity to do so.

## **B. BACKGROUND FACTS**

- 6. In the 90<sup>th</sup> minute of the National Premier League 1 (NPL1) match between Sydney United 58 FC (**Club**) and Manly United on 7 August 2016, the Referee issued a red card to Mr Fragogiannis (**Player**) for an offence of R2 – Violent Conduct.
- 7. Table A of Schedule 3 (Table of Offences) to the FNSW Regulations provides that the minimum suspension for an offence of R2 – Violent Conduct is the Mandatory Match Suspension (MMS) + 1 Fixture and the maximum suspension for the same offence is 24 months (including the MMS).
- 8. On 10 August 2016, the DC provided a Notice of Suspension to the Player pursuant to section 7.2 of the FNSW Regulations. Pursuant to the Table of Offences, the DC suspended the Player for 3 fixtures. The suspension of 3 fixtures was 1 fixture above the minimum suspension for an offence of R2 – Violent Conduct.
- 9. By email dated 10 August 2016 from Mr Sam Krslovic of the Club to Mr Will Aplin of FNSW, Mr Krslovic sought to challenge the decision of the DC on behalf of the Player pursuant to section 7.4 of the FNSW Regulations.

10. On 15 August 2016, the DC determined the challenge as follows:

- (a) Pursuant to section 7.4(f)(iii) of the FNSW Regulations, the DC found the Player guilty of the same offence (Violent Conduct) but at a different grading (R2 – Violent Conduct – Kicking);
- (b) The DC determined the period of suspension as 3 fixtures, which is the minimum suspension for an offence of R2 – Violent Conduct – Kicking pursuant to the Table of Offences.

**C. THE DECISION THE SUBJECT OF THE APPEAL**

11. The Player appeals the decision of the DC on 15 August 2105, being a guilty finding of an offence of R2 – Violent Conduct – Kicking and the imposition of a suspension for 3 fixtures.

**D. THE GROUNDS OF APPEAL**

12. The Notice of Appeal articulates the following grounds of appeal:

- (a) The decision was one that was not reasonably open to the DC having regard to the evidence before it (section 9.3(d) of the FNSW Regulations); and
- (b) Severity (section 9.3(e) of the FNSW Regulations).

**E. THE HEARING**

13. The AT heard the appeal, on an expedited basis, on the evening of 24 August 2016.

14. The Player appeared in person and was represented by Mr Sam Krslovic, a director of the Club. FNSW was represented by Mr Lorenzo Crepaldi, FNSW General Counsel.

*Preliminary matters*

15. At the commencement of the appeal hearing, the Chair raised with the Player and his representative whether the appeal as to severity was to be pressed in circumstances where:

- (a) section 9.3(e) of the FNSW Regulations provides that the severity of the penalty is only available as a ground of appeal in limited circumstances including where a fixture/match suspension of 6 or more fixtures/matches and a time suspension of 3 or more months has been imposed; and

(b) the sanction imposed by the DC was for 3 fixtures and accordingly below the relevant threshold to engage the ground of appeal.

16. The Player did not press the severity ground of appeal.
17. Another preliminary issue raised for determination was whether the Player should be entitled to rely upon video footage of the send-off offences of Player Bernal and Player Stamatellis and a table summarising sanctions imposed by the DC on other players in the NPL 1 competition during the 2016 season in relation to conduct including R2 offences. FNSW opposed reliance upon this evidence, which, it was accepted, was not in evidence before the DC (**Fresh Evidence**).
18. In aid of its submissions, FNSW referred to section 12.10(j) of the FNSW Regulations which provides that unless there are exceptional circumstances (to be determined by the AT, in its absolute discretion), in determining an appeal such as this one under section 9.3(d), the AT is not to consider evidence which was not before the DC.
19. An example of an exceptional circumstance is where the evidence was not available to a party at the time of the hearing before the DC. In this case, the evidence was clearly available at the time of the DC hearing but neither the Player nor the Club marshalled that evidence or placed it before the DC.
20. In an appeal under section 9.3(d), the task of the AT is to determine whether the decision of the DC was not reasonably open to it having regard to the evidence before the DC (emphasis added). It is for this reason that the AT must, other than in exceptional circumstances, limit its consideration to only the evidence that was before the original decision-maker.
21. The AT determined that there were no exceptional circumstances warranting the admission of the Fresh Evidence and the Player's application to use that evidence was accordingly rejected. We note, in any event, that the Fresh Evidence was intended to be adduced as relevant to the issue of severity of sanction. As that ground of appeal was not ultimately pressed, the Fresh Evidence would have been of no relevance to the determination of the appeal and, accordingly, the Player suffered no prejudice from it not being admitted.
22. Section 9.4(e) of the FNSW Regulations requires that the AT will use its reasonable endeavours to issue a short oral or written summary of its determination (**Preliminary Determination**) within 5 working days of the completion of the hearing with a formal written Determination, with reasons given for the decision (**Final Determination**), to be provided within 21 working days, of the completion of any hearing.

23. At the conclusion of the hearing, the AT provided a Preliminary Determination orally dismissing the appeal. This is the Final Determination furnished in accordance with section 9.4(e) of the FNSW Regulations.

#### **F. SUBMISSIONS**

24. In written submissions, the Player relevantly contended that:
- (a) There is an inconsistency between the report of the Referee and the video of the incident;
  - (b) The player from Manly United was not injured as a result of the incident;
  - (c) His conduct was a natural reaction to an incident occurring immediately prior to his infraction and was not pre-meditated;
  - (d) He is remorseful and that the conduct was out of nature for him as displayed by his record (in this respect, the AT was supplied a written statement from the Player);
  - (e) His record indicates that he has only been sent off once in his 15 year playing career which occurred as a result of receiving 2 yellow cards earlier this season and for which he served a 1 match suspension; and
  - (f) The matters listed above should be taken into consideration by the AT in determining the appeal.
25. In written submissions, FNSW relevantly contended that:
- (i) The Player had failed to articulate how the appealed decision of the DC was not reasonably open to it having regard to the evidence before it;
  - (ii) The decision of the DC was reasonably open to it due to the fact that the DC had available to it not only the evidence used in the Original Decision, but it was also provided with additional video evidence which clearly shows the Player kicking an opposing player;
  - (iii) The Laws of the Game 2016/2017 sets out the definition for violent conduct as follows:
    - " *Violent Conduct is when a player uses or attempts to use excessive force or brutality against an opponent when not challenging for the ball, or against a team-mate, team official, match official, spectator or any other person regardless of whether contact is made.*
    - In addition, a player who, when not challenging for the ball, deliberately strikes an opponent or any other person on the head*

*or face with the hand or arm, is guilty of violent conduct unless the force used was negligible."*

- (iv) The Player's conduct was clearly intentional thereby making it more serious than a negligent or reckless act;
  - (v) The Player submits that the offence "was a natural reaction ..." In no circumstances can it be a "natural reaction" for a player to lash out at another player by kicking him regardless of how aggrieved he may feel and particularly in circumstances where the other player had his back to the aggressor and is moving away from him. Players are taught from an early age to "play the whistle" and to not take matters into their own hands.
  - (vi) The charge of violent conduct - kicking is made out on the video evidence;
  - (vii) The Player was issued with a suspension of 3 fixtures for "Violent Conduct – Kicking" and that this is the minimum suspension that can be issued for this offence pursuant to the FNSW Regulations;
  - (viii) If the Player is able to make out this ground of appeal, but the AT is satisfied that the conduct still amounts to "Violent Conduct" simpliciter the suspension cannot be reduced below the Minimum Suspension of MMS plus one fixture (sections 7.4(e) and 7.4(f)(iii));
  - (ix) If the Player is able to make out this ground of appeal, and the AT is satisfied that no offence has been proven, the suspension cannot be reduced below the MMS (sections 7.4(e) and 7.4(f)(i)); and
  - (x) Little weight should be placed on the remorse indicated in the Player's statement. The Appellant's remorse is not without reservation and is not genuine as he blames his actions on alleged provocation by the victim and on the Match Official's failure to award a free kick, going so far as to state, *"I believe if a free kick was correctly given (this situation would never have eventuated)."*
26. Each party was afforded an opportunity to supplement their written submissions orally. The oral submissions did not expand in any significant manner upon those summarised in the written submissions.
27. However, during the course of submissions, the Player accepted that the real contest was whether the conduct should, in effect, be downgraded to "R2 Violent Conduct" for which he accepts the minimum sanction is MMS + 1 week or whether

it should remain as "R2 Violent Conduct – Kicking" for which he accepts the minimum sanction is MMS + 2 weeks.

## **G. CONSIDERATION AND DETERMINATION**

### *Relevant legal principles*

28. A decision is not reasonably open to a tribunal having regard to the evidence before it (and is thus affected by error) if that evidence in its totality preponderates so strongly against the conclusion found by the tribunal that it can be said that the conclusion was not one that a reasonable tribunal member could reach (see, for example, *Calin v The Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 and *Mainteck Services Pty Limited v Stein Heurtey SA* [2013] NSWSC 266).
29. Further, the AT will only intervene to set aside a determination on the ground that it is unreasonable if "*there was no information available to the tribunal on which reasonable and honest minds could possibly reach the conclusion* (see the decision of the Appeal Committee of the Football Federation of Australia in the *matter of Roy O'Donovan*, 25 January 2016 at [16] and the cases there referred to).
30. For the purposes of an appeal generally, it will be necessary to demonstrate legal error, not merely an erroneous ruling, and the error must be material to or likely to affect the outcome of the decision appealed from; that is, the decision must be one which is vitiated by error (see, for example, *Hamod v Suncorp Metway Insurance Ltd* [2006] NSWCA 243 at [11], *Yates Property Corp Pty Ltd (in liq) v Darling Harbour Authority* (1991) 24 NSWLR 156 at 177).

### *Consideration*

31. During the conduct of the hearing, the AT was shown a video of the incident for which the Player was sent off for the offence of R2, Violent Conduct – Kicking.
32. That footage shows the following:
  - (a) Manly Player 6 challenged the Player for the ball during which he made contact with the Player. The Player at all times during this challenge maintained his feet although the Manly player went to ground;
  - (b) The referee played an advantage as the attacking team (the Player's team) had possession and opportunity;
  - (c) The Manly player had got to his feet and started moving towards the ball and in a direction away from the Player (who was then behind the Manly player);



- (d) The Player followed the Manly player with clear intent to retaliate for the foul in respect of which the referee had played an advantage. The Player only had eyes for the Manly player. He stepped towards the Manly player and extended what appears to be his right leg and foot towards the back of the left leg of the Manly player in a kicking motion. The Manly player was unable to take any evasive action as the contact was made from behind. The Manly player went to ground; and
  - (e) The referee had a clear and unobstructed view of the incident. He stopped play, showed the Player a red card and sent him from the field of play.
33. There is nothing materially inconsistent between the account of the referee as recorded in his send-off report, the report submitted by the referee's assessor and the video evidence of the incident.
34. In our opinion, the Player's actions were clearly intentional. We reject the submission that the Player's conduct "was a natural reaction" to circumstances where he had been fouled and the referee played advantage. It was nothing short of retaliatory conduct. Players and, in particular those at the higher levels of the game, are expected to exhibit discipline and respect for the game, for match officials and for their opponents. The Player's conduct fell short of the standards expected of him.
35. The DC had before it the referee's send-off report, the assessor's report and the video of the incident. Those documents and video were in evidence before the AT. In our view, it cannot be said that there was no information available to the DC on which reasonable and honest minds could possibly reach the conclusion that it did.

#### *Determination*

36. The appeal should accordingly be dismissed with the consequence that the decision of the DC of 10 August 2016, being a suspension of 3 fixtures, is confirmed.

#### **H. RELIEF**

37. The appeal is dismissed.

38. The costs, if any, of the hearing before the AT, as determined by FNSW, are to be met by the Player.

A handwritten signature in black ink, appearing to read 'A P Lo Surdo', with a stylized flourish at the end.

A P Lo Surdo SC  
Chair  
Appeals Tribunal  
Football NSW