



FOOTBALL NSW

APPEALS TRIBUNAL OF FOOTBALL NEW SOUTH WALES

DETERMINATION IN THE FOLLOWING MATTER:

Player/Official/Member/Association Member/Participant/Club	Simon Lucas v Football NSW
Decision Appealed	Appeal from the decision of the General Purposes Tribunal of Football NSW
Date of Decision	12 November 2015
The basis upon which the matter is before the Appeals Tribunal	Sections 9.1(ii) & 9.2(a) & (d) of the Football NSW Grievance and Disciplinary Regulations, 2014
Ground(s) of Appeal	Sections 9.2 (a) & (d) of the Football NSW Grievance and Disciplinary Regulations, 2014
Date of Hearing	22 June 2016
Date of Determination	7 July 2016
Appeals Tribunal Members	Anthony LoSurdo SC, Chair Graham Turnbull SC, Member Clint Dal Santo, Member

A. INTRODUCTION AND JURISDICTION

1. The Appeals Tribunal (AT) has been established in accordance with section 9.1 of the Football NSW Grievance and Disciplinary Regulations, 2014 (FNSW Regulations) to determine appeals from the Disciplinary Committee (DC), the General Purposes Tribunal (GPT) and the Association Appeals Committee (AAC) but subject to the limitations provided in that section.

2. The sole grounds of appeal prescribed by section 9.2 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;
 - (c) the decision was affected by actual bias;
 - (d) the decision was one that was not reasonably open having regard to the evidence before the decision-maker; and
 - (e) severity, only where the decision imposed a sanction of at least:
 - i. a Fixture Suspension of 6 or more Fixtures; or
 - ii. a Time Suspension of 3 or more months; or
 - iii. a fine of \$3,000 or more; or
 - iv. a loss of 6 Competition points; or
 - v. expulsion from a competition.
3. 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) any decision including any sanction or penalty; and
 - (b) impose any sanction, measure or make any order it thinks fit or a decision that either the DC or the GPT could have imposed or made under the Regulations.

(s 9.3(b) of the FNSW Regulations)
4. This appeal arises from a determination of the GPT dated 12 November 2015. The AT is satisfied that it has jurisdiction to hear the appeal. Further, neither party raised any objection to the AT's jurisdiction.

B. BACKGROUND FACTS

5. As at 10 May 2015, Mr Lucas was the coach of the Inter-Lions U 17 Women's team and was thus a Team Official as that term is defined in the FNSW Regulations.
6. By Notice of Charge dated 13 October 2015 issued by FNSW pursuant to section 8.2 and 15.3 of the FNSW Regulations, Mr Lucas was charged with three offences

relating to conduct which allegedly proceeded the conclusion of the U17's Women's National Premier League 2 match between the Inter-Lion's Soccer Club and the Sydney Olympic Football Club at Concord Oval on 10 May 2015 (**Fixture**).

7. The conduct which constituted Charge 1 was that Mr Lucas allegedly used offensive, obscene, provocative and/or insulting language towards Sydney Olympic Football Club players, officials and parents. The alleged conduct included telling those people to "fuck off" (**Charge 1**).
8. The conduct which constituted Charge 2 was that Mr Lucas allegedly used offensive, obscene, provocative and/or insulting language and/or gestures towards a Sydney Olympic Football Club parent Ms Natalie Montgomery. The alleged conduct included standing in close proximity to Ms Montgomery and shouting at her and calling her a "cunt" (**Charge 2**).
9. The conduct which constituted Charge 3 was that Mr Lucas allegedly behaved in a provocative manner by suggesting to an unidentified male affiliated with the Sydney Olympic Football Club that the matter be settled elsewhere (**Charge 3**).
10. FNSW alleged that the conduct which constituted each of the three charges was in breach of:

section 15.3(b), (e), (f) and/or (g) of the Football NSW Regulations; and/or

section 15.3(d) of the Football NSW Regulations: Schedule 3, Table C,
Number 3 and/or Number 6; and/or

clauses 2.1 and 2.2(c) and/or (d) of the Football Federation Australia Code of Conduct.

C. THE DECISION THE SUBJECT OF THE APPEAL

11. The charges were heard by the GPT on 26 October 2015.
12. We have the benefit in this appeal of a transcript of the proceedings before the GPT. References to that transcript in this determination are abbreviated to "T" followed by the relevant page number.

13. Mr Lucas was represented at the hearing before the GPT by Mr Michael Furlong. Mr Furlong is a corporate solicitor. He indicated to the GPT that he was not retained by Mr Lucas as a lawyer but was proposing to appear for Mr Lucas as a "support person". We note in this regard that section 8.2(e)(iv) of the FNSW Regulations provides that a person responding to a charge may elect to be represented by a lawyer or by a support person. In an exchange between the GPT Chairman and Mr Furlong, Mr Furlong said that he intended to make submissions and to cross-examine through the GPT Chairman witnesses called by FNSW (T 6). The transcript reveals that he did so.
14. Following exchanges between the GPT Chairman and Mr Furlong, Mr Lucas amended his plea to charge 1. He continued to deny that he had used the words "fuck off" but he did admit to having used the words "piss off". In changing his plea, it appears that Mr Lucas accepted, through Mr Furlong, that use of the words "piss off" could constitute offensive, obscene, provocative and/or insulting language in breach of section 15.3(b), (e),(f) and/or (g) of the Football NSW Regulations; and/or section 15.3(d) of the Football NSW Regulations: Schedule 3, Table C, Number 3 and/or Number 6; and/or clauses 2.1 and 2.2(c) and/or (d) of the Football Federation Australia Code of Conduct (T47 & 48). It appears that the GPT proceeded, with the concurrence of Mr Furlong for Mr Lucas, as if Charge 1 had been amended by deleting the words "fuck off" where they appear in the charge and substituting them for the words "piss off".
15. The evidence before the GPT consisted of the following:
 - an undated written statement from Ms Natalie Montgomery;
 - a copy of an email dated 12 June 2015 from Ms Montgomery to Mr Shane Merry of FNSW;
 - an undated statement from Ms Kylie Khoury;
 - an undated statement from Mr Con Limnios;
 - an undated statement from Mr Sandro Fiora;

an undated statement from Ms Glenda Fiora;

an undated statement from Mr Neal Meharg;

an undated statement from Ms Irene Konstantinidis;

a statement dated 16 October 2015 from Mr Simon Lucas;

a 14 page statement from Mr Simon Lucas headed "to whom it may concern, Re: Misconduct allegation-Concord Oval, 10 May 2015";

an undated statement from Ms Carolyn Cecere;

a two-page undated statement from Mr Simon Lucas , beginning with the words "I am not able...";

a statement from Goran Marjanovic, dated 11 June 2015;

an undated statement from X, and

a statement from Helen Lucas, dated 3 September 2015.

16. The GPT also had the benefit of hearing oral testimony from Ms Montgomery, Mr Limnios, Ms Konstantinidis and Mrs Helen Lucas. The GPT attempted to make telephone contact with Mr Fiora (T 100 & 101) and Mr Meharg (T 100) without success. The GPT was told by Mr Furlong that Ms Cecere would be available to give evidence by telephone (T 39).

17. The GPT suggested that telephone contact be made with Ms Cecere (see below). The transcript reveals the following exchange between the GPT Chairman and Mr Lucas which occurred at a time when the GPT was considering, given the lateness of the hour (it was after 10 pm – see T 84), whether it should adjourn the hearing (at T 109):

"CG [Chris Gardiner- GPT Chairman]: The question is um, being sure that you had had every opportunity to present your case. So we have Mr, we have Caroline Cessare[sic] to call.

SL [Simon Lucas]: but I am happy for me personally. If you just say to everyone stay, let's all make a decision, personally. I feel like it is a bit volume weighted against statements versus what's happened and that's you know, what can I do. That's my feelings on it. That's how I feel and I just think take statements, make your decision.

It will be what it is. I am not even really that phased on making a submission because it just feels to me that, that is, that is how I feel, unfortunately. It's just volume weighted against statements that have come in against me that are lies and I have just got to... That's how I feel. I cannot, you know, that's all/ can say.

You know, your time was taken up, my time is taken up which costs me a lot of money at work, this. Everyone needs to move one (sic)."

18. The hearing accordingly proceeded without the benefit of any oral evidence from Ms Cecere although the GPT did consider her written statement.
19. The GPT delivered its Preliminary Notice of Determination on 26 October 2016 in which the GPT recorded that it had found each of the 3 charges proved and imposed a suspension on Mr Lucas totalling six (6) fixtures. That suspension has been served.
20. The GPT delivered its final determination including reasons for that determination on 12 November 2015.
21. In relation to charge 1, the GPT "...noted and accepted Mr Lucas's admission and expression of regret for offensive language..." and determined that an appropriate sanction was a two fixture suspension (GPT Determination [30]). The GPT's reference to Mr Lucas's "admission" is a reference to Mr Lucas, through Mr Furlong, having admitted to saying the words "piss off" to Ms Montgomery in circumstances where he maintained a denial of having used the arguably more offensive words "fuck off" with which he originally stood charged.
22. The GPT's reasons relating to charge 2 are summarised in paragraphs 31 to 39 of its determination. In short, the GPT appears to have accepted the evidence of Ms Montgomery which was corroborated by the evidence of Mr Limnios, the Sydney Olympic U17's Women's Coach. That evidence consisted of a written statement together with evidence given orally at the hearing and which Mr Lucas, through Mr Furlong, was given the opportunity of challenging. This evidence was favoured over that given by Mr Lucas and that of Ms Cecere who, whilst independent of Mr Lucas, the GPT noted was *"not available to the Tribunal to test her evidence."* (GPT Determination [34] and [17] & [18] above). Indeed, it is the case that Mr Lucas,

having been given the opportunity by the GPT of calling Ms Cecere elected not to do so (see [17] of these reasons).

23. The GPT found that the weight of the evidence strongly supported charge 3 and found that charge proved. The evidence upon which the GPT relied were statements from the following persons: Ms Montgomery, who heard Mr Lucas say "*to take this further walk outside the park*"; Ms Khoury, who heard Mr Lucas say "*Jet's take it outside*"; Mr Limnios, who heard Mr Lucas say "*Jet's settle things in the car park*" and "*Jet's sort things out*"; Mr Fiora , who heard Mr Lucas say "*take the matter outside onto the road*" and Mr Meharg who heard Mr Lucas say "*let's take it outside*" (GPT Determination [40]).

D. THE GROUNDS OF APPEAL

24. By Notice of Appeal filed on 26 August 2015, Mr Lucas appeals on each of the grounds stipulated in section 9.2 (a) to (d) of the FNSW Regulations. However, in the Outline of Submissions dated 3 December 2015, the grounds have been limited to those set out in section 9.2 (a) & (d) of the FNSW Regulations.
25. The grounds of appeal may be summarised as follows:
- (a) that the findings of guilt on each of the three charges laid against Mr Lucas by FNSW were not reasonably open to the GPT having regard to the evidence before it (s 9.2(d)); and
 - (b) that Mr Lucas was not afforded a reasonable opportunity to present his case and was thus denied procedural fairness (s 9.2(a)) by:
 - (i) being prevented from examining Ms Natalie Montgomery about whether she used offensive language;
 - (ii) being prevented from examining Ms Konstandinidis about her location at various times by reference to the photographs annexed to Mr Meharg's statement; and
 - (iii) being denied an opportunity to be heard on penalty with respect to charges 2 and 3 before the sanctions were imposed.

E. THE HEARING

26. The AT heard the appeal on the evening of 22 June 2016.

27. At the hearing, Mr Lucas was represented by Ms April Francis and Mr Chris McGorey, of counsel. FNSW was represented by Mr Lorenzo Crepaldi, Head of Member Services and Legal Counsel, FNSW and Mr Will Aplin, Legal Counsel, FNSW.

The AT had before it the evidence that was tendered at the hearing before the GPT (see [15] of these reasons) together with a transcript of the hearing before the GPT. Neither party contended that the AT should have regard to any other evidence.

F. SUBMISSIONS

28. Mr Lucas provided the AT with a written Outline of Submissions dated 3 December 2015 and a written Outline of Supplementary Submissions dated 28 February 2016. FNSW provided the AT with undated written submissions. The parties were each afforded an opportunity to and did supplement their written outlines orally at the hearing. For the sake of brevity we do not propose to repeat those submissions but will address them to the extent that it may be necessary to do so in disposing of the appeal.

G. CONSIDERATION AND DETERMINATION*Relevant legal principles*

29. A Tribunal must conduct a hearing in any manner as it sees fit, provided that all parties are given a reasonable opportunity to be heard and the hearing is conducted with as little formality and technicality as proper consideration of the matters before it permits (FNSW Regulations, s 12.10(c)). Further, a Tribunal is not bound by the rules of evidence (FNSW Regulations, s 12.10(a)) but a hearing must be conducted in accordance with the principles of natural justice (FNSW Regulations, s 12.10(b)). We will return to these provisions below.

30. The question of whether, and to what extent, a domestic tribunal (and relevantly the GPT or AT as the case may be) is obliged to conduct its proceedings consistently

with the principles of natural justice and procedural fairness is an issue that turns upon the proper construction of the FNSW Regulations.

31. Following *McClelland v Burning Palms Surf Life Saving Club* [2002] NSWSC 470:

"In Australia, the preferable view is that natural justice comes to operate in private clubs and associations by the rules of those private organisations being construed on the basis that fair procedures are intended, but recognising that possibility that express words or necessary implication in the rules could exclude natural justice in whole or part" (per Campbell J at [97]).

32. This is consistent with earlier authority, including *Dickason v Edwards* (1910) 10 CLR 243 (per O'Connor J at 255):

"The rules of a society may give power to decide disputes on any principle the members think fit. The rules may be of such a nature as to empower a judicial body to decide in violation of all principles of natural justice. If the parties choose to agree to a tribunal having power of that kind the Courts will not interfere."

33. These principles were recently affirmed in *Sharp v National Rugby League* [2016] NSWSC 730 (per Stevenson J).

34. Section 12.10 of the FNSW Regulations clearly requires the GPT and the AT to afford parties natural justice and procedural fairness. The real issue is as to the substance of the obligations imposed by these requirements. To employ the words of Mason J in *Kioa v West* (1985) 159 CLR 550 (at 585):

"The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?"

35. In this sense, the rules of natural justice have a "variable, chameleon quality" (*McClelland v Burning Palms Life Saving Club* [2002] NSWSC 470, [102] per Campbell J).

36. The standard of proof applicable in determinations by a "Body" as defined in the FNSW Regulations which include the GPT, is on the balance of probabilities (FNSW Regulations, s 12.13). A fact is proved on the balance of probabilities if its existence is more probable than not (see, for example, *Reifek v McElroy* (1965) 112 CLR 517).

37. An appeal involves the consideration of whether the decision under consideration is affected by legal, factual or discretionary error (see, for example, *Allesch v Maunz* (2000) 203 CLR 172). The question as to whether there is any evidence of a particular fact is a question of law. Likewise, the question as to whether a particular inference can be drawn from facts found or agreed is also a question of law (see, for example, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355 per Mason CJ).
38. However, in considering an appeal regard must be had to the comparative advantages available to the tribunal at first instance of having experienced the whole course of the proceedings including having heard and observed all of the witnesses and having considered the totality of all of the other evidence (see, for example, *Fox v Percy* (2003) 214 CLR 118).
39. 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).
40. 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).
41. 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).

42. Procedural fairness requires that a decision maker "...act fairly...in the making of...decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of the contrary intention...": *Kiora v West* (1985) 159 CLR 550 at 584 per Mason J.
43. Natural justice involves a duty to act judicially, to deal with the matter for decision without bias, that a person be given a fair hearing, the opportunity to present one's case and to have a decision based on logically probative evidence (see, eg, *Salemi v MacKellar (No. 2)* (1977) 137 CLR 396).
44. Generally, denying a party the right to call admissible evidence which that person wishes to call to rebut a claim or charge is a denial of natural justice: *HG v R* (1997) CLR 414 at [97] per McHugh J.
45. Where a denial of natural justice deprives a party from making submissions on an issue of fact and the denial deprived the party of the possibility of a successful outcome, an appeal should be allowed unless a properly conducted trial would not have produced a different result: *Stead v State Government Insurance Commission* (1986) 161CLR 141at 147.
46. A person found guilty of an offence should be given an opportunity to be heard on the penalty before sanctions are imposed: *Malone v Marr* [1981] 2 NSWLR 982.

Was the finding of guilt on Charge 1 reasonably open to the GPT having regard to the evidence before it?

47. The GPT's finding of guilt on Charge 1 was based upon Mr Lucas's admission that he used the words "piss off" in an exchange with Ms Montgomery although he steadfastly denied that he used the words "fuck off" (GPT Determination [19]; see also T 47 & 48). In submissions (T 114), Mr Furlong accepted, correctly in our view, that use of the words "piss off" would constitute offensive, obscene, provocative and/or insulting language in breach of section 15.3(b), (e), (f) and/or (g) of the Football NSW Regulations; and/or section 15.3(d) of the Football NSW Regulations: Schedule 3, Table C, Number 3 and/or Number 6; and/or clauses 2.1 and 2.2(c) and/or (d) of the Football Federation Australia Code of Conduct.

48. Having regard to the admission made by Mr Lucas, it is apparent that the GPT did not consider that it was required to and did not make a finding as to whether Mr Lucas used the words "fuck off". The GPT, in effect, proceeded on the basis that the charge had been amended by consent by deleting the words "fuck off" and substituting them with the words "piss off".
49. Ms Francis submitted in oral argument that Mr Lucas's decision to amend his plea to guilty of using offensive, obscene, provocative and/or insulting language by having used the words "piss off" was caused by the GPT having misled Mr Lucas as to his criminal culpability by suggesting that use of those words would meet the criteria of charge 1 (T 45). It was submitted that this exchange constituted a denial of procedural fairness. We disagree.
50. After the relevant exchange took place there appears to have been a break in proceedings to enable Mr Furlong to confer with Mr Lucas (T 47). After proceedings resumed, Mr Furlong indicated to the GPT that Mr Lucas was prepared to amend his plea and rely upon provocation by way of mitigation (T 47 & 48). This was a conscious decision by Mr Lucas informed, we infer, from advice provided by Mr Furlong to him. Mr Lucas had every opportunity to take a different course.
51. Mr Lucas submits that *"he was sanctioned in respect of conduct which he denied"* (Outline [65]). This submission proceeds on a wholly unsupported premise that the GPT made a finding that he used the words "fuck off" in his exchange with Ms Montgomery. It did not.
52. Further, and more substantively, we consider that the GPT was entitled to find, based upon the admission made by Mr Lucas that he used the words "piss off" in his exchanges with Ms Montgomery, that his conduct constituted offensive, obscene, provocative and/or insulting language in breach of section 15.3(b), (e), (f) and/or (g) of the Football NSW Regulations; and/or section 15.3(d) of the Football NSW Regulations: Schedule 3, Table C, Number 3 and/or Number 6; and/or clauses 2.1 and 2.2(c) and/or (d) of the Football Federation Australia Code of Conduct. The GPT

took into consideration this admission and Mr Lucas's remorse in determining the appropriate sanction to impose (GPT Determination [30]).

53. This ground of appeal in relation to Charge 1 is dismissed.

Was the finding of guilt on Charge 2 reasonably open to the GPT having regard to the evidence before it?

54. The GPT's findings in relation to Charge 2 are contained in paragraphs 31 to 39 of the GPT Determination.

55. Mr Lucas submits that the GPT made no express finding about what Mr Lucas said to Ms Montgomery and, in particular, whether he had called her a "cunt" as alleged in the charge. It is further submitted that in the absence of any proper factual findings that the AT is unable to assess the reasonableness of the GPT Determination (Outline [71]).

56. As to the first of the submissions, we accept that the GPT Determination does not, in express terms, find that Mr Lucas called Ms Montgomery a "cunt" as alleged in the charge. However, having regard to the fact that the GPT found the charge proved, we infer that the GPT must have found that Mr Lucas did call Ms Montgomery a "cunt".

57. As to the second of the submissions, we do not accept that we are unable to assess the reasonableness of the GPT Determination. We have before us the evidence that was before the GPT and which we are able to independently assess to determine whether the finding of guilt was reasonably open on that evidence. Mr Lucas also submits that a finding that Mr Lucas verbally abused or inappropriately gestured to and approached Ms Montgomery in the manner alleged was not open to the GPT having regard to all the evidence (Outline [88]). For the reasons that follow each of these submissions should be rejected.

58. The evidence relevant to Charge 2 that was before the GPT can be summarised as follows:

- * Ms Montgomery: Mr Lucas *"stood an inch away from my face and continuing to shout profanities in my face and to have myself called a C@#t in front of my own daughter"* (undated written statement- Annexure A in the GPT hearing);
- * Mr Limnios:
 - Mr Lucas *"[got] up in the mothers' faces and verbally [threw] accusations and explicit language towards them..."* (undated written statement- Annexure E in the GPT hearing);
 - Mr Lucas was in women's faces, *"Natalie [Montgomery], Kylie"* (T 75)
 - Mr Lucas used *"very foul language..."* (T 75)
 - Mr Lucas *"used the fuck word, the slut word and cunt"* (T 76 & 77);
- * Mr Lucas: generally denied using any foul or abusive language in any of his exchanges with parents of the Sydney Olympic team and Ms Montgomery in particular: *"...piss off. This was the only bad language that I uttered during the whole incident..."* (p 5, Simon Lucas, undated 14 page statement and p 1, Simon Lucas undated statement); *[a]t no stage did I use the F word, the C word or push or shove anyone."* (p 6, Simon Lucas, undated 14 page statement);
- * Ms Cecere: *"I know you were exchanging words with the other parents...I did not hear you say swear words of any kind...I heard you say a few things but I did not hear you swear or use the C word and I would remember that as I would not expect to hear that sort of language."* (undated statement);
- * Mrs Helen Lucas: in each of her two statements, Mrs Lucas recalls Mr Lucas being verbally abused by Sydney Olympic parents and being called a *"fucking loser"* and a *'lucking nobody"*. Relevantly, Mrs Lucas says *"...that's all I heard clearly although I could hear other profanities I didn't hear the exact context in which they were said to Simon."* Mrs Lucas's account is directed to only recording the profanities directed at her Mr Lucas. Her account is

silent as to whether Mr Lucas directed any profanities or words that could be construed as such to any other person(s) (statement dated 3 September 2015);

* X: like her mother's account, X's statement focusses on the conduct of the Sydney Olympic parents towards her and Mrs X. It is relevantly silent as to whether Mr Lucas directed any profanities or words that could be construed as such to any other person(s) (undated statement);

and

* Mr Marjanovic: Mr Marjanovic recalls Ms Montgomery and Irene Konstantanidis "*abusing*" Mr Lucas and "*[c]alling him a nobody and a few swear words were involved.*" However, Mr Marjanovic does not record what words were used and whether they were solely directed at Mr Lucas or emanated in whole or in part from Mr Lucas (statement dated 11 June 2015).

59. Mr Furlong was given an opportunity to challenge Mr Limnios's account. The transcript indicates that Mr Furlong asked several questions of Mr Limnios through the GPT Chairman (see T 79-83). Mr Limnios's evidence relating to Charge 2 as summarised in the preceding paragraph was not challenged. The transcript records the following exchange between the GPT Chairman (CG) and Mr Furlong (MF) (T 83):

"CG: Anything else?"

MF: Nothing

CG: You sure?"

MF: Probably not, but I'm going to stick with it anyway."

Mr Furlong asked no further questions of Mr Limnios and he was then excused.

60. There was an obvious and apparent tension between the evidence of Mr Limnios and that of Ms Cecere. Notwithstanding that tension, Mr Lucas elected not to call Ms Cecere to give evidence even though he was given every opportunity by the GPT to do so (see [17] of these reasons). Accordingly, Mrs Cecere did not appear to give

evidence in person or to be challenged on the contents of her written statement which was tendered in evidence before the GPT.

61. In finding Charge 2 proved, the GPT accepted the evidence of Ms Montgomery which was corroborated by the unchallenged evidence of Mr Limnios which the GPT found to be a *"very credible witness"* (GPT Determination [35]). This evidence was favoured over that given by Mr Lucas and Ms Cecere who, whilst independent of Mr Lucas, the GPT noted was *"not available to the Tribunal to test her evidence."* (GPT Determination [34] and [17] & [18] of these reasons).
62. We see no error in the GPT's finding or in the reasons expressed for it. The contest in the evidence in relation to Charge 2 was ultimately between Ms Montgomery whose account was corroborated by Mr Limnios and Mr Lucas whose account was corroborated by Ms Cecere. Mrs X, Ms X and Mr Marjanovic's statements provided no assistance in relation to Charge 2. Mr Limnios was not, however, challenged on his recollection of events relating to Charge 2 and Mr Lucas chose not to call Ms Cecere. Further, in reaching the conclusion that it did, the GPT had the benefit of having heard and observed all of the witnesses including Mr Limnios.
63. Though it does not strictly form a part of the relevant ground of appeal, Ms Francis submitted orally that the GPT had denied Mr Lucas procedural fairness by failing to notify him of the potential consequences of not calling Ms Cecere. We reject that submission for the following reasons:
 - proceedings before the GPT are essentially adversarial in nature and it is no part of the GPT's role to provide advice (apart from information relating to the practice and procedure of the GPT itself) to any party appearing before it; that is moreover the case where, as in the present circumstances, Mr Lucas was legally represented;
 - the submission assumes that the GPT had formed a view as to the significance or otherwise of Ms Cecere's evidence. There is no evidence which indicates that the GPT had formed such a view;

- the GPT afforded Mr Lucas every opportunity to call Ms Cercere even suggesting an adjournment to enable that evidence to be given (see [17] of these reasons); and
- Ultimately, the decision not to call Ms Cecere was that of Mr Lucas alone.

64. The GPT was, in our opinion, wholly justified in these circumstances in preferring the evidence of Ms Montgomery and Mr Limnios over that of Mr Lucas and Ms Cecere. There was ample probative evidence before the GPT to support its finding of guilt on the balance of probabilities. It is not a case where the totality of the evidence preponderates so strongly against the conclusion found by the GPT that it can be said that the conclusion was not one that a reasonable tribunal could reach or on which reasonable and honest minds could possibly reach the conclusion.

65. This ground of appeal in relation to Charge 2 is dismissed.

Was the finding of guilt on Charge 3 reasonably open to the GPT having regard to the evidence before it?

66. The GPT's findings in relation to Charge 3 are contained in paragraphs 40 to 42 of the GPT Determination.

67. Mr Lucas submits that it was not reasonably open to the GPT to find Charge 3 proven on the basis of all the available evidence especially having regard to the conflicts in the evidence and with most witnesses being unable to recount what words Mr Lucas in fact used (Outline [128] & [129]).

68. The evidence upon which the GPT relied to support its finding of guilt in relation to Charge 3 were statements from the following persons: Ms Montgomery, who heard Mr Lucas say "*to take this further walk outside the park*"; Ms Khoury, who heard Mr Lucas say "*let's take it outside.*"; Mr Limnios, who heard Mr Lucas say "*let's settle things in the car park*" and "*let's sort things out*"; Mr Fiora, who heard Mr Lucas say "*take the matter outside onto the road*" and Mr Meharg who heard Mr Lucas say "*let's take it outside.*" (GPT Determination [40]).

69. In addition, Mr Limnios gave oral evidence that he heard Mr Lucas say the following words to another father, *"if you're man enough let's go across the back of the paddock."* (T 77)
70. Mrs Konstantinidis gave oral evidence at the hearing that she was standing a metre or so away from Mr Lucas when she heard him say to another father, *"let's go over there and have a fight"*. (T 86 & 89). Mrs Konstantinidis's evidence was challenged by Mr Furlong (T 94-97). Mr Furlong directed many of his questions to ascertaining the distance between Mrs Konstantinidis and Mr Lucas at the time that he had allegedly made the comments attributed to him by Mrs Konstantinidis. Mrs Konstantinidis maintained that she was no further than a metre away from Mr Lucas (T 95).
71. In her statement, Mrs Fiora said that she saw Mr Lucas *"gesturing with his arm and pointing across the road..."* and say *"Let's take it across the road"*.
72. In his statement, Mr Lucas denied suggesting *"...to anyone that the way to resolve the situation was to do so physically"* (p 5, Simon Lucas, undated 14 page statement). He also denied the words attributed to him by Mr Meharg and says that he recalled saying at one stage *"let's move away from here"* in the direction of the field rather than the car park and suggested that this is what Mr Meharg may have misheard (pp 6 & 7, Simon Lucas, undated 14 page statement).
73. In her statement, Mrs Lucas provides no evidence that is relevant to Charge 3.
74. In her statement, Ms X provides no evidence that is relevant to Charge 3.
75. Mrs Cecere provides no evidence in her statement directly relevant to Charge 3. Her evidence in relation to Charge 3 does nothing more than provide context. In particular, she makes plain in her statement that she *"...did not remember clearly what was said by people."*
76. What the evidence establishes is that there was an escalating verbal altercation between persons including Ms Montgomery and Mr Lucas in the carpark following the conclusion of the Fixture. However, there are competing versions of what Mr Lucas is alleged to have said and what was intended to have been conveyed by

those words. There is, however, a theme common to the evidence adduced by FNSW in support of the charge; that is, that Mr Lucas was purporting to challenge an unidentified person associated with the Sydney Olympic Football Club to settle their apparent differences elsewhere by way of a fight.

77. These things need not be judged to a nicety. Common sense and experience must and do have a role in a tribunal's assessment of the evidence before it. We are of the opinion that the weight of the evidence supports Charge 3. It is not a case where the totality of the evidence preponderates so strongly against the conclusion found by the GPT that it can be said that the conclusion was not one that a reasonable tribunal could reach or on which reasonable and honest minds could possibly reach the conclusion.
78. We are fortified in our view when account is taken of the fact that the GPT had the benefit of oral evidence from Mr Limnios and from Mrs Konstantinidis and of judging their demeanour. Mr Limnios's evidence regarding facts relevant to Charge 3 was not challenged. Mrs Konstantinidis's evidence regarding facts relevant to Charge 3 was challenged but Mrs Konstantinidis adhered to the facts recorded in her statement and that she was no further than a metre away when she heard the words attributed to Mr Lucas.
79. This ground of appeal in relation to Charge 3 is dismissed.

Denial of Procedural Fairness

80. Mr Lucas asserts that he was denied procedural fairness because he was:
- (a) prevented from examining Ms Natalie Montgomery about whether she used offensive language;
 - (b) prevented from examining Ms Konstantinidis about her location at various times by reference to the photographs annexed to Mr Meharg's statement; and
 - (c) not afforded an opportunity to be heard on penalty with respect to Charges 2 and 3 before the sanctions were imposed.

81. During the course of oral submissions when introducing this topic, Ms Francis referred the AT to the High Court of Australia decision in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* 223 ALR 171 and a decision of the Supreme Court of Victoria in *Hoe v Manningham City Council* [2011] VSC 37. Each of those decisions arose by operation of statutory regimes guaranteeing rights of appeal to superior courts of law from determinations involving statutory bodies. Each of those cases involved very different bodies to the Judicial Bodies of FNSW such as the GPT and the AT and the regimes by which these bodies are constituted and empowered.
82. It was submitted by reference to those authorities that the GPT procedures in the case of Mr Lucas denied him procedural fairness generally by refusing to recognise and permit Mr Lucas to test the evidence by cross-examination otherwise than through questions being asked of witnesses through the GPT Chair and only to the extent that the GPT permitted those questions to be asked.
83. FNSW Regulations s 12.10(b) recognises the principles in accordance with which hearings must be conducted, but s 12.10(a) and (c) set out the practical manner in which the hearing must be conducted. Section 12.10(a) differentiates the FNSW Tribunals from courts of law explicitly by mandating that they will not be bound by the laws of evidence usually applicable in "to proceedings in courts of law". Section 12.10(c) requires that a party be afforded a reasonable opportunity to be heard, and that the hearing be conducted with as little formality and technicality and with as much expedition as the matter before it permits.
84. Consistent with FNSW Regulations s 12.10(c), the GPT Chairman enunciated at the commencement of the hearing that Mr Lucas through Mr Furlong would be permitted to ask questions of witnesses called by FNSW but that those questions should be asked through the Chair. In our opinion, this direction is consistent with the intent, object and purpose of s 12.10(c), that is, to ensure that proceedings are conducted with as little formality and technicality and with as much expedition as the circumstances permit. We accordingly reject the submission that the procedures adopted by the GPT denied Mr Lucas the opportunity of a fair hearing.

Further, it was not established that there was a substantial risk that the GPT's capacity to assess fairly the evidence and Mr Lucas's case and to carry out its decision-making functions conferred by the FNSW Regulations was impaired by the procedures adopted by it (*NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* 223 ALR 171, [106] per Gleeson CJ).

Examination of Ms Montgomery

85. Mr Lucas asserts that Mr Furlong, who appeared for Mr Lucas at the hearing before the GPT, was denied the opportunity of asking Ms Montgomery if she had used "offensive language" (T 59). When asked by the GPT Chairman as to the relevance of that line of questioning Mr Furlong responded that it could be relevant to the question of provocation and credit (T 59).
86. It appears that the GPT refused Mr Furlong's request to pursue this line of questioning as it considered it to be of no relevance to the facts in issue. The GPT's reasoning process appears to have been as follows:
- (i) Mr Lucas had pleaded not guilty to each of Charges 2 and 3 and, in particular, Charge 2 to which the proposed line of questioning was directed. Implicit in that denial is the fact that Mr Lucas did not say the words attributed to him and, accordingly, nothing Ms Montgomery said could have been construed as provocative (T 60); and
 - (ii) Even if the questions were put to Ms Montgomery and she admitted that she may have said words that were provocative of Mr Lucas, it would have no bearing on whether Charge 2 was proved. (T 60)
87. In our opinion, the GPT was justified in refusing Mr Furlong's request to pursue the line of questioning in issue and it did not constitute a denial of procedural fairness to do so, because:
- (a) provocation, even if it existed, would not constitute a defence to the charge; and

(b) it is not apparent how, even if it could be shown that Ms Montgomery had used offensive language in her exchanges with Mr Lucas, it alone would affect her credit.

88. Further, and in any event, even if the GPT had erred in its ruling to reject the line of questioning, we are of the view that such an error was not material to the outcome of the decision appealed from; that is, that the decision itself was vitiated by that error. We come to this view because there was ample evidence which, on the balance of probabilities, supported the relevant finding of guilt (see [58] & [59] of these reasons) and, in our opinion, any evidence that could have been adduced from Ms Montgomery was unlikely to have had any material impact on that finding.

Examination of Mrs Konstantinidis about her location by reference to photographs

89. Mr Lucas submits that Mr Furlong was denied an opportunity of testing Mrs Konstantinidis's evidence by reference to 2 photographs taken by Mr Meharg and ultimately tendered by FNSW and admitted into evidence as Annexures J and K. The GPT appears to have refused Mr Furlong's request to do so because they "*could not be linked to a particular moment in the incident...*" (GPT Determination [29] & T 91).

90. No suggestion was made by Mr Furlong in any of his submissions to the GPT that either of the photos depicted Mrs Konstantinidis or that they were taken at a time when the words attributed by Mrs Konstantinidis to Mr Lucas were uttered. No such submission is made in the appeal. In the circumstances, the relevance of the photographs and any questioning of Mrs Konstantinidis in relation to them are not immediately apparent.

91. Accordingly, the GPT was justified in refusing Mr Furlong's request to pursue the line of questioning in issue and it did not constitute a denial of procedural fairness to do so.

92. Further, and in any event, even if the GPT had erred in its ruling to reject the line of questioning, in our view, such an error was not material to the outcome of the decision appealed from; that is, that the decision itself was vitiated by that error. We come to this view because there was ample evidence which, on the balance of

probabilities, supported the relevant finding of guilt (see [68] - [78] of these reasons) and, in our opinion, any evidence that could have been adduced from Mrs Konstantinidis was unlikely to have had any material impact on that finding.

Opportunity to be heard on penalty

93. Mr Lucas submits that he was not given notice about the findings of guilt with respect to Charges 2 and 3 before the penalty was imposed. That submission should be rejected for the following reasons:

- (a) the GPT indicated at the outset of the hearing that Mr Lucas would be given an opportunity to make submissions on sanction (T 3);
- (b) at the conclusion of the hearing, Mr Lucas was given an opportunity to make submissions both as to whether the charges were proved and as to penalty (T 114-115);
- (c) Mr Furlong made lengthy submissions on whether Charges 2 & 3 were proved (T 114-117); and
- (d) Mr Furlong did make a submission as to penalty, if any. He said, "... [i]f *there was a necessity for a punishment that the punishment may have already been applied in the sense that...Simon's position as coach of Inter was terminated...and that in itself was a substantial punishment...*" (T 115).

H. RELIEF

94. The appeal should be dismissed with the parties bearing his or its own costs of the appeal.



A P LoSurdo SC
Chair
Appeals Tribunal
Football NSW