



APPEALS TRIBUNAL OF FOOTBALL NEW SOUTH WALES

DETERMINATION IN THE FOLLOWING MATTER:

Player/Official/Member/Association Member/Participant/Club	Andrew Prentice v Football NSW
Decision Appealed	Appeal from General Purposes Tribunal determination
Date of Decision	19 September 2016
The basis upon which the matter is before the Appeals Tribunal	Sections 9.1 (b) & 9.3 (e) of the Football NSW Grievance and Disciplinary Regulations, 2016
Ground(s) of Appeal	Section 9.3 (e) of the Football NSW Grievance and Disciplinary Regulations, 2016
Date of Hearing	Determined on the papers
Date of Determination	12 October 2016
Appeals Tribunal Members	Anthony Lo Surdo SC, Chair Iain Rennie, Member Michael Holmes, 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, 2016 (**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 9.3 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;
 - (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) subject to any applicable minimum suspension, 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.
 - (c) conduct a fresh hearing of the matter; or
 - (d) remit the matter to the DC, GPT or AAC or the tribunal that dealt with the matter at first instance, for rehearing and issue any directions or orders in relation to the re-hearing as considered appropriate.

(s 9.4(b) of the FNSW Regulations)
4. This appeal arises from a determination of the Football NSW General Purposes Tribunal (GPT) dated 19 September 2016. The AT is satisfied that it has jurisdiction

to hear the appeal (9.1(b) of the FNSW Regulations). Further, neither party raised any objection to the AT's jurisdiction.

B. BACKGROUND FACTS

5. On 3 September 2016, Andrew Prentice (**Coach**), the coach for the Sydney University SFC (**Club**) Premier League, Division 3 team was sent from the technical area following a free kick decision in the 64th minute of the game against Balmain Tigers FC at Arlington Oval. The Coach was sent from the technical area for using language and gestures to the referee which were offensive, intimidating, insulting or abusive.
6. The circumstances that led to the Coach being sent from the technical area (taken substantially from the referee's send-off report) are as follows:
 - (a) in the 64th minute of the game the referee awarded a free kick for Sydney University SFC;
 - (b) the Coach commenced yelling at the referee from the technical area to the effect that he felt the offending player should have been cautioned;
 - (c) the referee approached the Coach and proceeded to tell him that his behaviour was not warranted. The Coach continued to remonstrate with the referee and spoke over the top of the referee;
 - (d) the referee proceeded to advise the Coach that he was making the game about himself by preventing the game from continuing. The Coach then pointed at the referee while yelling "No, I'm making the game about you" before making a dismissive gesture with his hands, turning and walking 2-3 steps away;
 - (e) The referee then removed the Coach by advising him to leave the technical area. As the Coach left the technical area he told the referee to "Fuck Off" again making a dismissive gesture with his hands; and
 - (f) the Coach then left the technical area without further incident.
7. The referee's account was supported by an incident report submitted by the assistant referee.

8. On 7 September 2016, the Coach was charged by FNSW with 3 offences relating to the incidents in question:
- using offensive, insulting or abusive language and/or gestures towards a match official, in breach of section 15.4(d) of the FNSW Regulations (Charge 1);
 - using threatening or intimidating language or conduct towards a match official in breach of section 15.4(d) of the FNSW Regulations; or in the alternative using offensive, insulting or abusive language and/or gestures towards a match official, in breach of section 15.4(d) of the FNSW Regulations (Charge 2);
 - using offensive, insulting or abusive language and/or gestures towards a match official, in breach of section 15.4(d) of the FNSW Regulations (Charge 3);
9. The Coach pleaded 'guilty' to Charge 1 and part of Charge 2, and 'not guilty' to Charge 3.
10. The GPT convened on 14 September 2016 to consider each of the charges. The GPT found that the Coach was:
- (a) guilty of using offensive, insulting or abusive language and/or gestures towards a match official (Charge 1, Charge 2 [part] & Charge 3).
 - (b) not guilty of using threatening or intimidating language or conduct towards a match official (Charge 2 [part]).
11. The Coach was suspended by the GPT from all football related activities (excluding spectating):
- (a) for 3 fixtures in respect of Charge 1;
 - (b) for 3 fixtures in respect of that part of Charge 2 in respect of which he was found guilty;
 - (c) for 3 fixtures in respect of Charge 3;
- with those sanctions to be served consecutively.

12. Consequently, the Coach was suspended for a total of 9 fixtures. It was noted by the GPT that one fixture had already been served so that the suspension applied to a further 8 fixtures.

C. THE GROUNDS OF APPEAL

13. By Notice of Appeal filed on 28 September 2016, the Coach appeals the decision of the GPT on severity alone.

D. THE HEARING

14. The parties jointly submitted that given the nature of the issues raised on the appeal that a direction should be made by the AT for the appeal to be heard on the papers and without the need for the appearance of either party. On 7 October 2016, the Chair made a direction pursuant to section 12.10(m) of the FNSW Regulations for the appeal to so proceed.

E. SUBMISSIONS

15. The AT received joint written submissions dated 6 October 2016 from Simon Philips, of counsel, for the Coach and Lorenzo Crepaldi, General Counsel for FNSW.
16. The Joint Submissions stated that the appeal was advanced on two principal grounds:
 - (a) that the decision of the GPT was not reasonably open to it on the basis of the evidence before it; and
 - (b) severity, namely that the sanction imposed by the GPT (a fixture suspension of nine fixtures in total) was manifestly excessive.
17. However, the Joint Submissions only addressed the second of these two grounds on the basis that if the submissions (as to severity) are accepted, then the remaining ground of appeal would not be pursued.
18. As to severity, it was submitted that:

- (a) the Coach has been suspended for a total of nine fixtures, comprising three separate suspensions of three fixtures each, for three separate charges arising from what was a relatively brief incident;
- (b) As to the third charge, while the Coach disputed before the GPT (and would on appeal wish to dispute) that he actually used the precise words which were attributed to him in the match official reports, on the question of severity, he accepts that, having been found guilty of the charge, a penalty of three fixtures (being the minimum applicable suspension), is in and of itself and standing in isolation, not manifestly excessive;
- (c) that the additional sanction of two separate and consecutive suspensions of three weeks each arising from the other two charges, which are to be served consecutively with the sanction in respect of the third charge, is manifestly excessive for three principal reasons:
 - (i) The GPT expressly found that, based on the evidence, the Coach was not guilty of the more serious charge in respect of Charge 2 but did not identify what the Coach actually did which warranted the finding of guilt with respect to the alternative charge for that offence;
 - (ii) On any view, the conduct involved in the first and second charges was towards the lower end of the range of culpability for which the minimum suspension of 3 fixtures (MMS + 2) would have been appropriate; and
 - (iii) Any suspension imposed with respect to the first two charges should be served concurrently rather than consecutively, as the relevant conduct giving rise to these two charges occurred almost simultaneously and, in any event, a total suspension of six fixtures for this conduct would be clearly excessive; and
- (d) that the appropriate sanction in this case should have been, and should be a total suspension of five fixtures, comprising three fixtures for Charge 3 and three fixtures for Charges 1 and 2, with the suspensions in respect of the first

and second charges to be served wholly concurrently with each other and that the combined suspension be served partly cumulatively with the suspension in respect of the third charge in order to adequately reflect the seriousness of the third charge.

19. It appears to be common ground that the Coach has served two fixtures of his suspension. We note in this regard that he had only served one fixture of his suspension at the time of the GPT determination the subject of this appeal.

F. CONSIDERATION AND DETERMINATION

Relevant legal principles

20. 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 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).
21. Where an offence, or charge, contains common elements arising out of the same or substantially the same facts, the offender should not be punished twice for the commission of elements of the respective offences that are common. The relevant tribunal should fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well as questions of totality (*Pearce v The Queen* (1998) 194 CLR 610 at 623-4).
22. The principle of totality requires a tribunal sentencing for multiple offences concurrently to review the aggregate of the sentences and consider whether their total effect is just and appropriate. The tribunal must look at the totality of the impugned behaviour and ask itself what is the appropriate sanction for all of the offences. An appropriate result, consistent with principle, may be achieved by making the sanctions wholly or partially concurrent or lowering the individual sanctions below that which would otherwise be appropriate to reflect the fact that a number of sanctions are being imposed. Where practicable, the former approach,

that is, of making sanctions wholly or partially concurrent, is to be preferred (*Mill v The Queen* (1988) 166 CLR 59 at 62-63).

23. It is also important for a tribunal to consider and if thought appropriate to state in its reasons that a plea of guilty has been taken into account in setting an appropriate sanction. A plea of guilty should generally be assessed in the range of a 10%-25% discount on sentence. The primary consideration determining where in the range a particular case should fall is the utilitarian value of the plea and that, in turn, should be considered against the timing of the plea and the complexity of the issues. The earlier the plea and the greater the complexity of the issues, the more significant is the utilitarian value of a plea (*R v Thomson* [2000] NSWCCA 294 and *R v Houlton* [2000] NSWCCA 183).

Consideration

24. The conduct of the Coach is comprehensively recorded in the expulsion report prepared by the referee and the assistant referee.
25. The conduct of the Coach which led to his removal from the technical area was clearly unacceptable. Coaches hold an important position of leadership and are expected at all times to exhibit discipline and to act in a manner which shows respect for match officials.
26. The AT notes that the Coach has:
- (1) played in over 530 games in FNSW and FFA sanctioned competitions between 1982 and 2001, serving a total of two games suspension in that time; and
 - (2) Participated as a coach in over 250 games in FNSW sanctioned competitions since 2002 without serving a suspension.

Determination

27. Under the FNSW Regulations, using offensive, insulting or abusive language and/or gestures towards a match official carries a minimum sanction of 3 fixtures.
28. We are of the view that while the sanctions imposed by the GPT (3 fixtures per charge) were reasonable, the GPT erred in deciding that the sanctions in respect of

Charge 1 and Charge 2 (3 fixtures per charge) were to be served consecutively rather than concurrently. This is because:

- (a) Each of these charges arise from the same incident or series of incidents; that is, the exchanges between the Coach and the referee which immediately preceded his expulsion (being those set out in paragraph 6(c) & (d) of this determination);
- (b) Where an offence, or charge, contains common elements arising out of the same or substantially the same facts, the offender should not be punished more than once for the commission of elements of the respective offences that is common. The sanction imposed by the GPT involved the Coach being, in effect, punished more than once for common elements of each set of charges; and
- (c) The decision of the GPT offended the principle of totality because, in our view, the effect of the consecutive nature of the sanctions, when viewed as part of the overall sanctions imposed for the conduct, rendered that sanction disproportionate to the conduct.

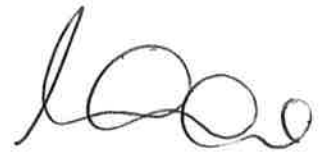
- 29. The GPT accordingly erred in deciding that the Coach was to serve a total sanction of 9 fixtures.
- 30. We do not accept the submission that the sanction for Charges 1 & 2 should be served only partly cumulatively with the suspension for Charge 3. Charge 3 is of a wholly different character to Charges 1 & 2. The conduct is more serious involving, as it did, the use of an expletive and dismissive hand gestures towards a referee after the Coach had been expelled from the technical area. That sanction should, in the circumstances, be served wholly consecutively with the sanctions for Charges 1 & 2.
- 31. In light of this finding it is not necessary to consider whether the decision of the GPT was reasonably open to it on the basis of the evidence before it (para 12 of the Joint Submissions).

F. RELIEF

- 32. The appeal is upheld.
- 33. The AT determines as follows:

- (a) The determination of the GPT that the sanctions for Charge 1 and Charge 2 be served consecutively be set aside and instead directs that those sanctions are to be served concurrently with the consequence that the Coach is suspended for a total of 3 fixtures in respect of Charges 1 & 2;
- (b) The determination of the GPT in relation to the sanction for Charge 3 of a 3 fixture suspension is confirmed;
- (c) In respect of Charges 1-3, the Coach be suspended for a total period of 6 fixtures, with such suspension to be served on match days involving a club for which the Coach is registered as coach and otherwise in accordance with section 14.6 of the FNSW Regulations; and
- (d) As the Coach has already served two fixtures of the suspension, the total suspension to be served is 4 fixtures.

34. The appeal fee is to be refunded.



A P Lo Surdo SC
Chair
Appeals Tribunal
Football NSW