



APPEALS TRIBUNAL OF FOOTBALL NEW SOUTH WALES

DETERMINATION IN THE FOLLOWING MATTER:

Player/Official/Member/Association Member/Participant/Club	Daniel Loe v Football NSW
Decision Appealed	Appeal from the decision of the Disciplinary Committee of Football NSW
Date of Decision	14 August 2017
The basis upon which the matter is before the Appeals Tribunal	Sections 8.3 & 10.1(b) of the Football NSW Grievance and Disciplinary Regulations, 2017
Ground(s) of Appeal	Section 10.3(a) of the Football NSW Grievance and Disciplinary Regulations, 2017
Date of Hearing	30 August 2017
Date of Determination	8 September 2017
Appeals Tribunal Members	Anthony Lo Surdo SC, Chair Graham Turnbull SC, Deputy Chair Ivan Griscti, Member

A. INTRODUCTION AND JURISDICTION

1. The Appeals Tribunal (AT) has been established in accordance with sections 4 & 5 of the Football NSW Grievance and Disciplinary Regulations, 2017 (**FNSW Regulations**). Under section 10 of the FNSW Regulations, the AT has jurisdiction to, amongst other things, hear and determine appeals from the FNSW Disciplinary Committee (**DC**) pursuant to section 8.3 but subject to the grounds of appeal set out in section 10.3 of the FNSW Regulations.

2. The sole grounds of appeal prescribed by section 10.3 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;
 - (b) subject to any applicable Minimum Suspension/Sanction and Maximum Suspension, impose any sanction, measure or make any order it thinks fit or a decision that either the Body, which includes relevantly the DC could have imposed or made under the Regulations;
 - (c) conduct a fresh hearing of the matter; or
 - (d) remit the matter to the Body from which the appeal originated, for rehearing and issue any directions or orders in relation to the rehearing of the matter that the AT deems appropriate.

(s 10.4(b) of the FNSW Regulations)

4. This appeal arises from a determination of the DC dated 14 August 2017. It appears to have been brought in accordance with the time limits and other requirements set out in section 8.3 of the FNSW Regulations. We are accordingly of the view that the AT has jurisdiction to hear the appeal. Neither party contended to the contrary.

Background Facts

5. Mr Loe is a member of the St George National Premier League 2 squad (**Player**).
6. On 5 August 2017, the Player was competing in a fixture against Mount Druitt Town Rangers at Ponpondetta Park.
7. Just before the 67th minute of the match, when play was at the southern end of Ponpondetta Park, the referee issued a second yellow card to St George player No. 3, Ali Nasreddine, and dismissed him from the field of play. At that time, according to the referee's report, dated 5 August 2017, he heard someone shout "you are a fucking joke ref." The referee turned around to face the penalty area and saw the Player walking purposely towards him, looking directly at him and shouting aggressively, "you are a fucking joke ref" a further three times.
8. The Player was issued with a red card for using foul or abusive language. He left the field immediately and with no further incident and play was restarted with a direct free-kick to Mount Druitt. The referee's account is supported by that of the assistant referee closest to the location of the incident, dated 7 August 2017.
8. On 7 August 2017, Football NSW suspended the Player for 5 fixtures for an R6 offence after he was found to have used offensive, insulting or abusive language and/or gestures towards a Match Official (**Notice of Suspension**).

B. THE DECISION THE SUBJECT OF THE APPEAL

9. The Player challenged the Notice of Suspension under section 8.2 of the Football NSW Regulations. That challenge was heard by the DC on 14 August 2017. In dealing with a challenge under section 8.2, the DC has no power to remove a Red Card, a Mandatory Match Suspension or reduce a Minimum Suspension, but may:

- (a) make a finding that the Offence has not been proven, in which case it may remove any Additional Suspension that may have been imposed;
 - (b) make a finding that the Offence has been proven, in which case the DC may, in its discretion, increase the Additional Suspension or decrease the Additional Suspension (but not below the applicable Minimum Suspension); or
 - (c) make a finding that the Player is guilty of a different Offence, or the same Offence that a different grading, in which case the applicable Minimum Suspension (at least) must be applied and, if the DC, in its absolute discretion, sees fit, it may impose any Additional Suspension.
10. Section 8.2(g) & (h) of the FNSW Regulations set out considerations to which the DC may have regard when determining a challenge in accordance with section 8.2(f) and the circumstances which it must not take into account in determining such a challenge.
11. The DC heard the Player's challenge to the Notice of Suspension on 14 August 2017. It rejected the challenge. In doing so, the DC had regard to the following evidence:
- (a) the report of the referee, dated 5 August 2017;
 - (b) the report of the assistant referee closest to the incident the subject of the Notice of Suspension, dated 7 August 2017;
 - (c) a video of the incident; and
 - (d) an undated statement statement from Terry Palapanis, Technical Director/First Grade Coach for St George headed "12:54 am (1 day ago)."

(DC Determination)

12. The Player appeals the DC Determination.

C. THE GROUNDS OF APPEAL

13. By Notice of Appeal filed on 21 August 2017, the Player appeals the DC Determination in reliance upon the ground stipulated in section 10.3 (a), that is, that

he was not afforded a reasonable opportunity to present his case. No other ground is relied upon.

D. PROCEDURAL MATTERS

14. On 22 August 2017, the Chair of the AT made directions for the preparation of the appeal for an expedited hearing, having regard to the fact that the Player's team was expecting to compete in the finals series of the NPL competition.
15. The Chair noted in those directions that as the only matter in contention on the limited ground of appeal relied upon was whether the DC had afforded the Player a reasonable opportunity to be heard or, put another way, whether he was afforded procedural fairness, the Player was to provide written submissions identifying the manner in which he asserted that the DC:
 - (a) had an obligation to conduct its hearing in accordance with the principles of natural justice; and
 - (b) had failed to comply with its obligations in this regard.

The first of the matters upon which submissions were sought was prompted by a concern that section 13.11 of the FNSW Regulations which requires that all hearings before a "Tribunal" be conducted in accordance with the principles of natural justice may not apply to proceedings before the DC because "Tribunal" is defined in the Regulations to mean the General Purposes Tribunal or the Appeals Tribunal.

The Player was also requested, when preparing any submissions in support of his appeal, to bear in mind and address the primacy or importance afforded to match officials' reports under section 13.6 of the Football NSW Regulations.

16. The parties exchanged written submissions in accordance with the directions made by the Chair of the AT.
17. These are addressed below however, the principal argument relied on by the Player was not contained in the written material and was put orally at the hearing on 30 August 2017.

18. When serving his submissions, the Player also gave notice of his intention to rely on evidence that was not before the DC. FNSW did not expressly state a position in respect of the proposed reliance on new evidence. The Player did not press reliance upon that evidence. Instead, as will be apparent from what follows, the Player chose to put his case in a manner that obviated the need to rely upon that additional evidence.

E. THE HEARING

19. The AT heard the appeal on the evening of 30 August 2016.
20. At the hearing, the Player appeared in person and represented himself.
21. FNSW was represented by Mr Michael Napoli, Legal & Regulatory Officer, FNSW.
22. Owing to the urgency of the appeal, at the conclusion of the hearing and after it had adjourned to consider the matter, the AT issued a short oral summary of its determination in accordance with section 10.4(e) of the FNSW Regulations, in which it dismissed the appeal. This is the full written reasons for its determination provided in accordance with section 10.4(e) of the FNSW Regulations.

F. SUBMISSIONS

23. In support of his position, the Player provided, on 24 August 2017, an “official statement”, being broadly in the nature of a combined statement and submissions. In addition to the existing evidence, the Player also served a brief (undated) statement from St George FC player Ali Nasredine and a statement from Mr Palapanis dated 17 August 2017.
24. FNSW provided submissions dated 28 August 2017.
25. The Player replied to those submissions by email dated 29 August 2017.
26. The Player’s official statement does not appear to contain any direct submission addressing the sole ground of appeal, namely whether the DC afforded the Player a reasonable opportunity to be heard. Indeed, he appears to concede in his reply submissions that he was, at least procedurally, afforded an opportunity to be heard. The Player said that he thought “these matters went straight to court” and that he

would “be able to present the core of his argument in person”. Further, that he did not think that he was “presented with a complete opportunity – yes procedures were followed although no proper investigation was conducted so therefore how did I really have an opportunity?” His complaint, at least on the papers, was apparently confined to a concern that bore no connection with the ground of appeal upon which the Player relied.

27. In its submissions in reply, FNSW contended that procedural fairness had been afforded to the Player as he was given a reasonable opportunity to provide material and evidence that he deemed appropriate. FNSW submitted that the appeal constituted an attempt by the Player to overcome his own failure to provide a witness statement or supporting statements and there is no reasonable explanation as to why the additional statements were not provided at the time of original challenge.
28. At the hearing on 30 August 2017, the Player, for the first time, presented an argument in support of his procedural fairness point in reliance upon the content of an email from Mr Napoli of FNSW to the St George FC Secretary dated 14 August 2017 in which the outcome of the DC determination was advised. The email was in the following terms:

Dear Greg

The Disciplinary Committee (DC) have recently made a determination in relation to the Notice of Suspension issued to Daniel Loe on 7 August 2017.

*The DC has advised that it has **not upheld** the challenge and the original Notice of Suspension still stands (**attached**).*

In addition, the DC notes that the comments made in Terry Palapanis’ witness statement were not in any way helpful to the player or his club, nor did it negatively influence the DC’s decision in accessing (sic) this challenge to the Notice of Suspension.

Please note that if the Participant wishes to appeal the DC's determination, refer to sections 8.3 and 10 of the FNSW 2017 Grievance and Disciplinary Regulations.

(Email)

29. The Player argued that the Email indicated that the DC had failed to take into account the content of the statement provided by Mr Palapanis, which was the only statement before the DC containing a version of events contrary to that of the referee and his assistant. In the circumstances, the Player contended that he was denied procedural fairness because the DC failed to give any consideration or weight to the statement containing facts which, if accepted, would, he submitted, have resulted in an outcome favourable to him. The Player submitted that when considered in the context of his being one of three red cards in the match, the Email indicated a lack of fairness in respect of his position.
30. It is relevant to consider the content of the statement provided by Mr Palapanis that was before the DC. By way of summary, Mr Palapanis states that the Player was directing his abusive language to his teammate Ali Nasredine for incurring a second yellow card and not to the referee. However, Mr Palapanis also took the opportunity to criticise the referee, amongst other things, describing him as incompetent and stating that his performance warranted an investigation.
31. As Mr Napoli was present at the hearing, the AT took the opportunity to ask him what was intended to be conveyed by that part of the Email the subject of the Player's complaint. He informed the AT that he was passing on the information provided to him by the two members of the DC to the effect that the comments made by Mr Palapanis in his statement in relation to the referee were unhelpful and did not factor in the DC's deliberations in any way.
32. It was Mr Napoli's understanding that these comments were not directed to the totality of the statement but were intended to refer solely to the statements made by Mr Palapanis regarding the refereeing. It was not his intention, to either convey or give the impression that the DC had not taken into account the whole of the contents of the statement.

G. CONSIDERATION AND DETERMINATION

33. The parties proceeded on the premise that the Player was entitled to procedural fairness in respect of the DC challenge. Certainly, FNSW did not contend to the contrary. The AT was prepared to proceed on this basis notwithstanding the matters identified by the Chair and referred to in paragraph 15 of this determination. However, it is a matter that could benefit from some clarification from FNSW.

General Principles

34. 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.
35. 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).
36. 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.
37. 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) 161 CLR 141 at 147.

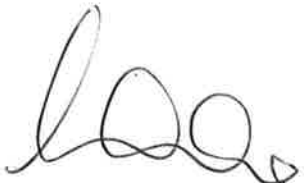
Application of Legal Principles to the Facts

38. Consistent with the above principles, a failure by the DC to consider relevant evidence which the Player wishes to rely on would constitute a denial of natural justice.

39. However, the AT does not consider that the facts support a denial of natural justice in the present case.
40. First, the AT considers that a natural reading of the Email is that the reference to “comments” in Terry Palapanis’ witness statement is limited to those parts of his statement which are in fact comments rather than relevant evidence or submissions. That is, properly construed, it is a reference to that part of the statement where he expresses an opinion in relation to the refereeing and not the part of the statement where he addresses the facts of the case.
41. This construction of the Email is consistent with and reinforced by the evidence provided by Mr Napoli as to both the provenance of the contents of that email and what he intended to convey when he drafted it.
42. At the hearing, the Player did not address the matters raised in his written submissions, however they were not abandoned. Insofar as those submissions sought, in effect, to reargue the merits of the case or, in other words, to reargue the matter afresh, they are of no relevance given the fact that his appeal ground was limited to a denial of natural justice. There was nothing in the Player’s submissions supporting the position that he had been denied the opportunity to put his case. Indeed, to the contrary, the Player appears to have conceded in his reply submissions that he was, at least procedurally, afforded an opportunity to be heard.
43. In all the circumstances, the AT does not consider the Player was denied a reasonable opportunity to be heard.

H. RELIEF

45. The appeal is accordingly dismissed.



A P Lo Surdo SC
Chair
Appeals Tribunal
Football NSW