



**FOOTBALL  
NSW**

APPEAL TRIBUNAL OF FOOTBALL NEW SOUTH WALES  
DETERMINATION IN THE FOLLOWING MATTER:

<b>Club</b>	Wollongong United FC
<b>Decision appealed</b>	Appeal from the decision of Football South Coast Appeal Committee
<b>Date of Decision</b>	16 June 2016
<b>The basis upon which the matter is before the Appeals Tribunal</b>	Sections 9.1(c) & 9.2 of the Football NSW Grievance and Disciplinary Regulations, 2016
<b>Ground(s) of Appeal</b>	Sections 9.3(d) and (e)(v) of the Football NSW Grievance and Disciplinary Regulations, 2016
<b>Date of Hearing</b>	27 July 2016
<b>Date of Determination</b>	15 August 2016
<b>Appeals Tribunal Members</b>	Iain Todd, Chair Graham Turnbull SC, Member David Stanton, Member

### **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 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 of 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. This appeal is from a MAC pursuant to section 9.6 but only where the matter has proceeded in accordance with, and exhausted, that member's own disciplinary/grievance Rules and 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.

### **Background Facts**

6. These may be simply stated as there was no dispute by Wollongong United Football Club (**WU**) of the following matters: -
  - a. WU participate in Football South Coast (**FSC**) Men's Competition in the

Illawarra Premier League Competition (**IPL**);

- b. As a member of the FSC Men's Competition, WU are subject to the Rules and Regulations contained in:
    - i. FSC Men's Football Competition Rules and Regulations (**FSC Rules**); and
    - ii. FSC Disciplinary and Dispute Regulations (**FSC Disciplinary Regulations**).
7. On 7 May 2016 FSC notified WU of a potential breach of Rule 7.15 in the FSC Rules. The Rule provides as follows: -

*7.15 VISA PLAYERS*

*7.15.1 A visa player is defined as a player holding an international visa selected to the team squad list.*

*7.15.2 Clubs are permitted a maximum of three (3) visa players per Club, in any season. If a visa player leaves a Club for any reason, albeit a Club or player choice, an additional visa player on top of the three (3) visa players is not permissible.*

8. FSC alleged that WU had used 4 visa players over the first 7 rounds of the IPL in breach of Rule 7.15.2.
9. WU admitted the following: -
  - a. A number of WU identified players were visa players within the meaning of the Rule, namely:-
    - i. Daisuke Yuwaza;
    - ii. Jinya An;
    - iii. Motoki Kinjo;
    - iv. Bradley Welch
  - b. Mr Yuwaza, Mr An and Mr Kinjo were all Japanese Nationals and Mr Welch was an American National;
  - c. Each of the 4 visa players played in the first 7 rounds of the IPL, save Mr Welch who was an unused substitute in round 2 of the IPL.
  - d. It was agreed that each of the 4 players had been registered using a computer online system by either the players or WU.
  - e. WU accepted that for the first 7 rounds of the IPL the Club was in breach of Rule 7.15.2.
10. On 2 June 2016 the General Purpose Tribunal (**GPT**) was convened under the FSC Disciplinary Regulations. The GPT considered whether WU had breached FSC Rules 7.15.2, 2.6.1(c) and 2.6.1(d).
11. Rules 2.6.1(c) and 2.6.1(d) are in the following terms: -

- a. *2.6.1 (c) Any Club playing an ineligible player shall be ineligible for any match points and shall be subject to any disciplinary action as imposed by the FSC through its Councils and the FSC DOR.*
- b. *2.6.1(d) FSC may reserve the right to sanction a Club at any time for breaching player ineligibility. Full points allocated for the fixture shall be forfeited to their opponents and a 3-0 forfeit result or an average score (whichever is greater) will be awarded.*

12. The GPT determined:

- a. There was no breach of Rule 2.6.1 as the definition of an ineligible player does not clearly include those players who are registered despite being in excess of the visa player cap;
- b. It was admitted there was a breach of Rule 7.15.2. The GPT decision was that such conduct fell within the category of M2 under the FSC Disciplinary Regulations.

13. Category M2 of the FSC Dispute Regulations requires the relevant misconduct to be misconduct against FSC.

14. By reason of its admission of breach of Rule 7.15.2 and the application of category M2 under the FSC Disciplinary Regulations, the GPT determined the appropriate penalty to be:-

- a. A deduction of 9 competition points from the current season in the relevant grade; and
- b. A \$1,000 fine imposed against WU.

15. WU exercised its right of appeal under the FSC Disciplinary Regulations. On 16 June 2016 the appeal was heard by a FSC Appeal Committee. WU's appeal alleged that the rating given to the misconduct was inappropriate within the context of the FSC Disciplinary Rules and submitted in those circumstances, the severity of the penalty was too great.

16. The FSC Appeal Committee hearing found as follows: -

- i. It rejected the appeal in that WU had clearly enjoyed an unfair benefit by breaching the competition Rules by having 4 visa players on the team sheet for the first 7 competition rounds;
- ii. Imposed a greater penalty by: -
  - 1. Increasing the point deduction from 9 to 13 competition points (representing the points gained by WU from the first 7 games which were played in breach of the Rules); and
  - 2. Deleted the \$1,000 fine.
- iii. The FSC Appeal Committee also awarded a 3-0 win plus 3 competition points to those teams who played against WU in the first 7 rounds.

17. The FSC Appeal Committee hearing represented the completion of the appeal rights under the FSC Disciplinary Rules.

18. It is from the FSC Appeal Committee decision that this appeal is brought.

### **The Decision the Subject of the Appeal**

19. WU appeals from the Appeals Committee decision dated 16 June 2016.

### **The Grounds of Appeal**

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

- a. The decision was one that was not reasonably open to a body or a member appeals committee having regard to the evidence before the body or the member appeals committee; and
- b. Severity only where the decision of the body or a member appeals committee imposed a sanction of at least:-
  - i. A deduction, a loss or ban on accruing six (6) or more competition points.

21. At the hearing of the appeal on 27 July 2016 WU applied to amend its grounds of appeal to include the following:-

*"A party was not afforded a reasonable opportunity to present its case."*

22. This was an application that was made without notice to FSC. An opportunity was provided to FSC to provide written submissions in response to the application.

23. The basis of the application by WU was that the FSC Appeals Committee had not given notice to WU that it was contemplating imposing a greater penalty than that imposed by the GPT determination. In the criminal law, this is known as a failure to provide a Parker direction. In MCL v R, Kirby J said the following regarding a Parker direction:-

*"For a long time, appellate courts in Australia have followed a practice of informing an appellant when the court has reached a tentative conclusion that, as a result of invoking the appellate process, the appellant stands in risk of a punishment more severe than that previously imposed. The purpose of providing such a notice includes that of affording the appellant, in an appropriate case, the opportunity to consider withdrawing or seeking leave to withdraw the appeal or part of the appeal so as to avoid an outcome that could not have been contemplated in initiating the appeal. Additionally, such a notice gives the appellant the opportunity, by evidence and argument, to persuade the appellate court to change its tentative opinion. Support for viewing such a notice as included in the fair conduct of proceedings before an appellate court in Australia can be found in decisions of this Court.*

*Although the principle just stated applies more generally to appellate proceedings, it has special significance in a criminal appeal in which a tentative view is formed by the appellate court that, in its disposition of the appeal, a more severe punishment of the appellant might be called for. Because imprisonment is the most severe sanction known to the*

*criminal law in Australia, the provision of notice will ordinarily apply with particular force where the appellate court is contemplating the substitution of a sentence of imprisonment for a non-custodial sentence or an increase in custodial punishment. In this regard, the content of the requirement of procedural fairness is concerned with the effect on the punishment if it were altered. Because the requirements of procedural fairness depend upon all the circumstances, the obligation has not settled into a rigid Rule of law. It does not oblige a court to spell out all of the detriments that may conceivably flow to an appellant. At least where the appellant is legally represented and it is not apparent that such a representative has failed to appreciate a warning once given, it is not essential to express in fine detail what may follow if the appeal proceeds to finality. The content of the obligation of procedural fairness in such a case depends on the circumstances and the procedure by which the complaint concerning the want of procedural fairness is raised.” (see McL v R (2000) 203 CLR 452 at [125]-[126]*

24. The question is whether a Parker direction has any application in appeal proceedings before a sporting tribunal? Obviously in a criminal context, it is relevant given the risk to liberty if an appeal is unsuccessful. Such considerations do not apply before a sporting tribunal.
25. Be that as it may, FSC submitted that in the circumstances the application to amend the appeal grounds should not be granted as to do so would delay the determination of the appeal and require further evidence to be called by those who conducted the appeal regarding the nature of the discussions that took place before the Appeal Panel (such discussions taking place in the absence of FSC).
26. A further submission made by FSC is that in an appeal process that does not involve lawyers, one needs to avoid being too technical in dealing with an appeal. The AT believes there is merit in this submission. It must be remembered that generally football is conducted throughout the State by volunteers who devote their time and energy for the purpose of the sport. Such volunteers conduct disciplinary hearings and appeals on behalf of various football bodies in order to ensure the proper application of Rules that apply to particular competitions. The application of strict legal Rules is too onerous upon such bodies, particularly in the absence of a right to be legally represented (which is often the case in disciplinary Rules throughout various football associations).
27. There is obviously an advantage in an appeal tribunal indicating to an appellant its intention to impose a greater penalty. To do so would permit an otherwise aggrieved appellant an opportunity to reconsider its position and ultimately save time and expense to all involved in the process by withdrawing the appeal. Furthermore, if an appellant is notified of the prospect of a greater penalty being imposed, it affords the appellant an opportunity to dissuade the appeal tribunal from embarking upon that course.
28. WU were given ample opportunity to raise the appeal ground they seek to rely upon. It is noted by the AT that WU have had legal representation and an opportunity to provide written submissions in support of their appeal. Within those written submissions was no application to amend the appeal grounds and no suggestion that it would seek to do so.

29. Taking all of these matters into account, the AT is of the opinion that the amendment sought to be made by WU to raise the new appeal ground should be denied.
30. Before leaving a consideration of the FSC Appeal Committee hearing, it is noted by the AT that part of the appeal before the FSC Appeal Committee was conducted in the absence of the representatives of each party (namely WU and FSC). There is a danger in conducting appeals in private. One of the matters raised by WU in support of its application to amend its appeal ground was that no indication was given by the FSC Appeal Committee of the fact that it was contemplating increasing the penalty. There is of course a difficulty in testing such an allegation when one of the relevant parties has been excluded from the appeal process. It is the AT's view that both disciplinary hearings and disciplinary appeals should be conducted in an open fashion where each party is afforded the opportunity to hear allegations, evidence and submissions made by another party. This affords all parties natural justice before persons conducting such hearings and appeals and will avoid the situation that arose in this case, namely a suggestion by one party that could not be either agreed to or challenged by another party.

### **The hearing**

31. On the evening of 27 July 2016 the AT heard the appeal.
32. At the hearing both WU and FSC had representatives in attendance. The Appeal Tribunal invited the receipt of written submissions and both parties provided written submissions. Both parties had an opportunity to speak to those written submissions at the hearing.
33. Section 9.4(e) of the FNSW Regulations requires that the Appeal Tribunal 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.

### **Submissions**

34. Written submissions were provided by both parties. Annexed to this Determination are copies of each of the written submissions.

### **Consideration and Determination**

35. It was agreed by all parties that there had been a breach of Rule 7.15.2 in that WU had used 4 visa players over the first 7 rounds of IPL in breach of the Rule.
36. One of the issues for determination by the AT is the appropriate penalty that results from a breach of Rule 7.15.2.
37. The appropriate penalty for a breach of Rule 7.15.2 is not prescribed by the

FSC Rules or the FSC Disciplinary Regulations. Rule 1.3.2 of the FSC Rules however provides as follows:-

*"To avoid doubt where these competition Rules do not specify the consequences of a breach or failure to comply with these competition Rules, such breach or failure to comply will still amount to misconduct and may be subject to the provisions of the FSC DDR."*

38. Pursuant to the FSC Disciplinary Regulations, Schedule 2 contains the appropriate penalty for misconduct. The section distinguishes between a M1 offence and a M2 offence. A greater penalty is prescribed for a M2 offence. The distinction between M1 and M2 is that an M1 offence is an offence of general misconduct whilst a M2 offence is misconduct against FSC.
39. WU submitted that the appropriate offence was M1. WU argued that M2 did not have application as for M2 to apply, the offending conduct must be directed towards FSC. It was submitted that the conduct would require: -
  - a. An intent to commit the relevant misconduct; and
  - b. An intent that such misconduct be deliberately taken against FSC.
40. It was submitted that the actions of WU which were accepted by the GPT to have no intent were in no way directed towards FSC.
41. The AT does not believe that it is necessary to read into the phrase of "misconduct" the concept of intent. Gross recklessness or negligence may well be misconduct. Likewise, conduct that was rash or undertaken "in the heat of the moment" may well satisfy the definition. By way of example, verbal abuse of a referee (although not intended to cause harm) may in some circumstances represent misconduct against FSC.
42. There can be no doubt that the Rule 7.15.2 imposes upon Clubs (and not individuals) a requirement to ensure that the Rule is complied with. The AT does not believe it is an appropriate answer to a breach of 7.15.2 to suggest that the registration process is a matter that may be undertaken by the individual players without any reference to the Club. It is a requirement of Clubs to ensure that the Rules that apply to the IPL are complied with. This is particularly so in relation to a Rule that is clearly directed to ensuring there is fairness in the competition. Reckless indifference to ensuring compliance with the Rule may result in an unfair advantage to a Club playing in the IPL. It is clear the Rule is directed at avoiding such an unfair advantage and the AT does not believe it is an answer to avoid compliance with the Rule by stating that the Club is dependent upon visa players to identify themselves as such to the Club. Clearly, more is required by Clubs to ensure a compliance with the Rules of the competition in which they participate.
43. Furthermore, the unfair advantage obtained from playing games in contravention of the Rules must be seen as misconduct against FSC in that the advantage obtained over other teams in the competition may well affect the integrity of the IPL. Such an impact is one that directly impacts upon FSC. Seen in that light, a breach of 7.15.2 is properly to be considered misconduct against FSC and attracting the penalties referred to under M2.
44. In those circumstances the maximum penalty is 10 years suspension and/or a \$5,000 fine and/or deduction of a maximum 9 competition points.

45. The advantage obtained by WU by having more than the permitted number of visa players was 13 competition points. M2 however indicates a maximum penalty of 9 points. In those circumstances, if the breach of the Rules is limited to 7.15.2 (and not other Rules referred to above) then the FSC Appeal Committee committed an error in increasing the penalty to 13 competition points.
46. It should be noted that the AT is at liberty to impose its own penalty and is not constrained by that that occurred before. At the AT hearing the parties were invited to make submissions upon the basis that the General Purpose Tribunal determination was reinstated and the FSC Appeal Committee determination was overturned. WU submitted that the appropriate penalty was M1 and therefore the General Purpose Tribunal fell into error. For the reasons indicated above, that submission has not been made out. FSC indicated that if the breach was correctly considered to be Rule 7.15.2, then it did not wish to be heard regarding the penalty imposed by the GPT.
47. Having considered the severity of this matter and the fact that 13 competition points were obtained as a result of an unfair advantage, the AT is of the opinion that if the only breach of the Rules was a breach of 7.15.2, then the appropriate penalty is that as found by the GPT namely:-
- a. A loss of 9 competition points;
  - b. A monetary fine of \$1,000.

#### **Was there a breach of Rule 2.6.1?**

48. Rule 2.6.1 is in the following terms:

*2.6.1 The eligibility of players shall be defined by FSC from time to time.*

*a) A qualified or Bona fide player is one who has completed the registration process and is registered as per these Competition Rules and not currently serving a suspension.*

*b) It is the responsibility of the club to check with FSC that all of their players are registered through the 'MyFootballClub' data base (FFA National Data Base).*

*c) Any club playing an ineligible player shall be ineligible for any match points and shall be subject to any disciplinary action as imposed by the FSC through its Councils and the FSC DDR.*

*d) FSC may reserve the right to sanction a club at any time for breaching player ineligibility. Full points allocated for the fixture shall be forfeited to their opponents and a 3-0 forfeit result or an average score (whichever is greater) will be awarded.*

*e) Where both teams from the same match are in breach of player eligibility, the match result will be determined as a No Result. The club(s) will also be fined at level BR5 under Schedule 1 of these Competition Rules, plus costs associated with the match or a greater amount as determined by the FSC through its Councils/ Tribunals in addition to any other disciplinary action imposed.*

49. An ineligible player is not defined under the Rules. An eligible player however is defined by Rule 2.6.1(a). A player who completes the appropriate registration process under the FSC Rules (and is not serving a suspension) is an eligible player. It follows that an ineligible player is therefore a player who either:
- a. Completes the registration process and is serving a suspension, or
  - b. Fails to complete the registration process.
50. There was no suggestion in the circumstances of this case that any of the visa players had not completed the registration process. Rather, the uncontested evidence was that each player had been properly registered using the FSC web page for that purpose. Further, in each of the seven games they were on the team sheet, they were not players who had been suspended. Accordingly, the players were eligible players within the definition as provided by the Rule.
51. Thus it was submitted by WU that at no time was there a breach of Rule 2.6.1 as none of the players were ineligible.
52. FSC submitted that there was a breach of this Rule as Rule 2.6.1(a) provided that registration was required "as per these Competition Rules". The Competition Rules of course included Rule 7.15.2.
53. The difficulty with FSC's submission is that the registration process is one often (but not always) completed by the individual player. Each individual player is not to know whether in a particular team there is more than the permitted number of visa players. This of course is the responsibility of a Club and not an individual player. In the circumstances of this case, FSC rely upon the fact that WU registered the Visa players as evidence that WU ought to have known that the registration of all four players was a breach of the Rules. The AT accepts that there is a problem in the drafting of Rule 2.6.1. On the face of the Rule, the fact that a player is a Visa player does not mean that a player registered is an ineligible payer. That being so, the AT is not persuaded that the concept of being an ineligible player within the meaning of Rule 2.6.1 extends to the registration of the Visa players by WU. If the FSC wishes to remove the doubt that arises from the drafting, the Rule should be amended to define ineligibility more clearly. For these reasons, the AT is of the opinion that there has not been a breach of Rule 2.6.1

## **Determination**

54. As the AT is of the opinion that WU did not field an ineligible player, then the only breach of the Rules that has been committed is that of Rule 7.15.2. For the reasons indicated above, the maximum penalty in those circumstances in terms of loss of points is 9, which is less than the 13 that the FSC Appeal Committee imposed upon it. Accordingly, the FSC Appeal Committee fell into error and the appeal by WU succeeds to the extent that the penalty imposed by the FSC Appeal Committee was in excess of that provided under the Rules.

## **Relief**

55. The appeal is upheld in respect of ground 9.3(b). For the reasons indicated above, the other ground of appeal is not made out.

**The determination of the Appeals Tribunal is as follows: -**

- 1 WU breached Rule 7.15.2 of the FSC Rules;
- 2 Such a breach was misconduct against FSC within the meaning of M2 of Schedule 2 of the FSC Rules;
- 3 The appropriate penalty in the circumstances is as follows: -
  - (a) A loss of 9 competition points;
  - (b) A monetary penalty of \$1,000.
- 4 Pursuant to 12.14 of the FNSW Regulations, each party shall bear their own costs of the appeal.

A handwritten signature in blue ink, appearing to read 'David Stanton', is written over a light blue rectangular background.

Signed by David Stanton on behalf of  
Iain Todd, Chair  
Graham Turnbull SC  
David Stanton

Appeals Tribunal  
Football NSW