

**APPEAL COMMITTEE OF THE FOOTBALL FEDERATION OF
AUSTRALIA**

IN THE MATTER OF

**AN APPEAL BY ROY O'DONOVAN (CENTRAL COAST
MARINERS) AGAINST THE DETERMINATION OF THE
DISCIPLINARY AND ETHICS COMMITTEE OF THE
FOOTBALL FEDERATION OF AUSTRALIA DATED 7
JANUARY 2016**

DETERMINATION

Introduction

1. The Appellant, Roy O'Donovan, was involved in an incident whilst he was playing for his club, the Central Coast Mariners Football Club, against the Wellington Phoenix on Thursday 31 December 2015 in or about the 58th minute of the match. Television footage of the incident appeared to show the Appellant head-butting Manny Muscat ("**Muscat**"), a player from the Wellington Phoenix.

2. The Appellant was issued with a yellow card following the incident by the match referee.

3. The Football Federation of Australia (“FFA”) is entitled where it determines in its sole and absolute discretion that a Referee has made an Obvious Error and that a failure to remedy the Obvious Error would be prejudicial to the interests or good image of football in Australia, to both refer a matter for a hearing and to cite players in accordance with clause 9.40 of the A-League Disciplinary Regulations (the “**Regulations**”).

4. As a result of a review by the FFA of the television footage of the incident, the FFA cited the Appellant by issuing a Disciplinary Notice dated 4 January 2016. The Category 1 Offence stated by the FFA in the Disciplinary Notice was Offence 4 (R2 for Players) - “Assault on a Player (e.g., violent conduct when not challenging for the ball)” (the “**Offence**”).

5. As a result of the Disciplinary Notice, the incident came before the FFA Disciplinary Committee, now known as the Disciplinary and Ethics Committee of the FFA pursuant to the FFA Judicial Bodies By-Law dated 11 November 2015 (the “**Committee**”).

6. The Committee conducted a hearing on 6 January 2016 to determine whether the Offence had been committed, and if so, what sanction should be imposed in accordance with the Regulations.

7. Following the hearing, the Committee found that the Offence had been established and noted that in any event, the Appellant had entered a guilty plea. The Committee decided to impose a suspension of 8 matches

on the Appellant. The minimum sentence for the Offence was two matches, i.e., the Mandatory Match Suspension plus one additional match. The maximum sentence for the Offence was 24 months suspension.

8. On 7 January 2016 the Committee published the reasons for its decision.

9. Under clause 8.1 of the Judicial Bodies By-Law dated 11 November 2015, the Appeal Committee has jurisdiction to hear appeals from decisions of the Committee. In respect of such an appeal, the Appeal Committee has the powers set out in clause 21.6 of the Regulations.

10. On 8 January 2016 the Appellant filed an appeal against the decision of the Committee. The Appellant did not appeal against the Committee's finding that the Appellant was guilty of the Offence but only appealed against the severity of the sanction imposed by the Committee.

11. The sole ground of appeal relied upon by the Appellant was that contained in Clause 21.5(c) of the Regulations, *viz*:

“... the decision was one that was not reasonably open to the ...
Committee ... having regard to the evidence before the ...
Committee ...”

12. The Appeal Committee comprised Mr. Malcolm Holmes QC as President, Ms. Deborah Healey and Mr. Arthur Koumoukelis. The

Appellant was represented by Mr. Adam Casselden and Mr. Justin Simpkins appeared as Disciplinary Counsel.

13. The appeal was heard on the evening of Friday 23 February 2016. At the conclusion of the hearing and after its deliberations, the Appeal Committee decided to announce its decision and to publish its reasons at a later date.

14. The Appeal Committee announced that it had unanimously decided to dismiss the Appellant's appeal against the sanction imposed by the Committee.

15. These are the reasons for that decision.

Limited grounds of appeal

16. This Appeal Committee is only entitled to intervene with a decision on the ground of unreasonableness under clause 21.5(c) if the decision is so unreasonable that no reasonable disciplinary tribunal or body could have reached that decision on the evidence before it. The Appeal Committee will only set aside the decision of the Committee 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 reached": (*Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 at 558 per Tadgell JA, and see also the Appeal Committee's Decision in respect of *Ney Fabiano* dated 26 September 2008 at [13]-[14] and the Appeal Committee's Decision in respect of *Steven Pantelidis* (2010), at [8]-[9]). In *Australian Football League v Carlton Football Club Ltd*, Hayne JA indicated (at 565) that the

decision could be interfered with if it was demonstrated to be “manifestly untenable”.

17. For the Appeal to succeed it is not sufficient for the Appeal Committee to determine that it would have reached a different decision if it had been the Committee. Rather, it must be demonstrated that the Committee’s decision was so unreasonable that no Committee acting reasonably could have reached the decision based on the evidence before it. It is not sufficient that the Appeal Committee may come to an alternative conclusion as to the characterization of the facts before the Committee as was pressed by counsel for the Appellant, if it cannot be demonstrated that the Committee’s own characterization was so unreasonable that no reasonable Committee could have reached the decision based on the evidence before it.

The Evidence

18. The evidence before the Committee comprised footage of the incident from several angles, the Disciplinary Notice, the handwritten referees’ match card, the Appellant’s disciplinary record, a recording of an interview given by the Appellant that was broadcast on Fox Sports, a document showing a list of sanctions proposed by the Match Review Panel, an outline of submissions on behalf of the Appellant, two character references, a statement from the Appellant, an FFA Media Release dated 5 January 2016 concerning Manny Muscat, and images showing the Appellant’s left eye and slides submitted by the Appellant. Although there was no transcript of the hearing, it is apparent from the reasons for the Committee’s decision that during the course of the hearing the Appellant answered several questions “asked” of him by the Committee

and that he “acknowledged” certain matters (see paragraphs 22, 40 and 41 of the decision).

19. At the hearing before the Appeal Committee, the Appellant sought to rely on additional information in relation to the sanctions which have been imposed by decisions of “other high level international Football disciplinary bodies.” The FFA objected to the Appeal Committee receiving this information, as it was not before the Committee.

20. Clause 23.6 of the Judicial Bodies By-Law provides that, before the Appeal Committee, a party may not rely on evidence that was not before the Committee unless it can establish that the evidence was not reasonably available to that party at the time of the hearing before that Committee. The Appeal Committee is not so satisfied and this objection is upheld.

The facts as found by the Committee

21. The Committee found that;
- (a) in around the 58th minute the Appellant and Muscat were running towards the ball when the Appellant “pulled on the shirt” of Muscat;
 - (b) the “referee awarded a free kick for the shirt pull”;
 - (c) “after that free kick, Muscat raised his right arm and pushed the” Appellant away;
 - (d) after that action, Muscat “made a second and separate action with his right arm where he used his elbow and forearm to strike the [Appellant] in the vicinity of the left cheek and eye”;
 - (e) “no action was taken by the referee”;

- (f) the Appellant “then appealed to the referee for a foul, being of the view, correctly, that he had been assaulted by ... Muscat”;
- (g) “when no action was taken by the referee, the [Appellant] remonstrated by yelling at the referee and indicating that Muscat had fouled him with an elbow. The [Appellant] continued to yell at the referee”;
- (h) the Appellant proceeded to walk away and “then saw Muscat approaching him from his left rear” yelling a torrent of abuse;
- (i) the Appellant “turned, focused on Muscat and head-butted him”;
- (j) Muscat fell to the ground and a melee ensued;
- (k) the Appellant “was assaulted by the Wellington players. He was confronted pushed and jostled” and he “walked away from” the melee.

Submissions of the Appellant to the Appeal Committee

22. The Appellant submitted that the decision to impose a suspension of 8 matches “was manifestly excessive and one that was not reasonably open to the Committee having regard to the totality of the evidence before it”.

23. In amplification of this primary submission, the Appellant submitted that the Committee “failed to give proper consideration and due weight to” four matters. In expressing the submissions in these terms, the submissions appeared to be impermissibly more in the nature of a merits review of the appropriate weight that should have been given to some or all of the evidence.

24. The four matters relied upon by the Appellant were those listed in paragraphs (a), (b), (c) and (d) of Clause 11.2 of the Disciplinary Regulations. Each of these four matters is considered in the following paragraphs but it should be stated at the outset that the issue for the Appeal Committee's consideration is whether or not the sanction imposed by the Committee was not reasonably open to it in the sense described above and not whether the Appeal Committee would have reached a different result.

The Nature And Severity Of The Offence

25. The first matter relied on by the Appellant was the "nature and severity of the offence." The Appellant submitted that the Committee erred when assessing the "objective seriousness of the offence having regard to the totality of the evidence before it." The Committee allegedly erred in characterizing his actions as retaliatory in nature and not actions taken in self-defence. The Appellant alleged the Committee erred in its failure to identify "any evidence to support its rejection of the Player's contention that his actions were in self defence." In his witness statement he had said that he felt "threatened" by Muscat who was running at him "swearing profusely" and he "reacted by bowing" his head and "leaning into Manny". The Appellant's submission was that there is nothing in the Committee's written decision "to suggest ... that it was put to him by the Committee that his actions were retaliatory in nature."

26. The issue of whether his actions were retaliatory or defensive was in fact clearly a live issue at the hearing before the Committee and it was apparent that his version of events was under challenge. The nature and severity of his conduct was the very focus of the hearing. It was raised in his statement and in his representative's submissions at paragraphs 8, 9

and 10. It was raised in the Disciplinary Counsel's submissions at paragraphs 8 and at 26(c), where it was submitted that the head-butt was "retaliation" for "Muscat's earlier, unpunished actions" and therefore not defensively to ward off the running and swearing Muscat. The Committee was clearly alive to this issue and was at pains to consider whether the head-butt was defensive or retaliatory, and if so, in retaliation for what conduct. The Committee analysed in detail the evidence leading up to and surrounding the admitted head-butt. The Committee went further and referred in paragraph 22 of its reasons, to "asking" the Appellant about the footage which showed him clenching his teeth just prior to his head making contact with Muscat. His oral evidence is also referred to in paragraph 40 of the decision including; "It looks like I cleaned him out" and "And it does look like my head moved quickly." His questioning was again referred to by the Committee in paragraph 41 of its decision where he was asked whether he had turned and had seen Muscat coming and that he had said that he could not deny "what you see on the TV." The Committee recorded in paragraph 42 that: "Having been challenged on his version of events that he merely leaned across without looking at Muscat, the Committee finds that he did in fact see Muscat coming and did intend to head-butt Muscat."

27. This finding was clearly open to the Committee in these circumstances. The Committee was entitled on the evidence before it, to "specifically reject", as it did, that the Appellant "without looking at Muscat, leaned his head across to defend himself" (paragraph 34(7) and footnote 1). The Appeal Committee having viewed the footage closely is of the same opinion as the Committee. Contrary to the submissions of the Appellant, the Appellant turned and deliberately head-butted Muscat.

28. In these circumstances it was open to the Committee to find that it did “not accept that the player was defending himself” (paragraph 48) and that the Appellant “got his retaliation in when Muscat approached him abusing him” (paragraph 43).

29. The Appeal Committee has considered what would have been the effect of the alternative finding had the Committee accepted that the reason the Appellant deliberately head-butted Muscat was because he genuinely felt “threatened” by Muscat who was running at him “swearing profusely” and that he had acted defensively. In those circumstances an appropriate possible sanction would still have been in the 6 to 8 week range. There would still be a need for a specific and general deterrence and it would still remain a deliberate assault. The present sanction of 8 weeks may, or may not, have been imposed in those changed circumstances but it would still have been open to the Committee to impose a 6, 7 or 8 week suspension. The fact that this Appeal Committee or another Committee constituted differently may have come to a slightly different view on sanction does not establish that the Committee’s decision is so unreasonable that it must be set aside on this ground. This appeal is not a rehearing on the same evidence.

30. In addition, the Appellant in oral submissions asserted that on a proper reading of paragraph 43 of the decision, the Committee had disregarded the two prior physical assaults as they were conduct which “had occurred some seconds earlier and relevantly was in the past”. The Appellant submitted that in paragraph 31 of its decision, the Committee had stated “that provocation proximate to the Offence can be taken into account as extenuating circumstances.” It was said that the Committee had regarded the two prior physical assaults on the Appellant by Muscat

as not proximate to the head-butt and therefore had not taken these two assaults into account as part of the extenuating circumstances. In particular, the Appellant submitted that the second assault was a “violent and deliberate elbow to the [Appellant’s] eye causing a nasty cut that required attention.” Accordingly when these two assaults were taken into account as part of the extenuating circumstances, it was submitted that an eight week suspension was totally unreasonable and the appeal should be upheld.

31. However the Committee had clearly indicated very early in its decision that the prior deliberate elbow did amount to provocation and was therefore an extenuating circumstance. In paragraph 3 of its decision, the Committee said: “As will be apparent from the whole of this determination this matter concerns a head-butt by a player in retaliation for a deliberate elbow to the head. The on field behavior of both players is visually disturbing and has no place in the game. The provocation that occurred might explain but does not justify the subsequent head-butt.” The prior assaults were regarded by the Committee as provocation and thus were part of the extenuating circumstances. In any event, if they were specifically included as extenuating circumstances, or if they were not specifically included as extenuating circumstances, the sanction of an eight weeks suspension was clearly open to a Committee acting reasonably in both situations and does not justify setting the decision aside.

32. Further, the Committee’s sanction of an eight week suspension was reasonably and manifestly open to it having regard to the objective facts before the Committee and in particular, as identified by the FFA on the appeal;

- (a) in the present case there was no physical altercation between the two players at the time of the Appellant's head-butt;
- (b) the head-butt did not arise in open play. Neither player was involved in the match at that point;
- (c) the Appellant's head-butt appeared to arise from dissatisfaction with the referee's failure to award a free kick following the elbow from Muscat and was as retaliation for Muscat's prior assaults on him.

The Appellant's Past Record

33. The second matter relied on by the Appellant was the alleged failure by the Committee to give due weight to the Appellant's past record. The Committee in paragraph 44 of its decision specifically stated that his past record was taken into account in his favour. This matter does not, either when taken alone, or when considered with the other matters relied on by the Appellant, establish this ground of appeal.

Remorse

34. The third matter relied on by the Appellant was the alleged failure by the Committee to give due weight to the remorse of the Appellant under Clause 11.2 of the Regulations. This clause was set out in the Committee's decision in paragraph 30, and his evidence of remorse was set out at paragraph 34(11), *viz.*, "deeply remorseful for his actions." This was also clearly taken into account by the Tribunal. This matter does not, either when taken alone, or when considered with the other matters relied on by the Appellant, establish this ground of appeal.

35. A variation on this submission was advanced during oral submissions at the appeal hearing to the effect that his early guilty plea should have been considered as remorse. Further the early plea should have resulted in a reduction, of the order of 25% in penalty because that is what is provided under the unspecified rules in other unspecified sports. Equally the Appeal Committee notes that an athlete is encouraged to plead guilty in some sports to gain a reduction in the applicable sanction. These practices in other sports may in fact exist but an early guilty plea does not amount to remorse. The Regulations, as contractual provisions, must be given their ordinary and natural meaning as understood by the football community. The fact that athletes may, or are encouraged to, enter an early guilty plea in other sports, does not amount to evidence of remorse or a percentage reduction in the otherwise applicable penalty.

The existence of extenuating circumstances

36. The fourth matter relied on by the Appellant was the existence of what was described as extenuating circumstances. The particular circumstances relevant to the Appellant's conduct were said to be "the provocation by Muscat and the wholly disproportionate sanction Muscat received for his conduct that resulted in the commission of the offence."

37. The Committee addressed this argument that a comparison should be made with the sanction received by Muscat in the following terms;

"The sanction which was proposed by the Match Review Panel and accepted by Muscat was a sanction of 2 matches. That sanction was not one imposed by this Committee. Although the Committee

has not heard from Muscat as he is not a party, the Committee is of the view that he was well advised to accept the 2 match suspension as it could have been considerably more had his conduct come before this Committee. The fact remains that whatever sanction is imposed by this Committee will be viewed in connection with the sanction on Muscat proposed by the Match Review Panel. Rightly or wrongly, the Committee has felt constrained by what it perceives to be the low level of sanction imposed on Muscat. That has worked in favour of O'Donovan.”

38. This was a factor that weighed in the Appellant's favour. This does not support the Appellant's submission that the sanction was excessive, and unreasonably so. The Appeal Committee considered a similar factor in *Steve Pantelidis, Gold Coast United FC and FFA*, dated 3 February 2101, at paragraph 28, where it was submitted that the Committee should have made a comparison with a sanction imposed by the Match Review Panel. The Appeal Committee said:


“There was no evidence before the Disciplinary Committee that would have enabled it to properly address the comparative severity of the conduct in those two cases and the conduct of the Appellant in the present. Even if there were, it is doubtful that any comparison of penalty would be a valid one. That is because the 2 match sanctions in each cases were imposed by the Match Review Panel, and not by the Disciplinary Committee. There is no facility in the Regulations for the FFA to appeal against a sanction imposed by the Match Review Panel (which would enable it to appeal against sanction it considered too lenient). As a result, in our view it would not be a valid logical or jurisprudential exercise

for the Disciplinary Committee to use sanctions imposed by the Match Review Panel as “comparative verdicts” for the purposes of its own power to impose a sanction. In the course of argument it is apparent that this was the position of the Chairman of the disciplinary Committee, and we respectfully agree with that position.”

39. This Appeal Committee agrees with this reasoning and respectfully disagrees with the position adopted by the Committee in this case.

40. The Appeal Committee has determined that the sanction imposed on the Appellant was reasonably open to the Committee and accordingly, the appeal is dismissed.

25 January 2016


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Malcolm Holmes QC
President

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Deborah Healey
Member

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Arthur Koumoukelis
Member

