

**APPEAL COMMITTEE OF FOOTBALL AUSTRALIA**

**IN THE MATTTTER OF**

**AN APPEAL BY AIDAN SIMMONS (WESTERN SYDNEY WANDERERS FC)  
AGAINST THE DETERMINATION OF THE DISCIPLINARY AND ETHICS  
COMMITTEE OF FOOTBALL AUSTRALIA DATED 8 FEBRUARY 2024 (WITH  
REASONS GIVEN ON 9 FEBRUARY 2024).**

**CORAM: DOMINIC VILLA SC**

**ARTHUR KOUMOUKELIS**

**JUSTIN QUILL**

**DETERMINATION**

## ***Introduction***

1. This is an appeal to the Appeal Committee of Football Australia from a decision of the Disciplinary and Ethics Committee of Football Australia (**D&EC**) given on 8 February 2024 (with reasons for the decision published on 9 February 2024).
2. The D&EC had jurisdiction under clause 4.4 of the “A-League Disciplinary Regulations” dated October 2023 (**Disciplinary Regulations**) which apply to the 2023/24 A League season, that jurisdiction being to determine matters which have been referred to it pursuant to the Disciplinary Regulations.
3. The referral to the D&EC was made under clause 11.23(b) of the Disciplinary Regulations as a result of the Player having been given a direct red card by the match referee. The consequence of the direct red card is that the Player had to serve an automatic Mandatory Match Suspension (MMS), in this case of one match.
4. The direct red card, and the subsequent automatic MMS, was not challenged by the Player (under clause 11.4 of the Disciplinary Regulations, being a challenge to the decision to issue the red card when no card was warranted).
5. The Match Review Panel (**MRP**) formed the view that on the material available to it an additional sanction of two matches over and above the MMS was warranted. A Disciplinary Notice was issued to the Player under clause 11.22 of the Disciplinary Regulations, following which the Player exercised his right to make the referral to the D&EC under clause 11.23(b).
6. As is clear from the Disciplinary Regulations, such a referral is limited to determining the question of whether an additional sanction should be imposed over and above the MMS, and if so, what that additional sanction should be. As the D&EC correctly observed, the D&EC was not constrained by the recommendation of the MRP. It could, had it chosen to do so, determine to impose a greater sanction or a lesser sanction. However, having not exercised his right under clause 11.4 to challenge the direct red card, the starting point is the determination by the referee that the Player had engaged in Serious Foul Play.

7. In its Determination the D&EC concluded that the appropriate sanction to be imposed upon the Player was the MMS plus an additional two matches. It is from this Determination that the Player has appealed to the Appeal Committee under clause 23.1 of the Disciplinary Regulations.
8. The Appeal Committee<sup>1</sup> has jurisdiction under clause 4.7 of the Disciplinary Regulations. The Grounds of Appeal are limited by clause 23.1 of the Disciplinary Regulations. In the present case the Player relies upon clause 23.1(c), namely:

“the decision was one that was not reasonably open to the Disciplinary and Ethics Committee...having regard to the evidence before the Disciplinary and Ethics Committee.”
9. It is important to note that the ground of appeal is on the basis that the “decision” was not reasonably open. Having regard to the contents of clause 22.3 of the Disciplinary Regulations, there is a distinction to be drawn between the “decision”, the “Determination” and the “reasons on which the Determination<sup>2</sup> is based”. Properly construed, the relevant ground of appeal is not made out merely by establishing that one or more parts of the reasoning was not reasonably open. The relevant ground of appeal is made out only if the “decision” (ie the decision to impose an additional two match suspension above the MMS) was not reasonably open on the evidence.
10. This is not to say that identification of defects in the reasoning might not, in an appropriate case, demonstrate that the ultimate decision itself was not “reasonably open”. But this is not an exercise in reviewing the decision (or the reasons for the

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<sup>1</sup> Although the Appeal Committee is ordinarily required to include a former professional player (clause 4.8 of the Disciplinary Regulations), due to exigencies of time and the need to have this appeal determined quickly (lest any success in the appeal be rendered moot, the Player having already served the MMS and one of the two additional matches suspension) the Player has consented to the present composition of the Appeal Committee. In addition it should be recorded that due to the unavailability of the current Chair of the Appeal Committee the function of the Chair is being exercised by a Deputy Chair (see clause 7.7 of Football Australia’s Judicial Bodies By-Law). Finally, it should be recorded that the Player and Football Australia have each agreed to waive any non-compliance with any requirement of the Football Australia Constitution that the appointment of the members of the Appeal Committee have not been ratified by the Members of Football Australia in General Meeting (this obviates the need to determine whether the conferral upon those Members of a power to “ratify the appointment” of members of the Judicial Bodies has the consequence that such ratification is a pre-requisite to the exercise of jurisdiction by such a Judicial Body).

<sup>2</sup> There is some awkwardness in this provision, as it seems apparent that the “Determination” is a reference to the document issued by the D&EC which records both the “decision” and the “reasons”, although it would be a more natural use of language to refer to the “reasons for the decision” rather than the “reasons for the Determination”.

decision) of the D&EC to ascertain whether its decision was correct. It is also not an exercise in determining what additional sanction (if any) the Appeal Committee considers should have been imposed. The function of the Appeal Committee is limited to determining whether the decision was reasonably open to the D&EC on the evidence before it.

### ***Player's Submissions***

11. The Player raises a number of matters in support of his contention that the decision of the D&EC was not reasonably open to it.
12. The first is a complaint that “The summary of events set out in the DEC’s determination are unrepresentative and do not accord with the totality of the video images and the player’s unchallenged evidence.” What then follows is an analysis of the evidence that was before the D&EC, what is implicitly said to be a more representative summary of the events, and a re-statement of submissions that were made to the D&EC. Complaint is made that the Determination does not refer to certain matters at what are said to be critical parts of the reasoning.
13. It is important at this juncture to observe that absence or inadequacy of reasons is not an available ground of appeal. Further, clause 22.3(c) of the Disciplinary Regulations provides for the reasons for decision to be in the “in the shortest form reasonably practicable.” The reasons given must be understood in that context.
14. Furthermore, there is always a difficulty in attempting to analyse (and portray in a written Determination) what is a dynamic activity by the use of still images. They are necessarily selective snap-shots in time, and experience demonstrates that the selection of different still images can present a very different portrayal of the same dynamic event.
15. In our view there is no reason to think that the D&EC in making its decision has not had regard to the totality of the visual material before it, or that particular weight has been unduly or unfairly placed upon the images in fact selected by the D&EC for the purposes of explaining its reasoning.

16. The Player makes frequent reference to the “unchallenged evidence” he gave that his right foot had slipped. In our view there is no doubt that the D&EC was alert to that evidence and to the Player’s contentions based upon that evidence. That the Player was asserting that his right foot had slipped, or that he had lost his footing, is apparent from paragraphs 23(3), 23(5), 46 and 47 of its Determination.
17. The D&EC does not expressly make a finding as to whether or not it accepted that the Player’s right foot had slipped. In our view it would have been preferable had it done so, in order to more clearly expose the reasoning in its decision that the appropriate penalty was an additional two match suspension above the MMS.
18. However, we note that at paragraph 47 in its Determination the D&EC *has* explained why it regarded that as an appropriate suspension even if the Player’s right foot had slipped. In our view that conclusion was open to the D&EC.
19. At paragraph 20 of the Player’s submissions on the appeal the Player asserts that the D&EC “omits certain crucial factual findings, the absence of which clearly influenced its decision”, which are then set out in the succeeding paragraphs. What the Player now relies upon in those paragraphs are largely summarised by the D&EC at paragraph 23 of its Determination. We are not persuaded that these matters (which were largely repetitive of the Player’s submissions before the D&EC) were ignored by the D&EC, and as we have noted above the reasons for the decision are to be “in the shortest form reasonably practicable.”
20. The Player further complains that it was “Unreasonable for the D&EC to consider that Simmons’ disciplinary record was ‘neutral’.” By describing it as “neutral” we do not regard the D&EC was suggesting that it is irrelevant. Nor, as is suggested by the Player’s submissions, has the D&EC regarded the Player’s “youth and inexperience” as something that should “count against him”. It may be that the description of the Player’s disciplinary record as being “neutral” was an infelicitous shorthand way of expressing a conclusion that the Player’s disciplinary record, in the main positive, was not sufficient to bring about a reduction in the appropriate penalty. In that way the D&EC has “taken into account” the disciplinary record, but having taken it into account it is “neutral” in the sense that it has resulted in a reduction in the appropriate penalty.

### *Disciplinary Counsel's submissions*

21. Without in any way doing an injustice to the careful submissions provided by Disciplinary Counsel, in essence they boil down to two propositions:
  - a. the submissions filed by the Player were essentially an attempt to re-run the hearing before the D&EC;
  - b. the Player had not demonstrated that the decision of the D&EC was one that “no reasonable disciplinary tribunal or body could have reached...on the evidence before it.”
22. The first submission itself does a slight disservice to the Player’s approach to the appeal, in the sense that it has not simply re-run the hearing before the D&EC but has engaged with the Determination given by the D&EC and attempted to demonstrate the respects in which that Determination is in error.
23. The second submission, however, has considerably more force, and appropriately recognises the limited grounds of appeal to the Appeal Committee, and recognises the limits of the relevant ground of appeal relied upon by the Player.

### *Discernment*

24. As we have noted above in addressing the submission made by the Player in this appeal, in our view the Player’s complaints about the reasons given by the D&EC for its decision are in large part misplaced and unsustainable. They do not demonstrate that the additional two match suspension was not reasonably open to the D&EC on the evidence before it.
25. We have recorded our view that where there are contested (or contestable) facts it is preferable for the D&EC to clearly express the findings it makes, particularly where that fact (in this case, the Player’s loss of footing) is an important part of the defence of the Player, and where the determination of that fact itself must necessarily affect the proper characterisation of the Player’s conduct as intentional, negligent, or

reckless, and if negligent or reckless the degree to which that conduct is properly so regarded.

26. For any given incident there will be a range of available sanctions that could properly be imposed by the D&EC. That there is a range of available penalties that could properly be imposed with respect to any particular incident is one reason why it is very difficult to compare different disciplinary cases. It is also one reason why the penalty that the Appeal Committee considers would have imposed is an irrelevant question.
27. It might be thought that the range of available sanctions to be properly imposed will differ depending upon (in this case) whether or not the Player's right foot slipped (thereby contributing to the severity of the clash between opposing players). However, in the present case in our view those different ranges overlap so that the same penalty may properly be imposed whichever finding was to be made by the D&EC. The same may be said with respect of the other matters relied upon by the Player, both individually and in combination.
28. It follows that we are not persuaded that the penalty imposed by the D&EC was a decision not reasonably open having regard to the evidence before it. Accordingly, the appeal is dismissed.



**Dominic Villa SC**

**Deputy Chair, on behalf of the Appeal Committee (consisting of Dominic Villa SC, Arthur Koumoukelis, and Justin Quill)**

**23 February 2024.**