

DISCIPLINARY & ETHICS COMMITTEE OF FOOTBALL AUSTRALIA
DETERMINATION IN THE FOLLOWING MATTER:

Player and club	Max Burgess, Sydney FC
Alleged offence	Offence No. 4, Assault on a Player
Date of offence	4 March 2023
Occasion of offence	Match between Sydney FC and Melbourne Victory
Date of Disciplinary Notice	6 March 2023
Basis the matter is before the Disciplinary Committee	A referral: see clause 3.3(a) and 11.22(b)(ii)
Date of Hearing	16 March 2023
Date of Determination	16 March 2023 (oral pronouncement of determination) 23 March 2023 (written reasons for determination)
Disciplinary Committee Members	Peter Speed (Chair) Stephen Free SC Chris Harold (Former Player)

A. INTRODUCTION AND JURISDICTION

1. The Committee has jurisdiction under clause 4.4 of the "A-League Men Disciplinary Regulations" applicable to the 2022-23 A League season (**the Disciplinary Regulations**) to determine matters which have been referred to it pursuant to the Disciplinary Regulations. When a matter is duly referred, clause 3.3(a) provides that the Committee must determine the matter and "impose such sanctions as are authorised and appropriate to the determination".
2. In this matter there has been a referral under clause 11.22(b)(ii) of the Disciplinary Regulations. Max Burgess (**the Player**) was given a direct red card by the referee. The March Review Panel issued a Disciplinary Notice advising that the Red Card Offence constituted an Offence No. 4 being "Assault on a play (eg violent conduct when not challenging for the ball) or against any other person other than a Match Official, including attempted Assault" (**the Offence**). The "Minimum Sanction for the Offence" under the Disciplinary Regulations is 2 matches, being the Mandatory Match Suspension plus one additional match.
3. In response to the Disciplinary Notice, the Player elected under clause 11.22(b)(ii) of the Disciplinary Regulations to refer to the Disciplinary and Ethics Committee for hearing and determination the "sole question of ... whether Exceptional Circumstances apply and therefore a sanction outside of the Range at the Table of Offences should be imposed, provided always that the Mandatory Match Suspension must be served".
4. Given the nature of the Offence and the treatment of an offence of this kind under the Table of Offences, the substantive question arising on the appeal was whether

or not the suspension period should be reduced from 2 games to 1 game (noting that under clause 11.22(b)(ii) the Mandatory Match Suspension must be served).

5. The Committee is satisfied that it has jurisdiction to deal with this referral. Neither party contended to the contrary.

B. THE HEARING

6. On 16 March 2023, the Committee heard the referral of the matter by AVL.
7. At the hearing Disciplinary Counsel was Mr Ivan Griscti, of counsel, and the Player was represented by Mr Peter Paradise, solicitor.
8. The relevant evidence was comprised of:
 - (a) video footage of the incident;
 - (b) evidence given by the Player at the hearing, including in response to questions put by Disciplinary Counsel and members of the Committee;
 - (c) the referee's report;
 - (d) the 4th official's report;
 - (e) the disciplinary notice, dated 6 March 2023;
 - (f) evidence of contributions to the community made by the Player; and
 - (g) the disciplinary record of the Player.
9. The Committee was also assisted by the written submissions provided by the parties. In reply submissions filed on the day of the hearing the Player advised that he was not pressing certain arguments to do with the invalidity of the Disciplinary Notice. Further oral submissions were provided at the hearing by both parties.
10. At the conclusion of the hearing (following deliberations and pursuant to clause 22.4 of the Disciplinary Regulations) the Committee verbally announced the result, being that the referral was dismissed (such that the Mandatory Minimum Sanction of 2 matches would stand). These are the written reasons of the Committee, noting the requirement in the Disciplinary Regulations that such reasons must be in the "shortest form reasonably practicable": clause 22.3(c).

C. FACTS

11. In the 84th minute of the Match, the Player was challenged from behind by Melbourne Victory player Bruce Kamau (**Kamau**) as the ball approached the sideline adjacent to the Melbourne Victory technical area. The Player was shielding the ball towards the sideline. Kamau, by hooking his leg around the Player, was successful in kicking the ball back into play before it crossed the sideline. It is apparent that the Player was taken by surprise by the challenge and both players were entangled as they rolled over the sideline and into the edge of the Melbourne Victory technical area.
12. The Player gave evidence at the hearing that he was disorientated by these events, and anxious to disentangle himself, regain his feet and rejoin the play (which was continuing without both players). Kamau broke free and regained his feet. As he did so, the Player was still on the ground with his legs in contact with the back of Kamau. He then extended his leg, away from his body and towards Kamau so that the edge of the bottom of his boot came into contact with Kamau's back. There is no suggestion that this was an attempt to challenge for the ball,

which was nowhere in the vicinity by this stage. The 4th official in his report describes the force of the contact with Kamau as "moderate". Based on the video evidence Kamau does not appear to have been injured by that contact, or even to have registered that it had occurred.

13. Meanwhile the ball had remained in play leading to a shot on goal by Melbourne Victory. In the subsequent break in play, the referee (who had not seen the incident between Kamau and the Player according to his report) conferred with the 4th official who had seen the incident. While this was occurring, the Player twice walked across to Kamau, apparently to apologise to him and check that he was unhurt. That appeared to be graciously received by Kamau. Based on the advice of the 4th official, the referee issued a red card to the Player. The Player did not dispute the decision or otherwise react adversely to the red card and left the field immediately. These actions and reactions by the Player are to his credit, although viewed in context they are consistent with the Committee's ultimate conclusion that the Player had lashed out inappropriately against Kamau, and he knew this at the time.

D. SUBMISSIONS

14. What follows is a short summary of the parties' submissions, consistent with the obligation to keep these reasons in the shortest form practicable. The Committee has had regard to all of the written and oral submissions of the parties, and what follows is intended to be no more than a summary of some of the key points raised.
15. The Player appropriately focused his submissions on the question posed by clause 11.22(b)(ii), namely whether "Exceptional Circumstances" applied, such that a sanction of only 1 match should be imposed. The Player put a number of different submissions on the topic of "Exceptional Circumstances". One was that the offence itself had not been made out, which was said to constitute an "Exceptional Circumstance". An alternative argument, which was ultimately the focus of the argument on this topic at the hearing was, was that "Exceptional Circumstances" applied essentially because of the way in which the Player was challenged by Kamau and became entangled with him, with the result that he had to extend his leg in an attempt to break free of the restraint.
16. In developing this argument the Player sought to draw an analogy with the case of *Bojic* where "Exceptional Circumstances" were found to exist because the player was being physically restrained on the ground, at a time when his team was in peril of conceding a goal, and struck out in order to break the hold and rejoin play. Analogies were also sought to be drawn with *Akotto* (where the Exceptional Circumstance found to exist was the opposition player standing on the player's mouthguard, which prompted his violent act in attempting to liberate his mouthguard) and *Berisha* (where the Exceptional Circumstance was a state of possible concussion which led the player to act with the intention of receiving treatment for his injury).
17. The Player also advanced a submission, in the alternative, that the Offence had been inappropriately classified as an offence under no. 4 of the table of offences, and should have been classified as either "Serious Foul Play" (No. 3) or "Serious Unsporting Conduct (No. 5).

18. As to the facts of the Offence, the Player submitted in writing that although he had acted recklessly and may have endangered the safety of the opponent, he was merely "attempting to create space for himself and regain his footing whilst off balance". The Player in his oral evidence at the hearing sought to explain and characterise the foul in a similar way.
19. The Disciplinary Counsel submitted that there were no Exceptional Circumstances in the present matter, and no proper analogy to be drawn with *Bojic* or any of the other cases cited by the Player. On the question of the classification of the offence, the Disciplinary Counsel submitted that the conduct was violent conduct within the *Laws of the Game* and fell within the concept of "Assault on a Player" under the Table of Offences in the Disciplinary Regulations. This was principally because the Player used excessive force against Kamau when not challenging for the ball.

E. CONSIDERATION AND FINDINGS

20. The submissions made by the Player in relation to the alleged mischaracterisation of the offence raised an issue as to the nature of the hearing being conducted by the Committee. That is not a straightforward matter. As noted above, the matter comes to the Committee by reason of a referral under clause 11.22(b)(ii) of the Disciplinary Regulations. According to that subclause, the matter which is referred to the Committee is the "sole question of ... whether Exceptional Circumstances apply and therefore a sanction outside of the Range at the Table of Offences should be imposed, provided always that the Mandatory Match Suspension must be served" (emphasis added). According to the definition in the Disciplinary Regulations, the "Range at the Table of Offences" relevantly means, in relation to each Offence, the range bounded by the Minimum Sanction prescribed in Players Table of Offences and the maximum prescribed at Schedule 3. Here the relevant "Range" is between 2 matches suspension and suspension for 24 months.
21. Clause 11.23(a) provides that at a hearing conducted pursuant to a referral under clause 11.22(b), the Committee "must make a Determination as to sanction applying the Range at the Table of Offences and in accordance with and subject to clause 13 of these Regulations". Clause 13 of the Disciplinary Regulations relevantly provides that a Judicial Body (which is defined to include the Committee) must "determine the scope and duration of each sanction in accordance with [the] Regulations" (cl 13.1(b)) and "is not bound by the categorisation of an offence by the Referee, other Match Official or the Match Review Panel" (cl 13.1(e)).
22. Here the Player sought to argue that by reason of cl 13.1(e) it was open to the Committee to conclude that the Offence had been wrongly categorised as "Assault on a Player", in favour of a less serious classification as "serious foul play" or "serious unsporting conduct". That raised a question as to whether this was properly a feature of the hearing of a referral of this kind, noting in particular the stipulation in cl 11.22(b)(ii) that the "sole question" which is the subject of referral is whether Exceptional Circumstances apply, and on that basis a sanction outside the Range at the Table of Offences should be imposed.
23. The Committee pressed the representative of the Player and Disciplinary Counsel for submissions as to how the Committee had jurisdiction, despite cl 11.22(b)(ii), to reclassify the offence itself. It was submitted for the Player that the power derived from cl 13. Disciplinary Counsel accepted that in substance the Committee

could engage in a reclassification of this kind if Exceptional Circumstances existed, though perhaps not otherwise.

24. It is unnecessary for the Committee to resolve this jurisdictional conundrum. That is because the Committee would not in any event accept the submission that the Offence was wrongly classified as "Assault on a Player".
25. As to the factual circumstances of the Offence, the Committee does not accept the explanation that the Player merely made inadvertent (or even reckless) contact with Kamau while he was attempting to create space for himself and regain his footing whilst off balance. It may be accepted that events moved quickly, and the Player was disorientated to some extent by being bundled over the sideline from behind and momentarily entangled with Kamau. However, the Committee is satisfied on the basis of the video evidence that the Player was no longer entangled with Kamau when he struck out with his leg in a deliberate and aggressive motion towards Kamau's back with the bottom of his boot. The contact was glancing and did not cause damage to Kamau. But it did involve the use of excessive force, or at the very least an attempt to use excessive force, against Kamau when not challenging for the ball. According to the *Laws of the Game*, such conduct is "violent conduct". Indeed, an attempt to use excessive force is violent conduct "regardless of whether contact is made". Under the Disciplinary Regulations "violent conduct when not challenging for the ball" is a species of "assault on a player". An "attempted assault" also constitutes an "assault on a player".
26. For these reasons, even if the Committee had jurisdiction to reclassify the offence as the Player urged, the Committee would not do so on the facts of this case.
27. As for "Exceptional Circumstances", the Disciplinary Regulations provide that this means circumstances "operating at the time of the Offence and relating to the commission of the Offence and not to the impact a sanction may have". The definition goes on to state that certain specified matters are not Exceptional Circumstances including:
 - "(d) the conduct, including actions, words or gestures of any Player or Team Official or the opposing team during or related to the A-Leagues Match"
28. The Committee drew this aspect of the definition to the attention of the parties, noting that on one view the matters relied on by the Player as constituting Exceptional Circumstances might be thought to be caught by the express exclusion in (d), given that they concerned the conduct of Kamau (a player in the opposing team) in precipitating the foul by the Player.
29. It was submitted that while the words of (d) on their face could be seen as having that application, the exclusion might be better understood as applying only to provocations of a more remote kind. Disciplinary Counsel proceeded to make the express concession that he placed no reliance on the exclusion in (d). In the circumstances, the Committee will proceed on the basis that the matters relied on by the Player may be capable of constituting Exceptional Circumstances, notwithstanding subparagraph (d) of the definition of that phrase.
30. On this assumption, the Committee is not satisfied that the circumstances relied on by the Player are in any relevant sense "exceptional". Two players becoming physically entangled as a result of a challenge is a commonplace event in a game of football. That includes a situation where one player becomes disorientated by

being bundled to the ground. There is no meaningful analogy with the situation described in *Bojic*, where according to the reasons of the Committee Bojic was held on the ground by an opponent who held his arms in a locked position, and Bojic reacted violently with his arm to free himself. In the opinion of the Committee in *Bojic*, this was not a "common thing to see on a football field". In contrast, the Player in the present case was not being held down, by a locked arm hold or otherwise, when he lashed out at Kamau. The relevant act of lashing out at Kamau occurred in circumstances that were not in any relevant respect different from those which are common to see on a football field.

F. RESULT

31. The referral to the Committee is dismissed, with the result that the previously advised sanction of 2 matches remains.

Peter Speed, Disciplinary & Ethics Committee Chair

Stephen Free SC, Committee Member

Chris Harold, Committee Member

23 March 2023