

DISCIPLINARY COMMITTEE OF THE FOOTBALL FEDERATION OF AUSTRALIA

DETERMINATION IN THE FOLLOWING MATTER:

Player and club	Brendon Santalab of Western Sydney Wanderers FC
Alleged offence	Use of discriminatory language and/or gestures, including racist, religious, ethnic or sexist (R6)
Date of alleged offence	8 March 2014
Occasion of alleged offence	Match between Western Sydney Wanderers and Sydney FC
Date of Disciplinary Notice	19 March 2014
Basis the matter is before the Disciplinary Committee	A referral: see clause 3.3(a) and 9.42(b)
Date of Hearing	Monday 24 March 2014; Thursday 3 April 2014
Date of Determination	10 April 2014
Disciplinary Committee Members	John Marshall SC, Chair Lachlan Gyles SC Dominic Longo (former player)

A. INTRODUCTION

1. This matter concerns an incident which occurred between Brendon Santalab (the **Player**) and Ali Abbas (the **Complainant**) during the Sydney derby which took place at Allianz Stadium on 8 March 2014.
2. A complaint was lodged with the FFA on 10 March 2014 regarding an alleged racist comment by the Player. This Committee was constituted to deal with the complaint and to determine whether an offence had been committed by the Player, as alleged.
3. The Committee dealt with the complaint over two lengthy hearings, and reserved its decision. It is intended that these reasons shall be made public, and hence the specifics of the charge are not disclosed to avoid potential prejudice or harm to those involved. While this may make the reasons more difficult to follow, we believe that it remains in the public interest to expose our reasoning, to the extent possible, to avoid speculation about that.
4. In the end, the compass of the factual dispute was extremely narrow, involving only one word. Both parties accepted that if the word was used, it constituted racial abuse. The Player accepts that the Complainant genuinely believed that the word was used, but says that there has been a misunderstanding and that another word was used, not of a racial or ethnic character. This Committee needs in that context to determine whether the offence has been proven to the necessary standard of proof.

5. Plainly, the abuse of a player in the A League, or at any level of the game in Australia, on racial or ethnic grounds is abhorrent and cannot be tolerated. At the same time however, a finding that a player did make a racist comment to another can have significant consequences for the reputation and standing of the player. It is not a finding that can therefore be made lightly, and while the allegations must be taken seriously the accused player must also be treated fairly in the process.

B. JURISDICTION

6. The Disciplinary Committee (**the Committee**) has jurisdiction under clause 4.4 of the "FFA A-League Disciplinary Regulations" applicable to the 2013-2014 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.
7. Clause 9.41 of the Disciplinary Regulations allows the FFA to appoint an Investigations Officer to investigate an incident during a match involving a Participant that has escaped the Referee's attention and of which there is no or only Partial Broadcast Footage.
8. When the alleged incident occurred on 8 March 2014 during approximately the 85th minute, the referees were not in close enough proximity to hear the alleged words stated by the Player to the Complainant, nor is it possible from the Broadcast Footage to see or hear what may have been said.
9. The Investigations Officer submitted a report to the FFA on 17 March 2014 indicating that there was sufficient basis for this matter to be referred under clause 9.42 of the Disciplinary Regulations to the Committee for hearing to determine if an Offence has been committed and if so, what sanction should be imposed.
10. As such, there has been a referral under clause 9.42(b) of the Disciplinary Regulations which gives the FFA authority to refer a matter to the Committee upon receipt of a report from the Investigations Officer as is the case here.
11. Normally under Annexure A.6 of the Disciplinary Regulations, cases involving allegations of racial, ethnic, religious or sexual discrimination will first be referred for mediation under the FFA's National Member Protection Policy (**the policy**)¹ before application of the Disciplinary Regulations. However, as per clause 6(a) of 'Attachment D2: Mediation' of the Policy, referral to mediation was not recommended because the Player in this case has a materially different version of the relevant conversation to that of the Complainant, and the Complainant did not wish to go to mediation.
12. The FFA therefore issued a Disciplinary Notice to the Player on 19 March 2014 in accordance with clause 9.42. The Disciplinary Notice set out the details of the alleged offence (being, Use of discriminatory language and/or gestures, including

¹ The Australian Sports Commission makes it a condition of funding that sports adopt a Member Protection Policy (MPP) at all levels, which contain prohibitions on racial discrimination and vilification, with complaint, mediation and disciplinary mechanisms to assist the resolution of disputes.

racist, religious, ethnic or sexist and alternatively, Use of offensive, insulting or abusive language and/or gestures) and referred the matter to the Committee.

13. The Disciplinary Notice was subsequently amended during the adjourned hearing upon application by the Disciplinary Counsel to refine the details of the alleged conduct, and to drop the alternative charge concerning offensive conduct. Hence the only charge which needs to be dealt with by the Committee is the offence of using racist or ethnic discriminatory language.
14. The Committee must determine whether this Offence has been committed, and if so, what sanction should be imposed in accordance with the Disciplinary Regulations (see Clause 9.42(b)).

C. THE HEARING

15. The hearing of the Committee took place over two nights, 19 March and 3 April 2014, and occupied many hours. Both the Player and the Complainant gave evidence and were cross-examined, and video footage of the incident was shown and considered. These are the written reasons of the Committee in the "*shortest form reasonably practicable*" (see clause 20.3(c)) and in a form intended to be capable of being made public.
16. The Disciplinary Counsel and legal representatives of the Player were given the opportunity to provide written submissions, and did so, and each also addressed the Committee orally.
17. At the hearing Disciplinary Counsel was Ivan Griscti and the Player was represented by Adam Casselden of counsel and Robert McClelland of Turner Freeman solicitors.

D. THE EVIDENCE

18. In addition to the Report of the Investigations Officer, and attachments, of 17 March 2014, the following evidence was tendered by the Disciplinary Counsel at the hearing:
 - (1) Statement (x2) of the Complainant dated 11 March 2014;
 - (2) Statement of the Player dated 14 March 2014;
 - (3) Statement of the Referee, Mr Griffiths-Jones dated 13 March 2014;
 - (4) Statements of the Assistant Referees, Mr Brennan and Ms Flynn, dated 13 March 2014;
 - (5) Statement of the Fourth official, Mr Young, dated 13 March 2014
 - (6) Statement of Sydney FC Players and Officials as follows: Messrs Gligor, Pigmata, Farina, Vidosic, Ognenovski, Urosevski, Petkovic, Garcia, Jurman and Janjetovic;
 - (7) The Disciplinary Record of the Player.
19. Counsel for the Player tendered the following material in response:
 - (1) Statement of Wanderers players and Officials as follows: Messrs Gorman, Tsatsimons, Jenson, Fofanah, Popovic (x2), Covic and Hersi;
 - (2) Report of an Acoustics Expert, Joseph Scoppa and associated articles;
 - (3) The Disciplinary Record of the Complainant;

- (4) The transcript of an interview between the Player and Sebastian Hassett on 8 March 2014.

E. THE INCIDENT

20. In around the 85th minute of the game an initial incident occurred between the Player and Sydney FC Goal Keeper Vedran Janjetovic. Following the incident, the referee awarded a free kick to Sydney FC. At this time the Player began to walk back to his usual position on the field when he crossed paths with the Complainant.
21. The Complainant appears to have initiated a conversation which took place for a time while the players were moving away from the Sydney FC goal. It appears from the video footage that during the exchange the players were at certain times within about one metre of each other, and at other times such as when the exchange commenced, were further apart. Emotions were obviously running high, and they ultimately had to be separated by the Referee.
22. Shortly after the exchange of words, the Complainant confronted Referee Kris Griffith-Jones (**Jones**) and complained that he had been racially abused by the Player. Jones said that he did not hear the comments so could not act upon the incident. The Complainant continued to remonstrate with Jones which resulted in him being awarded a yellow card for Y2 dissent.
23. Immediately after the issue of the yellow card, the Complainant made his way over to his team's technical area where he had a conversation with Sydney FC Assistant Coach Rado Vidosic and Coach Frank Farina.
24. Upon the whistle at full time, the Complainant again was seen to be extremely agitated and ran towards the Player. There he proceeded to exchange words with the Player whilst his team mates were restraining him by holding him back. Assistant Referee Luke Brennan intervened between the two players to calm the situation.
25. The Complainant was asked to conduct a post match interview on the field in which he was asked about his agitated behaviour. He asserted that "we are not here to attack religion or culture we are here to play football". That received extensive media coverage. The Committee notes at this point that the statement of the Complainant must be endorsed. Racial abuse has no role in football.
26. On 10 March 2014, Sydney FC (the club where the Complainant plays) filed a formal complaint.

F. NO CASE SUBMISSION/AMENDMENT

27. At the conclusion of the FFA case, and before the Player went into evidence, a no case submission was put seeking a verdict in his favour by direction. A similar argument arose when the Disciplinary Notice was sought to be amended, which was opposed by the Player. The Committee was not prepared during the hearing to summarily dismiss the matter on those grounds, or to disallow the amendments, and Mr Casselden was content for reasons to those matters to be dealt with at the end of the hearing. We shall endeavour to do so now.
28. Mr Casselden for the Player in substance sought to persuade the Committee to treat the matter as akin to a criminal matter, and to strictly hold the FFA to the

wording of the original notice. We do not consider that to be the correct approach, for the reasons set out below.

29. First, these proceedings are not criminal proceedings, and thereby not constrained by the particular structures of criminal procedure. The authorities referred to by Mr Casselden were therefore of limited utility. Second, the real issue as regards to the amendment was whether the Player would suffer any prejudice if the amendment was allowed. In circumstances where the charge itself did not change, and the Player was on notice of the conduct ultimately relied upon to make out that charge, it is difficult to see that he could have been. It would have been different if new and alternative conduct was sought to be relied upon, but here the allegation was in fact reduced in compass to conform with the evidence given by the Complainant. On one view it was of assistance to the Player for the description of the offence to be reduced in that way, and thereby to make the specific allegation clearer to him.
30. The prejudice ultimately relied upon was said to be a forensic decision going to the ambit of cross examination of the Complainant, which was said to have proceeded on the basis that the Complainant was entitled to have the complaint as originally formulated dismissed by direction, and thereby cross-examination on the words used by the Complainant did not take place. We do not accept this. In our view, the no case submission was destined to fail because it was not necessary for the whole of the conduct set out in the Notice to be made out for the offence to be sustained. While the Notice plays an important role in establishing the parameters of the conduct complained of so as to give the player a fair opportunity to deal with it, the role of this Committee is to hear and consider the evidence as presented, and to decide whether an offence has been committed. So long as no unfairness arises, which in this case it does not, it can make such a finding even if not all of the relevant conduct is made out, and is bound to do so.
31. Therefore the Player's representative was not entitled to proceed on the basis that the no case submission would succeed, and were at risk if they chose to do so. Further in circumstances where the Player accepted that the Complainant genuinely believed that the words as alleged were said, there was little place for a credit cross-examination in any event. Further no application was made to further cross-examine after the amendment was allowed. We therefore do not accept that there was any relevant prejudice arising from the amendment.
32. Third, the FFA Regulations do not provide for "no case" applications, and the matter is not of a criminal or quasi criminal nature. In our view, in the interests of both the Complainant and the process itself there should be a hearing on the merits.

G. SUBMISSIONS

33. The matters submitted by Disciplinary Counsel can be summarised as follows:
 - (1) The standard of proof is the balance of probabilities, having regard to the observations in cases such as *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 and *Briginshaw* (1938) 60 CLR 336.
 - (2) The contemporaneous and objective evidence supports the Complainant's version of events, particularly the Complainant's reaction and immediate complaint to the Referee.

- (3) That the Complainant is a more reliable witness than the Player, the latter's evidence including inconsistencies such as how far apart the players were during their exchange and his assertion as to not knowing of the alleged racial nature of the complaint until the following day.
 - (4) The acoustics evidence is based upon an assumption as to background noise which has not been proved, and that commonsense would dictate a finding that the Player could be heard properly in circumstances where conversations between other players were taking place on the ground in which players could be heard, and where the crowd noise had reduced somewhat at the time of the incident.
 - (5) The Committee should find that the offence as described in the Notice was made out.
34. The matters submitted on behalf of the Player can be summarised as follows:
- (1) The Player does not contest or challenge that the Complainant genuinely believes that the offensive words, the subject of the Notice, were used, but says that this does not of itself prove that such words were in fact used.
 - (2) If a finding of the conduct is made out, this would have significant consequences for the Player, including as to his reputation, future playing contracts and sponsorships, and future employment generally.
 - (3) In the circumstances, such a finding would not be made lightly and demands a higher standard of proof.
 - (4) The clear and contemporaneous evidence is that the noise level on the field was excessive, and the unchallenged expert evidence of Dr Scoppa is that such noise levels probably affected the ability of the Complainant to be clearly heard.
 - (5) That the Complainant having English as a second language may have in such circumstances created more difficulty than usual in comprehending what was said to him.
 - (6) The Complainant's inconsistent recollections itself casts doubt as to what may have been said.
 - (7) That the Committee should find that the case has not been made out to the requisite standard of proof.

H. THE LEGISLATION AND RULES CONCERNING RACIAL DISCRIMINATION

(1) FFA Codes and Statues

35. Policies in place to prevent racial discrimination can be found in a number of codes, statues and regulations in place by the FFA. They relevant sections are listed below.
36. A-League Disciplinary Regulations Season 2013-2014

6. TABLE OF OFFENCES

Offence No.	Offence	Minimum Sanction	Category
...			

6 (R6 for Players)	Use of discriminatory language and/or gestures, including racist, religious, ethnic or sexist	4 additional matches plus the Mandatory Match Suspension	Category 2
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Definitions

Discrimination Policy means the FFA Member Protection Policy or such other policy as promulgated by FFA from time to time.

37. FFA Code of Conduct

2. BRINGING THE GAME INTO DISREPUTE

2.1 A Member must not bring FFA or the game of football into Disrepute.

2.2 Without limiting the generality of clause 2.1, a Member will be taken as having brought football into Disrepute if any of the following occurs:

(a) discriminatory behaviour, including public disparagement of, discrimination against, or vilification of, a person on account of an Attribute;

...

(c) offensive behaviour, including offensive, obscene, provocative or insulting gestures, language or chanting;

38. FFA National Disciplinary Regulations 2009

6. TABLE OF OFFENCES

Offence No.	Offence	Minimum Sanction
...		
6 (R6 for Players)	Use of discriminatory language and/or gestures, including racist, religious, ethnic or sexist	4 additional matches plus the Mandatory Match Suspension

39. FFA Statutes 2011

Definitions

Member Protection Policy means the national policy that addresses discrimination (sexual or otherwise) and child protection in football, as specified in Annexure C or as varied FFA from time to time in accordance with these Statutes.

Article 3 Neutrality and non-discrimination

1 FFA is neutral in matters of politics and religion.

2 FFA is committed to providing a sport and work environment free of discrimination and harassment (sexual or otherwise), where individuals are treated with respect and dignity.

3 Discrimination of any kind against a country, private person or group of people on account of race, colour, religion, language, politics, national or ethnic origin, gender, transgender, sexual orientation, age, marital status, pregnancy or intellectual or physical impairment or any other attribute specified under commonwealth or state legislation is strictly prohibited and punishable by disciplinary sanction, including suspension or expulsion.

4 Each Member must comply with the Member Protection Policy, which establishes the rights and responsibilities of Members in relation to discrimination, harassment and child protection.

5 Each spectator at a Match must comply with the Spectator Code of Behaviour, which specifies minimum standards of behaviour to ensure

40. FFA National Member Protection Policy

1. Purpose of Policy

This FFA Member Protection Policy (**Policy**) ... outlines our commitment to a person's right to be treated with respect and dignity and to be safe and protected from abuse. This Policy informs everyone involved in our sport at the national, state and local levels of his or her legal and ethical rights and responsibilities and the standards of behaviour that are required.

The Policy attachments outline the procedures that support our commitment to eliminating discrimination, harassment, child abuse and other forms of inappropriate behaviour from our sport. As part of this commitment FFA will take disciplinary action against any person or organisation bound by this Policy if they breach it.

5.3 Anti-Discrimination and Harassment

The Governing Bodies oppose all forms of harassment, discrimination and bullying. This includes treating or proposing to treat someone less favourably because of a particular characteristic; imposing or intending to impose an unreasonable requirement, condition or practice which has an unequal or disproportionate effect on people with a particular characteristic; or any behaviour that is offensive, abusive, belittling, intimidating or threatening – whether this is face-to-face, indirectly or via communication technologies such as mobile phone and computers. Some forms of harassment, discrimination and bullying, based on personal characteristics such as those listed in the Dictionary at section 9 of this Policy, are against the law.

9. Dictionary

...

Discrimination means treating or proposing to treat someone less favourably because of a particular characteristic in the same or similar circumstances in certain areas of public life (Direct Discrimination) The characteristics covered by discrimination law across Australia include, but are not limited to:

...

j) Race;

k) Religious belief/activity;

7. What is a Breach of this Policy

It is a breach of this Policy for any person or organisation to which this Policy applies, to do anything contrary to this Policy, including but not limited to:

...

d) Discriminating against, harassing or bullying (including cyber-bullying) any person;

...

(2) FIFA Disciplinary Code

41. FIFA is the governing body of football worldwide. FIFA's provisions to against racial are therefore relevant.

Section 3. Offensive and discriminatory behaviour

57 Offensive behaviour and fair play

Anyone who insults someone in any way, especially by using offensive gestures or language, or who violates the principles of fair play or whose behaviour is unsporting in any other way may be subject to sanctions in accordance with art. 10 ff.

58 Discrimination

1. a) Anyone who offends the dignity of a person or group of persons through contemptuous, discriminatory or denigratory words or actions concerning race, colour, language, religion or origin shall be suspended for at least five matches. Furthermore, a stadium ban and a fine of at least CHF 20,000 shall be imposed. If the perpetrator is an official, the fine shall be at least CHF 30,000.

(3) The FA

42. The English Football Association (**FA**) has a strong stance on racial discrimination and hands out heavy penalties to those who breach their standard.

43. In 1993 the Commission for Racial Equality and the Professional Footballers' Association implemented the FA's 'Kick It Out' anti-racism campaign.

44. In 2009 the FA progressed and implemented an 'Equality Standard' into the Kick It Out campaign for all Clubs.

45. The Standard aims to ensure that individuals are not discriminated against on the grounds of Race, Religion, Age, Gender, Disability and Sexual Orientation and encourages compliance with the UK discrimination laws.²

(4) FFA takes racial abuse seriously

46. The reason the matters above have been set out is to record that racial discrimination or abuse is not to be tolerated and that the sport of football and the FFA in Australia has in place policies and codes to deal strictly with established breaches.

I. CONSIDERATION AND FINDINGS

47. Despite the large volume of evidence tendered in the case, and the lengthy hearing, in the end the factual issue for determination by the Committee was very narrow. The conduct relied upon to make out the offence, and supported by the evidence of the Complainant, was that the Player had said three words to him, the second of which was accepted to have constituted discriminatory language of a racial or ethnic nature. The Player did not dispute that two of the words were used by him, but rather says that the second word which was used was different,

² Race Relations Act 1976, Sex Discrimination Act 1975, Disability Discrimination Act 1995, and Age Discrimination Act 2006, as well as any amendments to these Acts.

and although unfriendly, was not of a racial or ethnic nature. The question for the Committee is whether the FFA has proved to the relevant standard that the Player used the word which the Complainant says that he heard. If the Committee is so satisfied, there is no issue that the offence will be made out.

48. The Committee in its considerations does not have the benefit of any eyewitness who heard the exchange between the Player and the Complainant. Equally, the video evidence, while relevant to the physical proximity of the players during their exchange, also sheds no light on the particular words used by the Player.
49. An unusual feature of this matter is that the Player accepts that the Complainant believed that the offensive word had been used, and thus does not challenge the fact that he believed that he had been the subject of racial abuse. His conduct thereafter is of course entirely consistent with this, both as to the contemporaneous statements to team mates and officials, the significant and unusual nature of his reaction, and the subsequent making of the complaint. That means that the credit of the Complainant in this matter is not under challenge.
50. The Committee's considerations in those circumstances rather involve an assessment as to the possibility that the Complainant misheard and/or misunderstood what had been said to him. That first involves an assessment of the proximity of the players at the time that the statement was made and the likely noise levels, and secondly a consideration of the credit of the Player both as a witness and more generally.
51. The evidence of the match officials is of little assistance on these issues given that they did not hear what was said. The statements provided by the Sydney FC Officials and players are really only directed towards the reporting by the Complainant to each of them of his own belief as to what he was called.
52. The statements of the Wanderers Officials and players essentially deal with three issues. *First* as to corroboration of the Player's denial of having racially abused the Complainant, *second* to the levels of noise on the field at the time, and *third* as to the Player's character in respect of racism generally. In our view, the first category of evidence is of marginal utility given that it is self serving and of little probative value concerning the truth of that being alleged. In other words he may simply be not telling the truth consistently.
53. The noise issue is important. The Complainant himself accepted in cross examination that the crowd noise that night was very noisy, and that the noise levels increased throughout the game. This is corroborated by the Wanderers Coach, Tony Popovic, the Goal Keeper, Ante Covic and another player, Youssouf Hersi. There was evidence that at times during the game, players could not make themselves heard on the field at a distance of more than 3 metres. That suggests that difficulties still may be encountered at distances less than 3 metres. The submissions of the Player's representative point out that the Fox Sports Commentator described the noise level of the match in these terms:

I can barely hear you, I tell you what if there was a roof on this place it would have already blown off.
54. It is therefore largely not in issue that the crowd was extremely noisy on this night particularly, one might expect, towards the end of a close match. The question is whether the noise in the vicinity of the Complainant and the Player at the time of the comments made, may have been sufficient to cause the Complainant to have either misheard or misunderstood what the Player had said.

55. In this regard, an article was tendered from the Daily Telegraph of 28 October 2013 in which a journalist Phil Rothfield says that he took a sound meter to Allianz Stadium and recorded the sound levels for 20 minutes while in the Red and Black Block of the Wanderers Supporters, and 20 minutes while in the Cove of the Sydney FC Supporters. That testing, for what it is worth, saw sound levels up to 117 dB for the RBB, and 109 dB for the Cove. Mr Gorman, the CEO of the Wanderers, in a statement tendered in these proceedings says that the noise in the last five minutes of the match on 8 March 2014 was "every bit as noisy as the highest noise level of the first derby match in 2013."
56. On 25 March 2014 Dr Scoppa, an expert in noise induced hearing loss, was asked to provide an opinion as to whether at a noise level of between 100 and 117 dB there would have been communication problems between players on the pitch during the course of the game. Dr Scoppa's opinion was that there probably would have been. He for example says that a reading of 107 dB is equivalent to the noise created by a lawnmower at 3 feet, at 110 dB is equivalent to a chainsaw at 3 feet, and 115 dB being the equivalent of a loud rock concert. Commonsense would indicate that noise at those levels could well impact upon a person's capacity to hear what is being said to them.
57. We accept Disciplinary Counsel's submission that the noise during the game ebbed and flowed, and that at around the time of the incident was not at its highest. We also accept that it was likely to have been less than 117dB. However one could not safely conclude that it was not somewhere in excess of 100dB at the time.
58. Other important factors are whether or not the persons are facing each other at the time of the words being said, and the distance between them. In respect of the former, the evidence of the Player was that the comments he had made were at a time where he was speaking to the Complainant over his shoulder rather than directly facing him. So far as the latter is concerned, the Player readily conceded that the distance may have been as little as 1-2 metres. The evidence of the Complainant was that they were closer. In this respect, the video evidence is potentially inconsistent in parts with each of their versions. So far as the Player is concerned, it is plain that during the course of the exchange between them, there were times when they were very close to each other which is inconsistent with the Player's evidence. However the footage also indicates that the exchange was initiated by the Complainant who moved approximately 15 metres to be in proximity to the Player and that the exchange took place over a far longer period than had been indicated by the Complainant in his evidence. In this regard the Complainant is at least in certain respects mistaken in his recollection. The footage, overall, indicates that the players, in the heat of the moment, may not have the most accurate recollection of the events.
59. One matter we observed is that the accounts given by the Player and the Complainant and other witnesses whose evidence is being received in statement form *appear to be generally consistent* with the Fox Sports footage that was widely seen and readily available. The other angle from a technical supplier, which was first shown to the Committee at 10:30pm on the first night of hearing, gives much more information about the movements of the players from the high and wide angle where the camera was placed. What is interesting is that some of the evidence the Committee heard is difficult to reconcile with what is observed from that wider angle. The Committee considers that this illustrates the subconscious way in which such matters can influence recollection, and in this

case people endeavouring honestly to do the best they can to describe the events have been shown to be wrong in certain respects.

60. The difficulty with all of the footage (from both sources) is that one does not know when during the exchange the relevant alleged words were said. If said early in the exchange, it may well be that at that time the Player was not squarely facing the Complainant but rather making the comments over his right shoulder, and at a distance, something in the order of 2 metres. That would corroborate his evidence. If on the other hand the words were said later in the exchange, the players may have been facing each other squarely and have been closer. The difficulty which the Committee has is that there is little objective evidence which goes to that question, and on the evidence of the Complainant, which is that the words were spoken after an initial comment by him, that would tend to them having been spoken at an early stage.
61. If that is correct, and the words were spoken over the Player's shoulder, that could be significant as to likelihood of him being misheard.
62. There is therefore an uncertainty about the circumstances in existence when the relevant alleged words were used. *First*, it is unlikely that the levels of noise at that time were as high as the peak tested by Mr Rothfield on the earlier occasion, but they may well have been at a level in excess of 100 dB and thereby capable of affecting the capacity of the Complainant to hear what had been said. *Second*, if the comments had been made while the Player was not squarely facing the Complainant, this would accentuate the first problem. The overhead footage suggests the Player's recollection on this point is correct. *Third*, as submitted by the Player's legal representative, the fact that English was not the Complainant's first language may also have given rise to a greater possibility of misunderstanding than would otherwise be the case.
63. We then have the evidence of the Player that he did not use the relevant alleged word, which involves a consideration of his credit as a witness. Disciplinary Counsel pointed out certain alleged inconsistencies in the Player's evidence. There was confusion about when he first became aware that the allegation against him was as to racial abuse, his evidence on this aspect being unclear. It was said that this may have been confusion on his part, and in the end whether he knew immediately after the game or only the following day is not of great moment in the case. We did not therefore see anything in the way in which the Player gave his evidence which would of itself provide a basis to reject his version of events.
64. The other matter which we take into account is the Player's good disciplinary record and the fact that no prior complaints had been made concerning allegations of racial abuse. Further, the evidence is that he participates in multicultural activities on behalf of his Club, is spoken of highly by his Coach Mr Popovic, and for example by Mr Hersi, a player of a different racial background. For his part, the Complainant says that he is Croatian by background, and that he is not a racist and has never made racist comments. The Player is aware of the problems of racism and indicated he would be very troubled indeed to be thought of as a person who had made a racially abusive statement.
65. Cross-examination by Disciplinary Counsel was skilled and persistent. In the face of that the Player did give evidence in which minor discrepancies came up. However notwithstanding that probing cross-examination, the Player appeared a credible witness. One factor that the Committee considers relevant is that the

Player accepted that the alleged words were racially abusive. He did not shy away from that fact but made it clear he thought it would be wrong to have said what was alleged against him. The Player's point is that he did not make a racially abusive insult, he would not do so and the Complainant must have misheard him.

66. In all of the circumstances (and taking into account the strong evidence of the Complainant as to his belief as to what was said), given the lack of any eyewitness or other corroborative evidence, and particularly having regard to the undisputed high noise levels at the time of the incident, the Committee accepts the Player's defence that the Complainant may have misheard what was said by the Player. The Committee is unanimous in the outcome. We are not satisfied to the necessary standard of proof that the offending words were used by the Player. The charge is therefore not established.

J. RESULT

67. The Complaint is dismissed.

John Marshall

J E Marshall SC, Disciplinary Committee Chair
Thursday, 10 April 2014