

## DISCIPLINARY COMMITTEE OF THE FOOTBALL FEDERATION OF AUSTRALIA

### DETERMINATION IN THE FOLLOWING MATTER:

<b>Player and club</b>	Besart Berisha, Melbourne Victory FC
<b>Alleged offence</b>	R2 – Assault on a Player (e.g. violent conduct when not challenging for the ball)
<b>Date of alleged offence</b>	Saturday 02.04.2016
<b>Occasion of alleged offence</b>	Match between Wellington Phoenix and Melbourne Victory FC
<b>Date of Disciplinary Notice</b>	Monday 04.04.2016
<b>Basis the matter is before the Disciplinary Committee</b>	A referral: see clause 3.3(a) and 9.14(b)
<b>Date of Hearing</b>	Tuesday, 12.04.2016
<b>Date of Determination</b>	Wednesday, 13.04.2016
<b>Disciplinary Committee Members</b>	John Marshall SC, Chair Lachlan Gyles SC David Barrett

#### A. INTRODUCTION AND JURISDICTION

1. What is before the Committee, in substance, is whether the second match of a two match sanction imposed on Besart Berisha (**the player**) should be upheld. The player was sent off in about the 36<sup>th</sup> minute of the match and thereafter has served the first of the two matches of the existing sanction.
2. The circumstances of the case raise the appropriate way in which the concussion policy of the FFA is to be administered. FFA adopted the Consensus Statement on Concussion in Sport at the 4<sup>th</sup> International conference on concussion, November 2012. The concussion policy is circulated to all clubs and match officials. It is part of the Collective Bargaining Agreement (**CBA**) for the benefit of all players. Within the CBA the concussion policy is part of the minimum medical standards applicable to the A-League. The most recent addition of the concussion policy is the one updated 25.09.2015.
3. Under the concussion policy a team doctor as part of a medical team including a physiotherapist is to attend on a player and carry out, on the field, “an initial on-pitch concussion assessment”. During that assessment the match is suspended for up to 3 minutes to allow the assessment. It is one of the rare, if not only, situations in which the clock is stopped during a match. It is different to injury time added on. The clock is stopped. By this important part of the concussion policy the opposing team cannot be prejudiced as no time wasting can occur. What is to occur is a very important medical function for the protection of the health of football players.

4. In this case the ability of the concussion policy to be properly carried out was impeded. The circumstances which arose whereby the "initial on-pitch concussion assessment" was unable to be properly carried out are sufficient in the opinion of this Committee to give rise to Exceptional Circumstances as defined (see paragraph **23** below). The reasons are more fully explained below in this determination.
5. The Committee has jurisdiction under clause 4.4 of the "FFA Hyundai A-League Disciplinary Regulations" applicable to the 2015-2016 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.
6. In this matter there has been a referral under clause 9.14(b) of the Disciplinary Regulations. Prior to a referral under clause 9.14(b) the player will have been given a direct red card by the referee. The consequence is that the player will have an automatic Mandatory Match Suspension (in this case 1 match). The Match Review Panel (**MRP**) is then obliged to apply a sanction within the range in the table to the Disciplinary Regulations.
7. In this case the minimum sanction in the table is 1 additional match plus the Mandatory Match Suspension (ie  $1 + 1 = 2$  matches). Under clause 9.12 the MRP determined that the appropriate sanction within the range was the minimum. The MRP is not able to apply the power in clause 11.1 or to find "Exceptional Circumstances".

8. The following Disciplinary Notice was issued to the player:



### DISCIPLINARY NOTICE (Red Card or Expulsion)

<b>TO:</b> <i>(Player)</i>	Besart Berisha	<b>OF</b> <i>(Club)</i>	Melbourne Victory FC
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The Match Review Panel (**MRP**) provides this Disciplinary Notice (**Notice**) to you in accordance with the Hyundai A-League Disciplinary Regulations (**Regulations**).

The purpose of this Notice is to advise you of the following:

1. You were issued with a direct Red Card when playing for your Club against Wellington Phoenix on Saturday, 2 April 2016 in or around the 36<sup>th</sup> minute;
2. In accordance with "Annexure A - 6. Table of Offences", the MRP has determined that the Red Card Offence constitutes "R2 – Assault on a Player (e.g. violent conduct when not challenging for the ball)" (the **Offence**);
3. The Minimum Sanction for the Offence under the Regulations is two (2) Hyundai A-League matches (being the Mandatory Match Suspension plus one (1) additional Hyundai A-League match); and
4. The MRP has proposed the Minimum Sanction of two (2) matches, being the Mandatory Match Suspension plus one (1) additional Hyundai A-League match.

#### **Player Options**

5. As the MRP has proposed the Minimum Sanction stipulated at "Annexure A – 6. Table of Offences" for R2 – Assault on a Player, the Player or Club may:
  - (a) accept the sanction proposed at paragraph 4 above; or
  - (b) refer the matter to the Disciplinary Committee for the consideration of whether Exceptional Circumstances exist which would enable a Judicial Body to impose a sanction outside of the Range of the Table of Offences.
6. You must notify FFA of your election by forwarding the enclosed Election Form to FFA by **5:00pm (AEST) Tuesday, 5 April 2016**.
7. If FFA does not receive the properly completed Election Form by the time specified in paragraph 6 above, you are deemed to have accepted the proposed sanction.

Signed:   
 \_\_\_\_\_  
 For and on behalf of the Match Review Panel

Date: 4 April 2016  
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9. Upon receipt of the Disciplinary Notice from the MRP the player has the right under clause 9.14 to refer the matter to this Committee for determination of what sanction above the Mandatory Match Suspension should be imposed "applying the range"; in other words between the minimum and maximum in the table. Under clause 9.15 the Committee must make a determination as to sanction "applying the range" and in accordance with clause 11.
10. The function of the Committee in such a case is to determine the question of what additional sanction should be imposed over and above the Mandatory Match Suspension which must be served. In the circumstances of this referral guilt or innocence of the player is not up for review. That issue has been finally

determined by earlier processes. The Committee has no jurisdiction to deal with that question and will not express any view on that topic.

11. However, it is open to the Committee to upgrade or downgrade the offence; albeit not to eliminate the Mandatory Match Suspension. The Committee is not bound by the categorisation of the red card by the referee (clause 11.1(d)) and is also empowered to determine whether there are Exceptional Circumstances. It is to be noted that the MRP can do neither and as will be seen that is the basis upon which this Committee has reached a different result. The point is that the different result before the Committee is a function of additional powers of the Committee and not as a result of any error of the MRP.

## **B. THE HEARING**

12. On the evening of Wednesday, 13 April 2016 the Committee heard the referral of the above matter. At the conclusion of the hearing (following deliberations and pursuant to clause 20.4 of the Disciplinary Regulations) the Committee verbally announced the result of the hearing. These are the written reasons of the Committee in the "*shortest form reasonably practicable*" (see clause 20.3(c)).
13. At the hearing Disciplinary Counsel was Ivan Griscti and the player was represented by Christopher Townshend QC and Miguel Belmar of counsel and Stephen Meade of K&L Gates.

## **C. FACTS**

14. In around the 36th minute of the game the player went up to head a long ball. A defensive player also went up for the header and the forearm and/or elbow of the defender struck Berisha in the back of the head. From what can be observed from the footage made available it appears the contact was very forceful.
15. The referee lodged this report:

Just prior to the 36th minute of the match, I stopped play to allow Mr Besart Berisha (number 8 Melbourne Victory) to be assessed to receive treatment, as he went down clutching his head after an aerial challenge with an opponent.

I called the medical staff on to assess Mr Berisha's injury. During this time, Mr Berisha became quite irate and began yelling and gesticulating towards me. I moved away from the incident briefly, so as not to allow him to further escalate the situation. As I moved away momentarily, I noticed Mr Andrew Durante (number 22 Wellington Phoenix) move towards Mr Berisha, and stand over him on the ground, appearing to make comments to the effect to hurry him up, and leave the field of play. Mr Berisha appeared aggrieved by this approach and lashed out and kicked his opponent in the leg. Mr Berisha was shown the red card and sent from the field of play for Violent Conduct, as this appeared as an act of brutality against an opponent when not challenging for the ball (as the ball was out of play). Mr Durante was also cautioned for Unsporting Behaviour for his involvement in the incident. I was approximately 2-3 metres from the incident at the time, with a clear view.

16. The assistant referee who states he was 15 metres away made a very similar report.
17. The evidence of the Melbourne Victory physiotherapist narrates the facts in more detail from which the following was taken:

- (1) From the sideline the physiotherapist was able to observe that Berisha was in discomfort. The doctor and physiotherapist were standing in the MVFC technical area, awaiting instruction from the referee to enter the field of play to perform a head injury assessment.
- (2) The referee was on the scene. After a short period of time, the referee gestured to the MVFC bench for the Melbourne Victory medical team to enter the field of play.
- (3) Upon attending Berisha on the field of play, the player was believed to be in discomfort.
- (4) The club doctor and the physiotherapist immediately commenced a head injury assessment protocol whereby they sought an accurate history regarding the collision with the defender.
- (5) Berisha was in a sidelying position with both hands supporting the back of his head. The club doctor asked Berisha whether he had been knocked out following the collision. Berisha responded that he had been temporarily rendered unconscious immediately following the collision. He also reported mild dizziness with no peripheral pins and needles or numbness. Berisha requested ice to be applied to the posterior aspect of his head to alleviate the pain he was experiencing. He was informed that there were no provisions on the field to administer treatment however the medical team needed to complete their assessment to determine whether Berisha was fit to continue playing or whether he was required to leave the field of play for the remainder of the game.
- (6) Berisha appeared to be agitated and was not conversing in a logical or rational manner and the doctor and the physiotherapist were predominantly concerned with calming Berisha down to enable completion of questioning as per the head injury protocol.
- (7) The referee enquired of the physiotherapist as to whether the medical team required the entitled 3 minute stoppage in order to complete the head injury assessment. The physiotherapist informed the referee that this would be necessary. The referee informed the 4th official that there would be a 3 minute stoppage to complete the assessment.
- (8) The club doctor and the physiotherapist continued with their questioning of Berisha and he was able to move into a supine position. Berisha was gesturing to the referee as the referee walked alongside him to engage in conversation with other players in the vicinity.
- (9) At this time, the opposing player Durante approached Berisha from the direction of his feet. The physiotherapist was able to observe Durante leaning over Berisha and Durante encroached into the space that was being utilised by the medical team to complete their assessment. As Durante leant over Berisha he made physical contact with Berisha's chest. Durante verbalised and gestured in a manner which the physiotherapist believed was provocative and this elicited a verbal response from Berisha for Durante to remove himself from the space where medical attention was being given.
- (10) After physical contact was made by Durante against Berisha, Berisha remonstrated by pushing the opposition player with an outstretched arm.

The physiotherapist was aware that Berisha had kicked out with his right leg however the physiotherapist was unable to determine whether any contact was made.

- (11) According to the physiotherapist, the situation was difficult to manage from a medical perspective due to the nature of the onfield scene in which multiple players were within the vicinity, including opposition players who were aggressively voicing their displeasure regarding the time taken for Berisha to be assessed and for play to continue.
18. The physiotherapist went on to make common sense observations which may be relevant for the future when the concussion protocol is being administered on field. In short he recommends that the referee keep all other players well clear of the area where the medical assessment is being made. The Deputy Chair of the Committee has suggested that the referee's spray can of white foam could be used to mark out a white circle and no one apart from medical staff be permitted within that circle until the assessment is complete. The Committee supports that suggestion.
19. The Committee accepts the evidence of the physiotherapist who was available to be cross-examined but was ultimately not cross-examined. The only area where we made findings that are inconsistent is where we accept other evidence of the player and/or based upon the photographic evidence which goes beyond what the physiotherapist has said.
20. The player gave evidence and was plausible in his explanation of what happened. Based upon his evidence we make the following findings:
- (1) The player has been involved in football since a very early age and has been passionate about his football ever since he started playing.
  - (2) He played a large amount of his early football in Berlin. He had his first professional contract at the age of 18. His career took him to Australia and this is his fifth season in the A League.
  - (3) He is familiar with other players in the league and can recognise the voices of quite a few of the players. He is quite often targeted and he says "players try to provoke me".
  - (4) In relation to the incident itself he says he recalls going up for a header and that he received "a very hard knock". He felt a lot of pain and was dizzy. This relates to where the defender's forearm and/or elbow came in contact with the back of the player's head. When the referee came by he says that he told the referee that he would "need a minute". He recalls that the medical team did not come out immediately. He does not know why. The Committee now knows that it is because the referee did not immediately give permission to the medical team to enter the field.
  - (5) The player recalls that there was a lot of swearing and screaming around him.
  - (6) Whilst he was on his back receiving medical treatment he recalls that Durante came into him very close and put his foot up against his body between his right hip and his ribs. He says that he was not kicked but that Durante's foot was placed in position against Berisha and that Durante

maintained pressure against Berisha the whole time. That evidence is supported by the video and stills taken from the video.

- (7) What happened next is extraordinary. Berisha says that Durante put his hand down towards Berisha and pushed against his throat. That was not apparent from an initial review of the footage. However close examination of the footage and the still photograph below shows a hand up below Berisha's chin and against Berisha's throat. The hand is not that of the doctor (who had blue gloves) or the physiotherapist. This is consistent with and tends to corroborate Berisha's evidence.



- (8) The boots with the red/orange heels are the boots of Durante. The right boot can be seen up against the body of Berisha. The right hand is between Berisha's chin and chest. The evidence was that this was the hand of Durante. Whether or not the hand was pressing against Berisha's throat as Berisha says is ultimately not material. There was a hand there in an area in which it should not have been.
- (9) Apparently Durante then said, whilst doing this, "calm down calm down". (It is not necessary to speculate as to why those words were used but not all explanations are consistent with innocent conduct.) Apparently he said other things which warranted (at least) the yellow card he was subsequently given.
- (10) At this point the player said he was scared, in pain and wished to have the medical assessment carried out properly.
- (11) The player moved his arm and his leg in a way which the player was designed to move Durante away. He says (and the Committee accepts) that he did not kick at Durante, but rather he moved his leg upwards and outwards to move Durante away. This is inconsistent with the referee's report nevertheless a close and repeated review of the footage supports what Berisha says.
- (12) In the image below there is a blurry object which is in fact Berisha's foot and lower leg. It has not struck Durante. The side of Berisha's leg has brushed against Durante with a tendency to push Durante away and towards the referee.



(13) The player was asked whether his studs struck Durante; he said no. He was asked again and he confirmed that his studs had not struck Durante. The Committee accepts that evidence. He was also asked whether he intended to kick Durante and he said that he swung his leg to push Durante away. We accept that evidence.

21. At this point the Committee observes that Durante had no business being in the vicinity of a player while receiving the concussion protocol from medical staff. The Committee finds that Berisha believed Durante was not there to offer sympathy, condolences or assistance. The Committee finds that Berisha perceived Durante to be there to interfere with the medical process and to intimidate him. There is objective evidence to support the reasonableness of Berisha holding those views.

#### **D. SUBMISSIONS**

22. Reference has been made to clause 11.2 of the Disciplinary Regulations and to clause 11.3 which provides:

Where an additional sanction above the Mandatory Match Suspension is to be imposed, a sanction outside of the Range at the Table of Offences may be imposed by a Judicial Body only in Exceptional Circumstances that must be detailed in the Determination.

23. The term "Exceptional Circumstances" is defined both positively and negatively as follows:

**Exceptional Circumstances** 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 following are not Exceptional Circumstances:

- (a) the significance or importance to the Participant or his Club of the A-League Match in which the Offence was committed;
- (b) the significance or importance of any match or tournament in which the Participant will be ineligible to participate because of the imposition of a sanction within the Range at the Table of Offences;
- (c) the point in the A-League Match at which the Offence was committed;



(d) the conduct, including actions, words or gestures of any Player or Team Official of the opposing team during or related to the A-League Match; and

(e) any disciplinary decision taken or failure to take a disciplinary decision by a Match Official during the A-League Match.

(underlining added)

24. The matters submitted by Disciplinary Counsel included:
- (1) The central question raised by the referral is whether there are Exceptional Circumstances as defined.
  - (2) The submission made on behalf of the player that he was protecting his space ought be rejected. The Committee observes that this submission depends on the findings of fact which the Committee will make.
  - (3) The only decisions of this Committee which have found Exceptional Circumstances are *Akoto* (25.08.2010) and *Bojic* (06.01.2011). The facts in this case are sufficiently different from those earlier decisions.
25. The matters submitted on behalf of the player included:
- (1) Medical staff of the player's club were carrying out a compulsory concussion test with the approval of the referee.
  - (2) There is a 3 minute period during which the clock stops when the head injury protocol is being carried out. As a result of the mandatory stopping of the clock there can be no prejudice which could be the subject of legitimate complaint.
  - (3) The opposing player Durante had absolutely no business being immediately adjacent to and making contact with Berisha.
  - (4) Although Berisha did kick out, the contact made was negligible.
  - (5) The evidence of the player should be accepted. Alternatively, the Committee at least should accept the evidence of the physiotherapist.
  - (6) The facts are sufficiently unique that they do justify a finding of Exceptional Circumstances.
  - (7) If the Committee accepts that Exceptional Circumstances existed then the appropriate sanction is the one match already served.

#### **E. CONSIDERATION AND FINDINGS**

26. Whilst it is not open to the Committee to reach the conclusion that there was no red card offence, the Committee does have regard to the nature of the conduct and whether the category of red card offence is appropriate. Here the conduct was away from the ball and was perceived by the referee to be violent conduct. Nevertheless while still a red card offence, it is difficult to see how, in all the circumstances, the conduct should be classified as "excessive force or brutality against an opponent" as referred to in the 2015/2016 Laws of the Game (page 129).
27. The Committee gave consideration as to whether the categorisation, still as a red card, was row 2 being an abusive gesture with contact or row 5 serious unsporting conduct.

28. Had either of those categories been the better category the minimum sanction would have been the Mandatory Match Suspension already served.
29. Ultimately it has been unnecessary to reach a final view on that topic. This is because the Committee finds there were "circumstances operating at the time of the Offence and relating to the commission of the Offence" which were within the ordinary meaning of the word "exceptional". Further the negative part of the definition does not preclude that outcome for the reason that the Committee has found that the player was acting in a way to permit the concussion protocol to be properly carried out.
30. At this point the Committee notes the decisions in *Bojic* and *Akoto*. In *Bojic* the player was sent off with a red card for the same offence (R2). The Committee (differently constituted on that occasion) found that the player was trying to free himself from the arm lock applied by the opposing player so that he could re-join play. In *Akoto* former player Kevin Muscat placed his boot on top of the mouthguard of Akoto. Akoto had requested Muscat to move and then pointed to Muscat's boot, to no avail. On that occasion the Committee found that "*for whatever reason Kevin Muscat's boot remains on top of the mouthguard*" and "*at that point Akoto pushes Muscat away from the mouthguard*". The Committee found that the attempt to retrieve the mouthguard, in all the circumstances, established "Exceptional Circumstances".
31. Here Berisha was injured. He did not know the seriousness of the injury. The medical team was applying the concussion protocol to him. Head injuries are a very serious issue in sport and the adverse impacts of head injuries on long-term health are now well-known having received a great deal of attention in the last 3 years. FFA has a concussion policy. Berisha was prone on the ground. An opposing player had encroached the area required for the administration of the on field concussion assessment. The opposing player had put his foot up against Berisha and his hand on or at least very close to his throat. Berisha could not move away. He could not remove himself and the medical team to another point so as to receive the concussion protocol. Under the protocol Berisha is to remain where he is while being assessed. Durante's presence on the scene was intimidating and uncalled for. The Committee finds that the response of Berisha was, in his mind, committed to seek removal of Durante from the area.
32. The Committee finds that the circumstances satisfy the positive and negative aspects of the definition of "Exceptional Circumstances".
33. Whilst the matters concerning Durante mentioned in this determination if proved in a hearing against Durante (or any player) might be expected to be dealt with by way of a sanction of some sort, it must be understood by any reader of this determination that Durante is not on trial and his version of events has not been heard; he has had and can have no part in the hearing. The consequence is that what we have said above may have been different if Durante had had a chance to have his say. He has had no such chance because he has not been charged with anything. The findings we make are for the limited purpose of dealing with the case of Berisha and it would be quite wrong for anyone to read our findings as having any bearing on Durante.
34. One further matter is that the footage the Committee had to review shows that a Melbourne Victory player number can be seen to push the referee away whilst the

referee was giving the red card to Berisha. This Committee has had to deal with players making intentional contact with referees on numerous occasions. Conduct such as that which appears on the footage has previously been met with a red card and a very significant sanction if proved at a hearing.

35. As one of the television commentator's noted the whole situation had escalated and could have led to a very serious on field confrontation. The Committee agrees. There was no real prejudice to the opposing players or their team as the clock had been stopped.
36. In light of the above it is necessary to determine the appropriate sanction. As a result of the red card Berisha missed the balance of the first half and the whole of the second half of the game in which the incident occurred as well as a second match. The Committee is of the view that sufficient sanction has now been imposed and no further sanction should be imposed.

#### **F. RESULT**

##### *(1) Sanction to be imposed*

37. The sanction we impose is the Mandatory Match Suspension, which has already been served.

*John Marshall*

J E Marshall SC, Disciplinary Committee Chair  
Wednesday, 13.04.2016